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Recent Developments: Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute

Aily Shimizu

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Recent Developments

Domestic Violence in the Digital Age: *Towards the Creation of a Comprehensive Cyberstalking Statute*

Aily Shimizu ††

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I. INTRODUCTION

Stalking is “a course of conduct directed at a specific person that involves repeated visual or physical proximity, non-consensual communication, or verbal, written or implied threats or a combination thereof, that would cause a reasonable person to fear.”¹ It refers to repeated harassing or threatening behavior, such as following a person, appearing at one’s home or work, leaving written messages or objects, or vandalizing a person’s property.² While stalking occurs in a variety of other contexts, there is a strong association between domestic violence and stalking.³ Seventy-four percent of individuals who were stalked by a former intimate partner experienced violence or coercive control during the relationship and eighty-one percent of individuals stalked by a former or current intimate partner experienced physical assault during the relationship.⁴

With the advent of computer technology and the Internet, stalking has changed radically. Indeed, the Internet has provided a new vehicle by which individuals can commit the traditional act of stalking.⁵ Cyberstalking includes the use of the Internet, e-mail, and other electronic communication devices to stalk another person.⁶ This includes sending threatening or obscene e-mail, spamming, harassing in chat rooms, tracing another person’s computer and Internet activity, and posting threatening or harassing messages on blogs or through social media.⁷ Stalking and cyberstalking are similar in some respects. Both play an integral part of violence against women and both are methods used by an abuser to intimidate and control his victim.⁸ However, they are also gravely different.

The Internet creates a new and more favorable environment for stalkers. It provides a low-cost method of communication without requiring a perpetrator to

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1. Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, 2 (Apr., 1998), <https://www.ncjrs.gov/pdffiles/169592.pdf>.
 2. *Id.* at 1.
 3. *Intimate Partner Stalking*, NAT’L INST. OF JUSTICE (Apr. 20, 2012), <http://www.nij.gov/nij/topics/crime/intimate-partner-violence/stalking/welcome.htm>.
 4. *Id.*
 5. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (explaining that the Internet “provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue”).
 6. *Stalking And Domestic Violence: Report To Congress*, U.S. DEP’T OF JUSTICE, 1 (May 2001) <http://www.ncjrs.gov/pdffiles1/ojp/186157.pdf> [hereinafter *Report to Congress*].
 7. *See id.*
 8. Paul E. Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 280 (2002); *Report to Congress*, *supra* note 6, at 1.

be in the same geographic location as his victim. Also, it facilitates a cloak of anonymity and is impersonal by nature.⁹ Thus, due to the general nature and characteristics of the Internet, the crime of cyberstalking becomes separate and distinct from the traditional elements of stalking. First, “[o]ffline stalking generally requires the perpetrator and the victim to be in the same geographic area.”¹⁰ However, a cyberstalker can reach his victim from anywhere in the country or the world regardless of geographic boundaries.¹¹ Second, the Internet can also be used by perpetrators to urge others to harass or make threats to the victim.¹² Third, the Internet significantly diminishes the amount of effort that a cyberstalker must expend. For example, while a stalker would have to physically follow a victim around, a cyberstalker can accomplish the same from his computer, without leaving his desk.

Although there are no hard statistics, as more people take advantage of the Internet and other telecommunications technologies, cyberstalking will become more prevalent and dangerous.¹³ Not only is it another way for an abuser to control and dominate his victim while the abusive relationship is ongoing, it also makes it much more difficult for a domestic violence victim to leave her abuser.¹⁴ Even where a victim is able to physically escape her abuser, he can nonetheless maintain control and continue to harass and threaten her from a distance with relative ease.¹⁵ Moreover, it stands to reason that cyberstalking, like other cybercrimes, will continue to sophisticate as modern technology continues to develop at an exponential rate.¹⁶ Since cyberstalking has already outpaced state and federal laws and will continue to do so,¹⁷ it is prudent to take action now.

This Recent Developments piece will discuss the current state of criminal cyberstalking statutes at both the state and federal levels in Section II. Section III will discuss the availability of civil remedies for cyberstalking victims and the difficulties victims may nonetheless encounter when bringing a civil suit.

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9. Joseph C. Merschman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 276 (2001).
 10. *Report to Congress*, *supra* note 6, at 3.
 11. *Id.*
 12. *Id.*
 13. *Id.* at 3-4.
 14. Dalia Colon, *Tech Terror: Cyber-Stalking and Domestic Violence*, MIAMI HERALD (Oct. 9, 2010), available at <http://www.miamiherald.com/2010/10/09/v-fullstory/1865351/tech-terror-cyber-stalking-and.html> (“Technology makes it even harder to escape domestic abuse. . . . Technology is being used more to track the victim and stalk them, monitor anywhere that they go.”).
 15. *Id.* (describing domestic violence victim whose abuser continued to terrorize her through the Internet; although she has tried filing cyberstalking charges against her ex-husband, she has been largely unsuccessful).
 16. Terrence Berg, *The Changing Face of Cybercrime: New Internet Threats Create Challenges to Law Enforcement*, 86 MICH. B.J. 18, 18 (2007) (describing how, while federal, state, and local responses to cybercrimes continue to mature, new criminal threats are constantly emerging due to the “ever-changing environment” of the Internet).
 17. *See infra* Part III.

Section IV will proceed to discuss constitutional issues that threaten the viability of current and future cyberstalking statutes. Finally, Section V proposes a federal statute criminalizing cyberstalking. Enactment of the statute would facilitate uniform prosecution of cyberstalkers and provide proper relief for their victims while securing greater safety for domestic violence victims on the Internet.

II. STATUTORY PROHIBITIONS ON CYBERSTALKING

A. State Statutes

Cyberstalking strips domestic violence victims of at least two tools that have traditionally afforded them protection from an abuser who stalks them. First, victims are threatened with the inability to prosecute cyberstalkers¹⁸ when the unique characteristics of cyberstalking put it out of reach of criminal stalking statutes.¹⁹ Some states have reacted by reforming stalking statutes to incorporate elements of cyberstalking,²⁰ while the most progressive states have recognized cyberstalking as a distinct and separate crime from stalking and have enacted cyberstalking-specific statutes.²¹ Second, victims are threatened by the inability to obtain or enforce civil protection orders on the basis of cyberstalking.²² Therefore, because cyberstalking circumvents two major tools used by victims and advocates against domestic violence, states must proactively reform criminal statutes and statutes authorizing civil protection orders to ensure domestic violence victims are fully protected from all forms of stalking.

1. Criminal Cyberstalking Statutes

With the Internet rapidly becoming a part of most Americans' daily lives, it is no surprise that state governments have begun extending their regulatory authority into cyberspace. States generally have two ways to achieve this task: (1) by extending the application of real space laws to Internet activity, or (2) by creating new laws specifically targeting Internet conduct.²³ Indeed, there are a number of states that have amended existing stalking statutes to cover cyberstalking,²⁴ while a small minority of states have actually enacted legislation

18. See Colon, *supra* note 14.

19. See *infra* Section II.A.1 (cyberstalking may fall out of reach of criminal stalking statutes because such statutes fail to address the use of electronic communications, require a physical threat, do not criminalize anonymous communications, require that communication was directed at the victim, or do not address third-party inducement).

20. See *infra* notes 24-36.

21. See *infra* notes 37-41.

22. See *infra* Section II.A.2.

23. See Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 141-43 (2007).

24. *Id.* States that have amended stalking statutes to address cyberstalking include: Alabama, Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Idaho, Kentucky, Maine, Michigan, Nevada, South Carolina, Tennessee, Utah, West Virginia, and Wyoming. *Id.*

that expressly addresses cyberstalking.²⁵ However, many of these statutes fail to provide comprehensive coverage to address adequately the unique criminal components of cyberstalking.²⁶ A comprehensive statute must (1) address the use of electronic communications;²⁷ (2) not have a physical threat requirement;²⁸ (3) cover anonymous communications;²⁹ (4) not have a requirement that communications be directed at the victim;³⁰ and (5) address third-party inducement by the perpetrator.³¹

First, some states do not address cyberstalking at all.³² Statutes that maintain physical pursuit requirements³³ or do not reference electronic communications³⁴ fail to address the greatest distinction between stalking and cyberstalking—that the stalking no longer occurs in real space, but by the use of the Internet and other telecommunications technologies. Some states have recognized this and have amended traditional stalking statutes to include electronic communications.³⁵ Even then, these statutes fail to address the implications of the stalking occurring in cyberspace, namely the opportunities for perpetrators to engage third parties and to harass or threaten without direct communication.³⁶ For example, while New York's stalking statute covers both anonymous communications and communications by electronic means,³⁷ it fails to cover two other important versions of cyberstalking: (1) where a perpetrator makes a threat to a victim by posting on a blog or a website instead of directly sending an e-mail or message to the victim, and (2) where third parties harass the victim at the perpetrator's prompting.³⁸

Only a few states have created statutes directly targeting cyberstalking.³⁹ However, even within this small crowd, only Ohio,⁴⁰ Rhode Island,⁴¹ and

25. *Id.* at 144. States that have enacted legislation that exclusively addresses cyberstalking include: Illinois, Louisiana, Mississippi, North Carolina, Rhode Island, and Washington. *Id.*

26. *Id.* at 146–47.

27. See WASH. REV. CODE ANN. § 9.61.260(1) (West 2012); OHIO REV. CODE ANN. § 2903.211(A)(2) (West 2011); R.I. GEN. LAWS ANN. § 11-52-4.2(a) (West 2011).

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.*

32. Goodno, *supra* note 23, at 141.

33. *Id.* (statutes that maintain physical pursuit requirements include: CONN. GEN. STAT. ANN. § 53a-181 (West 2012), MD. CODE ANN., CRIM. LAW § 3-802 (West 2012), IOWA CODE ANN. § 708.11 (West 2012), N.Y. PENAL LAW § 120.55 (McKinney 2008), and N.Y. PENAL LAW § 120.60 (McKinney 2000)).

34. *Id.* (statutes that do not reference electronic communications include: ARK. CODE ANN. § 5-71-229 (West 2011); CONN. GEN. STAT. ANN. § 53a-181e (West 2012)).

35. *Id.*

36. *Id.* at 142.

37. See N.Y. PENAL LAW § 240.30(1) (McKinney 2011).

38. Goodno, *supra* note 23, at 142.

39. *Id.* at 144 (as of January 2007, the following six states have cyberstalking-specific statutes: Illinois, Louisiana, Mississippi, North Carolina, Rhode Island, and Washington).

40. See OHIO REV. CODE ANN. § 2903.211 (West 2011).

41. See R.I. GEN. LAWS ANN. § 11-52-4.2 (West 2011).

Washington⁴² have statutes that explicitly address all aspects of cyberstalking.⁴³ These statutes should be utilized as a model to craft cyberstalking-specific statutes.⁴⁴

2. Civil Protection Orders

Not only does cyberstalking elude the grasp of traditional stalking statutes, it also undermines the effectiveness of civil protection orders. Victims can generally obtain civil protection orders, which are binding court orders that enjoin an abuser from engaging in abusive and harassing conduct.⁴⁵ Protective orders may include provisions that restrict contact; prohibit abuse, intimidation, or harassment; determine child custody and visitation issues; mandate counseling; prohibit firearm possession; and any other provisions for relief that a court may find appropriate.⁴⁶ If and when these orders are violated, courts are able to enforce them through either civil contempt or criminal misdemeanor charges.⁴⁷ Civil protection orders thereby provide an additional legal remedy to victims because they (1) provide protection more expeditiously than the criminal justice system or family court; (2) offer more complete relief by addressing issues of custody, visitation, and financial support; (3) do not limit relief just to spouses but can also extend to other family members, including children; and (4) deters abusers from engaging in prohibited conduct by threat of contempt.⁴⁸ Accordingly, in addition to cyberstalking-specific statutes, state statutes governing civil protection orders must also be modified to account for cyberstalking.

a. Cyberstalking as Grounds for Issuance of a Civil Protection Order

First, a perpetrator's cyberstalking may not provide adequate grounds by which a judge can issue a civil protection order. In some states, particularly those states that have yet to recognize cyberstalking as a crime separate and distinct from stalking, victims may not be able to obtain a civil protection order based on having been cyberstalked. For example, Maryland does not have a separate cyberstalking statute.⁴⁹ Instead, it has a general stalking statute that merely

42. See WASH. REV. CODE ANN. § 9.61.260 (West 2012).

43. Goodno, *supra* note 23, at 146.

44. See *infra* Section V.

45. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 95 (2005).

46. *Enforcement of Protective Orders*, U.S. DEP'T OF JUSTICE 1 (Jan. 2002), <http://law.lclark.edu/live/files/6440-protective-order-enforcement>.

47. Smith, *supra* note 45, at 101.

48. Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 166 (1993).

49. See MD. CODE ANN., CRIM. LAW § 3-802(a) (West 2011).

prohibits “malicious course of conduct that includes approaching or pursuing another.”⁵⁰ This physical pursuit requirement would preclude a victim from relying on instances of cyberstalking, like online harassment or threatening emails, to bolster her petition for a civil protection order. In contrast, Florida permits a court to grant a civil protection order in cases of “two incidents of violence or stalking,”⁵¹ which also by definition includes cyberstalking.⁵² Thus, an individual who has been a victim of cyberstalking has the statutory authority to use it as a basis on which to obtain a civil protection order. Similarly, in New York, a harassing or threatening message sent by e-mail constitutes aggravated harassment in the second degree.⁵³ Therefore, where a petitioner can establish that the respondent harassed or threatened her by e-mail, by a fair preponderance of the evidence,⁵⁴ she may use it to obtain a civil protection. All states should follow in Florida and New York’s footsteps to ensure that a civil protection order can be issued based on a perpetrator’s acts of cyberstalking.

b. Cyberstalking as Grounds for Enforcement of a Civil Protection Order

Second, a victim who has obtained a civil protection order should be able to enforce a violation on the grounds of cyberstalking. In some states, the scope of a civil protection order permitted by statute may be too narrow to prohibit a perpetrator from “cyberstalking.”⁵⁵ While a judge cannot constitutionally prohibit or restrain an individual’s right to protected speech,⁵⁶ he may nonetheless include in the civil protection order a description of acts that a cyberstalker cannot engage in, such as sending communications to the victim, without constraining the cyberstalker’s ability to speak freely on the Internet.⁵⁷

Additionally, some statutes provide that where a perpetrator commits the act of cyberstalking in violation of a standing civil protection order, the cyberstalker may be charged with a felony instead of a misdemeanor.⁵⁸ For example, Ohio’s cyberstalking statute makes stalking a felony if the perpetrator

50. *Id.*

51. *See* FLA. STAT. ANN. § 784.046(1)(b) (West 2012).

52. *See* FLA. STAT. ANN. § 784.048(1)(d) (West 2012).

53. *See* N.Y. PENAL LAW § 240.30 (1)(b) (McKinney 2011).

54. *See* N.Y. FAM. CT. ACT § 832 (McKinney 2011); *Smith v. Smith*, 24 A.D.3d 822, 823 (2005) (holding that “petitioner need only establish that respondent committed this crime by a ‘fair preponderance of the evidence.’”).

55. *See* MD. CODE ANN., FAM. LAW § 4-506(d) (West 2011) (limiting what relief may be granted in a civil protection order; while it does permit relief from harassment generally, it does not explicitly provide for relief from either stalking or cyberstalking).

56. *See infra* Section IV.

57. *See Towner v. Ridgway*, 182 P.3d 347, 352-53 (Utah Sup. Ct. 2008) (upholding a civil protection order that enjoined the perpetrator from making comments to the victim or making comments directed to the victim and finding that such restrictions did not violate the perpetrator’s First Amendment rights).

58. *See* OHIO REV. CODE ANN. § 2903.211(B)(2)(g) (West 2011); WASH. REV. CODE ANN. § 9.61.260(3)(a) (West 2012).

is subject to a protection order, without regard to whether the victim of the stalking was the individual protected under the order.⁵⁹ Similarly, in Washington, cyberstalking becomes a felony if the victim has a civil protection order against the perpetrator.⁶⁰ By recognizing a standing civil protection order as an aggravating circumstance that enhances the crime of cyberstalking, these states make clear to perpetrators that cyberstalking is a serious offense with serious consequences.

States have adopted a wide range of statutory approaches to address the issues implicated by the rise in cyberstalking. While no one state has the best approach in all respects, it is clear that the mere extension of current stalking laws to online stalking fails to address the complexities of cyberstalking. In addition, statutes pertaining to civil protection orders must also be reformed in order to ensure that domestic violence victims are able to continue to utilize fully civil protection orders to defend against their abusers' cyberstalking.

B. Federal Statutes

Generally, federal legislation has treated computer-related crimes as distinct federal offenses instead of amending traditional statutes to address issues raised by new technologies.⁶¹ With regard to cyberstalking, Congress has expanded two traditional statutes⁶² while also creating a statute exclusively aimed at stalking.⁶³ On the one hand, Congress' efforts are laudable: the statutes do provide some protection to cyberstalking victims, and certainly much more than if the statutes had not been amended or enacted. On the other hand, the protection that is provided by the statutes, individually and collaboratively, is too limited because the statutes fail to criminalize specific acts that nevertheless constitute cyberstalking. Moreover, none address cyberstalking specifically in the context of domestic violence, leaving victims without adequate protection.

1. The Interstate Communications Act, 18 U.S.C. § 875(c)

The Interstate Communications Act, 18 U.S.C. § 875(c),⁶⁴ broadly prohibits interstate threats to harm another person.⁶⁵ "Whoever transmits in interstate or foreign commerce any communication containing any *threat to kidnap* any person or any *threat to injure* the person of another", is subject to a

59. OHIO REV. CODE ANN. § 2903.211(B)(2)(g) (West 2011).

60. WASH. REV. CODE ANN. § 9.61.260(3)(a) (West 2012).

61. Laura J. Nicholson, Tom F. Shebar & Meredith R. Weinberg, *Computer Crimes*, 37 AM. CRIM. L. REV. 207, 212 (2000).

62. See The Interstate Communications Act, 18 U.S.C. §875(c) (West 2012); The Federal Telephone Harassment Statute, 47 U.S.C. § 223 (West 2006).

63. See The Federal Interstate Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A (West 2006).

64. 18 U.S.C. § 875(c) (2006).

65. *Id.*

fine or up to five years in prison, or both.⁶⁶ Thus, the government must prove three things: (1) a transmission in interstate or foreign commerce, (2) a communication containing a threat, and (3) the threat must be to injure or kidnap the person of another.⁶⁷ In order to constitute a communication containing a threat within the meaning of the statute, the communication must be such that a reasonable person would take the statement as a serious expression of an intention to inflict bodily harm, and would perceive such expression as being communicated to effect some change or achieve some goal through intimidation.⁶⁸

The architecture of this statute renders it of little value to domestic violence victims. First, the statute is limited to communications threatening to kidnap or injure the person of another.⁶⁹ As such, a perpetrator who harasses, annoys, or makes threats that do not involve injury or kidnapping will not be criminally liable under this statute. Second, courts have applied an objective test to both the mens rea and actus reus requirements.⁷⁰ The court in *United States v. Alkhabaz*⁷¹ reasoned that if “an otherwise threatening communication is not, from an objective standpoint, transmitted for the purpose of intimidation, then it is unlikely that the recipient will be intimidated or that the recipient’s peace of mind will be disturbed.”⁷² This reasonable person standard fails to take into account the particular experiences of a domestic violence victim. While a message may not seem like a threat to the reasonable person, a victim of domestic violence may find it a credible threat that deeply disturbs her peace of mind.⁷³

Illustrative of this problem is *United States v. Landham*,⁷⁴ where the Sixth Circuit concluded that the following statement did not constitute a communication “containing a direct threat to kidnap, nor would a reasonable observer in [the victim’s] shoes perceive it as an indirect threat”:⁷⁵

“I’m going to tell you something you. You will not have [your daughter] by her second birthday, because I’m going to have all your children. You will not

66. *Id.* (emphasis added).

67. *Id.*; see also *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992).

68. *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997).

69. 18 U.S.C. § 875.

70. *Alkhabaz*, 104 F.3d at 1496.

71. *Id.*

72. *Id.*

73. Mary A. Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1193 (1993) (“[B]attered women may reasonably perceive themselves to be in imminent danger in situations when this may not otherwise be apparent to the outside observer.”) (citing Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 IOWA L. REV. 553, 553 (1991)).

74. *United States v. Landham*, 251 F.3d 1072 (6th Cir. 2001).

75. *Id.* at 1081.

have [your daughter] to raise . . . I'm going to get her.”⁷⁶

Accordingly, the court held that the district court erred in failing to dismiss the count brought under section 875(c).⁷⁷ The court bolstered its conclusion by the fact that because the wife had obtained a civil protection order barring defendant's contact with their daughter and removing him from his home, a reasonable person would have perceived this statement merely as a simple custody disagreement.⁷⁸ However, the court should have found that this particular statement was a very real and credible threat to kidnap or harm the victim's daughter because of: (1) the context of the parties' abusive relationship; (2) the fact that the wife did have a standing protection order; and (3) the common practice by abusers to maintain dominance and control over their victims by leveraging custody over children. If the court had analyzed the statement made by the defendant from the subjective perspective of the domestic violence victim, it would and should have upheld the section 875(c) claim. Instead, the court's application of an objective determination to delineate what constitutes a threat under this statute will fail domestic violence victims, as was the case here. Therefore, instead of the objective standard some courts have adopted, motive should be irrelevant—the mere act of sending a message which the recipient reasonably finds threatening should be sufficient to constitute a threat for purposes of the statute.⁷⁹

2. The Federal Telephone Harassment Statute, 47 U.S.C. § 223

In comparison, the Federal Telephone Harassment Statute, 47 U.S.C. § 223,⁸⁰ prohibits abusive, threatening, or harassing communications that may be intended to “instill fear in the victim.”⁸¹ 47 U.S.C. § 223(a)(1)(C)⁸² prohibits “utilizing a telecommunications device without disclosing one's identity with the intent to annoy, abuse, threaten, or harass any person at the called number”.⁸³ 47 U.S.C. § 223(a)(1)(E)⁸⁴ prohibits repeated communications by telephone or telecommunications device, solely to harass the recipient.⁸⁵ However, these

76. *Id.*

77. *Id.*

78. *Id.*

79. *Alkhabaz*, 104 F.3d at 1504 (6th Cir. 1997) (Krupansky, J., dissenting) (“Whether the originator of the message intended to intimidate or coerce anyone thereby is irrelevant. Rather, the pertinent inquiry is whether a jury could find that a reasonable recipient of the communication would objectively tend to believe that the speaker was serious about his stated intention.”). The author also notes that other circuits have declined to follow the Sixth Circuit's narrow interpretation of § 875(c) but on First Amendment grounds. *See United States v. Jongewaard*, 567 F.3d 336, 340 (8th Cir. 2009).

80. 47 U.S.C.A. § 223 (2006).

81. *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), *cert. granted, judgment vacated*, 543 U.S. 1182 (2005).

82. 47 U.S.C. § 223(a)(1)(C) (2006).

83. *Id.*

84. 47 U.S.C. § 223(a)(1)(E).

85. *Id.*

provisions under this statute are of limited utility to the victims of cyberstalking: they only apply when a telephone or other “telecommunications devices” are used and because [t]elecommunication devices” do not include an interactive computer service,⁸⁶ by definition, the statute excludes messages or communications made on the Internet.⁸⁷ Moreover, they require that the perpetrator directly targets the victim and does not cover instances where a cyberstalker solicits third parties.⁸⁸ Thus, the Federal Telephone Harassment Statute provides little protection to cyberstalking victims.

3. The Federal Interstate Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A

Lastly, the Federal Interstate Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A,⁸⁹ is a federal stalking statute that specifically accounts for cyberstalking.⁹⁰ Section 2261A(2)(A) prohibits any individual with the intent to kill, injure, harass or cause substantial emotional distress to another, to use any interactive computer service to cause substantial emotional distress.⁹¹ In 2006,⁹² Congress amended this particular provision, expanding various elements within the statute: the scope of intent, requisite action, and mechanisms of injury.⁹³ However, while the statutory language itself seemingly provides broad protections for victims, a recent federal district court case striking down the statute as applied unveils limitations in its application to the cyberstalking context.

In *United States v. Cassidy*,⁹⁴ a federal district court found section 2261A unconstitutional as applied to a defendant who harassed a prominent religious figure through blog postings and Twitter messages.⁹⁵ While the case ultimately turned on a constitutional issue regarding protected speech about a public figure, the rationale of the court nonetheless raises questions about future prosecutions

86. 47 U.S.C. § 223(h)(1)(B).

87. 47 U.S.C.A. § 230(f) (West 1998).

88. Goodno, *supra* note 23, at 150.

89. 18 U.S.C. § 2261A (2006).

90. *Id.* at § 2261A(2)(A).

91. *Id.*

92. See Violence Against Women Act, Pub. L. No. 109–162, tit. I, 119 Stat. 2987 (2006) (amending the criminal provisions relating to stalking in the Violence Against Women Act).

93. *United States v. Cassidy*, 814 F. Supp. 2d 574, 581 (D. Md. 2011) (“These amendments significantly broadened the scope of the law. The requisite *intent* no longer was limited to an intent to ‘kill or injure,’ but was broadened to include the intent to ‘harass or place under surveillance with the intent to . . . harass or intimidate or cause substantial emotional distress.’ The requisite *action* was also broadened so as to bring within the scope of the law a course of conduct that merely ‘causes substantial emotional distress.’ Prior to the 2006 change, the course of conduct was limited to one that places a person in reasonable fear of death or serious bodily injury. Finally, the 2006 changes expanded the *mechanisms of injury* to add use of an ‘interactive computer service’ to the existing list which already included use of mail or any facility of interstate or foreign commerce.”).

94. *Id.*

95. *Cassidy*, 814 F. Supp. 2d at 579–80.

related to domestic violence brought under this statute. In order to apply real space laws to cyberspace, the court analogized that a Twitter or blog posting is like a posting on a public bulletin board.⁹⁶ According to the court, while a telephone call, letter, or e-mail is specifically addressed to and directed at another person, a posting made on a blog, website, or through social media is a public posting and does not target any specific individual.⁹⁷ While the government has a legitimate interest in prohibiting an individual from harassing another by telephone, the same interest does not translate to cyberspace because, while harassing telephone calls are targeted towards a particular victim and occur within a private forum, public, online postings are not targeted towards a particular victim and occur within the public sphere.⁹⁸ The court's distinction between circumstances where harassing conduct is targeted at a specific individual from where harassing conduct is posted publicly on a website was critical to its analysis of whether the statute serves a compelling governmental interest.⁹⁹ By extension, this distinction made by the *Cassidy* court leaves open the question as to whether the federal stalking statute will also likely be found unconstitutional as applied where an abuser uses Twitter and blog postings to harass a victim.¹⁰⁰

Although section 2261A¹⁰¹ was enacted to specifically target stalking and cyberstalking, it is clearly susceptible to constitutional challenges in the near future, especially the use social media applications to cyberstalk public figures. Whether by amendment or by enacting a new statute altogether, Congress must address the constitutional considerations that arise from the technical architecture and design of the Internet, which will be discussed in Section IV.

III. CIVIL REMEDIES FOR CYBERSTALKING

A. Federal Civil Remedies

There are currently no federal civil remedies available for stalking or

96. *Id.* at 576–77.

97. *Id.*

98. *Id.* at 585 (citing *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988) and *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004)).

99. *Id.* at 585–86.

100. *But see* *United States v. Sayer*, 2012 WL 1714746 (Maine 2012) (upholding the constitutionality of § 2261A as applied to defendant who created fictitious internet postings inviting men to come to victim's listed home address for sexual encounters and posted explicit, consensually-created video clips of the victim to adult pornography websites. Distinguishing from the facts of *United States v. Cassidy*, the Court reasoned that in the instant case what the defendant was "alleged to have done involves no political or religious speech or the promotion of ideas of any sort. Instead, everything that [the defendant] allegedly said was 'integral to criminal conduct,' his criminal conduct seeking to injure, harass or cause substantial emotional distress to the victim."). The analysis in *Cassidy* leaves open the possibility that the exact method the defendant uses to convey messages may factor into whether the speech is constitutionally protected.

101. 18 U.S.C. § 2261A.

cyberstalking victims, and it is highly unlikely that they will become available due to federalism concerns. The Violence Against Women Act of 1994 established a civil remedy provision for victims of gender-motivated violence.¹⁰² However, this civil remedy provision was found unconstitutional in *United States v. Morrison*.¹⁰³ The Supreme Court held that the Commerce Clause did not provide Congress with authority to enact the civil remedy provision because: (1) it was not a regulation of activity that substantially affected interstate commerce; (2) gender-motivated crimes of violence were not an economic activity and the provision failed to include a jurisdictional element tying the proscribed activity to interstate commerce; and (3) the congressional findings were weakened by relying on but-for causation to tie violent crime to an effect upon interstate commerce.¹⁰⁴ The Court argued that the “regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”¹⁰⁵ Accordingly, the Court’s holding and reasoning suggest that a federal civil remedy for current federal statutes that address stalking or for any future statutes will likely not survive constitutional challenge.

B. State Civil Remedies

Some state legislatures have begun recognizing a civil action for stalking, either by specific enactment of a civil action or by inference from a criminal statute.¹⁰⁶ Stalking as a tort has been an exclusively statutory creation as courts have been reluctant to extend common law to create a separate civil action for stalking.¹⁰⁷ While stalking may constitute behavior that is actionable under established tort theories such as invasion of privacy, nuisance, trespass, defamation, or intentional infliction of emotional distress, the recognition of stalking as an independent theory of liability emphasizes the gravity of stalking and ensures that a victim may seek recourse even if her specific claim may not otherwise constitute a legally cognizable cause of action.¹⁰⁸ For example, an element of the traditional tort of assault is imminence, a characteristic that is absent from the remote transmissions implicated in online stalking.¹⁰⁹ In addition, as a matter of public policy, recognizing the tort may deter violence that usually is connected to stalking.¹¹⁰

In 1990, California became the first state to create a separate and distinct

102. 42 U.S.C. § 13981 (West 1994).

103. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

104. *Id.* at 618.

105. *Id.*

106. *See* 32 CAUSES OF ACTION 2d 487 § 3 (2006).

107. *Id.* at §§ 5-6.

108. *Id.*

109. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 128 (2003).

110. CAUSES OF ACTION, *supra* note 106, at §§ 5–6.

action for stalking.¹¹¹ Michigan,¹¹² Wyoming,¹¹³ Texas,¹¹⁴ Oregon,¹¹⁵ Rhode Island,¹¹⁶ and Virginia¹¹⁷ have since followed. Some jurisdictions, like Illinois, recognize the tort only in the context of domestic violence.¹¹⁸ Moreover, other states recognize a civil tort by inference from criminal statutes,¹¹⁹ while some states have explicitly rejected an implied civil cause of action.¹²⁰ States should continue to develop their respective tort laws to recognize a civil remedy for stalking and begin to recognize a civil remedy for cyberstalking.¹²¹ Doing so will further punish and deter individuals from engaging in such behaviors and prevent violence, while concurrently providing an extra level of protection for victims. States seeking to create such a statute should follow California's statutory recognition of cyberstalking as a tort.¹²² It delineates the requisite elements of the tort,¹²³ permits a finding of tortious injury if the stalking occurs in violation of a protective order,¹²⁴ and provides a broad definition of "electronic communication device" to include the use of computers and cell phones.¹²⁵

However, even where a tort remedy for cyberstalking is available, victims will nonetheless encounter difficulties in successfully bringing suit because a state court may be unable to exercise personal jurisdiction over a named defendant. Specifically, the fact that the stalking occurs on the Internet creates heightened issues of personal jurisdiction over the cyberstalker.

1. Jurisdictional Challenges in a Civil Suit

The absence of territorial borders in cyberspace clouds the imposition of traditional territorial concepts to the Internet.¹²⁶ Since an individual can conduct

111. CAL. CIV. CODE § 1708.7 (West 2012).

112. MICH. COMP. LAWS ANN. § 600.2954 (West 2012); *see also* *Nastal v. Henderson & Assoc. Investigations, Inc.*, 691 N.W.2d 1, 9 (2005).

113. *See Veile v. Martinson*, 258 F.3d 1180, 1189 (10th Cir. 2001) (affirming an award of \$90,000 in compensatory damages and \$86,000 in punitive damages for stalking in Wyoming).

114. TEX. CIV. PRAC. & REM. CODE ANN. § 85.003 (West 2011).

115. OR. REV. STAT. ANN. § 30.866 (West 2012).

116. R.I. GEN. LAWS ANN. § 9-1-2.1 (West 2011).

117. VA. CODE ANN. § 8.01-42.3 (West 2011).

118. *See* 750 ILL. COMP. STAT. ANN 60/102 (West 2012).

119. *See Stockdale v. Baba*, 795 N.E.2d 727, 747 (2003) (Ohio appellate court affirming a jury verdict for the "common-law tort of stalking").

120. *See Troncalli v. Jones*, 514 S.E.2d 478, 480 (1999) (the Court of Appeals of Georgia reversing a jury award of damages because "stalking is not a tort").

121. *Rustad & Koenig, supra* note 109, at 129.

122. CAL. CIV. CODE § 1708.7.

123. CAL. CIV. CODE § 1708.7(a). *Compare* MICH. COMP. LAWS ANN. § 600.2954 (generally providing that "[a] victim may maintain a civil action against an individual who engages in conduct that is prohibited under section 411h or 411i of the Michigan penal code.").

124. CAL. CIV. CODE § 1708.7(a)(3)(B).

125. CAL. CIV. CODE § 1708.7(b)(3).

126. David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48

his Internet activities from anywhere in the world, activities and crimes on the Internet will raise jurisdictional issues that have not been addressed by territorially defined law.¹²⁷ The court first must have subject matter jurisdiction over the suit. In addition, the court must have personal jurisdiction over the defendant.

a. General Personal Jurisdiction

First, a court may be able to exercise general jurisdiction over the defendant's person. Traditionally, an assertion of general jurisdiction must be predicated on contacts that are sufficiently continuous and systematic to justify haling the defendant before a court in that state.¹²⁸ A cyberstalker's activities will likely not amount to the high threshold required by traditional general personal jurisdiction analysis because they may be sporadic.¹²⁹ In addition, courts have been reluctant to find general personal jurisdiction over a defendant based solely upon a defendant's activities on the Internet.¹³⁰

b. Specific Personal Jurisdiction

As general personal jurisdiction will likely not be found, the court may nonetheless have specific jurisdiction over defendant's person. Traditionally, specific jurisdiction is appropriate where defendant's contacts with the forum state may not be systematic and continuous, but where defendant's minimum contacts with the state, specifically relating to the claim that plaintiff has brought against the defendant, are such that compelling him to appear and defend in the forum would not offend "traditional notions of fair play and substantial justice."¹³¹

Jurisdiction over a defendant is proper when the defendant "directs his electronic activity into the State with the manifested intent" of targeting the effects of his conduct to the State.¹³² In *Calder v. Jones*,¹³³ the Supreme Court found that jurisdiction over a defendant newspaper which wrote a story about a California resident was proper because the intentional and allegedly tortious actions were expressly aimed at California.¹³⁴ The Court thus reasoned that it

STAN. L. REV. 1367, 1378 (1996).

127. Dan L. Burk, *Jurisdiction in A World Without Borders*, 1 VA. J.L. & TECH. 3, 6 (1997).

128. *International Shoe Co. v. State of Wash., Office of Unemp't Comp. and Placement*, 326 U.S. 310, 318 (1945) (explaining the level of contacts necessary for general jurisdiction).

129. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-19 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-48 (1952).

130. Davin M. Stockwell, *Let the Seller Beware: Personal Jurisdiction in Cyberspace*, 21 WHITTIER L. REV. 881, 895 n.105 (citing *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 115 (D. Conn. 1998) (holding that jurisdiction based solely on internet presence would lead to worldwide jurisdiction)).

131. *Int'l Shoe*, 326 U.S. at 316.

132. *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

133. *Calder v. Jones*, 465 U.S. 783 (1984).

134. *Id.* at 788-89.

was reasonably anticipated that they might be haled into court there to answer for the truths of their statements.¹³⁵ Similarly, a court will likely be able to assert personal jurisdiction over a cyberstalker because he intended his activities to cause harm to the victim and aimed his conduct towards the jurisdiction where the victim resides.

However, where a cyberstalker does not send his message directly towards his victim, the victim may have difficulty bringing suit in her home state. For example, in *Young v. New Haven Advocate*,¹³⁶ the Fourth Circuit held that the fact that a website can be accessed anywhere does not by itself demonstrate that the defendant was directing the website content to a specific audience.¹³⁷ Absent intent to direct website content to an audience in the forum state, the court is unable to exercise personal jurisdiction based on that contact.¹³⁸ Accordingly, where a cyberstalker does not directly send messages to his victim, but rather posts them on a social media network or a website, a victim may be precluded from litigating her claim because of the court's lack of personal jurisdiction over the defendant cyberstalker.

IV. CONSTITUTIONAL CONSIDERATIONS ARISING FROM THE TECHNICAL ARCHITECTURE AND DESIGN OF THE INTERNET

“The Internet is a decentralized, global medium of communication that links people, institutions, corporations and governments around the world.”¹³⁹ The Internet's decentralized nature makes it difficult to regulate without violating either the First Amendment or the dormant Commerce Clause.¹⁴⁰

A. First Amendment

Cyberstalking implicates speech that may not be specifically directed at an individual victim. For example, a perpetrator may create a website or use social networking sites to harass and annoy his victim. However, speech on the Internet enjoys the full protection of the First Amendment.¹⁴¹ As such, cyberstalking laws, both state and federal, may be challenged on First Amendment grounds if

135. *Id.*

136. *Young v. New Haven Advocate*, 315 F.3d 256.

137. *Id.* at 261.

138. *Id.*

139. *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

140. Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 105 n.221 (2011).

141. *Reno*, 521 U.S. at 870 (there is “no basis for qualifying the level of First Amendment scrutiny that should be applied” to online speech); *Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729, 2733 (2011) (“whatever the challenges of applying the Constitution to ever-advancing technology, basic principles of freedom of speech and press, like the First Amendment's command, do not vary when a new and different medium for communication appears.”) (internal quotations omitted).

they restrict or punish public communications.¹⁴²

1. True Threats

Relying on the unique characteristics of the Internet,¹⁴³ the Supreme Court has concluded that government regulation of content of speech on the Internet is more likely to interfere with the free exchange of ideas than to encourage it.¹⁴⁴ Accordingly, any content-based regulation of the “vast democratic forums of the Internet”¹⁴⁵ will warrant the highest level of First Amendment scrutiny.¹⁴⁶ However, not all speech is protected.¹⁴⁷ There are “well-defined and narrowly limited classes of speech” which remain unprotected by the First Amendment.¹⁴⁸ Unprotected categories include: (1) obscenity,¹⁴⁹ (2) defamation,¹⁵⁰ (3) fraud,¹⁵¹ (4) incitement,¹⁵² (5) true threats,¹⁵³ and (6) speech integral to criminal conduct.¹⁵⁴ Speech that falls outside of these recognized exceptions remains fully protected.¹⁵⁵

On some occasions, cyberstalking may include true threats. True threats are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.”¹⁵⁶ Although the Supreme Court has not yet adopted a clear standard by which to evaluate a true threat, the majority of circuits have adopted a strictly objective approach,¹⁵⁷ whereby “the inquiry is whether there was sufficient evidence to prove beyond a reasonable

142. See *People v. Sucic*, 401 Ill. App. 3d 492, 500 (2010).

143. See *Reno*, 521 U.S. at 863 n.30 (These characteristics include: (1) very low barriers to entry; (2) the fact that these low barriers to entry are identical for speakers and listeners; (3) diverse content available on the Internet; and (4) significant access to all who wish to speak in the medium).

144. *Id.* at 885.

145. *Id.* at 869.

146. *Id.* at 863 (the Internet is entitled to “the highest protection from governmental intrusion”).

147. *Cassidy*, 814 F. Supp. 2d at 582.

148. *Id.* (citing to *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

149. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

150. See *Beauharnais v. People of the State of Ill.*, 343 U.S. 250, 255–57 (1952) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, [and] the libelous”).

151. See *Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

152. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (*per curiam*).

153. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

154. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

155. See *United States v. Stevens*, 130 S.Ct. 1577, 1586 (2010) (holding that “depictions of animal cruelty” remain protected because there is no “freewheeling authority to declare new categories of speech outside the scope of the First Amendment”).

156. *Virginia v. Black*, 538 U.S. 343, 359 (2002); see also *Watts*, 394 U.S. at 707–08.

157. See *United States v. Khorrami*, 895 F.2d 1186, 1189 (7th Cir. 1990); *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1280 *supplemented*, 326 F. Supp. 2d 1303 (M.D. Ala. 2004).

doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm.”¹⁵⁸ Factors a court may take into account when making this determination include: (1) the language itself; (2) the context in which the communication was made; and (3) testimony by the recipient of the communication.¹⁵⁹

On one hand, in situations where any reasonable person would find a specific online threat constitutes a constitutionally impermissible “true threat,” the First Amendment shield will cede and the cyberstalker will be held accountable and liable for his online threats.¹⁶⁰ On the other hand, the objective, reasonable person standard fails to accommodate the experiences of a domestic violence victim. So long as a threat on a website or in an online posting does not amount to a true threat to a reasonable person, the cyberstalker will be shielded by his First Amendment right to free speech. Moreover, any speech that clearly is not a threat, such as speech that annoys or harasses a victim, will also be protected.¹⁶¹ Thus, the broad protections of the First Amendment to Internet speech will severely impede a victim of cyberstalking in the domestic violence context to legal recourse under a narrow, objective standard—only where a reasonable person would find a specific online statement to constitute a true threat.

2. Anonymous Speech

In addition, the First Amendment not only protects the right to speak freely, but also the right to speak anonymously.¹⁶² Speech on the Internet is no less protected.¹⁶³ While in the domestic violence context, most victims will know who her cyberstalker is, in order to bring criminal charges, obtain or enforce a civil protection, or bring a civil suit, she nonetheless will have to prove the

158. *United States v. Alaboud*, 347 F.3d 1293, 1296–97 (11th Cir. 2003) (internal citations, quotations, and alterations omitted).

159. *Carmichael*, 326 F. Supp. 2d at 1281.

160. *See United States v. Walker*, 665 F.3d 212, 227 (1st Cir. 2011) (threats mailed by the defendant to his victim were not protected speech).

161. *Cassidy*, 814 F. Supp. 2d at 586.

162. *See ACLU v. Miller*, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997). In *Miller*, the district court enjoined the enforcement of a Georgia statute making it a crime to falsely identify oneself while transmitting data through a computer network. The court reasoned that one’s name is content like any other content and the statute thus operated as a content-based restriction. Because it was not narrowly tailored, the court held the statute violated the First Amendment.

163. *See Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. at 2733 (“[W]hatever the challenges of applying the Constitution to ever-advancing technology, basic principles of speech and press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”) (internal quotations omitted); *see also In re Subpoena Duces Tecum to American Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372, *6 (2000), *order rev’d on other grounds*, 542 S.E.2d 377 (2001) (noting that the right to speak anonymously “arises from a long tradition of American advocates speaking anonymously through pseudonyms, such as James Madison, Alexander Hamilton, and John Jay, who authored the Federalist Papers but signed them only as ‘Publius’”).

identity of her cyberstalker in a court of law.

Anonymous speech has warranted great protection from the courts. For example, in the context of tortious defamation, federal courts have invalidated state statutes prohibiting the use of anonymous or pseudonymous identities on the Internet.¹⁶⁴ Nevertheless, the very reasons to vehemently protect anonymous speech online in the context of defamation are the very reasons to not protect anonymous speech in the context of cyberstalking. The courts have fleshed out three primary rationales as to why anonymous speech on the Internet should be entitled to a high standard of protection. First, protection of anonymous speech encourages more speech.¹⁶⁵ Second, authors may feel that revealing their identities will compromise or undermine their message.¹⁶⁶ Third, anonymity ensures greater access to sensitive information.¹⁶⁷ These three benefits of anonymity on the Internet, framed generally in the context of free speech, are simultaneously three benefits of anonymity that make cyberstalking not only a desirable activity for abusers, but also makes cyberstalking an effective weapon to use against domestic violence victims. Protection of anonymous speech ultimately empowers an abuser by encouraging him to continue the harassment, providing greater access to sensitive information, and increasing the perceived fear and threat by the victim.

B. Tenth Amendment

Another constitutional ground by which a cyberstalking statute may be challenged is under the Constitution's Commerce Clause.¹⁶⁸ As the Internet cannot be segmented by geographical state boundaries, any attempts to regulate content on the Internet in one state will necessarily impact Internet use in another. Accordingly, no state attempt to regulate content on the Internet has been upheld in the face of a Commerce Clause challenge.¹⁶⁹ It follows then that a state cyberstalking statute that criminalizes online content will be susceptible to a Dormant Commerce Clause challenge.

For example, in *ALA v. Pataki*,¹⁷⁰ the Southern District of New York struck

164. See *ACLU v. Miller*, 977 F. Supp. at 1230.

165. *In re American Online*, 2000 WL 1210372 at *6.

166. *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 342 (1995), stating:

On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent.

167. *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (noting that anonymity "permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment.").

168. U.S. CONST., art. I, § 8, cl. 3 (Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes").

169. See *Center for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 663 (E.D. Pa. 2004); *Johnson*, 4 F. Supp. 2d at 1031-34.

170. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

down a New York statute designed to protect minors from obscene and indecent online materials, not as a violation of the First Amendment, but on Commerce Clause grounds.¹⁷¹ The Court first noted that the Internet represents an instrument of interstate commerce.¹⁷² It then proceeded to hold a New York anti-pornography statute and its application to the Internet unconstitutional under the Dormant Commerce Clause because the statute was an unconstitutional projection of New York law onto conduct that occurs entirely outside of New York.¹⁷³ In addition, the court held that the burdens on interstate commerce far outweighed any local benefits derived from it.¹⁷⁴ Years later, a district court in Pennsylvania in *Center for Democracy & Technology v. Pappert*¹⁷⁵ also held that a Pennsylvania statute regulating child pornography violated the Dormant Commerce Clause because it affected communications wholly outside of Pennsylvania.¹⁷⁶ Similarly, a state's attempts to criminalize cyberstalking that implicates content that either originated outside of the state itself or travels to other states may be doomed. Thus, state statutes must be narrowly tailored to regulate not the *content* of the cyberstalker's speech, but the actual *conduct* of the cyberstalker.

V. PROPOSED CYBERSTALKING LEGISLATION

There are multiple advantages to cyberstalking-specific statutes. First, it permits focus on the specific issues that arise in the context of cyberstalking. Second, it creates visible and direct deterrents to make clear to the public the boundaries of legally permissible and impermissible conduct. Third, it will encourage the establishment of rules and guide law enforcement as to how cyberstalking investigations can and should be conducted. However, as this Recent Developments piece has outlined, there are procedural and substantive barriers to constructing effective cyberstalking statutes that will pass constitutional muster.

The solution to combatting cyberstalking lies in crafting a narrow federal statute that prohibits cyberstalking. Such legislation must meet three criteria. First, it must thoroughly address all of the elements of cyberstalking. Second, the right to free speech must be protected by regulating the conduct of the cyberstalker and not the content of his speech. Third, due to restraints on the state government by the Tenth Amendment, Congress should be proactive in enacting a federal criminal statute. Accordingly, this Recent Developments piece proposes the following federal legislation:

171. *Id.* at 177.

172. *Id.* at 173.

173. *Id.* at 177.

174. *Id.*

175. *Pappert*, 337 F. Supp. 2d at 606.

176. *Id.* at 662–63.

(1) Any person found to have made an electronic communication to another person or to a third party with the intent to harass, intimidate, torment, or embarrass any other person, by:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act, anonymously or repeatedly whether or not conversation occurs; or

(b) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household

shall be found guilty of a misdemeanor.

(2) Any person found to have made an electronic communication to another person or to a third party with the intent to harass, intimidate, torment, or embarrass any other person, by:

(a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act, anonymously or repeatedly whether or not conversation occurs; or

(b) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household

in violation of a civil protection order shall be found guilty of a felony.

(3) For purposes of this section, "electronic communications" includes the transmission of information by wire, radio, optical, electromagnetic, or other similar means. It includes, but is not limited to, e-mail and internet-based communications. Any of these electronic communications shall represent an instrument of interstate commerce.

(4) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.

(5) Any offense committed under this section provides an adequate basis for a civil suit.

First, the proposed model statute broadly includes electronic communications. However, it should be noted that as technology continues to develop, Section (3) should continually be reviewed and amended in order to keep up with technological developments. Second, as Section (1) applies to electronic communications made to a person or to a third party, the statute is applicable even where the perpetrator induces third parties to do the direct cyberstalking or where a message is posted on a third party website. Third, it covers anonymous communications. Fourth, it references civil protection orders

and provides for greater punishment if the cyberstalking occurs in violation of a Civil Protection Order. Fifth, it provides a civil remedy for plaintiffs. Moreover, while the statute is a general cyberstalking statute, it nonetheless provides protection to domestic violence victims because the statute focuses only on the intent and acts of the cyberstalker, not on the objective and reasonable perceptions of the victim.

VI. CONCLUSION

The need to address cyberstalking is nothing new: the Department of Justice first identified cyberstalking as a serious issue ten years ago.¹⁷⁷ At the same time, constitutional issues that are implicated by cyberstalking are both more complex and far-reaching than many other issues that are generally implicated in the domestic violence context. As evident from the preceding discussion, “much of the legal analysis of Internet-related issues has focused on seeking a familiar analogy for the unfamiliar.”¹⁷⁸ Legislatures face a challenge in constructing cyberstalking statutes that will pass constitutional muster since current constitutional jurisprudence is not clearly defined or developed.

In an increasingly digital world, the rate of cyberstalking will only continue to increase, necessitating federal or state law to curb and punish it. This Recent Developments piece has suggested that Congress should appropriately react by enacting the proposed federal cyberstalking statute. The basic framework in this proposed legislation addresses the various components that must be incorporated into a comprehensive cyberstalking statute. While the proposed legislation is not flawless, its conclusions rest comfortably within modern constitutional principles and existing case law, and are consistent with existing precedents based on other Internet-related crimes. Most importantly, the most meaningful idea it offers is a conceptual framework for crafting a comprehensive federal statute directed specifically towards cyberstalking as experienced by domestic violence victims.

177. *Report to Congress, supra* note 6.

178. *Pataki*, 969 F. Supp. at 161.