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THREADING THE FIRST AMENDMENT NEEDLE: ANONYMOUS SPEECH, ONLINE HARASSMENT, AND WASHINGTON'S CYBERSTALKING STATUTE

Sarah E. Smith*

Abstract: This Comment examines the constitutionality of Washington's cyberstalking statute, RCW 9.61.260, and its treatment of anonymous online speech. While the statute was drafted to ensure that women are free from domestic and gender-based violence, the statute as currently written and enforced infringes on the constitutionally protected right to free speech. There has only been one action, *Moriwaki v. Rynearson*,¹ enforcing the provision of the statute related to anonymous speech. The court ultimately overturned the stalking protection order, which the plaintiff brought to halt political speech, on First Amendment grounds. While the *Moriwaki* court concluded that the stalking protection order there was an unconstitutional application of the law, RCW 9.61.260 is likely facially invalid under the First Amendment and incapable of withstanding strict scrutiny analysis. Faced with these issues, Washington has several options. Washington courts could narrowly construct RCW 9.61.260(1)(b). In so doing, courts could differentiate between anonymous speech that is ordinarily protected by the First Amendment and speech that is unprotected. The courts could also overturn the entire statute as unconstitutional on First Amendment grounds. This Comment argues that the legislature should return to the drawing board and redraft RCW 9.61.260 so that it can pass muster under the First Amendment. This Comment also proposes model legislation on which the Washington legislature could base a new law. Regardless of what Washington decides to do, the importance of preventing violence against women and preserving free speech online are too great to sacrifice to sloppy legislative drafting.

INTRODUCTION

Imagine receiving constant unsettling messages via Twitter or Facebook: an ex-boyfriend threatens to post intimate photographs unless you agree to get back together.² Imagine an acquaintance that bombards

* J.D. Candidate, 2019, University of Washington School of Law. I would like to thank Professor Bob Gomulkiewicz for his insightful edits, comments, and mentorship throughout the drafting process. I would also like to thank the stellar editors at *Washington Law Review*. This piece would not be where it is without their efforts. As a matter of disclosure, I have previously interned with the Electronic Frontier Foundation, a technology and civil liberties impact litigation organization, and Legal Voice, a women's and LGBTQ rights impact litigation organization. All errors are my own.

1. No. 17-2-01463-1, 2018 WL 733811 (Wash. Super. Ct. Jan. 10, 2018).

2. See, e.g., DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 204 (2014) (detailing the experiences of a woman whose ex-boyfriend sent her family, coworkers, and business associates postcards featuring images of the woman in lingerie and links to websites that featured nude

your online accounts with threats due to some perceived slight.³ Imagine a coworker or neighbor with a grudge, pretending to be you and posting sexually explicit content under your name.⁴ Imagine some shadowy figure, seemingly dedicated to following your every move, on a website followed by hundreds of people you do not know, and suddenly the figure posts your home address, telling their followers to track you down and harm you.⁵ Most people would agree that the victims of these actions rightfully deserve an avenue to seek protection from their harassers.

Now imagine that you are an activist, taking advantage of the anonymity of the internet to criticize a local politician. You run an anonymous Facebook account, creating memes and posts calling for the politician to more critically examine their views and actions. You occasionally use this account to send direct messages to the politician, and while you are critical of them, you never threaten them or their family, say anything lewd or obscene, or advocate that others commit criminal acts. And even if you did share things directly with the politician, the intent of your comments never went beyond what would be considered harmless “trolling.” Should this local politician be allowed to cry foul just because you were frequently communicating with them anonymously?⁶ Assuming that the comments never rose to the level of threats or obscenity, most of us would probably balk at the suggestion

photographs of her after she refused to resume their relationship); Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> [<https://perma.cc/Y3UF-7VCM>] (detailing the experiences of Norma, a woman who took her ex-boyfriend to court after he posted intimate photographs of her taken and shared during the relationship to an adult-themed website after they broke up).

3. See, e.g., *State v. Stanley*, No. 74204–3–I, 2017 WL 3868480, at *1–3 (Wash. Ct. App. Sept. 5, 2017) (detailing the experiences of women who were sent messages threatening physical and sexual violence unless they responded to defendant’s messages).

4. See, e.g., Scott Gutierrez, *Former Assistant Attorney General Pleads Guilty to Harassment*, SEATTLE POST-INTELLIGENCER (Aug. 4, 2009, 10:00 PM), <https://www.seattlepi.com/local/article/Former-assistant-attorney-general-pleads-guilty-1305538.php> [<https://perma.cc/Q79P-Z5V3>] (detailing conduct by an attorney who harassed his former neighbor on the telephone before finally posting her address and phone number online and stating that she was looking for sexual partners).

5. See, e.g., Danielle Keats Citron, *Civil Rights in Our Information Age*, in *THE OFFENSIVE INTERNET* 31 (Saul Levmore & Martha C. Nussbaum eds., 2010) (detailing the experience of a female computer programmer and game developer who had her home address and Social Security number leaked online, as well as sexually-explicit photographs doctored to include her face).

6. The situation presented here is hypothetical, albeit similar to the situation faced by the defendant in *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811 (Wash. Super. Ct. Jan. 10, 2018). See *infra* section II.D.

that such an individual would be faced with potential civil and criminal consequences. However, given the current law in Washington, courts and prosecutors treat the harassing boyfriend situation in the same manner as the annoying Facebook commenter.

This Comment examines the limits to which states may regulate online speech to prevent cyberstalking, an increasingly prevalent form of online harassment. Washington is one of the few states that has a specific cyberstalking statute and, while some advocates against domestic violence hold Washington's statute up as a model, it is far from perfect.

Part I of this Comment delineates the history of cyberstalking generally, with particular attention paid to Washington's cyberstalking statute. This Part also addresses the situations in which state governments may constitutionally regulate speech consistent with the First Amendment. This Part pays particular attention to areas of First Amendment law that pose constitutional challenges to cyberstalking statutes, including facial invalidity, overbreadth, and vagueness.

Part II addresses the constitutionality of Washington's cyberstalking statute by considering the ways in which the statute is vulnerable on First Amendment grounds, including facial invalidity, overbreadth, and vagueness. State governments have a compelling interest in ensuring that people are free from harassment online and that women in particular are protected from relationship-based violence;⁷ however, the statute is not narrowly tailored to achieve this end.

Using *Moriwaki v. Rynearson*⁸ as an example, Part II argues that the Superior Court of Washington, which overturned a protection order wrongfully granted on the basis of protected political speech, got it right. However, the court in *Moriwaki* was not required to reach this conclusion based on the language and structure of the Washington cyberstalking statute; rather, it pulled from out-of-jurisdiction precedent to bolster its conclusion that anonymous speech cannot be criminalized when it is not simultaneously unprotected speech.⁹ Based on the statute's current structure, *nothing* requires a court to first conclude that the challenged speech was, on its own, unconstitutional separate from the fact that it was anonymous. This is a fundamental flaw in Washington's law, and a flaw that might well prove fatal.

7. *See, e.g.*, 18 U.S.C. § 2261A(2) (2018).

8. No. 17-2-01463-1, 2018 WL 733811 (Wash. Super. Ct. Jan. 10, 2018).

9. *Id.* at *9–10 (discussing *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011), in which a man who sent critical and caustic tweets about a leader in his former religion had his cyberstalking conviction overturned on First Amendment grounds, as “particularly persuasive”).

Finally, Part III suggests avenues to ensure that the legitimate scope of the cyberstalking statute remains in force while addressing the serious shortcomings of the statute as it currently stands. In particular, this Part argues that, while the courts could come up with a judicial solution to the issues posed by the Washington cyberstalking statute, the best solution would be for the Washington legislature to return to the drafting table and redraft the statute.

I. CYBERSTALKING, THE FIRST AMENDMENT, AND RCW 9.61.260

Part I provides a survey of stalking and cyberstalking, the reasons such laws came to be, and the effects of cyberstalking on a victim. The bulk of this Part focuses on First Amendment doctrine relevant to determining whether Washington's cyberstalking law is constitutional. Beginning with the protection of online speech and anonymous speech generally, this Part looks at ways in which a state can regulate harassing speech and common pitfalls in such laws. Finally, this Part examines the history of Washington's cyberstalking statute.

A. *Stalking and Cyberstalking Defined*

Stalking is generally defined as repeated conduct directed toward a specific person that would cause a reasonable person to feel fear.¹⁰ Offline stalkers can passively stalk victims—such as by making harassing phone calls at inappropriate hours. The stalking can also be more active, such as following a person, standing outside their home or workplace, or threatening harm.¹¹

While there is no standardized definition for cyberstalking, the term is generally defined as directed stalking where the perpetrator utilizes the internet, email, or other electronic communications to harass the target, causing them to fear for their safety.¹² It does not include general communications about the victim.¹³ Repeated private messages targeted

10. Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 126 n.6, 133 n.52 (2007); see also *Stalking*, BLACK'S LAW DICTIONARY 1623 (10th ed. 2014).

11. Ashley N. B. Beagle, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 463 (2011).

12. Goodno, *supra* note 10, at 126; see also CITRON, *supra* note 2, at 3; *Cyberstalking*, BLACK'S LAW DICTIONARY 470 (10th ed. 2014).

13. Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1111 (2011).

at a victim would qualify as cyberstalking, but posts about a victim on a public social media account would not.¹⁴ Examples of cyberstalking include repeated threatening or harassing emails or instant messages, the creation of websites or social media accounts for the purpose of threatening or harassing the target, or encouraging third parties to stalk or cause harm to the target via the internet, email, or other electronic communications.¹⁵ Similarly, cyber harassment “involve[s] the intentional infliction of substantial emotional distress accompanied by online speech that is persistent enough to amount to a ‘course of conduct’ rather than an isolated incident.”¹⁶ Cyberstalking is a narrower offense than cyber harassment, but, because cyberstalking and cyber harassment use the same means to achieve the same ends, many scholars use the terms interchangeably.¹⁷

Cyberstalking is distinct from offline forms of stalking in several ways. Because the internet is ubiquitous and can be accessed almost constantly by both the stalker and the victim, the stalker can harass and intimidate their target at any time and from any physical location.¹⁸ Furthermore, it is significantly easier for a person to engage in cyberstalking than offline stalking, as it requires less physical effort, is cheaper, and can be done from anywhere, from the stalker’s couch to the other side of the country.¹⁹ This factor in particular makes cyberstalking especially taxing on victims, because they never know when they might be at risk or where their stalker might be.²⁰ The remote and online nature of cyberstalking also allows online stalkers to remain anonymous with greater ease than their offline counterparts²¹; this makes it more difficult

14. CITRON, *supra* note 2, at 3.

15. Joey L. Blanch & Wesley L. Hsu, *An Introduction to Violent Crime on the Internet*, in 64 U.S. ATT’YS’ BULL. 2, 3–4 (2016); *see also* Nisha Ajmani, *Cyberstalking and Free Speech: Rethinking the Rangel Standard in the Age of the Internet*, 90 OR. L. REV. 303, 305 (2011).

16. CITRON, *supra* note 2, at 3.

17. *Id.*

18. Aily Shimizu, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 118 (2013).

19. *Id.*

20. *Id.*

21. While most lawyers, judges, and legislators talk about online speech as “anonymous,” it is actually more accurately described as “pseudonymous,” as there are ways for an internet user’s identity to be discerned. This Comment will use the term “anonymous” in accordance with this practice. For further reading on this point, see George F. DuPont, *The Criminalization of True Anonymity in Cyberspace*, 7 MICH. TELECOMM. & TECH. L. REV. 191 (2001), and David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. CHI. LEGAL F. 139 (1996).

for victims to identify their stalker and secure protection.²² Finally, cyberstalkers can easily impersonate their victims online, taking on their identity and wreaking havoc.²³

Cyberstalking can have a longer lasting impact on a victim than traditional forms of offline stalking.²⁴ A particularly unpleasant encounter or phone call lasts only for the duration of the moment, and even if unsettling, can be comparatively easy to avoid by changing one's phone number or moving to a new town. In contrast, online stalking is always present and cannot truly be avoided just by averting one's eyes from the computer screen.²⁵ And while the U.S. Supreme Court said in 2000 that "[w]e are expected to protect our own sensibilities," this was well before the rise of social media, smart phones, and the near-constant connection to the internet.²⁶ These changes make internet harassment and other forms of cyberstalking more difficult to avoid, and, while at least one district court has acknowledged this fact in the context of the federal cyberstalking law,²⁷ the Supreme Court has not yet spoken on the issue. Given the necessity of access and use of the internet in today's society, it is unreasonable to expect victims to stop using the internet to avoid stalkers.²⁸

22. Ajmani, *supra* note 15, at 305.

23. CITRON, *supra* note 2, at 8 ("According to a 2009 Microsoft study, nearly 80 percent of employers consult search engines to collect intelligence on job applicants, and about 70 percent of the time they reject applicants due to their findings. . . . Recruiters do not contact [applicants] to see if they actually posted nude photos of themselves or if someone else did. . . . The simple but regrettable truth is that after consulting search results, employers take the path of least resistance. They just do not call to schedule interviews or to extend offers.").

24. Lipton, *supra* note 13, at 1113 ("However, in today's interconnected world that is not a viable option, as people who are forced offline forgo important personal and professional opportunities. Also, if a victim moves offline, this does not stop others from posting harmful things about her that may continue to harm her personal and professional development despite her own choice not to read the postings. In many ways, it is better for a victim to know what is being said about her so she can take steps to combat the abuses." (footnote omitted)).

25. See, e.g., Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731, 749 (2013) (detailing the differences between cyberstalking laws); *id.* ("But when we hear our telephone ringing, get an envelope in the mail, or get an e-mail message—especially when the sender's identity is unfamiliar—we don't make the same deliberate choice to read a particular item, since we don't know what that item really is. And while we can avoid such intrusions by not having a telephone or an e-mail address, that is impractical in modern society.").

26. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

27. See, e.g., *United States v. Cassidy*, 814 F. Supp. 2d 574, 585 (D. Md. 2011), *appeal dismissed*, 12-4084 (4th Cir. Apr. 11, 2012).

28. John B. Major, *Cyberstalking, Twitter, and the Captive Audience: A First Amendment Analysis of 18 U.S.C. § 2261A(2)*, 86 S. CAL. L. REV. 117, 127 (2012).

Because of these unique characteristics, offline stalking laws are often inadequate to handle the realities of cyberstalking. For example, many victims of cyberstalking are told, in the absence of such specific legislation, that what their harassers are doing is not illegal and either that they need to toughen up or that they brought the abuse on themselves.²⁹ In light of this, many states enacted laws specifically addressing cyberstalking or amended existing laws to include cyberstalking.³⁰ Following the high-profile murder of Rebecca Shaeffer, an actress who starred in the 1980s sitcom “My Sister Sam,” at the hands of her stalker, California enacted the nation’s first anti-stalking law.³¹ Many states followed California’s lead in enacting anti-stalking legislation, and as the internet became more engrained in everyday life, some states also enacted cyberstalking legislation or amended their laws to encompass cyberstalking behaviors.³² Washington is among only a handful that enacted statutes targeting stalking and cyberstalking behaviors separately.³³ Washington’s cyberstalking statute is examined in depth in section I.D.

On the federal side, Congress enacted 18 U.S.C. § 2261A, a cyberstalking statute as part of the Violence Against Women Act (VAWA).³⁴ VAWA criminalizes the use of electronic or computer services in interstate commerce to harass, intimidate, kill, or injure or engage in surveillance, provided that the conduct places the victim in reasonable fear of death or bodily injury or causes substantial emotional distress to the victim.³⁵ While § 2261A is a powerful tool to punish cyberstalkers, law enforcement does not use it as frequently as state-law counterparts because it requires an element of interstate activity.³⁶

29. CITRON, *supra* note 2, at 19.

30. Beagle, *supra* note 11, at 475.

31. Goodno, *supra* note 10, at 127–28.

32. All fifty states had some form of anti-stalking laws by 1995.

33. Shimizu, *supra* note 18, at 120–21. As of 2018, only a handful of states have statutes specifically criminalizing cyberstalking, as opposed to amending offline stalking statutes to cover stalking that occurs via electronic communications. These states include Louisiana, Mississippi, North Carolina, Rhode Island, Virginia, Washington, and West Virginia. *Id.* at 120 n.39. Illinois’s cyberstalking statute was declared unconstitutional in 2017. *People v. Relerford*, 2017 IL 121094, ¶ 78.

34. 18 U.S.C. § 2261A(2) (2018).

35. Shimizu, *supra* note 18, at 121.

36. One of the few times § 2261A has been enforced was in *United States v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015). In that case, the defendants harassed the victim, who lived in Delaware, from their home in Texas. Press Release, U.S. Dep’t of Justice, Three Family Members Receive Life Sentences for Courthouse Murder Conspiracy (Feb. 19, 2016) [hereinafter DOJ Press

Stalking and cyberstalking are serious societal problems that disproportionately affect women. The Center for Disease Control and Prevention reported that, as of 2014, one in six women, compared with one in nineteen men, have faced or will face some form of stalking in their lifetime.³⁷ During a twelve-month period, an estimated 1.5% of people ages eighteen and older were victims of stalking,³⁸ and researchers predict that between 30 and 40% of internet users will deal with some form of cyberstalking or cyber harassment in their life.³⁹ Nearly seven out of ten stalking victims knew the offender in some way,⁴⁰ and women who have ended relationships are the most likely victims of stalking.⁴¹ One out of four victims of stalking were stalked through some form of technology.⁴² While it is clear that women as a group are more likely to face cyberstalking, it is also likely that lesbian, transgender, or bisexual women and women of color face an even higher risk of cyberstalking.⁴³

Cyberstalking can have a profound effect on the victim. Victims have more difficulty finding jobs, especially in situations where their stalker impersonates them online,⁴⁴ and incur significant financial impact.⁴⁵ From legal fees and moving expenses, the average financial impact of cyberstalking is more than \$1,200.⁴⁶ Further, victims of cyberstalking are more likely to take self-protective measures, and thus pay higher out-of-pocket costs to feel secure post-stalking.⁴⁷ Victims often feel their privacy has been violated and, as a result, become fearful and paranoid.⁴⁸

Release], <https://www.justice.gov/opa/pr/three-family-members-receive-life-sentences-courthouse-murder-conspiracy> [<https://perma.cc/CGM6-3NHK>].

37. DIV. OF VIOLENCE PREVENTION, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, NATIONAL DATA ON INTIMATE PARTNER VIOLENCE, SEXUAL VIOLENCE, AND STALKING (2014), <https://www.cdc.gov/violenceprevention/pdf/nisvs-fact-sheet-2014.pdf> [<https://perma.cc/6JFD-5ZUB>].

38. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, STALKING VICTIMS IN THE UNITED STATES - REVISED 1 (2012), https://www.bjs.gov/content/pub/pdf/svus_rev.pdf [<https://perma.cc/F5YH-22RU>].

39. CITRON, *supra* note 2, at 12.

40. CATALANO, *supra* note 38, at 1.

41. *Id.*

42. Major, *supra* note 28, at 126.

43. CITRON, *supra* note 2, at 14.

44. *Id.* at 7–10.

45. *Id.* at 10.

46. *Id.*

47. *Id.*

48. Beagle, *supra* note 11, at 465.

This fear and paranoia often manifests itself as a withdrawal from society; victims of cyberstalking often find it difficult to maintain their pre-stalking relationships and responsibilities, and mental illness is common among victims of cyberstalking.⁴⁹ Victims of cyberstalking have higher rates of anxiety, insomnia, social dysfunction, and severe depression than they did before the stalking occurred.⁵⁰ In particular, victims of cyberstalking are more prone to post-traumatic stress disorder, anorexia nervosa, and anxiety, which tend to grow in severity over time.⁵¹ In some cases, cyberstalking can escalate beyond harassment, leading to the death of the victim either at the hand of the stalker or by suicide.⁵²

These examples demonstrate that cyberstalking is a serious problem that legislatures rightly need to address. Despite the obvious impacts of cyberstalking on victims and the existence of some laws that criminalize such behavior, many victims of cyberstalking are simply told to grow a thicker skin, to leave the internet, or to just get over it.⁵³ This is not a solution. While there is disagreement among stakeholders about how best to accomplish this goal, there is at least consensus that there should be reforms to protect people from the harms of cyberstalking.⁵⁴

B. *First Amendment Challenges to Cyberstalking Laws*

The First Amendment states that Congress “shall make no law . . . abridging the freedom of speech.”⁵⁵ Courts have interpreted this to apply to speech as well as expressive conduct.⁵⁶ The First Amendment applies to the states through the process of incorporation via the

49. *Id.*

50. *Id.*

51. CITRON, *supra* note 2, at 10–11.

52. *See, e.g.*, United States v. Matusiewicz, 84 F. Supp. 3d 363 (D. Del. 2015) (a man, his mother, and his brother cyberstalked the man’s ex-wife across state lines, ultimately leading the man’s brother to shoot his ex-sister-in-law before shooting himself); DOJ Press Release, *supra* note 36 (“The successful prosecution and sentencing of the defendants responsible in the first federal conviction of cyber-stalking resulting in death is truly welcomed news for all federal, state and local law enforcement involved in the investigation.”).

53. CITRON, *supra* note 2, at 19.

54. For example, Professor Danielle Citron Keats grounds her analysis of cyberstalking and cyber harassment by calling for reform of federal civil rights laws so that they can be used to seek redress from an alleged cyberstalker in addition to tort and criminal actions. *Id.* at 120.

55. U.S. CONST. amend. I.

56. Texas v. Johnson, 491 U.S. 397, 406 (1989) (overturning a Texas law that prohibited dishonoring the American flag on First Amendment grounds).

Fourteenth Amendment's due process clause.⁵⁷ Thus, state governments may not "restrict expression because of its message, its ideas, its subject matter, or its content."⁵⁸ In contrast, regulation is content-neutral if the government regulates speech for reasons other than disagreement with the message the targeted speech contains.⁵⁹ Content-based laws are presumptively unconstitutional and may be justified and upheld only if the government proves they are narrowly tailored to serve a compelling state interest.⁶⁰ Regulation of speech is content-based if "a law applies to particular speech because of the topic discussed or the idea or message expressed."⁶¹ While some content-based regulations are obvious on their face, some are more subtle and "defin[e] regulated speech by its function or purpose."⁶²

When considering whether a speech restriction serves a compelling state interest, courts consider several principles.⁶³ The government cannot prioritize or privilege certain subclasses of core-protected speech over others; among these core speech areas is political speech.⁶⁴ Further, the government may not prohibit speech merely because society finds it

57. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

58. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361, 2371 (2018) ("The First Amendment . . . prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. . . . As a general matter, [content-based regulations] 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.' This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (internal citations omitted)).

59. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

60. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

61. *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2227 (2015).

62. *Id.*

63. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419–20 (1996).

64. *See Carey v. Brown*, 447 U.S. 455, 467 (1980).

disagreeable or offensive.⁶⁵ The under-inclusive nature of a statute may be an indication that the law does not serve a compelling interest.⁶⁶

Courts have further held that “the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”⁶⁷ That is, the remedy proposed by the state must be narrowly tailored to address the context of the problem. If a state does attempt to regulate speech based on its content, it must have a compelling interest to do so.⁶⁸ Courts have held that goals such as protecting the physical and psychological wellbeing of children⁶⁹ and preventing harassment generally are sufficient to meet the compelling-interest requirement.⁷⁰ In contrast, the U.S. Supreme Court has said that “[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists,” implicitly holding that there is no compelling state interest based solely on protecting those who are “sensitive.”⁷¹

While there have historically been limitations on harassing “one-to-one” speech made to a particular person, governments cannot regulate “one-to-many” speech about a particular person.⁷² Because cyber harassment behaviors may include speech not specifically addressed at the particular victim, and occur frequently on public platforms like Twitter and Facebook, cyberstalking laws that “restrict or punish public communications” are more susceptible to First Amendment attacks.⁷³

65. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (holding that New York’s “Son of Sam” statute that required that income from a work describing an accused or convicted criminal’s work be deposited in an escrow account available to victims of their crime or their creditors was unconstitutional under the First and Fourteenth Amendments); *id.* (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *United States v. Eichman*, 496 U.S. 310, 319 (1990))).

66. *See, e.g., Fla. Star v. B.F.J.*, 491 U.S. 524, 541 (1989) (finding that a Florida statute criminalizing the publication of the name of the victim of a sexual offense unconstitutional on First Amendment grounds because its underinclusive focus on mass communications did not show compelling state interests).

67. *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (quoting *Fla. Star*, 491 U.S. at 533).

68. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

69. *New York v. Ferber*, 458 U.S. 747, 756–57 (1982).

70. *See R.A.V.*, 505 U.S. at 409–10 (White, J., concurring) (arguing that the majority opinion recognizes preventing harassment as a compelling state interest).

71. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

72. *Volokh*, *supra* note 25, at 742.

73. *Shimizu*, *supra* note 18, at 131–32.

However, since cyberstalking is, by definition, specifically directed at one person, the one-to-one versus the one-to-many issue is not concerning so long as the statute regulates speech *directed at* a specific individual rather than speech *about* a specific individual.⁷⁴

Cyberstalking laws are vulnerable to challenges on First Amendment grounds because they have the potential to restrict protected speech and discriminate based on content. Laws targeting cyberstalking, including specific laws tailored to address the crime and expanded interpretations of traditional stalking laws, exist in all fifty states and the District of Columbia; however, this does not mean that all such laws are constitutionally sound.⁷⁵ Several states were forced to “dramatically narrow” the scope of their cyberstalking bills before sending them to the state governor for signature in order to avoid future legal challenges on First Amendment grounds.⁷⁶ Some scholars speculate that even the cyberstalking provision of VAWA is “patently unconstitutional.”⁷⁷ And in 2017, the Supreme Court of Illinois struck down the state’s cyberstalking law as facially unconstitutional.⁷⁸

These statutes all endeavor to remedy a wrong that many think should be discouraged; however, laws targeting cyberstalking may not do so at the expense of protected forms of speech. States should be cautious in drafting and enforcing such laws. Courts are willing to strike down these laws when they too broadly infringe on individuals’ right to speak. Of particular importance are constitutional challenges based on the rights to free speech online and anonymous speech.

1. *Right to Free Speech Online*

Online speech stands “on the same footing” as other speech and cannot be regulated simply because it occurs online.⁷⁹ As the U.S. Supreme Court once said, “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command,

74. Lipton, *supra* note 13, at 1111.

75. *See, e.g.*, *People v. Relerford*, 2017 IL 121094, ¶ 78 (striking down the state’s cyberstalking statute on First Amendment and due process grounds).

76. Volokh, *supra* note 25, at 739–40 (discussing cyberstalking bills from Tennessee and Arizona that were narrowed in response to public outcry before becoming law).

77. Lyrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1590 (2007).

78. *Relerford*, 2017 IL 121094, ¶ 78.

79. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

do not vary’ when a new and different medium for communication appears.”⁸⁰ States may regulate speech that offers such negligible social value that it is “outweighed by social interests in order and social morality,” so long as the regulations are in accord with the First Amendment.⁸¹ Similarly, “the First Amendment doesn’t allow us to weigh the pros and cons of certain types of speech.”⁸² Public spaces have been used for public debate and assembly since the beginning of the republic.⁸³ While traditionally these public spaces consisted of public property, public forums have now expanded to include internet platforms, even those that are privately owned.⁸⁴ Speech which occurs in these public spaces cannot be restricted “simply because it is upsetting or arouses contempt.”⁸⁵

The first Supreme Court case to recognize freedom of speech online, *Reno v. ACLU*,⁸⁶ held a provision of the Communications Decency Act (CDA) unconstitutional under the First Amendment.⁸⁷ The CDA prohibited, *inter alia*, the knowing transmission of obscene or indecent images to any recipient under the age of eighteen by means of a telecommunication or electronic device.⁸⁸ Plaintiffs challenged the child-protection provisions of the CDA, arguing that the law would, for example, penalize libraries from providing information on “[e]verything from online sex education, medical information, literature, art, music, and politics to everyday discourse.”⁸⁹ The Court held that sexually explicit, but not obscene,⁹⁰ speech addressed to adults was protected by

80. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

81. Katherine McCabe, *Founding Era Free Speech Theory: Applying Traditional Speech Protection to the Regulation of Anonymous Cyberspeech*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 823, 843 (2014).

82. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 711 (9th Cir. 2010).

83. See *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

84. While this point is outside the scope of this Comment, see generally Marc Rohr, *First Amendment Fora Revisited: How Many Categories Are There?*, 41 *NOVA L. REV.* 221 (2017).

85. *Snyder*, 562 U.S. at 458.

86. 521 U.S. 844 (1997).

87. *Id.*

88. *Id.* at 859.

89. Brief of Appellees Am. Library Ass’n et al. at 13, *Reno v. ACLU*, 521 U.S. 884 (1997) (No. 96-511).

90. The word “obscene” is a legal term of art in the First Amendment context, as first defined in *Miller v. California*, 413 U.S. 15, 24 (1973) (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts . . . in a

the First Amendment and could not be suppressed simply because some adults found it inappropriate for children.⁹¹ The *Reno* Court further held that neither the unique character of the internet, nor the legitimate need to protect children from age-inappropriate content, were sufficient grounds to outweigh the First Amendment rights of those burdened by the Act.⁹²

Following the Court's decision in *Reno*, Congress enacted the Child Online Protection Act (COPA).⁹³ COPA strove to do constitutionally what the CDA had unsuccessfully attempted to accomplish: criminalize the knowing posting or sharing of online content, for commercial purposes, which would be harmful to minors.⁹⁴ It too was swiftly challenged and found unconstitutional.⁹⁵ The Supreme Court held that, because there were less restrictive ways to protect children from offensive material, a lower court had not abused its discretion in enjoining enforcement of COPA.⁹⁶ In a concurring opinion, Justice Stevens wrote that he and Justice Ginsburg would have decided the case based on their belief that "the Government may not penalize speakers for making available to the general World Wide Web audience" speech which some might object to; thus, Justices Stevens and Ginsburg firmly grounded themselves in the reasoning laid out in *Reno*.⁹⁷ Justices Stevens's and Ginsburg's point is of particular import because, while they agreed that COPA unconstitutionally infringed on online speech, they focused not on the fact that it failed to be narrowly tailored. Instead, Justices Stevens and Ginsburg focused on the law's prioritization of certain classes of speech over others.⁹⁸ Rather than pointing out, as the majority did, that there was a constitutional, more narrowly-tailored means to achieve the ends of COPA, Justice Stevens's and Ginsburg's concurrence emphasizes the fact that the government may never regulate speech based on its content unless it serves a compelling state interest.⁹⁹

patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value test . . .'" (citations omitted).

91. *Reno*, 521 U.S. at 874–75 (quoting *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745 (1978)).

92. *Id.* at 867–68.

93. Codified at 47 U.S.C. §§ 231 (2000).

94. *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004).

95. *Id.*

96. *Id.* at 673.

97. *Id.* at 674 (Stevens, J., concurring).

98. *Id.* at 675.

Thus, the freedom to speak freely online has been ensured by the courts.¹⁰⁰

2. *The Right to Anonymous Speech*

The First Amendment also protects the right to anonymous speech, both online and offline. Many of the cases enshrining anonymous speech have their roots in election law, where the courts first recognized that “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”¹⁰¹

The roots of anonymous speech in the United States run deep. Anonymous speech has been used as a tool of social agitation and political advocacy since the Founding Era; many of the Founding Fathers utilized the protections of anonymous speech in order to effectively advocate for treason against the Crown.¹⁰² Anonymous speech flourished in the debate surrounding the ratification of the U.S. Constitution. On one side, Alexander Hamilton, John Jay, and James Madison wrote the Federalist Papers under the pseudonym Publius.¹⁰³ In opposition, the Anti-Federalists were represented by Cato, Brutus, Centinel, and Founding Farmer.¹⁰⁴ If anything, an originalist interpretation of the First Amendment *requires* protection of anonymous speech, especially when that speech is political in nature.¹⁰⁵ While United States courts have not reflexively protected speech simply because it was written anonymously, the courts have also not rescinded

99. *Id.* (“As a parent, grandparent, and great-grandparent, I endorse [the goal of protecting children from obscenity online] without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children’s viewing habits. In view of the gravity of the burdens COPA imposes on Web speech, the possibility that Congress might have accomplished the goal of protecting children from harmful materials by other, less drastic means is a matter to be considered with special care.”).

100. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1641–42 (1995).

101. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

102. *See generally* THOMAS PAINE, COMMON SENSE (Simon & Brown 2010) (1776).

103. *See generally* ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (Penguin Random House 2003) (1788); Post, *supra* note 21, at 156 (discussing whether the Ohio law at issue in *McIntyre* would have, ironically, banned distribution of the Federalist Papers because they were anonymously written and published).

104. *See generally* THE ANTI-FEDERALIST PAPERS (Ralph Ketcham ed., Penguin Random House 2003) (1788); Post, *supra* note 21, at 155 n.38 (discussing the *McIntyre* Court’s allusions to both the Federalist and Anti-Federalist Papers as examples of how anonymous political speech forms the backbone of the Republic).

105. McCabe, *supra* note 81, at 827.

protections from speech merely because it was anonymous. Anonymous speech in the United States is a nuanced creature typified by balancing tests to determine whether the democratic or artistic value of the speech is outweighed by some need to identify its source.¹⁰⁶

In *McIntyre v. Ohio Elections Commission*,¹⁰⁷ the hallmark case protecting the right to anonymous speech, the Court held that an Ohio statute prohibiting the distribution of anonymous campaign literature was unconstitutional.¹⁰⁸ While the state argued that the law was a reasonable regulation of the electoral process, the U.S. Supreme Court disagreed; the Court held that the law regulated “pure speech” in violation of the First Amendment despite the state’s legitimate interests in regulating the electoral process.¹⁰⁹ The Court further held that the decision to remain anonymous was like any other editorial decision, and, as such, the government could not compel its disclosure.¹¹⁰ Because the law was not cabined to regulate fraudulent or libelous speech, speech that is already not protected by the First Amendment, the Court concluded that the law was unconstitutional.¹¹¹ The Court stated that “[t]he right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”¹¹² While the Court did not establish that anonymity was an absolute right, it also did not establish a test to determine when anonymity would be protected.¹¹³

More recent courts, however, have shown a willingness to forgo protections of anonymous speech when anonymity does not serve an important speech interest. In 2010, the U.S. Supreme Court concluded that disclosure of the identities of signers of anti-gay marriage referendum petitions under the Washington Public Records Act would

106. *Doe v. Reed*, 561 U.S. 186, 194–97 (2010) (balancing First Amendment interest in remaining anonymous in referendum petitions with states’ compelling interest in regulating the electoral process).

107. 514 U.S. 334 (1995).

108. *Id.* at 337–38, 357.

109. *Id.* at 345.

110. *Id.* at 342.

111. *Id.* at 357.

112. *Id.*

113. Lidsky & Cotter, *supra* note 77, at 1545.

generally not violate the First Amendment.¹¹⁴ In this case, *Doe v. Reed*,¹¹⁵ the Court determined that the State of Washington's compelling interest in preserving electoral integrity outweighed signatories' right to anonymous political speech.¹¹⁶ However, the Court also held that if signatories could demonstrate that disclosure of their identities (and, consequently, their political beliefs) would cause them to face harassment and threats, disclosure of their identities might be exempted under the Act; the Court remanded this point for further determination.¹¹⁷

The right to anonymous speech has been extended to speech on the internet as well. Courts have recognized that the "free exchange of ideas on the [i]nternet is driven in large part by the ability of [i]nternet users to communicate anonymously."¹¹⁸ The Ninth Circuit Court of Appeals said "the ability to speak anonymously on the [i]nternet promotes the robust exchange of ideas and allows individuals to express themselves freely without 'fear of economic or official retaliation . . . [or] concern about social ostracism.'"¹¹⁹ Courts have repeatedly upheld the right to anonymous speech online, because the "ability to speak one's mind" online "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate."¹²⁰ To strip internet speakers of their anonymity would significantly chill speech online and thus chill basic First Amendment rights.¹²¹ Courts have held that "[p]eople who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court."¹²²

114. *Doe v. Reed*, 561 U.S. 186, 191 (2010) (reserving the question of whether disclosing signatories of this particular referendum petition was constitutional under the First Amendment for the district court).

115. 561 U.S. 186 (2010).

116. *Id.* at 202.

117. *Id.* at 200 (citing *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *Citizens United v. FEC*, 558 U.S. 310, 367 (2010)).

118. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

119. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2010) (alteration in original) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995)).

120. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

121. *2TheMart.com*, 140 F. Supp. 2d at 1093; *see also* *Mount Hope Church v. Bash Back!*, No. C11-536RAJ, 2011 WL 13116849, at *2 (W.D. Wash. Apr. 21, 2011).

122. *2TheMart.com*, 140 F. Supp. 2d at 1093.

3. *Regulating Harassing Speech*

Despite the broad protections provided by the First Amendment, the right to speech is not absolute. Some categories of speech are never protected by the First Amendment.¹²³ Fighting words, for example, is a term of art that encompasses “words likely to cause an average addressee to fight . . . when said without a disarming smile.”¹²⁴ The First Amendment does not protect “fighting words” because the Amendment does not permit “a breach of the peace.”¹²⁵ Calls for imminent violence are also not protected speech under the First Amendment.¹²⁶ Similarly, the First Amendment does not protect speech integral to criminal conduct.¹²⁷ Obscene speech is also not protected by the First Amendment.¹²⁸ Despite the fact that the general public might consider a wide range of speech to be “obscene,” the Court has narrowly defined the term: “no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law.”¹²⁹ True threats are also not protected by the First Amendment because “[t]rue threats inflict great harm and have little if any social value.”¹³⁰ However, true threats do not include political hyperbole, and thus hyperbole is protected.¹³¹ And while the Court has

123. *Anonymous Online Speakers*, 661 F.3d at 1173. While many scholars, and the Court for that matter, speak about “categories” of speech that are not protected by the First Amendment, it is not that clearly cut.

124. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (quoting *State v. Chaplinsky*, 18 A.2d 754, 762 (N.H. 1941)) (holding that appellations of “damned racketeer” and “damned Fascist” were likely to provoke a reasonable person to retaliate against the speaker and cause a breach of the peace and were thus “fighting words”).

125. *Id.* at 573.

126. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding that a Klu Klux Klan member who did not advocate imminent violence could not be charged under Ohio law against criminal syndicalism because the law did not distinguish between the challenged statement and “incitement to imminent lawless action” that could be regulated under the law).

127. *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

128. *Miller v. California*, 413 U.S. 15, 23 (1973).

129. *Id.* at 27. Even within this narrow definition, child pornography, for example, is subject to even stricter regulation than other forms of “hard core” pornography. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002) (“As a general rule, pornography can be banned only if obscene, but under [*New York v. Ferber*], pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*.” (citation omitted)).

130. *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001, 2016 (2015) (citing *Virginia v. Black*, 538 U.S. 343, 359–60 (2004)).

131. *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (Defendant’s alleged statement that he would refuse being drafted into armed forces and “if they ever make me carry a rifle the first man I want in my sights is L.B.J.” did not amount to a threat against the President).

acknowledged that a communication can contain both a threat and statement of value entitled to protection, the threat does not, by association, get the constitutional protection afforded the statement of value.¹³²

While recognizing the long-standing precedent of discussing “categories” of speech as unprotected by the First Amendment, the Court has slowly distanced itself from the categorical approach.¹³³ Governments may regulate these areas of speech “because of their constitutionally proscribable content,” not because they are “categories of speech . . . invisible to the Constitution.”¹³⁴ There is no “categorical ‘harassment exception’” to the First Amendment free speech clause.¹³⁵ In fact, the Supreme Court has time and again held that distressing or outrageous speech is protected under the First Amendment unless and until its content crosses over into one of the unprotected areas discussed above.¹³⁶ This is because courts cannot engage in “an ad hoc balancing of relative social costs and benefits” when determining whether speech is protected.¹³⁷

However, there are ways for state and federal governments to regulate harassing speech. First, they may frame harassment as non-expressive conduct rather than speech.¹³⁸ Because non-expressive conduct is not speech, the First Amendment does not apply. Governments can and do regulate harmful non-expressive conduct, and the First Amendment does

132. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part) (reversing conviction of a man who posted violent rap lyrics on his Facebook page because it was not proven that he intended for the lyrics to constitute threats or knew that the lyrics would be seen as threats).

133. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (“I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment’s expressive objectives and to the public’s legitimate need for regulation than a simple recitation of categories, such as ‘content discrimination’ and ‘strict scrutiny,’ would permit. In my view, the category ‘content discrimination’ is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic ‘strict scrutiny’ trigger, leading to almost certain legal condemnation.”).

134. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (emphasis omitted).

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

136. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *United States v. Cassidy*, 814 F. Supp. 2d 574, 582 (D. Md. 2011) (referencing *Boos v. Barry*, 485 U.S. 312, 322 (1988)); *see also Snyder v. Phelps*, 562 U.S. 443, 457 (2011); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

137. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

138. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (holding that the government could not compel an Irish-American Catholic organization to allow an LGBT group to participate in their St. Patrick’s Day parade); *id.* (“While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”).

not prevent restrictions aimed at conduct from imposing incidental burdens on speech.¹³⁹

Second, governments may regulate harassing speech when that speech arises to fighting words or true threats.¹⁴⁰ Similar to non-expressive conduct, speech that arises to fighting words or true threats are not considered speech for purposes of the First Amendment; even still, such regulations must not engage in viewpoint discrimination.¹⁴¹ For example, the U.S. Supreme Court concluded that a city ordinance, which made it a misdemeanor to burn crosses or swastikas with the intent to incite anger, alarm, or resentment in others on the basis of race, color, religion, or gender, was unconstitutional because it engaged in viewpoint discrimination.¹⁴² In so holding, the Court emphasized that “[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”¹⁴³ The Court further stated that the ordinance was unconstitutional because the regulation was based not on the content communicated, but rather because the “content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”¹⁴⁴ Because the ordinance banned all manners of communication of racial, religious, or gender intolerance rather than, for example, fighting words that communicated such intolerances, the law was unconstitutional.¹⁴⁵

In contrast, the Court concluded that Virginia was within its power to prohibit cross burnings “in light of cross burning’s long and pernicious history as a signal of impending violence.”¹⁴⁶ Alluding to its prior cross-burning cases, including *R.A.V.*, the Court here did not prohibit all forms of content-based discrimination; to the contrary, the Court continued to emphasize that “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable,” the speech can be regulated without “significant danger of

139. Compare *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (holding that a Vermont law restricting sale of pharmacy records that revealed prescribing practice of individual doctors was a restriction of speech, not conduct), with *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389, 804 (9th Cir. 2015) (holding that Seattle minimum wage ordinance regulated conduct, not speech).

140. *Virginia v. Black*, 538 U.S. 343, 359 (2004).

141. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

142. *Id.* at 392.

143. *Id.*

144. *Id.* at 393 (emphases omitted).

145. *Id.* at 394.

146. *Virginia v. Black*, 537 U.S. 343, 363 (2004).

idea or viewpoint discrimination.”¹⁴⁷ Because the entire class of speech at issue here was proscribable on such “neutral” grounds, the Court continued, “[s]uch a reason . . . is also neutral enough to form the basis of distinction within the class.”¹⁴⁸ Thus, the Virginia law at issue here banned cross burning with the intent to intimidate; because intimidation was already proscribable under the First Amendment, and the underlying law was not enacted because the speech at issue was explicitly disfavored by the government, the law was constitutional.¹⁴⁹ Here, Virginia could constitutionally engage in viewpoint discrimination and target a specific subset of intimidating speech, because “a State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.”¹⁵⁰ The First Amendment protects speech that is abusive or vicious unless it is non-expressive conduct, fighting words, or true threats, all areas by and large unprotected by the guarantee of free speech.¹⁵¹

Finally, states may regulate harassing speech when it can pass strict scrutiny. While states cannot regulate harassing speech based solely on its secondary effects,¹⁵² including listeners’ reactions to that speech, where harassing speech crosses the line into unprotected speech or transforms into conduct, states are then within their power to regulate it.¹⁵³ If the state can demonstrate that its regulation is narrowly tailored to achieve its stated goal, courts will uphold its statute even though it regulates speech based on its content.¹⁵⁴

147. *Id.* at 361–62 (quoting *R.A.V.*, 505 U.S. at 388).

148. *Id.* (quoting *R.A.V.*, 505 U.S. at 388).

149. *Id.* at 362.

150. *Id.* at 363.

151. *R.A.V.*, 505 U.S. at 391.

152. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (holding that a zoning ordinance requiring adult movie theaters to be more than 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park and more than one mile of any school was not an unconstitutional content-based regulation of speech but instead targeted the effect such theaters would have on the neighborhoods surrounding them).

153. *See, e.g., Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563–64 (2011) (finding that Vermont could not restrict the sale, disclosure, and use of records that revealed prescribing practices of individual doctors in accord with the First Amendment because it was not a commercial regulation that imposed only an incidental burden on speech of pharmaceutical companies).

154. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2226–27, 2232 (2015) (finding that an Arizona law did not survive strict scrutiny because it was content-discriminatory on its face and did not serve a compelling government interest).

4. *Facial vs. As-Applied Challenges*

Plaintiffs can make two types of challenges under the First Amendment. Plaintiffs may make an as-applied challenge and argue the law is unconstitutional as applied to their specific situation.¹⁵⁵ In contrast, a plaintiff might make a facial challenge and argue that the law is unconstitutional as applied to anyone.¹⁵⁶ While a facial challenge assumes that the law is unconstitutional on all fronts, an as-applied challenge foresees that the law could, hypothetically, be constitutionally applied to someone else.¹⁵⁷ Courts are generally skeptical of facial challenges and, as a consequence, facial challenges are more rare and generally less successful than as-applied challenges.¹⁵⁸ This is largely due to the judiciary's decision to accord respect and defer to the legislature, as well as a means of constitutional avoidance.¹⁵⁹

When a plaintiff makes an as-applied challenge, they only seek to reverse the penalty suffered as a result of the application of the law to them. For example, the Connecticut Supreme Court held that the application of its cyberstalking statute was unconstitutional as applied to a criminal defendant because the mere fact that the victim did not wish to be part of a conversation that was neither annoying nor alarming did not constitute harassment under the state's cyberstalking statute.¹⁶⁰ In that case, an au pair brought suit when her employer repeatedly contacted her, demanding that she comply with an employment agreement.¹⁶¹ The Court concluded that the Connecticut law was not applied content-neutrally and failed to regulate the harassing manner in which the contested speech was made.¹⁶² The Court further held that, to regulate language that is alarming or annoying, "the manner of communication must be something more than that there *was* a

155. *Fourth Amendment – Standing – Facial Versus As-Applied Challenges – City of Los Angeles v. Patel*, *Leading Cases: Constitutional Law*, 129 HARV. L. REV. 181, 246 (2015).

156. *Id.* at 246.

157. *Id.* at 246–47.

158. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1321–22 (2000).

159. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the [statutory] scheme . . . is challenged as overbroad.")).

160. *State v. Nowacki*, 111 A.3d 911, 930–31 (Conn. App. Ct. 2015).

161. *Id.* at 917–18.

162. *Id.* at 928–29.

communication. Rather, the communication must be made in a form likely to be viewed as annoying or alarming.”¹⁶³ Characterizing the exchange as one between a contractor and a contractee, the Court found the law unconstitutional as applied to the defendant.¹⁶⁴

Similarly, the District Court of Maryland held a federal cyberstalking law was unconstitutional as applied.¹⁶⁵ In that case, a disgruntled former member of a Buddhist sect used Twitter and his blog to send harassing messages to the sect leader, causing her significant emotional distress.¹⁶⁶ Though the court considered the facial validity of the law and examined whether there was a compelling state interest at issue, the court ultimately concluded that the statute was unconstitutional as applied and thus did not reach the facial issue.¹⁶⁷ The court did not explain its reasoning in reaching its conclusion that the law was unconstitutional as applied.¹⁶⁸

An as-applied challenge may have facial repercussions.¹⁶⁹ When a court is faced with a challenge to a law on as-applied grounds, it may “engage in reasoning that marks the statute as unenforceable in its totality. . . . [D]octrinal tests of constitutional validity can produce what are effectively facial challenges.”¹⁷⁰ For example, a group of abortion providers seeking as-applied relief from a Texas law that required abortion facilities to meet certain requirements and to have admitting privileges was struck down as facially unconstitutional.¹⁷¹

5. *Overbreadth*

The overbreadth doctrine is a type of facial challenge that combats fears that an overbroad law will chill protected speech.¹⁷² Because of this fear, “[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”¹⁷³ For a statute to be declared unconstitutional on overbreadth

163. *Id.* at 930 (emphasis omitted).

164. *Id.* at 931.

165. *United States v. Cassidy*, 814 F. Supp. 2d 574, 588 (D. Md. 2011).

166. *Id.* at 578–79.

167. *Id.* at 585–87.

168. *Id.* at 588.

169. Fallon, *supra* note 158, at 1327–28.

170. *Id.*

171. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292, 2319–20 (2016).

172. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 94 (7th ed. 2016).

173. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (holding that the Child Pornography Prevention Act’s prohibition on “virtual” child pornography was overbroad because it

grounds, the overbreadth must be substantial in comparison to a law's legitimate sweep.¹⁷⁴ The fact that "some impermissible applications of a statute [exist] is not sufficient to render it susceptible to an overbreadth challenge."¹⁷⁵ There must be a realistic danger that the challenged statute will "significantly compromise recognized First Amendment protections . . . for it to be facially challenged on overbreadth grounds."¹⁷⁶ Legislatures may add severability provisions to their statute to save the statute from being struck down entirely if one part is deemed unconstitutional.¹⁷⁷ However, a severability clause is an "aid . . . not an inexorable command," and thus courts are not bound to follow them in striking statutes as unconstitutional.¹⁷⁸

Cyberstalking laws are frequently challenged on overbreadth grounds; for example, in 2017, the Illinois Supreme Court struck down that state's cyberstalking statute as unconstitutionally overbroad.¹⁷⁹ The Illinois cyberstalking statute provided that a person commits cyberstalking when they harass another person through the use of electronic communications two or more times and threaten that person or their family, places that person or their family in reasonable fear of harm, or solicits a third party to cause fear or harm to that person or their family.¹⁸⁰ Further, the statute provided that a person commits cyberstalking when they engage in a course of conduct using electronic communication directed at a specific person that they know or should know would cause a reasonable person to fear for the safety of themselves or their family or suffer other emotional distress.¹⁸¹

The defendant in that case was charged with cyberstalking for harassing a radio personality via email and Facebook and challenged his conviction, alleging that the Illinois cyberstalking statute violated his First Amendment rights.¹⁸² The Supreme Court of Illinois held that,

did not serve the same compelling interest as a ban on actual child pornography and thus abridged the freedom to engage in substantial amounts of lawful speech).

174. *United States v. Williams*, 553 U.S. 285, 293 (2008); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987).

175. *State v. Bradford*, 175 Wash. App. 912, 922, 308 P.3d 736, 741 (2013) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)).

176. *Jews for Jesus*, 482 U.S. at 574 (quoting *Taxpayers for Vincent*, 466 U.S. at 801).

177. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985).

178. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292, 2319 (2016) (quoting *Reno v. ACLU*, 521 U.S. 844, 884–85 n.49 (1997)).

179. *People v. Relerford*, 2017 IL 121094, ¶ 78.

180. 720 ILL. COMP. STAT. 5/12-7.5(a-3) (2018).

181. *Id.* 5/12-7.5(a-1).

182. *Relerford*, 2017 IL 121094, ¶¶ 1–16.

while the state could regulate speech that was integrally related to criminal conduct or that amounted to true threats, the cyberstalking statute criminalized protected online speech.¹⁸³ Under the terms of the statute, a court could find a person guilty of cyberstalking if they knew or should have known that online complaints about a local business would cause the owner emotional distress.¹⁸⁴ The Court held that there was no limiting construction of the statute available and, accordingly, struck down the statute as unconstitutionally infringing on the right to free speech.¹⁸⁵

C. *Washington's Cyberstalking Law*

In 2004, Washington enacted one of the first state statutes directly criminalizing cyberstalking. The text of the statute provides that:

A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

- (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;¹⁸⁶ [*or*]
- (b) Anonymously or repeatedly whether or not conversation occurs; *or*
- (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.¹⁸⁷

183. *Id.* ¶¶ 34–48.

184. *Id.* ¶¶ 53–57.

185. *Id.* ¶¶ 60, 67–78.

186. Washington courts have tended to define “lewd” and “indecent” in a problematically broad manner. *See, e.g.*, *State v. Bell*, No. 70358–7–I, 2014 WL 4715519, at *3 (Wash. Ct. App. Sept. 22, 2014) (“‘Indecent’ is defined as: ‘not decent: . . . altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly.’ ‘Obscene’ is defined as: ‘marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage.’ Ms. Lansdowne used the word ‘bitch’ not in reference to a female dog, but in reference to a female human being. Such usage is both indecent and obscene as those words are commonly defined. A rational trier of fact could have determined that Ms. Lansdowne’s words were indecent or obscene.” (quoting *State v. Lansdowne*, 111 Wash. App. 882, 891–92, 46 P.3d 836, 840 (2002) (citations omitted))). Further, the U.S. Supreme Court held in *Miller v. California*, 413 U.S. 15 (1972), that only obscene, not indecent, speech can be regulated properly under the First Amendment. However, this Comment will assume for the purposes of argument that the obscenity provision of section 9.61.260 of the Revised Code of Washington is constitutional.

Section 9.61.260 of the Revised Code of Washington requires that the alleged cyberstalker intend to harass, intimidate, torment, or embarrass their target. This makes cyberstalking a specific intent crime. Specific intent is the “intent to accomplish the precise criminal act that one is later charged with.”¹⁸⁸ A defendant’s primary defense against a charge of cyberstalking is that they lacked the requisite intent to commit the crime. However, many cases in which an individual is charged with cyberstalking focus on the effect the alleged stalker’s speech had on their target or what a reasonable person’s response to the stalker’s speech would have been, rather than the defendant’s intent in communicating with the victim.¹⁸⁹ While courts have generally accepted the different intent portions of the statute, some courts have expressed some apprehension with regards to the “intent to . . . embarrass” prong.¹⁹⁰

Washington’s cyberstalking statute is almost identical to the state’s telephone harassment statute,¹⁹¹ and, while the telephone harassment statute has faced many constitutional challenges, none have successfully challenged its anonymity provisions.¹⁹² Similarly, Washington’s stalking statute¹⁹³ has been challenged on First Amendment grounds, to little avail.¹⁹⁴ In a recent case challenging the offline stalking statute on First Amendment grounds, the Washington Court of Appeals held that because the statute criminalized conduct, not speech, and the statute explicitly said it did not cover constitutionally protected activities, the stalking statute was constitutionally sound.¹⁹⁵

Based on testimony before the Washington State House of Representatives and Senate, legislators enacted RCW 9.61.260 to

187. WASH. REV. CODE § 9.61.260(1) (2018) (emphasis added).

188. *Specific Intent*, BLACK’S LAW DICTIONARY 931 (10th ed. 2014).

189. While there are no cases looking at the specific intent of the anonymous speech provision of section 9.61.260(1)(b), there is at least one case analyzing the intent element with regards to true threats under (1)(c). See *State v. Kohonen*, 192 Wash. App. 567, 574–76, 370 P.3d 16, 21 (2016) (“The test for determining a ‘true threat’ is an objective test that focuses on the speaker. The question is whether a reasonable person in the speaker’s position would foresee that the threat would be interpreted as a serious expression of intention to inflict the harm threatened.” (citations omitted)).

190. *State v. Stanley*, 2017 WL 3868480, at *9 (Wash. Ct. App. Sept. 5, 2017) (“In view of the limited briefing, we do not decide whether the intent to embarrass in the cyberstalking statute renders the statute unconstitutionally overbroad.”).

191. WASH. REV. CODE § 9.61.230 (2018).

192. *Stanley*, 2017 WL 3868480, at *6.

193. WASH. REV. CODE § 9A.46.110 (2018).

194. *State v. Bradford*, 175 Wash. App. 921, 921–22, 308 P.3d 736, 740 (Wash. Ct. App. 2013).

195. *Id.*

address the “expression of an old crime”: violence against women, in the new medium of the internet.¹⁹⁶ One particularly egregious case motivated the legislature to act; “[f]or over five years, an anonymous stalker sent malicious emails to the [anonymous] victim” and her co-workers.¹⁹⁷ The stalker pretended to be the victim in online chat rooms and went so far as to post her home and work phone numbers with suggestions that she was looking for sexual partners.¹⁹⁸ The victim reported the harassment to police, but the police reported that they could not help her as her stalker had not broken the law.¹⁹⁹ Upon hearing these experiences, the victim’s state representative and senator sponsored the cyberstalking bill.²⁰⁰

While there has been significant case law on the provisions targeting lewd or obscene messages and threatening statements, only one person has been the subject of an anti-stalking order on the basis of anonymous or repeated speech under RCW 9.61.260(1)(b). In November 2016, Richard Rynearson, a “self-proclaimed activist,” became Facebook friends with Clarence Moriwaki, a local figure on Bainbridge Island, Washington, and the volunteer-founder of the Bainbridge Island Japanese-American Exclusion Memorial.²⁰¹ After several “cordial” interactions, in early 2017 Rynearson authored numerous Facebook posts criticizing Moriwaki for not condemning political figures that supported the National Defense Authorization Act of 2012 (NDAA).²⁰² Rynearson did not support provisions of the NDAA that he believed permitted internment-like detention of American citizens overseas, and believed that Moriwaki was hypocritical in supporting these politicians while also being outspoken on the issue of Japanese internment.²⁰³ Rynearson sent direct messages and authored Facebook posts criticizing Moriwaki, even though Moriwaki asked Rynearson to stop.²⁰⁴ Moriwaki eventually blocked Rynearson from posting on his personal page, at which point Rynearson made a Facebook Group named “Clarence

196. S. COMM. ON TECH. AND COMM’N., H.B. REPORT 2711, S. 85, 2nd Sess., at 2 (Wash. 2004).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Rynearson v. Ferguson*, No. 3:17-cv-05531 RBL, 2017 WL 4517790, at *1 (W.D. Wash. Oct. 10, 2017).

202. *Id.*

203. *Id.*

204. *Id.*

Moriwaki of Bainbridge Island,” where he posted memes critical of Moriwaki.²⁰⁵

In March 2017, Moriwaki obtained a temporary stalking protection order against Ryneason in state superior court.²⁰⁶ Ryneason asked the local prosecuting attorney if there were plans to prosecute him for cyberstalking Moriwaki.²⁰⁷ The attorney said that they would not file charges at that time.²⁰⁸ In response to Moriwaki’s petition for a permanent stalking protection order in October, however, Ryneason officially challenged, *inter alia*, the constitutionality of Washington’s cyberstalking statute under the First Amendment in district court.²⁰⁹ Ultimately, the district court denied and dismissed Ryneason’s petition, holding that Ryneason should bring his constitutional challenge in the state court stalking order proceedings.²¹⁰

In January 2018, the Superior Court for Kitsap County reversed and vacated the stalking order on First Amendment grounds, holding that the online behavior engaged in by Ryneason did not amount to “stalking conduct” that justified the issuance of a stalking order.²¹¹ The court characterized Ryneason’s speech as “‘picketing’ on the internet” in holding that he was entitled to voice his opinions, even if they made Moriwaki uncomfortable.²¹² Analogizing the Moriwaki’s public Facebook page to public property, the court held that “Ryneason’s public internet postings opining about Moriwaki’s involvement with [a local Japanese internment memorial] are subject to First Amendment protections.”²¹³ While the trial court held, in issuing the stalking order, that Ryneason intended to make Moriwaki feel harassed, intimidated, tormented, and embarrassed, the court here held that Ryneason’s speech was protected “so long as it does not fall within any of the categories of unprotected speech.”²¹⁴ The court noted that Ryneason’s speech was neither obscene nor did it amount to true threats, and thus it would be

205. *Id.*

206. *Id.* at *2.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Moriwaki v. Ryneason*, No. 17-2-01463-1, 2018 WL 733811, at *1 (Wash. Super. Ct. Jan. 10, 2018).

212. *Id.* at *7.

213. *Id.* at *8 (referencing *State v. Noah*, 103 Wash. App. 29, 34–35, 9 P.3d 858, 862 (Wash. Ct. App. 2000)).

214. *Id.* at *8.

unreasonable to punish him for otherwise protected, anonymous speech.²¹⁵ The court concluded so despite the fact that neither the plain language nor grammatical structure of the statute mandated that conclusion; instead, the court cited to a district court case from Maryland to support its conclusion.²¹⁶

While Rynearson's challenge to RCW 9.61.260 makes its way through the federal courts,²¹⁷ it is unclear whether such a challenge will be successful.²¹⁸ There has been considerable case law addressing the true threats and obscenity aspects of Washington's cyberstalking statute,²¹⁹ though Mr. Rynearson is the first to challenge the anonymous and repeated speech provisions. This Comment will examine the constitutionality of the statute's treatment of anonymous speech and advise on what to do going forward to ensure that the legitimate scope of the statute is allowed to still exist.

II. WASHINGTON'S CYBERSTALKING STATUTE IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

In its attempt to eliminate harassing and intimidating speech targeted at women online, RCW 9.61.260(1)(b) unconstitutionally criminalizes anonymous speech protected by the First Amendment. Cyberstalking is a serious issue that predominately affects women and should be addressed, but "the manner of that confrontation cannot consist of selective limitations on speech."²²⁰ Because RCW 9.61.260 addresses cyberstalking by singling out anonymous speech that might be protected by the First Amendment, it is unconstitutional as-applied and is facially overbroad and vague.²²¹ RCW 9.61.260(1)(b) threatens to chill online

215. *Id.* at *10–11.

216. *Id.*

217. Oral arguments before the Ninth Circuit Court of Appeals occurred July 12, 2018. *See* Oral Argument, *Rynearson v. Ferguson*, No. 17-35853, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014043 [<https://perma.cc/PWL8-RNPN>].

218. *See Rynearson v. Ferguson*, No. 17-35853 (9th Cir. Sept. 7, 2018) (finding that the district court improperly abstained from considering Rynearson's constitutional challenge to RCW 9.61.260 and remanding for further proceedings).

219. Shimizu, *supra* note 18, at 120–21.

220. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (holding that a St. Paul ordinance criminalizing certain forms of hate speech was unconstitutionally overbroad because it targeted speech on the basis of its content).

221. Generally, courts will consider whether a particular application of a challenged law should be decided first. *See, e.g., Bd. of Trs. v. Fox*, 492 U.S. 469, 484–85 (1989) ("It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied. Such a

anonymous speech. As such, it should either be struck down as unconstitutional or courts should narrowly construct the law by requiring that the anonymous speech in question also be unprotected before a defendant is charged with criminal action. Ultimately, this Comment will propose that enacting new legislation redrafting the language of RCW 9.61.260 to avoid unconstitutional treatment of anonymous online speech is the best solution.

This Part will proceed as follows. First, section II.A will argue that the superior court in *Moriwaki v. Rynearson* got it right in concluding that RCW 9.61.260(1)(b) was unconstitutional as applied to Mr. Rynearson and will engage in statutory construction of the Washington cyberstalking statute. As discussed in sections I.B.1 and I.B.2, anonymous online speech is by default protected by the First Amendment; unless and until the speech loses its protected character by virtue of its proscribable content, governments cannot constitutionally regulate the speech. Next, section II.B will examine the ways in which RCW 9.61.260 is facially unconstitutional on overbreadth grounds and proposes modeling a legal challenge of RCW 9.61.260 on the successful challenge of Illinois's cyberstalking law.

A. *Moriwaki v. Rynearson as a Case Study: RCW 9.61.260(1)(b) Is Unconstitutional As-Applied*

RCW 9.61.260(1)(b) should not and cannot be constitutionally applied to Rynearson. His speech about and towards Moriwaki, while anonymous and repeated, was not intended as harassment. Speech may not be regulated merely because it is anonymous or because a listener felt harassed by the speech. This fact has been bolstered by the trial court's decision to vacate the stalking order against Rynearson. Using the order issued against Rynearson as a test case, it is possible that RCW 9.61.260(1)(b) may be challenged as-applied; this as-applied challenge could have facial consequences. This was the case when Illinois's cyberstalking statute was struck down as unconstitutional. If the law is unconstitutional as applied to one person's non-obscene and non-threatening anonymous speech, it may be applied unconstitutionally to all who speak online in a non-obscene and non-threatening manner.

course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. . . . Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.”)

1. *Anonymous Speech Must Fall Outside the Scope of the First Amendment to Be Grounds for Civil or Criminal Punishment*

While there may be instances in which a person can be constitutionally punished on the basis of online speech, the mere fact that a person speaks anonymously cannot be the basis for criminalization.²²² Anonymous speech is the heart of the internet, and the fact that some actors may abuse it does not mean that it should be banned or punished outright. Anonymous speech that rises to the level of harassment, intimidation, “true threats,” or obscenity may be criminalized in accordance with the First Amendment, but the criminalization of such speech hinges not on the anonymous nature of the speaker but on the unprotected status of their speech.²²³

The structure of RCW 9.61.260(1)(b) singles out anonymous speech among other types of speech without positioning it within any of the categories of speech unprotected by the First Amendment. In contrast with subsections (a) and (c), which, on their own, are generally not protected under the First Amendment, anonymous speech is protected under the First Amendment. Connecting subsection (b) with the intent clause of the statute partially corrects this problem, but not entirely. The statute begins by listing different levels of intent that can justify the entry of a stalking protection order on the basis of anonymous speech—“intent to harass, intimidate, torment, or embarrass.”²²⁴ However, assuming *arguendo* that all forms of intent enumerated are constitutional, the handful of people who have challenged their punishment under the law argue that they did not, in fact, possess the requisite intent to be punished.

In Mr. Rynearson’s case, the trial court entered an order against him despite his assertions that he did not intend to harass or intimidate Mr. Moriwaki.²²⁵ The superior court, on review, ultimately reversed the order because, despite Mr. Moriwaki’s contention that he felt harassed and intimidated, Mr. Rynearson himself lacked the requisite intent to commit the crime of cyberstalking.²²⁶ This shows that the law can, and has been, applied in such a way as to take the focus off the alleged

222. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

223. *See infra* section II.C.

224. WASH. REV. CODE § 9.61.260(1) (2018).

225. A full detailing of the posts and events that transpired between Mr. Rynearson and Mr. Moriwaki are available at *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *2–5 (Wash. Super. Ct. Jan. 10, 2018).

226. *Id.* at *10.

cyberstalker and place it instead on the victim. Those who engage in anonymous speech do not necessarily do so because they wish to harass the targets of their speech. A person who does not intend to harass the target of their speech should not be punished solely based on the anonymous nature of their speech. Despite the language in the statute requiring courts to look at the intent of the alleged stalker, courts have and will likely continue to focus on the effect of the speech on the victim in such a way that is ultimately unconstitutional.

2. *Anonymous Speech Is Not Inherently Threatening Speech*

Washington has fallen into a logical trap when it comes to anonymous speech; intent to harass is assumed because of the speaker's anonymous status. It is almost as if enforcement agencies presume that, because one speaks anonymously, that person could not possibly have anything to say that is worthy of protection under the First Amendment. This could not be further from the truth. If the logic used by the trial court in *Moriwaki* is any indicator, Washington courts instead look at the feelings of the target, rather than the intent of the speaker, in determining whether to punish a speaker under RCW 9.61.260(1)(b). Unless it can be proven beyond a reasonable doubt that the speaker actually intended to harass another person through anonymous speech, they may not and should not be punished based on that anonymous speech. A speaker's right to anonymous speech is no less real just because that speech occurs online.

As a matter of basic statutory construction and interpretation, RCW 9.61.260(1)(b) targets anonymous speech without connecting it to speech which is necessarily outside the scope of the First Amendment. While the statute does require that the alleged cyberstalker have a certain level of intent in order to be found culpable, courts have found a person to be liable despite the lack of such intent. Furthermore, as discussed in section I.C, there is no categorical exception to the First Amendment for harassing speech.²²⁷ Unless and until the harassing speech reaches the level of content proscribable under the First Amendment, there is no basis for regulating the speech.²²⁸

Assuming that the anonymous speech was not said with the required intent, there is no constitutional basis for criminalizing the speech in the first place. Critically, the legislature drafted the statute disjunctively,

227. *See supra* notes 119–38.

228. *Id.*

rather than conjunctively.²²⁹ The statute recognizes obscenity *or* anonymity *or* true threats, if said with the intent to harass, intimidate, torment, or embarrass, as equally valid avenues of committing the crime of cyberstalking.²³⁰ Based on the structure of the statute, it is not required by statute that anonymous speech also be obscene or constitutes true threats in order for it to be the basis of a stalking protection order.²³¹ While the superior court in *Moriwaki v. Rynearson* based its reasoning off such a connection in addition to its determination that Mr. Rynearson did not have the requisite intent, its conclusion was not mandated or even suggested by statutory language.²³²

There are instances in which anonymous speech should be punished. Where anonymous speech is harassing or intimidating, obscene, or a true threat, state governments can and should use their power to ensure that innocent people are protected from the physical, psychological, and economic harms caused by cyberstalking. However, where the underlying speech is protected by the First Amendment, and especially when it constitutes political speech, states must not criminalize those who express themselves anonymously.

B. RCW 9.61.260(1)(b) Is Facially Unconstitutional

If RCW 9.61.260(1)(b) cannot be struck down through an as-applied challenge with facial consequences, those seeking to preserve anonymous online speech should turn to the overbreadth doctrine. RCW 9.61.260(1)(b) is unconstitutionally overbroad because it has the potential to punish otherwise protected anonymous speech and threatens to chill speech. Similarly, RCW 9.61.260(1)(b) is unconstitutionally vague because it fails to provide people with adequate notice with sufficient specificity that their conduct is unlawful.

1. The Requisite Intent Under RCW 9.61.260 Is Overbroad and Facially Unconstitutional

RCW 9.61.260 makes a person guilty of cyberstalking if they engage in electronic communications with the intent to “harass, intimidate, torment, or embarrass.”²³³ While the “harass” and “intimidate” intent

229. WASH. REV. CODE § 9.61.260(1) (2018).

230. *Id.*

231. *Id.*

232. *Id.* at *11–12.

233. WASH. REV. CODE § 9.61.260(1) (2018).

levels are likely constitutional if the statute is not found to have failed at the strict scrutiny level of review, the “torment” or “embarrass” prongs are problematic.²³⁴

The use of the word “torment” within the context of cyberstalking renders RCW 9.61.260 substantially overly broad. The Oxford English Dictionary defines “torment” as “a state of great suffering, bodily or mental.”²³⁵ However, the Oxford English Dictionary also defines “torment” as “an instrument of irritation or annoyance.”²³⁶ While both definitions are correct, it is unclear which meaning the Washington legislature intended, as the word is not defined within the statute or in surrounding statutes. The word “torment” is often used colloquially to mean something far less than suffering or torture. Indeed, the most common usage that comes to mind is when an exasperated parent tells their child to “stop tormenting your sister/brother/the dog/the cat.” While the legislature would have been within its power to regulate speech that reaches the level of causing torture, it cannot reach the more colloquial usage of “torment” without wiping out speech that is protected under the First Amendment. The fact that reasonable minds can disagree further demonstrates that the use of the word “torment” within the context of RCW 9.61.260 is overbroad—there likely are constitutional applications of the statute to target tormenting, as in torturous anonymous speech, but the risk of tormenting, as in annoying anonymous speech getting swept up is too high. While the First Amendment does not prohibit laws that target speech that is tormenting in the context of telephone harassment,²³⁷ the use of the word in that context is based on the manner of the communication, not its contents. In that context, the word “torment” is used to regulate incessant phone calls late at night, rather than the content of those phone calls. The use of the word “torment” in connection with cyberstalking could, therefore, unconstitutionally cover speech that is protected by the First Amendment.

Similarly, the use of the word “embarrass” renders RCW 9.61.260 facially unconstitutional because there is no foreseeable constitutional application of the law on the basis of embarrassing anonymous speech.

234. *Id.*

235. *Torment*, OXFORD ENGLISH DICTIONARY ONLINE <http://www.oed.com/view/Entry/203557?rskey=twPmL&result=1&isAdvanced=false#eid> [<https://perma.cc/UAQ3-RC9A>].

236. *Id.*

237. *State v. Alphonse*, 142 Wash. App. 417, 174 P.3d 684 (2008) (finding that the purpose of Washington’s telephone harassment statute was to protect residents from fear and abuse of persons who intend to “torment” them by use of the telephone and from the intrusion of unwanted telephone calls).

The U.S. Supreme Court has held repeatedly that “[s]peech does not lose its protected character . . . simply because it may embarrass others.”²³⁸ And Washington courts have recognized that a stalking protection order cannot be issued “to penalize people who are overbearing, obnoxious, or rude.”²³⁹ A literal interpretation of the word “embarrass” in the statute could lead to absurd conclusions. Imagine, for example, a person who shares a naked childhood photo of their sibling, ostensibly to embarrass them on their birthday. In this age of constant internet access and social media, strangers post things about people around them that could very well be embarrassing to the subject.²⁴⁰ Would these examples fall within the scope of embarrassing obscene communications that amount to cyberstalking? Washington courts have already recognized in dicta that the use of the word “embarrass” in the statute is likely constitutionally problematic, though they have yet to officially answer the question. In *State v. Stanley*,²⁴¹ the Washington Court of Appeals held, in a challenge to RCW 9.61.260, that although it was suspicious of the “embarrass” prong of the intent requirement, “[i]n view of the limited briefing, [it would] not decide whether the intent to embarrass in the cyberstalking statute renders the statute unconstitutionally overbroad.”²⁴²

2. *The Failure to Connect Anonymous Speech to Unprotected Speech Renders RCW 9.61.260 Overbroad*

Regardless of the value of allegedly harassing speech, RCW 9.61.260(1)(b)—in its current form—is inherently overbroad because it does not cabin its application to anonymous speech which is also threatening or lewd; it hinges on the fact that the speech is anonymous or repeated rather than focusing on speech which is already

238. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)).

239. *Burchell v. Thibault*, 74 Wash. App. 517, 522, 874 P.2d 196, 199 (1994).

240. In July 2018, a woman chronicled the conversations and interactions between two strangers on a plane that she switched seats with, including insinuations that the two engaged in sexual activity while on the plane. While one of the subjects has embraced the publicity, the other has not, especially after her Instagram account was found. While this is certainly an invasion of both subjects’ privacy and was embarrassing for at least one party involved, it is not, and should not, be considered cyberstalking. Under the language in the statute, however, it very well could. *See, e.g., Mary Elizabeth Williams, That Viral ‘Strangers on a Plane’ Twitter Story: Not a Rom-Com but a Horror Show*, SALON (July 6, 2018), <https://www.salon.com/2018/07/06/that-viral-strangers-on-a-plane-twitter-story-not-a-rom-com-but-a-horror-show/> [<https://perma.cc/4RYD-BF56>].

241. No. 74204–3–I, 2017 WL 3868480 (Wash. Ct. App. Sept. 5, 2017).

242. *Id.* at *9.

unprotected. The First Amendment does not prohibit harassing or intimidating speech until its nonspeech elements make it ineligible for protection under the First Amendment.²⁴³ And while the intent requirement would likely render some applications of the statute constitutional, like where the speech arises to the level of criminal harassment or intimidation, such speech is likely much less frequent than speech which is embarrassing or tormenting, as that term is commonly used. States undoubtedly have compelling interests in preventing and punishing harassment, though states may not regulate harassment in a manner that infringes on protected speech. As it currently stands, RCW 9.61.260(1)(b) simply covers more speech than is constitutionally permissible. The internet is the quintessential twenty-first century example of a public forum. Speech that is protected by the First Amendment must be allowed to flourish online, even if some might find it objectionable.

Though RCW 9.61.260(1)(b) has not yet been enforced on a wide scale, it threatens to chill speech as speakers may choose to not speak at all lest they be punished for speaking anonymously.²⁴⁴ The language of the statute may focus on the intent of the speaker, but this is not how victims and prosecutors have used the statute with regard to anonymous speakers.²⁴⁵ And as discussed above, the use of the words “torment” and “embarrass” makes RCW 9.61.260 extremely prone to use against protected speech. While those terms could be constitutionally used to prohibit the dissemination of revenge pornography or true threats,²⁴⁶ to

243. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (finding that a city ordinance that criminalized speech said with the intent to intimidate on the basis of race was unconstitutional under the First Amendment). *But see* *Virginia v. Black*, 538 U.S. 343 (2004) (finding that a state law that banned cross burning was constitutional because the law focused on the nonspeech elements of cross burning).

244. *See, e.g.*, *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (discussing the Bipartisan Campaign Reform Act’s regulation of campaign commercials); *id.* (“Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure.”).

245. The U.S. Supreme Court has held that, if there is no mens rea stated in a federal criminal law, courts should read in a specific intent. *See* *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001, 2003 (2015) (overturning defendant’s conviction for threatening interstate communications because he did not intend to threaten his victims).

246. *State v. Kohonen*, 192 Wash. App. 567, 370 P.3d 16 (2016) (finding that a teenager’s tweet did not constitute a “true threat”, and therefore could not be the basis of punishment under RCW 9.61.260).

criminalize tormenting or embarrassing anonymous speech would be facially invalid.²⁴⁷

Further, the structure of the statute suggests that it could be used to punish speech that would ordinarily be protected to the highest degree, such as speech to boycott a local business for failing to engage in ethical practices or speech organizing a protest. Because the grammatical structure of the statute is disjunctive rather than conjunctive, anonymous speech can be the grounds of a cyberstalking action on its own, without reference to otherwise unprotected areas of speech like true threats or obscenity. While the court in *Moriwaki* decided to strike down the stalking protection order in that case because the order punished constitutionally protected political speech, the court was in no way required to do so. Courts should not and are not required to rewrite laws when legislatures are sloppy in their drafting. By interpreting RCW 9.61.260 to require a conjunctive element—that is, to be obscene or true threats *and* anonymous—to target anonymous online speech in line with *United States v. Cassidy*,²⁴⁸ it was not required to do so.

3. *Illinois’s Striking of Its Cyberstalking Statute Should be Used as a Model for Attempts to Strike RCW 9.61.260(1)(b)*

Washington courts should look to the Supreme Court of Illinois’s example when evaluating its cyberstalking statute. Illinois’s now-unconstitutional cyberstalking statute, which the Supreme Court of Illinois struck down on overbreadth grounds, was substantially similar to Washington’s. Like Illinois’s cyberstalking statute, Washington’s cyberstalking statute has the potential to penalize otherwise protected anonymous speech.

Illinois’s cyberstalking statute was struck down because it did not require that cyberstalking behaviors also constitute true threats or speech integral to criminal conduct.²⁴⁹ By its terms, the statute focused on whether a defendant’s speech would cause a reasonable person to fear for their safety or to suffer emotional distress.²⁵⁰ While this differs from the standard in the text of the Washington cyberstalking statute—which focuses on the speaker’s specific intent to harass, intimidate, torment, or

247. See, e.g., *People v. Relford*, 2017 IL 121094 (striking down Illinois law that prohibited online speech that would knowingly cause embarrassment or emotional distress on First Amendment grounds).

248. 814 F. Supp. 2d 574 (D. Md. 2011).

249. *Relford*, 2017 IL 121094, ¶¶ 22–30.

250. 720 ILL. COMP. STAT. 5/12-7.55(a)(1), (a)(2) (2018).

embarrass—when applied, these intent requirements are not significantly different. The Illinois’s statute’s focus on emotional distress makes the commission of a tort a criminal offense²⁵¹; the “embarrass” and “torment” prongs of the Washington statute are substantially similar to this. A person who reasonably fears for their safety as a result of someone else’s speech likely does so because the speaker intended it to have such an effect. The converse is also true; a person who intends to harass, intimidate, torment, or embarrass the target of their speech will cause that target to feel fear or suffer emotional distress.

Furthermore, neither the now-defunct Illinois cyberstalking statute nor the current Washington cyberstalking statute limited their respective applications to regulating speech that is unprotected by the First Amendment. This shortcoming was clearly recognized by the Supreme Court of Illinois in *Releford*²⁵² and by the superior court in *Moriwaki*.²⁵³ By their terms, each statute respectively focused on the content of speech that was considered emotionally distressing or harassing, intimidating, tormenting, or embarrassing. While there are certainly applications of the statutes in constitutional manners, that is, regulating speech unprotected by the First Amendment, the fact that cases like *Releford* and *Moriwaki* arose in their first place are indications that the overbroad terms in the laws are vulnerable to unconstitutional applications. The Supreme Court of Illinois in *Releford* essentially concluded that the law was not only unconstitutional as applied to Mr. Releford, but also that it was facially unconstitutional because it attempted to regulate constitutionally protected speech in its attempt to criminalize unprotected speech.²⁵⁴ The same is true of RCW 9.61.260, and Washington courts should recognize that.

C. RCW § 9.61.260(1)(b) Cannot Survive Strict Scrutiny

In order to withstand strict scrutiny, RCW 9.61.260(1)(b) must be narrowly tailored to serve a compelling state interest.²⁵⁵ Strict scrutiny is an extremely high bar; “nearly all laws fail strict scrutiny” review when it applies.²⁵⁶ “A law that is content based on its face is subject to strict

251. *Id.*

252. *Releford*, 2017 IL 121094, ¶ 78.

253. *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *11–14 (Wash. Super. Ct. Jan. 10, 2018).

254. *Releford*, 2017 IL 121094, ¶¶ 57–69.

255. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000).

256. John B. Major, *Cyberstalking, Twitter, and the Captive Audience: A First Amendment Analysis of 18 U.S.C. Sec 2261 A(2)*, 86 S. CAL. L. REV. 117, 152 (2012).

scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”²⁵⁷ RCW 9.61.260 is content-discriminatory on its face and, as an effect of the ambiguous meaning of its language and its grammatical structure, targets speech that is both protected and unprotected by the First Amendment.

In order to survive judicial review, RCW 9.61.260 must serve a compelling state interest. Representatives from the Washington Coalition of Sexual Assault testified before the State House of Representatives that “[c]yberstalking is an expression of an old crime: violence against women.”²⁵⁸ Further testimony shows that proponents of the bill intended it as “[a] message . . . sent to cyberstalkers that society will not tolerate their behavior. They must know that they will be caught, prosecuted, and punished.”²⁵⁹ As discussed in Part I, women predominately feel the harms of cyberstalking; one in six women will be victims of some form of cyberstalking during her life, compared with one in nineteen men.²⁶⁰ Furthermore, the U.S. Supreme Court has recognized that states have a compelling interest to protect their citizens, without regard to gender, from harassment as part of their police power.²⁶¹

Assuming, *arguendo*, that preventing violence against and the harassment of women is a compelling state interest,²⁶² RCW 9.61.260(1)(b) is not narrowly tailored to achieve that interest. The statute fails because there are less restrictive means to achieve this

257. *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218, 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

258. S. COMM. ON TECH. AND COMM’N., H.B. REPORT 2711, S. 85, 2nd Sess., at 2 (Wash. 2004).

259. *Id.*

260. *National Data on Intimate Partner Violence, Sexual Violence, and Stalking*, NAT’L CTR. FOR INJURY PREVENTION & CONTROL (2014), <https://www.cdc.gov/violenceprevention/pdf/nisvs-fact-sheet-2014.pdf> [<https://perma.cc/6JFD-5ZUB>].

261. *Cf. City of Bellevue v. Lorang*, 140 Wash. 2d 19, 27–28, 992 P.2d 496, 500–01 (2000) (collecting cases where the Court analyzed Washington’s telephone harassment statute and concluded the state could exercise its police powers to prevent harassment); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1146–47 (W.D. Wash. 2003) (“The government can assert no compelling interest in suppressing speech based on the content of that speech ‘when the speaker intends to communicate[,] but permitting the same speech if incidental to another activity.’ That is, the government cannot claim any such [compelling] interest is served by focusing solely on the intent of the speaker.” (citations omitted)).

262. While the U.S. Supreme Court has not explicitly held that preventing violence and harassment against women is a compelling state interest, there is at least one district court decision that so held with regards to the federal cyberstalking law. *See United States v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015).

goal without criminalizing potentially-protected anonymous speech. The U.S. Supreme Court has held repeatedly that less restrictive means of regulating online speech, like installation of filtering software on public computers, are more constitutionally sound ways to regulate speech.²⁶³ While there may be valid reasons for enacting laws that signal harassing speech will not be tolerated,²⁶⁴ this is not the least restrictive way of doing so. For example, many states have civil tort liability regimes that allow victims of abusive speech to seek compensation by bringing intentional infliction of mental distress claims against the speaker.²⁶⁵ While tort liability is not a perfect solution for victims, it is one avenue for relief that does not necessarily implicate content-based government regulation of speech.

As the U.S. Supreme Court said in *R.A.V.*, “the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”²⁶⁶ RCW 9.61.260 is not narrowly tailored because it targets communications that are protected by the First Amendment. Rather than targeting the mode of socially objectionable behavior, RCW 9.61.260 looks to the content of the anonymous speech and decides, regardless of whether the content is protected, that certain speech should be penalized.

Even if RCW 9.61.260(1)(b) is only applied when the speaker intends the anonymous speech to harass, intimidate, or torment, the law on its face distinguishes between favored and disfavored speech by favoring speech which is not anonymous—this is impermissible. While the U.S. Supreme Court has asserted that viewpoint discrimination was proper in some circumstances, this is not one of those circumstances. Anonymous

263. John B. Major, *Cyberstalking, Twitter, and the Captive Audience*, 86 S. CAL. L. REV. 117, 153 (2012). In *Reno v. ACLU*, 521 U.S. 844 (1997), and *Ashcroft v. ACLU*, 542 U.S. 656 (2005), the Court held that portions of the CDA and COPA, respectively, were unconstitutional because there were less restrictive and more narrowly tailored means available to achieve the government’s goal of protecting children from obscene online content.

264. See generally Aily Shimizu, *Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116 (2013).

265. See generally *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (plaintiff brought suit against the Westboro Baptist Church for intentional infliction of mental distress for protesting his son’s military funeral; however, the Court held that the Church had a free speech right to speak on “issues of public import” including homosexuality and the U.S. armed forces). *Contra Brekke v. Wills*, 23 Cal. Rptr. 3d 609 (Cal. Ct. App. 2005) (a teenager’s speech constituted harassment and infliction of emotional distress when directed at his girlfriend’s mother, justifying the grant of an injunction against the teen).

266. 505 U.S. 377, 393 (1992) (emphasis omitted).

speech that is harassing or intimidating may be prohibited. Here, however, the law sweeps up constitutionally protected anonymous speech in its attempt to prohibit harassment and intimidation. The very fact that the law allows for culpability when the anonymous speech is made with the intent to torment and embarrass signals that the law is not narrowly tailored. Thus, under the standards set by the U.S. Supreme Court, RCW 9.61.260 cannot survive strict scrutiny.

III. THE WASHINGTON COURTS AND LEGISLATURE MUST ACT TO PROTECT WOMEN FROM CYBERSTALKING AND RESPECT THE FIRST AMENDMENT RIGHTS OF ONLINE SPEAKERS

Washington has two avenues to address the problems posed by RCW 9.61.260. While the courts could narrowly construct the statute so as to avoid the constitutional question, such a construction is not commanded by the language or structure of the statute. Thus, the Washington legislature should redraft the statute. This Comment proposes a revised version of RCW 9.61.260 that is more likely to withstand constitutional scrutiny.

A. *Judicial Solutions*

RCW 9.61.260 does not contain a severability clause, nor does it contain explicit language allowing a court to strike down unconstitutional parts of the law while upholding its constitutional provisions. However, there are potential avenues that Washington courts could take to ensure the legitimate scope of RCW 9.61.260 stands.

To ensure that the cyberstalking statute is upheld, Washington courts should cabin its application to contexts in which the challenged speech is not constitutionally protected. Courts should attempt to find a limiting construction of RCW 9.61.260(1)(b). The other two provisions of 9.61.260(1) criminalize speech already unprotected by the First Amendment—obscenity and true threats. States can criminalize speech that is anonymous without running afoul of the First Amendment as long as the speech is also obscene or a true threat and is said with the intent to harass, torment, intimidate, or embarrass. While courts are usually not willing to rewrite law for the legislature,²⁶⁷ they might do so in order to preserve the legitimate sweep of the larger cyberstalking statute.

267. See, e.g., *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. 383, 397 (1988) (“It has long been a tenant of First Amendment law that in determining a facial challenge to a statute, if it be ‘readily

At least one Washington court has already embraced a limiting construction of RCW 9.61.260. This is evidenced by the trial court's language reversing and vacating the stalking order against Mr. Rynearson. The court relied on language of a District Court of Maryland case,²⁶⁸ *United States v. Cassidy*,²⁶⁹ in which the court held "even though numerous court decisions have made a point to protect anonymous, uncomfortable speech and extend that protection to the Internet [sic], not all speech is protected speech."²⁷⁰ The court further elaborated that "[t]here are certain 'well-defined and narrowly limited classes of speech' that remain unprotected by the First Amendment," but noted that speech is otherwise protected.²⁷¹ As the trial court there recognized "[t]here was no obscenity by words or conduct. There is no evidence [of] incitement or speech integral to criminal conduct."²⁷² In so doing, the superior court adopted a conjunctive, rather than disjunctive, reading of RCW 9.61.260. Although this reading of RCW 9.61.260 is more likely to withstand constitutional scrutiny, it is not faithful to the statute's language. As one court held, "[a] stalking protection order is not an available remedy if the speech and conduct complained of is protected under the First Amendment. The communication and conduct in this case falls under the umbrella of constitutionally protected speech."²⁷³ While courts are generally wary of rewriting laws, it seems that Washington courts have not hesitated to redraft legislation when it comes to ensuring that RCW 9.61.260 remains in full effect.

If there is no plausible limiting construction, Washington courts should strike down RCW 9.61.260 as unconstitutionally infringing on the right to free speech. A speaker's right to anonymous speech is no less protected because they speak online. While courts view facial invalidation as "strong medicine,"²⁷⁴ and are therefore unlikely to strike down RCW 9.61.260, a Washington court could easily determine there is no valid application of RCW 9.61.260(1)(b). Washington courts

susceptible' to a narrowing construction that would make it constitutional, it will be upheld. The key to the application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional standards." (citations omitted)).

268. *Moriwaki v. Rynearson*, No. 17-2-01463-1, 2018 WL 733811, at *10 (Wash. Super. Ct. Jan. 10, 2018).

269. 814 F. Supp. 2d 574 (D. Md. 2011).

270. *Id.* at 581–82.

271. *Moriwaki*, at *10 (quoting *United States v. Cassidy*, 814 F. Supp. 2d 574, 582–83 (D. Md. 2011)).

272. *Id.* at *11.

273. *Id.* at *12.

274. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

should follow Illinois and strike down the overbroad law as unconstitutional under the First Amendment.²⁷⁵ The Illinois court held that, while the state may regulate speech that is not constitutionally protected, the cyberstalking statute did not limit itself to such an application.²⁷⁶

The Illinois case is very similar to the situation facing Washington courts and should serve as guidance to Washington courts to strike down RCW 9.61.260. Courts should not do the legislature's job and make the law conform to the Constitution. While the courts are within their rights to follow the lead of the *Moriwaki* trial court and the *Cassidy* district court, they are not obligated to interpret RCW 9.61.260 beyond the plain language of the law.

B. Legislative Solutions

The Washington legislature should amend RCW 9.61.260 to ensure that the legitimate needs of victims of stalking receive the protection they need. As discussed above, the shortcomings in the current version of RCW 9.61.260 fails to do this. The legislature should take several steps to remedy the First Amendment issues implicated by the current version of the statute and provide a solution for a legitimate problem.

First, the intent elements of “torment” and “embarrass” should either be defined within the statute itself or removed altogether. The common usage of the term “torment” could render the current version of RCW 9.61.260 overbroad because it does not limit its application to speech which is torturing as opposed to merely annoying. The word “torment,” if kept in the new version of the statute, must be defined to specifically cabin the statute's application to cyberstalking activities that are torturous. The word “embarrass” should be removed from the statute entirely. Embarrassing speech is protected by the First Amendment until it crosses over into the realm of speech that is not protected or action that can be regulated by the state.²⁷⁷ Based on the now-overturned Illinois

275. *People v. Relford*, 2017 IL 121094, ¶¶ 24–34.

276. *Id.* ¶¶ 50–61.

277. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 457 (2011) (speech accusing plaintiff's dead son of being a pedophile because he was a service member and a Catholic was protected speech); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (District of Columbia provision that prohibited political picketing outside diplomatic embassies was unconstitutional); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (satirical advertisement insinuating that plaintiff Falwell engaged in incest was protected); *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (advertisement accusing city commissioner of conspiring against integration efforts did not constitute libel and, without evidence of actual malice, was protected).

statute, which focused on emotional distress, the fact that speech might be embarrassing or cause emotional distress might not on its own be enough to pass strict scrutiny. The State of Washington can legitimately regulate and criminalize speech that is harassing and intimidating, assuming that the elements of the crime are themselves constitutional.

Second, the Washington legislature should make the provision of RCW 9.61.260 dealing with anonymous speech specifically conjunctive rather than disjunctive. The statute should be rewritten as:

A person is guilty of cyberstalking if he or she, with intent to harass, intimidate **or** torment, **as defined in RCW X.XX.XXX**, ~~or embarrass~~ any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:

- (a) Using any ~~lewd, lascivious, indecent, or~~ obscene words, images, or language, or suggesting the commission of any lewd or lascivious act; **OR**
- ~~(b) Anonymously or repeatedly whether or not conversation occurs; **or**~~
- (eb) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; **OR**²⁷⁸
- (c) **anonymously or repeatedly contacts a person:**
 - (i) **using any obscene words, images, or language or suggesting the commission of any lewd or lascivious acts; OR**
 - (ii) **threatening to inflict injury on the person or property of the person called or any member of his or her family or household.**²⁷⁹

Making these changes will likely render RCW 9.61.260 constitutional. First, by explicitly connecting the anonymous speech component to speech that is not protected by the First Amendment—

278. WASH. REV. CODE. § 9.61.260 (2018) (emphasis added).

279. To clarify the changes I propose to RCW 9.61.260: Deleting the word “embarrass” and defining torment cures a significant portion of the statute’s overbreadth. Ideally, in section (a), the Legislature would limit the provision only to obscene words, images, or language to conform with the Supreme Court’s standards in *Miller v. California*. I flipped (b) and (c) to make the statute more clear and easier to read. I added provisions (c)(i) and (c)(ii) to further demonstrate that the anonymity provision of the statute must operate within constitutional constraints.

obscene speech and true threats—the anonymous speech element is no longer vulnerable to unpopular, but constitutionally protected, speech. Assuming, for the purposes of argument, that RCW 9.61.260 and the issuance of a stalking protection order is the most narrowly tailored way to regulate cyberstalking speech, this change would also likely make the statute survive strict scrutiny analysis. There is a compelling state interest in protecting people from cyberstalking; by connecting the anonymity element to types of unprotected speech, the statute is narrowly tailored to serve this goal.

The legislature should also add a clause limiting application of the statute to speech that is unprotected by the First Amendment. The legislature did so in drafting Washington’s unlawful harassment law, and this language can be copied verbatim and added to the cyberstalking statute.²⁸⁰ Enforcement of the unlawful harassment statute is limited to a “course of conduct” that amounts to harassment “but does not include constitutionally protected free speech.”²⁸¹ Adding this provision is a simple way to ensure that the statute not be enforced in such a way that violates the First Amendment and provides courts with an easy way to justify overturning an unconstitutional stalking protection order. Thus, the revised version of the statute would include a subsection that would prevent the application of RCW 9.61.260 in a way that violates the First Amendment.

The legislature should also add a severability clause to ensure that courts can selectively strike unconstitutional provisions without invalidating it as a whole. While severability clauses will not protect a statute from all constitutional attacks,²⁸² courts may utilize them to strike down only portions of a statute, as opposed to the entire statute.²⁸³ When a statute contains a severability clause, “the normal rule that partial, rather than facial, invalidation is the required course.”²⁸⁴ The addition of a severability clause would help ensure that the constitutional provisions

280. WASH. REV. CODE §§ 7.92.020(3)(c), 9A.46.110(6)(c).

281. *Id.* § 10.14.020(1).

282. *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (refusing to sever a federal statute because the unconstitutional provision was so “interwoven” with the constitutional provisions that the Court would have had to rewrite the law so it could stand).

283. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985) (finding that Washington’s “moral nuisance” statute was only partially invalid as being unconstitutionally overbroad, due in part to the legislature’s inclusion of a severability clause); *see also Reno v. ACLU*, 521 U.S. 844, 883 (1997) (saving the constitutionality of the Communications Decency Act from a facial overbreadth challenge by severing the term “or indecent” from the statute pursuant to its severability clause).

284. *Brockett*, 472 U.S. at 504.

of the statute can stand, while the unconstitutional provisions are rightly stripped away.

IV. CONCLUSION

Laws governing harassing speech and conduct must catch up with the realities of the twenty-first century. Cyberstalking statutes are necessary to address the threats and harassment people, and women in particular, face online. These threats are no less serious simply because they occur on the internet. The nature of the internet can make the cyberstalker seem both omnipotent and omnipresent. However, these laws must not infringe on internet users' right to free speech any more than is necessary.

RCW 9.61.260 impermissibly infringes on the right of online users to speak anonymously. The First Amendment is not void because a person chooses to speak online, and an anonymous speaker should not be punished simply because they choose to be anonymous. Because the structure of RCW 9.61.260 allows for criminal and civil enforcement actions targeting constitutionally protected speech, the law needs to be reconsidered. While the state generally has a compelling interest in protecting its citizens from harassment, it may not do so at the expense of constitutionally protected speech. RCW 9.61.260 has the potential to chill online anonymous speech, and as such should be amended so that constitutionally protected speech is not swept under its reach.

Washington is home to leaders and innovators in the technology world, and its laws should reflect the sophistication of its homegrown industry. Washington courts have two choices: re-interpret RCW 9.61.260 to require a connection between anonymity and unprotected speech, or strike down the statute altogether. Ideally, the Washington legislature will take heed of the issues this law presents; this Comment does not suggest that cyberstalking laws as a category should be struck down. On the contrary, such laws *must* exist to ensure that all speakers, women included, feel safe to speak and exist online. Whichever route Washington takes, cyberstalking is a serious issue that deserves a serious law to protect the women who so often deal with its harms.