Frog Eyes and Pig Butts: The North Carolina Stalking Statute's Constitutional Dilemma and How To Remedy It*

In State v. Mazur*, the North Carolina Court of Appeals found that the state's felony stalking statute created a constitutional prohibition on criminal conduct and did not implicate any protected speech. Only months later, a different panel of the same court, in* State v. Shackelford*, held that the statute actually created a content-based restriction that unconstitutionally infringed on the defendant's First Amendment rights. These conflicting analyses did not rest on the factual differences between the two cases, although there were many. Rather, the disparity arose from how the two panels applied existing First Amendment jurisprudence. The conflicting applications highlight the First Amendment dilemma presented by stalking statutes, a dilemma that this Comment attempts to solve.*

Stalking statutes must balance two competing interests. On the one hand, stalking is a serious problem, causing significant physical, financial, and emotional harm to victims. One of the primary ways stalkers inflict these harms is through sending harassing messages. Thus, victims need laws that can protect them from harassing communications by stalkers. However, when taken too far, stalking laws can reach beyond harassing communications and start to infringe on the constitutionally protected speech of defendants. Therefore, to survive constitutional challenge, stalking statutes must be broad enough to protect victims yet narrow enough to leave defendants' First Amendment rights uninfringed.

To solve this dilemma, this Comment uses the Mazur *and* Shackelford *decisions to illustrate why North Carolina's current stalking statute creates a content-based restriction that requires strict scrutiny. But rather than dooming stalking statutes, this Comment argues that strict scrutiny is actually the appropriate vehicle for balancing the competing interests of victims and defendants. Because stalking communications lie at the intersection of three areas of less protected speech—unwanted one-to-one speech, speech that invades a reasonable expectation of privacy, and speech that inflicts substantial emotional distress—a stalking statute limited by these three criteria should survive strict scrutiny. Not only would this statute advance the compelling state interests of safety and security, but it would also be narrowly tailored by three different lines of First Amendment jurisprudence.*

Stalking remains a serious problem in the United States. To address it, legislatures cannot pass overly broad statutes that lend themselves to misapplication and facial challenges. Instead, this Comment offers a proposed provision that strikes a balance between competing interests and complies with existing precedent. In doing so, it hopes to provide a model for legislatures and courts to follow when wrestling with the constitutional dilemma posed by stalking statutes.

INTRODUCTION

On September 18, 2018, the North Carolina Court of Appeals decided that the First Amendment does not protect yard decorations that harass one's neighbor.[1] Five months later, a different panel of the same court held that when the harassment originates from social media posts, First Amendment protections apply.[2] Why the different treatment? It was not because one case involved yard decorations and the other social media posts. Rather, the difference arose from how the panels applied First Amendment jurisprudence to North Carolina's felony stalking statute.[3] In doing so, their decisions highlighted the dilemma caused by broadly worded stalking statutes like North Carolina's—a dilemma that thrives within the ambiguity of current free-speech precedent.

In the yard decoration case, *State v. Mazur*,[4] the court found that North Carolina's stalking statute contained a constitutional prohibition of criminal conduct, not speech.[5] In contrast, in the social media case, *State v. Shackelford*,[6] the court found that the statute regulated speech and created a content-based restriction.[7] This disagreement—whether the stalking statute regulated conduct

1. State v. Mazur, 261 N.C. App. 538, 538, 817 S.E.2d 919, 919, 2018 WL 4440576, at *1 (2018) (unpublished table decision).

2. State v. Shackelford, 264 N.C. App. 542, 560, 825 S.E.2d 689, 701 (2019).

3. N.C. GEN. STAT. § 14-277A (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

4. 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 4440576 (2018) (unpublished table decision).

5. *Id.* at 538, 817 S.E. 2d at 919, 2018 WL 4440576, at *7.

6. 264 N.C. App. 542, 825 S.E.2d 689 (2019).

7. *Id.* at 558, 825 S.E.2d at 699.

or speech—is the crux of a constitutional dilemma that has puzzled courts and commentators alike for decades.[8]

Stalking laws exist to promote a positive societal outcome: the prevention of physical and emotional harm.[9] Before the enactment of these statutes, victims possessed few legal remedies to protect themselves from stalkers until after the aggressor had already caused harm.[10] Recognizing the need for more proactive legislation, state legislatures began passing laws prohibiting stalking.[11] By 1995, all fifty states as well as the District of Columbia enacted some sort of criminal stalking statute.[12]

While these statutes contained prohibitions on following victims around, they also included provisions banning harassing communications between the stalker and the victim.[13] Such provisions greatly benefited victims since "[s]ending persistent, unwanted, or inappropriate gifts, letters, notes, emails,

8. *See, e.g.*, *In re* Welfare of A.J.B., 929 N.W.2d 840, 855–56 (Minn. 2019) (finding that Minnesota's stalking statute was facially overbroad in violation of the First Amendment); Scott v. State, 322 S.W.3d 662, 669–70 (Tex. Crim. App. 2010), *abrogated by* Wilson v. State, 448 S.W.3d 418, 422 (Tex. Crim. App. 2014) (abrogating the case on other grounds, but also finding that Texas's stalking statute did not "implicate the free-speech guarantee of the First Amendment," as well as reaffirming *Scott*'s First Amendment holding); Parisi v. Mazzaferro, 210 Cal. Rptr. 3d 574, 585–86 (2016) (finding that an injunction prohibiting the defendant from publishing statements intended to harass a victim who had taken a restraining order out against defendant violated the First Amendment); *see also* Chan v. Ellis, 770 S.E.2d 851, 853 n.2 (Ga. 2015) (finding that appellate jurisdiction existed to examine whether posting on social media violated Georgia's stalking law but ultimately resolving the case on other grounds).

9. *See* State v. Ruesch, 571 N.W.2d 898, 903 (Wis. Ct. App. 1997) (noting that stalking statutes "serve[] significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence" (footnote omitted)); *see also* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 793–94 (2013) (explaining the reasons for stalking statutes by focusing specifically on their development in California); Ashley N.B. Beagle, Comment, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 466–69 (2011) (detailing the development of stalking statutes including the reasons for their enactment); Suzanne L. Karbarz, Note, *The First Amendment Implications of Anti-Stalking Statutes*, 21 J. LEGIS. 333, 334–37 (1995) (describing the history and purpose of stalking statutes).

10. *See* Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N. UNIV. L. REV. 271, 272–83 (1992) (detailing the shortcomings of legal remedies for stalking victims prior to the passage of stalking statutes); Karbarz, *supra* note 9, at 335 ("[S]talking legislation arose due to the inability of existing legal remedies to protect the victims from their stalkers."); *see, e.g.*, FLA. STAT. ANN. § 784.046(2) (Westlaw through Ch. 184 (End) of the 2020 2d Reg. Sess. of the 26th Legis.) (providing a cause of action for only those who are a victim of "repeat violence").

11. *See, e.g.*, N.C. GEN. STAT. § 14-277A (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

12. *See* Joseph C. Merschman, Note, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 266 (2001).

13. *See, e.g.*, N.C. GEN. STAT. § 14-277.3A(b)(1) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

texts, or social media messages" is one of the most common forms of stalking.[14] Accordingly, prosecutors needed these provisions to protect victims from the full range of stalking behavior.

However, the provisions also contained a restriction on speech, implicating the First Amendment.[15] As time passed, defendants began to bring First Amendment challenges against stalking statutes via affirmative defenses, albeit with varying degrees of success.[16] The strengths and weaknesses of their arguments are highlighted in *Mazur* and *Shackelford*, where two panels of the same court looked at the same issue—whether the statute created a content-based restriction or regulated criminal conduct—and reached opposite outcomes. Ultimately, these two North Carolina decisions highlight the great dilemma legislatures face when they attempt to pass stalking statutes that will survive constitutional scrutiny: How can a state provide robust protection for stalking victims while ensuring that no defendant's First Amendment rights are violated?[17]

14. Brianne Sandorf, *Signs of a Stalker: Are You Being Followed?*, ASECURELIFE (Nov. 7, 2019), https://www.asecurelife.com/signs-of-a-stalker/ [https://perma.cc/YMM2-93UX].

15. *See* Karbarz, *supra* note 9, at 333–34, 333 n.8 (noting prominent First Amendment critiques of stalking statutes); Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 993 (1993) (describing First Amendment problems with stalking statutes, though noting that no appellate court had yet considered a constitutional challenge).

16. *See, e.g.*, United States v. Petrovic, 701 F.3d 849, 854–56 (8th Cir. 2012) (denying defendant's First Amendment challenge because the Eighth Circuit found that the federal interstate stalking statute was constitutional both on its face and as applied); *In re* Welfare of A.J.B., 929 N.W.2d 840, 855–56 (Minn. 2019) (granting defendant's First Amendment challenge to Minnesota's stalking statute); Scott v. State, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010) (denying defendant's First Amendment challenge to Texas's stalking statute).

17. A critic might reasonably question the wisdom of publishing a Comment that advocates for restricting First Amendment rights given the danger to freedom of speech and the press that presently appears to come from both sides of the ideological spectrum. *See, e.g.*, Anthony L. Fisher, *'Divided We Fall' Author David French on Why America Could Come Apart, the Loss of Free Speech Culture, and How Trump Could Be the GOP's New Reagan*, BUS. INSIDER (Sept. 26, 2020, 8:17 AM), https://www.businessinsider.com/david-french-divided-we-fall-free-speech-culture-war-2020-9 [https://perma.cc/H82A-B9HC] (providing examples of free speech attacks by both liberals and conservatives); *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/Z4V2-Q6NC] (collecting signatures from both left- and right-leaning individuals expressing concern at the attack on speech coming from both ideological sides); Arthur Milikh, *Freedom of Speech Under Dangerous Attack from Left—We Must Preserve It*, HERITAGE FOUND. (Oct. 25, 2019), https://www.heritage.org/the-constitution/commentary/freedom-speech-under-dangerous-attack-left-we-must-preserve-it [https://perma.cc/H3VS-GV6G] (critiquing liberal-leaning writers for advocating to criminalize certain kinds of speech); *The Trump Administration and the Media*, COMM. TO PROTECT JOURNALISTS (Apr. 16, 2020), https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/ [https://perma.cc/5CAV-WHDU] ("The Trump administration has stepped up prosecutions of news sources, interfered in the business of media owners, harassed journalists crossing U.S. borders, and empowered foreign leaders to restrict their own media."). However, this Comment's purpose is not to advocate for blindly restricting a wide swath of free speech. Indeed, I applaud those individuals of all

This Comment attempts to answer that question by offering a proposed provision that prohibits stalking communications in a constitutionally permissible way. While the U.S. Supreme Court has never specifically addressed the constitutionality of stalking laws,[18] its precedent reveals general principles that can guide legislatures on how to craft a provision that survives constitutional challenges. Focusing on case law is especially important in a First Amendment inquiry where the "law has developed into an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication." [19] By evaluating and comparing these specific judicial decisions with one another, concrete principals emerge that outline the contours of an improved, constitutional stalking statute.

In the proposed provision, three key areas of less-protected speech coalesce to form the boundaries of a constitutional stalking law: (1) unwanted direct communications, (2) communications that violate a reasonable expectation of privacy, and (3) communications that inflict substantial emotional distress. While a law rooted in any one of these areas alone could not survive a constitutional challenge, this Comment demonstrates how, when combined, they create a narrowly defined content restriction able to overcome the most rigorous of judicial tests.

To that end, this Comment proceeds in four parts. Part I summarizes the development of stalking laws in America and the First Amendment dilemma they generate, as encapsulated in *Mazur* and *Shackelford*. Part II examines why *Shackelford*, not *Mazur*, applied the correct analysis to North Carolina's stalking statute. Part III proposes a model provision that navigates the complexities surrounding stalking communications by using established constitutional principles. Finally, Part IV examines potential criticisms of the proposed provision to ensure its survival under judicial scrutiny.

beliefs who, during these unprecedented times, have reiterated their commitment to free speech and the marketplace of ideas. Instead, this Comment attempts to lay the foundation to narrow existing stalking statutes (which currently impose overbroad restrictions on speech) in a way that protects the First Amendment rights of defendants, while also ensuring that victims receive adequate protection from harm. In doing so, it aims to strengthen the protections currently afforded to free speech by ensuring that its limitation only occurs in the most extreme of circumstances.

18. Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1698 (2015) ("The U.S. Supreme Court has not yet examined the constitutionality of any specialized criminal harassment statute.").

19. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1993).

I. THE PROBLEM: THE NEED FOR STALKING LAWS, THE FIRST AMENDMENT CONFLICT, AND THE DILEMMA OF *MAZUR* AND *SHACKELFORD*

While the impetus behind the sudden rise of modern stalking legislation has already been well documented,[20] a brief summary helps demonstrate the importance of these statutes, the danger that victims faced prior to their enactment, and the First Amendment challenges accompanying the statutes since their inception.

A. *The History of Stalking Statutes*

Stalking statutes arose in response to a significant, nationwide problem. In the late 1980s, studies began to show that at least half of women who left an abusive partner were followed and harassed or further attacked by the abuser.[21] In addition, nearly one-third of all women killed in the United States were murdered by their husbands, with as many as ninety percent of those women having experienced some sort of stalking behavior beforehand.[22]

Even for those who escaped violence, the psychological toll of stalking was significant. Almost one out of every four stalking victims considered suicide.[23] In addition, as many as seventy percent of victims suffered from post-traumatic stress disorder, characterized by depression, anxiety, and difficulty sleeping.[24] Other victims withdrew from social activities, struggled to maintain relationships, or experienced difficulties when trying to complete daily tasks.[25] While national media attention at first gravitated to the sensational deaths of celebrity victims,[26] further research quickly revealed that far more often the victims were common citizens.[27] And the phenomenon was not rare: experts

20. *See, e.g.*, Caplan, *supra* note 9, at 793–94; Paul E. Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 273–75 (2002); Beagle, *supra* note 9, at 466–69; Guy, *supra* note 15, at 991–93 (1993); Karbarz, *supra* note 9, at 333–37. For an in-depth look at the development of stalking laws throughout history and a psychological analysis of stalking behavior, see generally Kathleen G. McAnaney, Laura A. Curliss & C. Elizabeth Abeyta-Price, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819 (1993).

21. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64 (1991).

22. Melinda Beck, *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 60.

23. Merschman, *supra* note 12, at 265.

24. *Id.*

25. Christine B. Gregson, Comment, *California's Antistalking Statute: The Pivotal Role of Intent*, 28 GOLDEN GATE UNIV. L. REV. 221, 228 (1998)

26. *See, e.g.*, McAnaney et al., *supra* note 20, at 823–24 (explaining that actress Rebecca Schaeffer's death was the initial catalyst for stalking legislation); Beagle, *supra* note 9, at 467–68 ("California enacted [its stalking] statute largely in response to the 1989 death of a famous television actress, Rebecca Schaeffer."); Merschman, *supra* note 20, at 265–66.

27. Maria Puente, *Legislators Tackling the Terror of Stalking but Some Experts Say Measures Are Vague*, USA TODAY, July 21, 1992, at 9A (stating that 17% of stalking victims are highly recognizable

estimated that one out of every twenty women would endure stalking during their lifetime.[28]

Though recognition of stalking as a problem grew during the late 1980s, stalking victims lacked adequate legal protection until the early 1990s. Prior to the passage of stalking legislation, victims commonly used civil injunctions for protection from stalkers.[29] Civil injunctions alone, however, were far from effective.[30] Injunctions required victims to pay court fees, which could present a serious obstacle to low-income stalking victims.[31] In addition, even when the victim could afford court fees, most stalking occurred on the weekends or at nighttime when courts were closed, meaning that often the only immediate remedy available to victims was an unenforceable warning from a police officer to the stalker.[32] Lastly, the injunctions themselves were not well enforced.[33] In 1992, only twenty states held injunction violators in criminal contempt, while nine states did not impose any punishment whatsoever.[34] Even in those states that allowed for damages, the punishment often failed to deter stalking behavior when the defendant had little wealth or was insolvent.[35]

Against that lax backdrop, criminal stalking statutes provided a welcome relief to victims who lacked an otherwise adequate remedy. By making stalking a criminal offense, victims no longer needed to worry about lacking adequate funds for a civil injunction or waiting for a civil court to open.[36] The cost of prosecution was borne by the state,[37] and police officers could arrest stalkers at any hour of the day.[38] In addition, stalking statutes allowed prosecutors to address a series of stalking incidents, rather than just an individual event, which

celebrities, 32% are lesser-known entertainment figures, 13% are former employers or other professionals, and 38% are ordinary citizens).

28. *Id.* (discussing the work of Park Dietz, a clinical psychiatrist who conducted a major study of stalking). Admittedly, men are also victims of stalking, but almost eighty percent of stalking victims are women. Merschman, *supra* note 20, at 264.

29. Karbarz, *supra* note 9, at 335.

30. *See* Guy, *supra* note 15, at 997–98; Karbarz, *supra* note 9, at 335–36.

31. Bradburn, *supra* note 10, at 273.

32. *Id.* at 273–74.

33. *Id.* at 274.

34. *Id.*

35. Guy, *supra* note 15, at 997.

36. *See, e.g.*, Gregson, *supra* note 25, at 233–38 (describing in detail the development of California's stalking statute which made stalking a crime, thus allowing the police to intervene on a victim's behalf).

37. *See Victims of Crime: When Can a Lawsuit Be Filed?*, SHOUSE CAL. L. GRP., https://www.shouselaw.com/ca/personal-injury/victim-lawsuit/ [https://perma.cc/7QGT-HZHA].

38. *See* Rex M. Scism, *Human Fatigue in 24/7 Operations: Law Enforcement Considerations and Strategies for Improved Performance*, INT'L ASS'N CHIEFS POLICE, https://www.policechiefmagazine.org/ [https://perma.cc/AGD4-BHYZ].

frequently would not, on its own, rise to the level of a criminal offense.[39] Finally, stalking statutes provided serious criminal consequences, including jail time, for stalking violations.[40]

But while stalking statutes improved the recourse available to victims and the number of stalking reports increased with their passage,[41] stalking remains a major problem in the United States. A survey conducted by the Centers for Disease Control and Prevention found that 4.2% of women and 2.1% of men were stalked in 2011.[42] Among stalking victims, almost half experienced at least one interaction with their stalker per week and 11% had been stalked for five years or more.[43] Moreover, the rise in internet accessibility presents entirely new challenges, with one in four victims reporting some form of cyberstalking through email, instant messaging, or other means.[44] Nor have the effects of stalking decreased with time. Victims still report feeling afraid and over 50% report losing five days or more of work per year due to stalking.[45]

Accordingly, creating stalking laws that survive constitutional scrutiny is vitally important to ensure that victims have an effective remedy against a real and dangerous threat. While stalking statutes should not enable the government to trample on any citizen's First Amendment rights, a carefully crafted law should balance both goals without compromising either. But to find that balance, one must understand why First Amendment challenges can prove fatal to stalking legislation.

39. *See* Gregson, *supra* note 25, at 233; *see also, e.g.*, N.C. GEN. STAT. § 14-277A(c) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.) ("A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person . . . .").

40. *Id.* at 236.

41. NAT'L INST. FOR JUST. & CTRS. FOR DISEASE CONTROL & PREVENTION, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 9 (1998), https://www.ncjrs.gov/pdffiles/169592.pdf [https://perma.cc/AYS2-4BS3] (finding that stalking cases "occurring before 1990 . . . were significantly less likely to be reported to the police than stalking cases occurring after 1995, the year all 50 States and the District of Columbia had laws proscribing stalking").

42. KATHLEEN C. BASILE, MATTHEW J. BREIDING, JIERU CHEN, MELISSA T. MERRICK, SHARON G. SMITH & MIKEL L. WALTERS, CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION — NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011, at 6–7 (2014), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm [https://perma.cc/RQU5-W9YG].

43. *Stalking*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=tp&tid=973 [https://perma.cc/A7GL-S59U] [hereinafter *Stalking*].

44. KATRINA BAUM, SHANNAN CATALANO, MICHAEL RAND & KRISTINA ROSE, BUREAU OF JUST. STAT. & NAT'L INST. OF JUST., STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009), https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf [https://perma.cc/2TGQ-UHHK].

45. *Stalking*, *supra* note 43.

B. *First Amendment Challenges to Stalking Statutes*

Since their initial passage, stalking statutes have tangled with the First Amendment. In Florida, the first known prosecution under its stalking statute was against a man who followed an abortion clinic administrator, took pictures of her, and attempted to obstruct her view while driving, all to show his opposition to abortion.[46] Similarly, in 1993, soon after Texas enacted its new stalking statute, a judge found eight individuals guilty for protesting outside of abortion doctors' residences.[47] In neither instance did the defendant raise a First Amendment challenge to their convictions, but scholars were quick to note its applicability in both cases.[48]

Recent challenges have focused on the provisions of stalking statutes that prohibit the stalker from communicating to or about the victim. Since stalkers can inflict serious emotional distress by sending unwanted messages to victims, [49] many statutes include provisions prohibiting harassing communications.[50] However, once a statute restricts speech, it opens itself up to potential First Amendment challenges.

For instance, in *Scott v. State*,[51] the defendant was convicted under Texas's stalking statute for making phone calls to "annoy," "alarm," and "embarrass" the victim.[52] On the first appeal, the Court of Criminal Appeals found that the statute's language was unconstitutionally vague and therefore inhibited the defendant's exercise of his First Amendment freedoms.[53] But on a second review, the Texas Court of Criminal Appeals reversed its previous holding, finding that the statute was drawn narrowly enough to avoid implicating any First Amendment activity.[54]

Other stalking statutes have not fared as well. In 2019, Minnesota's Supreme Court struck down the state's stalking by mail statute, finding that it prohibited expressive activities protected by the First Amendment, not merely criminal conduct.[55] As these cases highlight, ultimately the constitutionality of

46. Karbarz, *supra* note 9, at 333.

47. *Id.*

48. *Id.*

49. *See Indicators of Stalking Behavior*, LANGSTON UNIV., https://www.langston.edu/title-ix/indicators-stalking-behavior [https://perma.cc/F7LF-X7GU] (listing examples of stalking behavior such as "[p]ersistent phone calls" and "[s]ending the victim written messages, such as letters, email, graffiti, text messages, IMs, etc.").

50. *See, e.g.*, N.C. GEN. STAT. § 14-277.3A(b)(2) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

51. 322 S.W.3d 662, 667 (Tex. Crim. App. 2010), *abrogated by* Wilson v. State, 448 S.W.3d 418 (Tex. Crim. App. 2014).

52. *Id.* at 665.

53. Scott v. State, 298 S.W.3d 264, 272–73 (Tex. Ct. App. 2009), *rev'd*, 322 S.W.3d 662 (Tex. Crim. App. 2010).

54. *See Scott*, 322 S.W.3d at 669–70.

55. *In re* Welfare of A.J.B., 929 N.W.2d 840, 852–53 (Minn. 2019).

a statute will depend on whether a court finds that it regulates speech or criminal conduct.

1. The General Avenues for First Amendment Challenges

Generally, First Amendment challenges proceed along two different routes: as applied or facial. If a party brings an as-applied challenge, they "argue[] that a statute cannot be applied to [them] because its application would violate [their] personal constitutional rights."[56] In First Amendment litigation, this requires the aggrieved party to prove that the statute prohibits them from making a constitutionally protected communication.[57]

For example, in *Snyder v. Phelps*,[58] the Westboro Baptist Church challenged the application of Maryland's tort of intentional infliction of emotional distress ("IIED") to its protest of a soldier's funeral.[59] The Supreme Court ruled in the church's favor because the topics addressed by the protestors—"the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy"—were matters of public concern and thus protected by the First Amendment.[60] As a result, even if the protest otherwise met the requirements of IIED, the speech could not be punished because it was constitutionally protected.[61] However, since the church brought an as-applied challenge, the Court did not strike down Maryland's entire IIED tort as unconstitutional, just its specific application in the instant case.[62]

In contrast, aggrieved parties can challenge an entire law for being overly broad, even when the particular speech at issue is not constitutionally protected.[63] When successful, this approach, known as an overbreadth or facial challenge, will require a court to strike down the entire statute as

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

57. *See, e.g.*, Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998) ("An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others.").

58. 562 U.S. 443 (2011).

59. *Id.* at 448–50.

60. *Id.* at 454.

61. *Id.* at 456–58.

62. *Id.* at 460–61 ("Our holding today is narrow . . . 'sweep[ing] no more broadly than the appropriate context of the instant case.'" (quoting Florida Star v. B.J.F., 491 U.S. 524, 533 (1989))); *see also* Jeffrey Steven Gordon, *Silencing State Courts*, 27 WM. & MARY BILL RTS. J. 1, 3–4 (2018) (noting that the Supreme Court's opinion merely "set aside the jury verdict"; it did not declare the tort itself unconstitutional in every application).

63. *See* Griffin v. Bryant, 30 F. Supp. 3d 1139, 1160 (D.N.M. 2014) ("Even if the challenger engaged in constitutionally unprotected, validly penalized speech, if he can establish that the statute penalizes a substantial swath of protected speech, then he will prevail in getting the statute invalidated not only as it relates to the constitutionally protected speech of others, but to his own unprotected speech, as well.").

unconstitutional on its face.[64] Put simply, a court asks whether "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[65] The Supreme Court has allowed this uniquely powerful remedy because overly broad speech statutes create "a chilling effect whereby would-be speakers are intimidated from engaging in constitutionally-protected speech, because—lacking a definitive front-end ruling from the courts—they fear that their speech may be proscribed by the speech restriction."[66]

For example, when Congress attempted to prohibit dog fighting and crush videos[67] by punishing anyone who "create[d, sold], or possesse[d] a depiction of animal cruelty" if done "for commercial gain,"[68] the Supreme Court in *United States v. Stevens*[69] struck down the entire law as unconstitutional.[70] The Court reasoned that due to its general language, the law was broad enough to enable the prosecution of many forms of constitutionally protected speech, such as hunting tutorials or clips of Spanish bullfighting.[71] Because the First Amendment does not allow laws that criminalize a large swath of protected speech, even when aimed at eliminating a widely decried social ill such as crush videos, the Court struck down the entire statute.[72]

Thus, stalking law defendants possess two options when trying to escape conviction for communicative actions: as applied or facial challenges. While an as-applied challenge may not appear as dangerous to stalking statutes as overbreadth challenges, given that such challenges do not require a court to strike down an entire act as facially unconstitutional, the more as-applied challenges defendants win, the more a law will begin to look overly broad. In turn, the more overly broad a statute starts to look, the more susceptible it becomes to facial challenges, risking the entire statute's invalidation.[73] Therefore, drafting a statute that can survive a substantial number of as-applied challenges increases the likelihood that the statute will also survive a facial

64. *Id.* at 1156; Fallon, *supra* note 56.

65. Wash. St. Grange v. Wash. St. Republican Party, 552 U.S. 442, 449 n.6 (2008) (quoting New York v. Ferber, 458 U.S. 748, 769–71 (1982)).

66. *Griffin*, 30 F. Supp. 3d at 1150.

67. Crush videos "typically depict women in stilettos or bare feet literally crushing, stomping on, or impaling, small, helpless animals to satisfy . . . sexual fetishes of . . . viewers." *Crush Videos*, ANIMAL WELFARE INST., https://awionline.org/content/crush-videos [https://perma.cc/KX3G-KTVT].

68. 18 U.S.C. § 48.

69. 559 U.S. 460 (2010).

70. *Id.* at 482.

71. *Id.* at 478–79.

72. *Id.* at 481–82.

73. *See id.* at 472–73 (describing the effect of a facial challenge); Fallon, *supra* note 56, at 1321 (explaining that a facial challenge involves arguing that a statute is generally invalid on its face).

challenge.[74] Moreover, when facing an as-applied challenge, the state has numerous ways to argue that its applications comport with established First Amendment jurisprudence.

a. Speech Integral to Criminal Conduct

When facing an as-applied challenge, the state has numerous ways to argue that an application comports with established First Amendment jurisprudence. One common argument utilized by prosecutors is that the provisions at issue prohibit only speech integral to criminal conduct.[75] First recognized in *Giboney v. Empire Storage & Ice Co.*,[76] the "speech-integral-to-criminal-conduct" doctrine ("the criminal conduct exception") removes otherwise protected speech from the First Amendment's reach if a court finds that the speech was "used as an integral part of conduct in violation of a criminal statute."[77] The criminal conduct exception is used to justify speech restrictions in typical common law crimes such as conspiracy, solicitation, or aiding and abetting.[78] While such crimes require speech as part of their commission, since such speech is integral to the criminal conduct, it falls outside the protection of the First Amendment.[79] As a result, legislatures can restrict speech integral to criminal conduct without violating the Constitution.[80] Therefore, convincing a court that a stalking statute prohibits only speech within the criminal conduct exception can provide a huge win to prosecutors, and entirely thwart defendants' attempts to challenge their convictions.[81]

Related to the criminal conduct exception, the Supreme Court has also recognized specific categories of speech that fail to receive any First Amendment protection, including "obscenity, defamation, fraud, [and] incitement."[82] Like speech integral to criminal conduct, a legislature can restrict

74. In theory, a statute might exist that has both a substantial number of legitimate and illegitimate applications and thus would fail a facial challenge under the Supreme Court's overbreadth jurisprudence. *See* N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988). This Comment simply argues that the less illegitimate, and therefore less unconstitutional, applications a statute has, the less likely it is to fail a facial challenge. *See id.*

75. *See* United States v. Ackell, 907 F.3d 67, 76–77 (1st Cir. 2018); United States v. Gonzalez, 905 F.3d 165, 192 (3d Cir. 2018); United States v. Osinger, 753 F.3d 939, 944 (9th Cir. 2014); United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012); State v. Shackelford, 264 N.C. App. 542, 554, 825 S.E.2d 689, 697 (2019) ("Specifically, the State contends that Defendant's posts constitute 'speech that is integral to criminal conduct'—a category of speech that falls outside of the protection provided by the First Amendment.").

76. 336 U.S. 490 (1949).

77. *Id.* at 498; Buchhandler-Raphael, *supra* note 18, at 1708–09.

78. *Id.*

79. *Id.*

80. *Id.*

81. State v. Mazur, 261 N.C. App. 538, 538, 817 S.E.2d 919, 919, 2018 WL 4440576, at *7 (2018) (unpublished table decision).

82. United States v. Stevens, 559 U.S. 460, 460 (2010).

any speech that falls within one of these categories without infringing upon the First Amendment.[83] However, the Court has not recognized stalking communications as comprising one of these distinct categories of unprotected speech, nor does it appear ready to expand the current list beyond its historical collection.[84] Accordingly, if a prosecutor cannot justify a stalking prohibition using the criminal conduct exception, they will need to employ a different argument to survive a First Amendment challenge.

b. Content-Neutral Restriction

Another argument open to prosecutors is that the restriction comprises a constitutional, content-neutral restriction. Supreme Court precedent is "clear" that "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech.'"[85] Because these restrictions do not depend on the content of the message, they are known as content-neutral restrictions and must only survive intermediate scrutiny.[86] Intermediate scrutiny requires that restrictions be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[87] In general, the Supreme Court has used this test to uphold statutes it deemed content neutral.[88] However, if a court determines that the statute makes a content-based restriction, it will need to survive the most rigorous of judicial tests: strict scrutiny.[89]

To determine whether a statute makes a content-based distinction, a court examines whether the law can be "justified without reference to the content of the regulated speech."[90] This is quite different than content-neutral restrictions, such as how loud music can be played in a public park,[91] which apply the same

83. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 999 (2016) [hereinafter Volokh, *Speech Integral to Criminal Conduct*].

84. *Id.* at 1015 ("Since *United States v. Stevens*, the Court has taken the view—whether rightly or wrongly—that the list of First Amendment exceptions is essentially limited to historically recognized exceptions, such as the ones for obscenity, libel, and the like.").

85. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

86. *Id.* at 798; *see, e.g.*, *First Amendment — Freedom of Speech — Content Neutrality* — McCullen v. Coakley, 128 HARV. L. REV. 221, 222–23 (2014) [hereinafter *First Amendment — Freedom of Speech*] (using the terms "content-neutral" and "intermediate scrutiny" to describe the Supreme Court's recent application of the standard announced in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

87. *Ward*, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

88. *See First Amendment — Freedom of Speech*, *supra* note 86, at 221.

89. State v. Bishop, 368 N.C. 869, 874, 787 S.E.2d 814, 818; *see also* Reed v. Gilbert, 576 U.S. 155, 163 (2015). Strict scrutiny holds laws "presumptively unconstitutional and . . . justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163.

90. *Reed*, 576 U.S. at 164.

91. *See Ward*, 491 U.S. at 803.

to all speech, regardless of its message. For instance, the Supreme Court found that a statute prohibiting U.S. citizens from providing material support to terrorists created a content-based restriction because the only way to determine whether the speech at issue provided material support was to examine what message the speaker communicated.[92] Or, in the words of the Court, if "[p]laintiffs want to speak to [terrorist groups], and whether they may do so under [the relevant statute] depends on what they say," then the statute is a content-based restriction.[93] Once a court determines that a statute is content-based, a prosecutor will have only one argument remaining.

c. Strict Scrutiny

If a court finds that the statute at issue not only regulates speech outside of the criminal conduct exception but also that it creates a content-based restriction, the statute's last hope is to survive strict scrutiny—the highest standard of review in constitutional jurisprudence.[94] A prudent prosecutor will avoid having a statute's application examined under strict scrutiny since it famously proves "'strict' in theory and fatal in fact."[95] Strict scrutiny "requires the [g]overnment to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[96] If the state can pass this test, then it can regulate any speech, regardless of whether it turns on the content of a speaker's message.[97]

Thus, prosecutors can raise an array of justifications when defendants challenge a stalking statute on First Amendment grounds. The North Carolina cases of *Mazur* and *Shackelford* demonstrate the strengths and limitations of these arguments.

2. North Carolina's First Amendment Challenges to Stalking Statutes

North Carolina courts have recently begun wrestling with the conflict between stalking laws and the First Amendment in the cases of *Mazur*[98] and

92. Holder v. Humanitarian L. Project, 561 U.S. 1, 22 (2010).

93. *Id.*

94. *See Reed*, 576 U.S. at 163–64; *Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818; *Strict Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20is%20the%20highest,scrutiny%20and%20rational%20basis%20review [https://perma.cc/CF3F-XEWN].

95. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 4 (2000).

96. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011) (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010)).

97. *See Reed*, 576 U.S. at 171.

98. 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 4440576 (2018) (unpublished table decision).

Shackelford.[99] However, unlike the Texas or Minnesota cases which dealt with overbreadth,[100] the North Carolinian defendants succeeded, or almost succeeded, by using as-applied challenges.[101]

a. Mazur*: North Carolina's Stalking Law Prohibits Criminal Conduct*

In *Mazur*, the defendants Mr. and Mrs. Mazur were convicted of stalking their neighbors Mr. and Mrs. O'Neal.[102] The saga began when Mrs. Mazur went over to the O'Neals' house and asked Mr. O'Neal to turn down his music.[103] After Mr. O'Neal refused to comply, Mrs. Mazur called the police and reported a noise violation.[104] When the police arrived, they found Mr. O'Neal playing music and issued him a citation.[105] Following that incident, the Mazurs commenced a campaign of harassment against the O'Neals, filing numerous baseless complaints with the local police department.[106] In addition, the Mazurs began calling the O'Neals racial slurs and employing playground insults, describing Mr. O'Neal as "frog-eyed" or "froggy" and calling Mrs. O'Neal a "pig."[107] Once insults were no longer enough, the Mazurs placed a statue of a frog in their yard and a statue of a pig with its butt in the air toward the O'Neals' home.[108] The Mazurs even made "googley-eye" glasses which they wore in their yard to mock Mr. O'Neal's appearance.[109] Finally, the Mazurs began recording the O'Neals with a handheld video camera.[110]

Eventually, Mr. O'Neal filed a complaint that resulted in the county charging the Mazurs with misdemeanor stalking and issuing a no-contact order between the two parties.[111] Once out on bond, the Mazurs installed three high-powered surveillance cameras with night vision capabilities in their yard, facing the O'Neals' house.[112] With the help of these videos, the Mazurs began taking copious notes on the O'Neals' departures and returns.[113] In addition, the Mazurs

99. 264 N.C. App. 542, 825 S.E.2d 689 (2019).

100. *See supra* notes 51–55 and accompanying text.

101. *See Mazur*, 261 N.C. App. at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *9; *Shackelford*, 264 N.C. App at 551, 825 S.E.2d at 695. An as-applied challenge involves "a party argu[ing] that a statute cannot be applied to her because its application would violate her personal constitutional rights." Fallon, *supra* note 56, at 1321.

102. *Mazur*, 261 N.C. App. at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *1.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *5.

107. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *2.

108. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *1.

109. *Id.*

110. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *2.

111. *Id.*

112. *Id.*

113. *Id.*

occasionally drove behind Mr. O'Neal and his son as they walked about the neighborhood.[114]

While those activities may have been enough for the State to proceed with a successful felony stalking case, what the Mazurs did next—and what the jury in-part relied upon to convict them—created a complex and unique First Amendment dilemma. During the ensuing October, the Mazurs erected alleged Halloween decorations in their yard, primarily consisting of Tupperware bowls with lightbulbs and red lines inside to look like an eyeball with veins.[115] In addition, the Mazurs hung large decorative eyeglasses with googly eyes painted on them on their mailbox and in trees facing the O'Neals.[116] When a trick-or-treating neighbor asked Mrs. Mazur what the decorations meant, she replied that "their intent was to convey the message that they—Defendants—'had their eyes on Mr. O'Neal.'"[117]

Eventually, the Mazurs went to trial where a jury found the couple guilty of felony stalking.[118] Because the court admitted the evidence of the frog and pig statues, as well as the Halloween decorations, the Mazurs immediately appealed their conviction, arguing that these items constituted First Amendment protected expressive conduct.[119] In response, the State argued that the decorations were actually prohibited contact by the Mazurs with the O'Neals, and thus North Carolina could prohibit it like any other contact, regardless of its expressive merit.[120]

After reviewing the case, the North Carolina Court of Appeals adopted the State's argument. First, it acknowledged the U.S. Supreme Court's holding in *Giboney*[121] that speech integral to criminal conduct is unprotected—the criminal conduct exception.[122] Next, it found that the felony stalking statute, which prohibited "harassing conduct," was not a content-based restriction on speech because "prohibiting certain conduct, while involving 'speech,' does not necessarily violate the First Amendment when the statute's focus is on the conduct."[123] Finally, because it found that the "[d]efendants point[ed] to no evidence presented at trial that they were seeking to express a message unreleated [sic] to Mr. O'Neal and [were] only incidentally harassing him," the

114. *Id.*

115. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *3.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *6.

120. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *5.

121. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *6 (discussing *Giboney*).

122. *Id.* (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)); *see supra* Section I.B.1.a.

123. *Mazur*, 261 N.C. App. at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *6.

court concluded that the decorations were not speech and no First Amendment violation occurred.[124]

In doing so, the *Mazur* court never stopped to examine whether the yard decorations constituted speech on their own. Rather, the *Mazur* court held that, because any message communicated by the yard signs was harassing, it was automatically criminal conduct. This reasoning was conclusory, and as explained in Section II.A, incorrect. But because the *Mazur* court viewed any prohibitions on speech in North Carolina's felony stalking statute as incidental, it concluded the statute restricted exclusively criminal conduct. Only months later, a different panel would examine that same statute and reach a different conclusion.

b. Shackelford*: North Carolina's Stalking Statute Restricts Protected Speech*

Though *Shackelford*'s facts were quite different from *Mazur*'s, the true contrast between the cases lies in how *Shackelford* applied the criminal conduct exception. In *Shackelford*, the defendant attended a Good Friday service at a Charlotte-based church where he met a church member, to whom the court gave the pseudonym "Mary."[125] After a brief conversation in a group setting, the two parted ways, and Mary gave no further thought to the exchange.[126] Several weeks later, Mary received an email from the defendant to her work account, asking if she would agree to meet with him to discuss a communications plan for his company.[127] Initially interested, Mary agreed to meet with the defendant to discuss the business but later retracted her offer after receiving a subsequent email from the defendant where he offered to pay Mary "100K . . . AND take [her] out to dinner at any restaurant in Charlotte."[128]

Despite Mary's refusal, the defendant continued trying to contact her. Two weeks after his last email, the defendant sent Mary a handwritten letter to her work address stating that when he saw her at the service he "thought he had found his soul mate" and that he wanted to take her on a date.[129] Understandably disturbed, Mary resolved to have no further contact with the defendant, and asked her supervisors to intervene.[130] One of the ministers at Mary's church had a phone call with the defendant and asked him to cease contacting Mary.[131] After the phone call, the defendant did not send another letter or email.[132]

124. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 4440576, at *7.
125. State v. Shackelford, 264 N.C. App. 542, 543, 825 S.E.2d 689, 691 (2019).
126. *Id.*
127. *Id.*
128. *Id.* at 543–44, 825 S.E.2d at 691.
129. *Id.* at 544, 825 S.E.2d at 691–92.
130. *Id.* at 545, 825 S.E.2d at 692.
131. *Id.*
132. *Id.*

Instead, the defendant took to social media, specifically Google Plus, to publicly announce his affection for Mary.[133] The same month that her minister talked with the defendant, Mary logged on to her Google Plus account to discover that the defendant had followed her account and had referenced her in four separate posts.[134] Though the defendant stopped using Mary's name following his conversation with the minister, a subsequent post included a shortened version of her name and another post included her initials.[135] But even when defendant's posts did not specifically name Mary, the subject of them remained clear, referring to her as "a woman at my church."[136]

Though disturbed by the defendant's posts, Mary refrained from legal action until she received a box of cupcakes at her work, accompanied by an unsigned note which read "[Mary], I never properly thanked you for the help you gave me regarding my company's communication plan, so, with these cupcakes, please accept my thanks."[137] Following the delivery, Mary filed a report with the Charlotte-Mecklenburg Police Department that resulted in the defendant's arrest on charges of misdemeanor stalking.[138] When Mary filed a petition for a no-contact order, the district court granted it and forbade the defendant from contacting Mary or "posting any information about [her] on social media."[139]

After receiving the order, the defendant refused to comply. Subsequent social media activity included: a post naming his favorite Carolina Panther's cheerleader, accompanied by a statement claiming it would make Mary jealous; a post praying his "future wife's family" was okay, following a significant rainstorm in South Carolina where Mary's family lived; and a post indicating that he had looked through Mary's Pinterest boards to determine which of the Myers-Briggs personality types she possessed.[140] In addition, the defendant sent two emails to a close friend of Mary, one of which requested that the friend ask Mary to tell the truth in court and another which detailed an elaborate scheme to allow Mary to "save face" by having the defendant take a televised

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 546, 825 S.E.2d at 692. Examples include this post from June 28, 2015:

> I'm feeling depressed. There's a woman at my church that I want really, really bad, but she doesn't want me. I've prayed to God asking him to relieve this pain in my heart by allowing me to view just a small glimpse of her angelic face while in church, but God won't even give me that. :(

Id.

137. *Id.* at 546, 825 S.E.2d at 693.

138. *Id.*

139. *Id.* at 547, 825 S.E.2d at 693.

140. *Id.* at 548, 825 S.E.2d at 693–94.

polygraph test live on CNN to prove that he had talked to God at least twenty times and seen God's face five times.[141]

While the State originally planned to prosecute the defendant for violating the no-contact order, the trial court ultimately dismissed those charges out of a concern that the language in the no-contact order was unconstitutional and instead relied on the stalking charges.[142] Following his conviction of four counts of stalking, the defendant immediately appealed, arguing that his social media activity was protected by the First Amendment.[143]

Unlike in *Mazur*, the reviewing court in *Shackelford* found that North Carolina's felony stalking law did not *exclusively* cover speech integral to criminal conduct. Per the statute, a defendant is guilty of stalking if he engages in a "course of conduct" that causes the victim to "[s]uffer substantial emotional distress by placing [them] in fear of . . . continued harassment."[144] But unlike *Mazur*, which focused simply on this prohibition of harassing conduct,[145] *Shackelford* dug deeper into the statute's language.[146] A "course of conduct" is defined by the statute as "[t]wo or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means . . . communicates to or about a person."[147] To analyze whether this provision was constitutional, the *Shackelford* court began by noting that social media posts constitute a protected form of expression under the First Amendment.[148] Next, the *Shackelford* court acknowledged the existence of the criminal conduct exception,[149] but found that, to fall within that exception, the speech at issue must possess some relationship to a criminal act outside of the speech itself.[150] Since a stalking conviction could rest exclusively on two communicative acts, such as any two of the defendant's Google Plus posts about Mary, the *Shackelford* court held that the North Carolina statute did not qualify for the criminal conduct exception.[151] Finding that the North Carolina statute

141. *Id.* at 548–49, 825 S.E.2d at 694.

142. *Id.* at 549, 825 S.E.2d at 694–95.

143. *Id.* at 550, 825 S.E.2d at 695.

144. N.C. GEN. STAT. § 14-277.3A(c) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

145. State v. Mazur, 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 4440576, at *6 (2018) (unpublished table decision).

146. *See Shackelford*, 264 N.C. App. at 551, 825 S.E.2d at 695–96.

147. N.C. GEN. STAT. § 14-277.3A(b)(1).

148. *Shackelford*, 264 N.C. App. at 552, 825 S.E.2d at 696 (discussing State v. Bishop, 368 N.C. 869, 873, 787 S.E.2d 814, 817 (2016), where a statute was found to regulate protected speech because it "outlawed posting particular subject matter on the internet").

149. *See id.* at 555, 825 S.E.2d at 697.

150. *Id.* at 554–56, 825 S.E.2d at 697–98 (relying in part on People v. Relerford, 104 N.E.3d 341, 352 (Ill. 2017), an Illinois Supreme Court case that addressed a law very similar to North Carolina's felony stalking statute).

151. *Id.* at 556, 825 S.E.2d at 698.

made "the speech itself . . . the criminal violation,"[152] and not merely a vehicle by which criminal activity occurs,[153] the *Shackelford* court concluded that the criminal conduct exception was not applicable.[154]

After finding that the statute regulated speech, not criminal conduct, the *Shackelford* court proceeded to the next step in a First Amendment analysis—does the statute create a content-based or content-neutral restriction? According to *Reed v. Gilbert*,[155] a content-based restriction exists when a law "cannot be justified without reference to the content of the regulated speech."[156] Only a year before *Shackelford*, the Supreme Court of North Carolina embraced this standard, holding that a content-based restriction exists when a court cannot "determine whether the accused has committed a crime without examining the content of his communication."[157] To determine this principle's application, the *Shackelford* court looked to *People v. Relerford*,[158] where the Illinois Supreme Court examined a stalking law that criminalized "distressing" speech.[159] Because the law required a defendant's speech be examined to determine whether it was "distressing," the Illinois Supreme Court found that the law created a content-based restriction.[160] Applying that same reasoning, the *Shackelford* court concluded that since the only way to determine whether a communication violated North Carolina's felony stalking law was to examine whether it "would cause a reasonable person to . . . [s]uffer substantial emotional distress," the statute created a content-based restriction.[161]

Once the *Shackelford* court determined that the law created a content-based distinction, the final step was to apply strict scrutiny—which all content-based restrictions must meet.[162] Assuming arguendo that North Carolina's stated purpose of preventing stalking from escalating into more dangerous behavior constituted a compelling state interest, the *Shackelford* court found that the stalking statute was not the least restrictive means to achieve that stated

152. *Id.* at 556–57, 825 S.E.2d at 698–99 (quoting United Food & Com. Workers Loc. 99 v. Bennett, 934 F.Supp.2d 1167, 1208 (D. Ariz. 2013)).

153. *Id.*

154. *Id.* at 556, 825 S.E.2d at 689–99.

155. 576 U.S. 155 (2015).

156. *Shackelford*, 264 N.C. App. at 557, 825 S.E.2d at 699 (alteration in original) (quoting *Reed*, 576 U.S. at 164).

157. *Id.* at 558, 825 S.E.2d at 699 (quoting State v. Bishop, 368 N.C. 869, 876, 787 S.E.2d 814, 819 (2016)).

158. 104 N.E.3d 341 (Ill. 2017).

159. *Id.* at 350.

160. *Id.*

161. *Shackelford*, 464 N.C. App. at 558, 825 S.E.2d at 699 (quoting N.C. GEN. STAT. § 14-277.3A(c)(2) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)).

162. *Id.* at 558, 825 S.E.2d at 700; *see also* Reed v. Gilbert, 576 U.S. 155, 163 (2015) (stating that strict scrutiny holds laws "presumptively unconstitutional and . . . justified only if the government proves that they are narrowly tailored to serve compelling state interests").

purpose.[163] As an example of a less restrictive means, the *Shackelford* court noted that the law could have simply required a no-contact order prohibiting the defendant from approaching or contacting Mary.[164] But by also prohibiting the defendant from posting his feelings *about* Mary on social media, the felony stalking statute included an additional, unnecessary restriction on protected speech.[165] Accordingly, the statute's application to the defendant was not as least restrictive as possible, failing strict scrutiny.[166]

Together, *Mazur* and *Shackelford* represent the two main approaches to First Amendment challenges brought against stalking statutes. On one side, *Mazur* illustrates how easily courts can uphold a statute if they determine that any implicated speech is simply "criminal conduct" that falls outside of First Amendment protection. Conversely, the *Shackelford* approach demonstrates that when the statute is treated as a content-based restriction, it must survive a far more rigorous examination. As states seek to pass legislation that will effectively protect victims from stalkers, they must determine which approach correctly applies to proposed statutes.

II. ANALYZING THE DECISIONS: WHETHER THE REASONING IN *MAZUR* OR *SHACKELFORD* COMPORTS WITH FIRST AMENDMENT JURISPRUDENCE

Mazur and *Shackelford* examine two different forms of stalking communications—yard decorations and social media posts—and reach two different outcomes. To determine whether either outcome is correct, this Comment uses existing jurisprudence to ask two fundamental questions of each case: (1) Is the conduct at issue speech, and (b) can the government restrict that speech without violating the First Amendment? When analyzed using these questions, the *Shackelford* court appears to reach the correct result, while the *Mazur* court appears to err in its analysis.

A. *Is the Conduct at Issue Speech?*

Every First Amendment inquiry begins by determining whether the conduct at issue is speech or at least expressive conduct. After all, if the defendants' actions do not amount to speech, or even expressive conduct, then they will not fall under the protections of the First Amendment.[167] For instance, in *Willis v. Marshall*,[168] the plaintiff sued the town, arguing that it violated her

163. *Shackelford*, 264 N.C. App. at 559, 825 S.E.2d at 700.

164. *Id.* at 560, 825 S.E.2d at 700.

165. *Id.* at 562, 825 S.E.2d at 702.

166. *Id.* at 560, 825 S.E.2d at 700.

167. Cornelius v. NAACP, 473 U.S. 788, 797 (1985) ("To resolve this issue we must first decide whether solicitation in the context of the CFC is speech protected by the First Amendment, for, if it is not, we need go no further.").

168. 426 F.3d 251 (4th Cir. 2005).

First Amendment rights when it refused to allow her to dance at a community depot.[169] However, the Fourth Circuit found that recreational dancing was neither speech nor expressive conduct, and thus the plaintiff could not bring a First Amendment claim.[170] In sum, the First Amendment only applies where some recognized form of communication occurs.

In *Shackelford*, the defendant's social media posts expressing his feelings and frustrations toward Mary [171] constitute speech and deserve First Amendment protection. Though a relatively new technology, the internet receives as much First Amendment protection as any other form of communication.[172] As noted by the Supreme Court, the internet provides today's pamphleteer "relatively unlimited, low-cost capacity for communication of all kinds."[173] In particular, the Court has specifically recognized social media as the modern world's primary form of communication and particularly worthy of First Amendment protection.[174] Therefore, the *Shackelford* court correctly held that the defendant's Google Plus posts fell within the scope of the First Amendment.

Mazur, in contrast, does not present quite as clear of a situation. While *Shackelford* involved social media posts with words, the expressive properties of frog eye and pig butt statues are not as readily apparent. However, the Supreme Court has never held that the First Amendment protects only those communications involving words.[175] Instead, symbols and other nonverbal conduct can receive constitutional protection when sufficiently expressive.[176] To determine if First Amendment protections apply, the Court looks to whether an action or symbol conveys a "particularized message," and whether there is a great likelihood that the message would be understood.[177]

In *Mazur*, while the defendant's nonexpressive physical conduct (such as following the victims in their car) did not fall under the expressive conduct cover of the First Amendment, the statues and yard decorations likely did fall within its protection. Admittedly, uncertainty exists as to what types of yard

169. *Id.* at 255.

170. *Id.* at 257–59.

171. *See supra* notes 133–41 and accompanying text.

172. Reno v. ACLU, 521 U.S. 844, 870 (1997).

173. *Id.*

174. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) ("[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.").

175. Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

176. *See id.* at 406.

177. *See* Nunez v. Davis, 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Johnson*, 491 U.S. at 404).

decorations receive First Amendment protections due to their artistic merit.[178] But the *Mazur* defendants possessed a strong argument that the statues and googly eye decorations met the requirements of symbolic speech. In *Spence v. Washington*,[179] the Supreme Court found that a college student engaged in symbolic speech when, on private property, he hung an upside-down American flag with a peace sign taped onto it outside of his window in order to protest the Cambodian invasion and Kent State shooting.[180] In making its decision, the Court looked to the intent of the speaker, the audience's understanding of the display, and the context surrounding it.[181]

Applying that same test to the facts in *Mazur* leads to the same conclusion reached in *Spence*. First, the defendants freely disclosed the intent behind the decorations: to communicate that they "had their eyes on Mr. O'Neal."[182] Second, as for the audience's understanding of the displays and the context of the situation, the two-year, vitriolic dispute between the neighbors provided the O'Neals more than ample understanding of the decoration's antagonizing message. Similarly, the message conveyed by the frog and pig statues—erected to reference the defendants' favorite insults[183]—would be easily understood by the O'Neals who were the intended recipients of these insults. Moreover, any argument by the State that these decorations were not speech is fatally undermined by the State's choice to include the decorations as evidence in its case against the defendants—evidence that was only relevant because of the message communicated by the decorations. If the decorations were not speech, they would have no bearing on the case.

Therefore, because the defendants in both *Shackelford* and *Mazur* were convicted in part for engaging in speech, the State needed a way to punish that speech without violating the First Amendment. Admittedly, the defendants had both committed other nonspeech acts which might have substantiated a stalking conviction alone, such as sending cupcakes in *Shackelford* or following the O'Neals in *Mazur*. But precedent requires appellate courts to reverse any conviction that may have rested upon unconstitutional grounds.[184] Because

178. *See* Kleinman v. City of San Marcos, 597 F.3d 323, 324, 326–29 (5th Cir. 2010) (finding that a decorated junk car kept in front yard to communicate "make love not war" was not expressive conduct protected by the First Amendment); David Leichtman & Avani Bhatt, *Federal Courts and the Communicative Value of Visual Art: Is an Intended Message Required for Strong Protection of Rights Under the First Amendment?*, FED. LAW., Sept. 2011, at 25; *see also* Brian Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. (forthcoming Mar. 2021) (exploring First Amendment protections of "art" and recognizing that such protections may be more difficult to achieve for nontraditional art forms).

179. 418 U.S. 405 (1974).

180. *Id.* at 406.

181. *Id.* at 413–15.

182. State v. Mazur, 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 44440576, at *4 (2018) (unpublished table decision).

183. *Id.* at 538, 817 S.E.2d at 919, 2018 WL 444057 at *2.

184. Stromberg v. California, 283 U.S. 359, 369–70 (1931).

neither case specified whether the jury used the protected speech as evidence to convict the defendants, reversal was warranted in both instances.[185] As a result, the State's only hope for winning on appeal was to find an argument that the defendant's speech in each case was not protected.

B. *Can the Government Restrict Either Defendants' Speech Without Violating the First Amendment?*

To escape the First Amendment's reach, the State argued in both cases that the speech was integral to criminal conduct.[186] As previously illustrated,[187] the criminal conduct exception removes otherwise protected speech from the First Amendment's reach if a court finds that the speech was "used as an integral part of conduct in violation of a criminal statute."[188] With the steady increase of this exception's popularity,[189] several circuits have come to rely on it to uphold convictions under the federal interstate stalking statute.[190] For example, in *United States v. Osinger*,[191] the defendant was convicted of interstate stalking for posting naked pictures of his ex-girlfriend on the internet without her consent.[192] When the defendant brought a First Amendment challenge, the Eighth Circuit found that any expressive activity prohibited by the law was necessarily "tethered to the underlying criminal conduct and not to speech."[193] Having reached that conclusion, the *Osinger* court had no difficulty upholding the statute.[194]

However, the circuits' use of the criminal conduct exception does not appear to comply with the current standard articulated by the Supreme Court. As noted by Professor Eugene Volokh, the Supreme Court only uses the criminal conduct exception when the crime at issue includes some additional act *other* than the speech itself.[195] Simply labelling speech "criminal" is not sufficient to place that speech within the criminal conduct exception.[196] Thus,

185. Indeed, because North Carolina's felony stalking statute requires two separate actions to constitute a conviction, and only one nonspeech action occurred in *Shackelford*, the State would have been unable to satisfy the elements of the crime as a matter of law. State v. Shackelford, 264 N.C. App. 542, 560–61, 825 S.E.2d 689, 701 (2019).

186. *Id.* at 554, 825 S.E.2d at 697.

187. *See supra* Section I.B.1.a.

188. Buchhandler-Raphael, *supra* note 18, at 1708–09.

189. Volokh, *Speech Integral to Criminal Conduct*, *supra* note 83, at 983–84.

190. *See id.* at 1040; *see also* United States v. Ackell, 907 F.3d 67, 77 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 2012 (2019); United States v. Gonzalez, 905 F.3d 165, 192 (3d Cir. 2018) *cert. denied*, 139 S. Ct. 2727 (2019); United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012); United States v. Osinger, 753 F.3d 939, 944 (9th Cir. 2014).

191. 753 F.3d 939 (9th Cir. 2014).

192. *Id.* at 942.

193. *Id.* at 944.

194. *Id.* at 948.

195. Volokh, *Speech Integral to Criminal Conduct*, *supra* note 83, at 1011.

196. *Id.*

when the Supreme Court used the criminal conduct exception to uphold the ban on advertising child pornography in *New York v. Ferber*,[197] it focused on the link between the expressive action of advertising the materials and the separate criminal conduct of producing it.[198] But when no separate criminal act exists other than the speech itself, the criminal conduct exception becomes inapplicable.[199] Otherwise, a court could take speech that it does not like, relabel it as conduct, and place it outside the First Amendment's protections.[200] Such a conclusory analysis would thwart "the whole point of modern First Amendment doctrine" which is "to protect speech against many laws that make such speech illegal."[201] As noted in *New York Times v. Sullivan*,[202] states cannot avoid First Amendment scrutiny by placing "mere labels" on controversial forms of speech.[203]

Based off these principles, the Ninth Circuit appears to have applied an incorrect version of the criminal conduct exception in *Osinger*.[204] While a state likely can prohibit the conduct at issue in *Osinger*—posting a nude photo of an ex-lover without consent[205]—the Ninth Circuit's path to reach this result was not a constitutionally acceptable route. Rather than dig into the complexities surrounding the issue of revenge porn, the Ninth Circuit simply noted that "[a]ny expressive aspects of Osinger's speech" were part of "harassing conduct"—conduct that the United States prohibits.[206] But, as noted by Professor Volokh, the Ninth Circuit reached this result by essentially just

197. 458 U.S. 747 (1982).

198. *Id.* at 761–62 (1982).

199. Volokh, *Speech Integral to Criminal Conduct*, *supra* note 83, at 1011.

200. *Id.* at 1036–39.

201. *Id.* at 987.

202. 376 U.S. 254 (1964).

203. *Id.* at 269. Recent Supreme Court precedent has not provided further clarification on this topic. For instance, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court had a chance to revisit when speech can be relabeled as conduct. *Id.* at 27 n.5. But the Court refused to explore the issue, noting simply that "the Government [did] not develop it." *Id.*

204. Volokh, *Speech Integral to Criminal Conduct*, *supra* note 83, at 1040–41.

205. *See, e.g.*, State v. VanBuren, 2018 VT 95, ¶ 69, 214 A.3d 791, 814 (2019) (upholding Vermont's revenge porn statute as a narrowly tailored, content-based restriction on protected speech); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 375–76 (2014) (arguing that an analysis similar to the one used in decisions upholding the private right of action in the Federal Wiretap Act and the tort for public disclosure of private fact permit a finding that revenge porn statutes do not violate the First Amendment); Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/ [https://perma.cc/8A8W-LZZE] (arguing that revenge porn can be prohibited as a form of obscenity). *But see Ex parte* Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018), *disc. rev. granted* (July 25, 2018) (holding that Texas's prohibition on revenge porn was facially overbroad).

206. United States v. Osinger, 753 F.3d 939, 947–48 (9th Cir. 2014).

"relabeling the speech as 'conduct.'"[207] Nowhere in its opinion did the Ninth Circuit point to any separate criminal act outside of the speech itself.

Returning to North Carolina, *Shackelford* appears to correctly reject the State's argument that the defendant's otherwise protected Google Plus posts were transformed into criminal conduct. Conversely, *Mazur*'s finding that the speech at issue was criminal conduct appears to contradict established precedent. Unlike the speech advertising child pornography in *Ferber*, the speech at issue in both *Mazur* and *Shackelford* was not integral to a separate criminal action different than the speech itself. The yard decorations in *Mazur* and the social media posts in *Shackelford* were integral to harassing conduct only as far as the decorations and posts themselves harassed the victims. Without a separate criminal action occurring, the posts and decorations could not fall within the criminal conduct exception as it is understood today. Accepting the State's argument that the stalking law prohibited "harassing conduct," and thus any speech covered by the statute fell outside the First Amendment, would empower the government to criminalize any speech it found distasteful. But protected speech does not lose its protection simply because a statute happens to define that speech as conduct.[208] Accordingly, if a state wishes to protect victims from stalking actions taken through a communicative medium, it needs a different vehicle than the criminal conduct exception.

III. CORRECTING *SHACKELFORD* AND *MAZUR*: HOW TO LIMIT A STALKING STATUTE'S REACH TO COVER ONLY THE SPEECH THAT A STATE CAN CONSTITUTIONALLY RESTRICT

How can courts uphold stalking convictions predicated upon the communicative actions of a defendant? Without the criminal conduct exception, North Carolina's felony stalking law becomes a content-based restriction, subject to strict scrutiny.[209] While the General Assembly could simply eliminate the part of the statute that prohibits expressive actions, such a solution would not adequately address the problem of stalking. Unwanted communications from a defendant to a victim are a classic part of stalking behavior.[210] In order to effectively protect victims from such actions, North Carolina needs a law that will prohibit these communications without violating the First Amendment. To that end, this Comment suggests the following "proposed provision":

207. Volokh, *Speech Integral to Criminal Conduct*, *supra* note 83, at 1042.

208. *See id.* at 1036–39.

209. *See* State v. Bishop, 368 N.C. 869, 874, 787 S.E.2d 814, 818 (2016) ("Content based speech regulations must satisfy strict scrutiny.").

210. Robert T. Muller, *In the Mind of a Stalker*, PSYCH. TODAY (June 22, 2013), https://www.psychologytoday.com/us/blog/talking-about-trauma/201306/in-the-mind-stalker [https://perma.cc/68RA-2ZBR].

> Two or more communications that the defendant intentionally directs to an individual when:
>
> (1) the defendant knows or has reason to know that the individual does not consent to receiving the communications;
>
> (2) the defendant directs the communications to reach the individual at a location where the individual possesses a reasonable expectation of privacy from such communications; and
>
> (3) the defendant knows or should know that the receipt of these communications would cause a reasonable person to suffer substantial emotional distress.[211]

As discussed below, the proposed provision walks the tightrope between free speech and citizen safety, and possesses several unique features derived from Supreme Court precedent that should enable the provision to pass even the strictest of judicial examinations.

Admittedly, critics might question this Comment's embrace of strict scrutiny as the best way to uphold a stalking statute. After all, the Supreme Court itself has noted that "it is [a] rare case in which we have held that a law survives strict scrutiny"[212] and precautioned against the test becoming "strict in theory but feeble in fact."[213] As a result, the doctrine is typically considered the "death knell" of a statute.[214] However, scholarship suggests that in recent years "strict scrutiny [has become] far from [an] inevitably deadly test."[215] Thirty percent of federal cases involving strict scrutiny have upheld the statute at issue,[216] and in "eleven individual and majority opinions," the Supreme Court itself has emphasized that statutes can survive strict scrutiny.[217] The proposed provision is such a statute. It balances a critical state purpose with the weighty concerns of the First Amendment to impose only minimal limitations on protected speech. Furthermore, strict scrutiny exists to oversee these types of balances and guide legislatures in deciding where to draw the line between

211. As in any criminal case, the jury, after receiving instruction on the law from a judge, will decide if the government has proven each element of the charged crime and pronounce a verdict. *See* United States v. Gaudin, 515 U.S. 506, 511–15 (1995). However, as demonstrated by the Supreme Court's decision in *Snyder*, should the jury's conviction violate the First Amendment, a judge can always set aside the verdict. *See supra* notes 58–62 and accompanying text. This Comment argues that if a defendant's harassing communication satisfies all three elements of the proposed provision, then that speech should not receive First Amendment protection.

212. Burson v. Freeman, 504 U.S. 191, 211 (1992).

213. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 314 (2013).

214. Gresham v. Rutledge, 198 F. Supp. 3d 965, 969 (E.D. Ark. 2016).

215. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

216. *Id.* at 812–13.

217. Ozan O. Varol, *Strict in Theory, but Accommodating in Fact*, 75 MO. L. REV. 1243, 1247 (2010).

prohibited and protected communications.[218] Rather than balking at strict scrutiny's withering standards, states should welcome the safeguards it provides and strive to enact a statute that survives its stringent rules.

Accordingly, this section explains how the proposed provision survives strict scrutiny. Strict scrutiny requires a state to prove that a statute's restriction on speech both advances a compelling state interest and is narrowly tailored to serve that interest.[219] While exacting, the standard is not impossible but rather presents a challenge that the proposed provision is well suited to meet.

A. *Prohibiting Stalking Communications Advances a Compelling State Interest*

The first prong of strict scrutiny requires the state prove that a restriction advances a compelling state interest.[220] When given the opportunity to decide whether protecting victims from stalking constituted a compelling state interest, *Shackelford* demurred the question and assumed arguendo that the first prong was met in order to reach the second prong: whether the statute was narrowly tailored (which it found the law failed).[221] But despite *Shackelford*'s silence, the asserted justification behind stalking laws likely rises to the level of a compelling interest. Both the standards set by the Supreme Court for determining a compelling interest and the times the Court has actually found a compelling interest overwhelmingly support the conclusion that preventing stalking is a compelling state interest.

While the Supreme Court has never provided an express definition of what constitutes a compelling interest,[222] it has provided several guidelines that lower courts can use when ascertaining whether a given government interest satisfies the high standard. For instance, the interest asserted must truthfully underlie the government's purpose for passing the statute and not be invented after the legislation's passage to survive judicial scrutiny.[223] Stalking laws satisfy

218. New York v. Ferber, 458 U.S. 747, 763–64 (1982) ("[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.").

219. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 442 (2015).

220. *Id.*

221. State v. Shackelford, 264 N.C. App. 542, 559, 825 S.E.2d 689, 700 (2019). *Shackelford* likely was justified in avoiding the question, due to the principle of constitutional avoidance. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("Considerations of propriety . . . [and tradition], demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.").

222. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731, 766 (2013) [hereinafter Volokh, *One-to-One Speech vs. One-to-Many Speech*].

223. Erznoznik v. City of Jacksonville, 422 U.S. 205, 205 (1975); Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 912 (1991).

this requirement due to the well-documented historical evidence that legislatures adopted stalking laws in direct response to the nation's growing awareness of stalking as a problem.[224]

In addition to possessing a genuine purpose, the statute must also "identify an 'actual problem' in need of solving."[225] Once again, a state should have no trouble meeting this standard. Numerous studies have demonstrated that stalking is a widespread problem, causing significant physical, mental, and economic harms to victims.[226]

Finally, a state must "demonstrate with clarity that [the statute's] 'purpose or interest is both constitutionally permissible and substantial.'"[227] Comparing previous cases where the Supreme Court found a compelling interest to the motivations underlying stalking laws satisfies this demonstration. A state's interest in preventing stalking includes the protection of its citizens, the preservation of tranquility in their homes, and the prevention of unwanted communications—interests which the Court has consistently recognized as important, if not compelling. First, the protection of persons and property is "a fundamental function of government" and constitutes a compelling interest.[228] Protecting citizens from physical harm lies at the core of a state's police powers and is well recognized by the Supreme Court as a legitimate exercise of state authority.[229] Second, protecting citizens from harassment, particularly in locations where citizens exercise a reasonable degree of privacy, has also been upheld as a compelling interest. In *Carey v. Brown*,[230] the Supreme Court noted that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[231] As a result, the Court has recognized this interest in cases involving targeted picketing outside of an individual's home[232] or in residential neighborhoods.[233]

Finally, the Supreme Court has recognized that protecting citizens from unwanted communications is a legitimate government interest, though perhaps not by itself a compelling one.[234] However, the interest is strong enough to

224. *See supra* text accompanying notes 9–12.

225. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (quoting United States v. Playboy Ent. Grp., 529 U.S. 803, 822 (2000)).

226. *See supra* text accompanying notes 21–28.

227. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 309 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).

228. Branzburg v. Hayes, 408 U.S. 665, 690 (1972).

229. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).

230. 447 U.S. 455 (1980).

231. *Id.* at 471.

232. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988).

233. *See Carey*, 447 U.S. at 470–71.

234. Hill v. Colorado, 530 U.S. 703, 716–18 (2000) (discussing the importance of the right to avoid unwanted communications but not assigning it a specific level of importance). Ultimately, the case was

justify regulations prohibiting repeated unwanted mailings [235] and the distribution of literature on matters of public concern to unwilling recipients.[236] Moreover, the strength of the government's interest in protecting citizens from unwanted communications increases as the ability of the recipient to avoid the speech decreases.[237] Therefore, when all of these interests are combined, the prohibition of stalking communications that victims have not consented to receive, put them in danger, and intrude into locations where the victim possesses a reasonable expectation of privacy, presents a compelling governmental interest, thus satisfying the first prong of strict scrutiny.

B. *Limiting the North Carolina Stalking Statute To Cover Speech That Receives Less First Amendment Protection Narrowly Tailors the Statute and Further Justifies Its Survival Under Strict Scrutiny*

With the first prong satisfied, the challenge remaining for legislatures to conquer is drafting a law that is so narrowly tailored that it covers only speech that the government has a compelling reason to prohibit. Far too often, it is this prong that proves fatal to otherwise promising statutes.[238] However, the proposed provision can survive this rigorous examination because each of the three elements represents an area where the state possesses an enhanced ability to restrict speech: (1) unwanted one-to-one communications, (2) communications that invade the listener's privacy, and (3) communications that inflict substantial emotional distress. While no single one of these elements is enough to uphold a content-based restriction, when combined, they create a narrow and discrete window of speech that captures the precise evil which stalking laws seek to remedy.

Before examining each of these elements individually, the overall type of communication that the proposed provision is designed to prohibit needs to be defined. From a psychological perspective, stalking occurs when an individual "repeated[ly]" and "persistent[ly]" engages in "unwelcome attempts to approach or communicate with the victim."[239] But this definition on its own fails to capture with sufficient legal specificity why stalking is so problematic. For instance, this definition covers a constituent who repeatedly mails vitriolic letters to an elected representative, expressing in colorful and energetic

decided under intermediate scrutiny, which requires a "significant" government interest. *See id.* at 725–26; Galloway, *supra* note 223, at 935.

235. Rowan v. Post Off. Dep't, 397 U.S. 728, 738 (1970).

236. *See Hill*, 530 U.S. at 728.

237. *Id.* at 716.

238. *See, e.g.*, State v. Bishop, 368 N.C. 869, 878–80, 787 S.E.2d 814, 820–21 (2016) (finding that protecting children was a compelling interest, but prohibiting social media posts that "intimidate[d] or torment[ed]" minors was not a narrowly tailored means to achieve that interest).

239. Paul E. Mullen, Michele Pathé, Rosemary Purcell & Geoffrey W. Stuart, *Study of Stalkers*, 156 AM. J. PSYCHIATRY 1244, 1245 (1999).

language the constituent's outrage at the representative's voting record. Quite likely, the representative would find these messages "unwelcome," particularly if they were "repeated" and "persistent."[240] But merely communicating one's displeasure to an elected official should not support a stalking conviction because such speech lies at the heart of the First Amendment.[241] Moreover, when assessing a stalking statute's constitutionality, courts and critics frequently look to whether the statute covers political speech—particularly communications between a constituent and a representative.[242] As a result, a narrowly tailored statute requires a precise definition that avoids punishing protected political activity.

But the proposed provision accomplishes that goal. To illustrate, consider a classic example of stalking communications. In *Dugan v. State*,[243] the defendant sent ten unsolicited letters to the victim at her workplace and her home, requesting sexual photos and describing in lewd language various sexual actions he wished to engage in with her.[244] Before writing these letters, the defendant had never spoken to the victim in person and only knew her through a mutual connection.[245] Moreover, the defendant became aware that the victim had no desire to receive the letters but continued to write them anyway.[246] When listing what type of communications stalking laws should be able to prohibit, the ones in *Dugan* likely sit near the top. If any type of speech exists from which states can protect their citizens, then it should include Dugan's letters—letters that repeatedly arrived at the victim's home and workplace containing obscene requests from a complete stranger. The remainder of this Comment will demonstrate how a state can prohibit these sorts of communications without endangering First Amendment freedoms.

But before examining how a state can restrict these communications, briefly note how *Dugan* corresponds to the proposed provision. In *Dugan*, the communication occurred solely between the defendant and the victim, the defendant had actual knowledge that the victim had no desire to receive the communications, the defendant directed the communications to a location where the victim possessed a reasonable expectation of privacy, and the communications were such that a reasonable person would suffer substantial

240. *See In re* Welfare of A.J.B., 929 N.W.2d 840, 853 (Minn. 2019) (postulating this exact scenario).

241. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010) (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)) (noting that political speech is "central to the meaning and purpose of the First Amendment").

242. *See In re* A.J.B., 929 N.W.2d at 853; People v. Relerford, 104 N.E.3d 341, 355–56 (Ill. 2017); Volokh, *Speech Integral to Criminal Conduct*, *supra* note 83, at 1041–42.

243. 451 P.3d 731 (Wyo. 2019).

244. *Id.* at 735.

245. *See id.*

246. *See id.*

emotional distress from their receipt. The proposed provision covers exactly the situation presented in *Dugan*. Indeed, this Comment will continue to refer to *Dugan* throughout this section to help illustrate the proposed provision's contours.

1. Unwanted Communications Receive Less First Amendment Protection

The primary principle guiding the proposed provision's first element is that states possess an enhanced ability to regulate communications when they are unwanted. Though broadly protective of free speech as a whole, the Supreme Court has demonstrated a willingness to restrict speech imposed upon an unwilling listener.[247] As stated in *Rowan v. United States Post Office Department*,[248] "no one has a right to press even 'good' ideas on an unwilling recipient."[249] Since its introduction in *Rowan*, the Court has employed this doctrine to protect citizens from targeted communications that they have no desire to receive. The highwater mark arrived in *Hill v. Colorado*,[250] when the Court upheld a statute prohibiting any person from coming within eight feet of a patient on their way to a healthcare facility to communicate with or distribute literature to the patient without consent.[251] Additional examples include prohibiting repeated picketing outside of a home in a residential neighborhood[252] and restricting unwanted mailings.[253]

However, *Rowan* and *Hill* come with an important qualifier, however: the unwanted speech must occur between one speaker and one listener. In the seminal article on the subject,[254] Professor Volokh explained that while one-to-many communications typically receive full First Amendment protection, unwanted one-to-one communications do not.[255] Modern American life is replete with restrictions on unwanted one-to-one communications, including restraining orders, do-not-call lists, and spam mail prohibitions.[256] As acknowledged by the Supreme Court, these restrictions do not pose the same dangers as restrictions on one-to-many speech.[257] Unwanted communications between a single speaker and a single recipient do not advance the goals of public discourse and the spread of information as much as speech between

247. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 741–43.

248. 397 U.S. 728 (1970).

249. *Id.* at 738.

250. 530 U.S. 703 (2000).

251. *Id.* at 725–27.

252. Frisby v. Schultz, 487 U.S. 474, 488 (1988).

253. *Rowan*, 397 U.S. at 738.

254. *See generally* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222 (analyzing the restrictions on one-to-one speech compared to one-to-many speech).

255. *See id.* at 740–44.

256. *See id.* at 740–41.

257. *See Rowan*, 397 U.S. at 736–38; Cohen v. California, 403 U.S. 15, 21–22 (1971).

willing participants. After all, in unwanted communications, the recipient by definition has no desire to receive the communication and thus is unlikely to listen to or be influenced by unwanted speech.[258] In contrast, the First Amendment requires rigorous protection of unwanted one-to-many speech, particularly when listeners find it offensive, because it empowers minority groups to submit unpopular views into the public consciousness.[259] Otherwise, the Supreme Court has warned, governments "[could] silence dissidents simply as a matter of personal predilections."[260] This would impose a chilling effect on speech and effectively close the marketplace of ideas.[261]

To avoid chilling protected speech, the proposed provision's first element requires that the defendant know that the recipient does not consent to receive the communications and that the defendant intentionally direct the communication to a single individual. By limiting the proposed provision's reach to a distinct area of lesser-protected speech, this restriction helps narrowly tailor the proposed provision. To illustrate, consider the defendant's speech in *Shackelford*. Addressed to the world at large and expressing the speaker's personal opinions, the social media posts in *Shackelford* comprised one-to-many, self-expressive speech—speech that lies at the heart of the First Amendment.[262] Accordingly, a properly limited stalking statute should not have applied to the defendant's posts. Looking to the proposed provision, its first element meets this criterion because it would not implicate the *Shackelford* defendant's posts. The defendant's posts were one-to-many speech shared on Google Plus for the entire world to read. They were not directed to an unwilling recipient because the victim in *Shackelford* needed to actively seek out the posts herself to discover their contents.[263] And though a victim might justifiably wish a defendant cease from posting statements about her online, the First Amendment, as currently understood, protects such speech.[264] Therefore, by not prohibiting social media posts disseminated to the world at large, the proposed provision complies with modern First Amendment jurisprudence and presents a far narrower scope than the current North Carolina stalking statute.

258. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 743.

259. *See Cohen*, 403 U.S. at 21.

260. *Id.*

261. *See* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

262. *See supra* notes 254–61 and accompanying text.

263. *See* State v. Shackelford, 264 N.C. App. 542, 556, 825 S.E.2d 689, 698 (2019). Note, however, that if the messages had been sent through Google Plus's instant-messaging tool, it would have been directed to the victim and thus would have met the first element of the proposed provision. This distinction is justified by the one-to-many versus one-to-one distinction. While social media posts are one-to-many speech, which the victim can only view if they send or accept a friend request to or from the defendant, instant messaging is one-to-one speech that the victim would be notified about without any action on their part. Because instant messaging, like an email, letter, or phone call, imposes one-to-one speech on an unwilling recipient, it falls within the confines of the proposed provision.

264. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 742–44.

In contrast, when the proposed provision is applied to classic stalking behavior, like the situation in *Dugan*, the narrowly crafted language provides a tight fit. In *Dugan*, the defendant directed his graphic letters exclusively to the victim—they were addressed to her and nobody else could read them without her sharing their contents. As such, they comprised one-to-one speech. Moreover, the defendant also knew that the victim did not wish to receive the letters, satisfying the other half of the proposed provision's first element. Thus, the first element of the proposed provision is still broad enough to prohibit *Dugan*'s criminal speech.

Comparing how the proposed provision's first element prohibits the harassing letters in *Dugan* but leaves untouched the social media posts in *Shackelford* demonstrates how narrowly tailored it is. In doing so, the first element strikes an appropriate and necessary balance between protecting victims from harm and respecting defendants' First Amendment freedoms.

But the first element by itself is not enough. Additional elements are needed to prevent the proposed provision from extending too far and entangling constitutionally protected speech. A well-meaning legislature cannot simply pass a law that bans all speech between one speaker and one listener when the speaker knows that the listener has no desire to hear it because such a provision would be overly broad. For instance, it would prohibit communications between a distressed constituent and their political representative—one of the most widely recognized forms of constitutionally protected speech.[265] These communications can occur between one speaker and one listener and the speaker often is quite aware that the representative has no desire to hear their speech. But prohibiting these communications would tread upon the core of protected First Amendment speech.[266] Moreover, stalking laws are not instituted to prohibit speech between a constituent and representative. Accordingly, the proposed provision's first element needs additional limitations to ensure that it does not encroach on such communications.

In addition, a blanket statute banning all unwanted, one-to-one speech could cover mailings between a commercial advertiser and a disgruntled citizen who communicated that they no longer wished to receive any advertisements. While a state can address this situation through a dedicated spam-mail statute,[267] it should not fall under the purview of a stalking statute. If a state's stalking statute is broad enough to cover a commercial advertisement, it would likely fail to survive the narrowly tailored prong of strict scrutiny, as well as potentially succumb to a well-litigated overbreadth challenge.[268]

265. *See supra* note 240 and accompanying text.

266. *See In re* Welfare of A.J.B., 929 N.W.2d 840, 853 (Minn. 2019).

267. *See* Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 738 (1970).

268. *See* People v. Relerford, 104 N.E.3d 341, 355–56 (Ill. 2017); *In re A.J.B.*, 929 N.W.2d at 855–56.

2. Communications That Intrude into a Location Where a Recipient Enjoys a Reasonable Expectation of Privacy Receive Less First Amendment Protection

The second element of the proposed provision helps avoid this danger by narrowing the North Carolina stalking statute's reach. Constitutional restrictions on one-to-one speech typically involve an element of imposition in addition to being unwanted. In other words, the speech violates the recipient's privacy.[269]

Take, for example, the seminal case of *Cohen v. California*.[270] Although the Supreme Court primarily expanded free speech protections, it still noted that the "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas."[271] Indeed, a common thread uniting cases involving unwanted communications is that most of the speech at issue intruded into the recipient's private space.[272] Traditionally, this space was the home—the epicenter of privacy.[273] In recent years, however, the definition of private space has become more flexible. The private space in *Hill*, for example, was one hundred feet around a health care facility.[274] As a whole, these cases demonstrate that when speech violates a recipient's privacy, the First Amendment provides less protection to that intrusive speech.[275]

To help implement this principle, the proposed provision adopts a term from Fourth Amendment jurisprudence: "reasonable expectation of privacy."[276] This phrase originated in *Katz v. United States* [277] in Justice Harlan's concurrence.[278] Now adopted by the Court,[279] the reasonable expectation of privacy requires: (1) the victim by their conduct to exhibit an actual (subjective) expectation of privacy and (2) that society (objectively) be prepared to recognize the individual's subjective expectation as reasonable.[280]

When applied properly, the reasonable expectation of privacy standard will help narrow the proposed provision's scope, while still ensuring that victims

269. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 748–49.

270. 403 U.S. 15 (1971).

271. *Id.* at 21.

272. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 748–49.

273. *See Cohen*, 403 U.S. at 21.

274. Hill v. Colorado, 530 U.S. 703, 708–09 (2000).

275. *See, e.g.*, *id.* at 716–18; Frisby v. Schultz, 487 U.S. 474, 488 (1988); Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 737–38 (1970); *see also* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 748–49 (noting cases where the Supreme Court has allowed restrictions on speech in part because it "intrud[ed] into the listener's private space").

276. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

277. Katz v. United States, 389 U.S. 347 (1967) (majority opinion).

278. *Id.* at 360 (Harlan, J., concurring); *see also* Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 914–16 (1997).

279. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2213–14 (2018).

280. United States v. Knotts, 460 U.S. 276, 281 (1983) (quoting *Katz*, 389 U.S. at 361).

receive adequate protection. After all, stalking communications primarily reach victims at locations where they possess a strong expectation of privacy, such as the home or workplace.[281] One of the most significant harms inflicted by stalking communications is the loss of the victim's sense of security, privacy, and safety in these locations.[282] In this regard, the *Katz* standard provides a relatively helpful analog since the Supreme Court has held that citizens possess a reasonable expectation of privacy in their own workplace or home.[283]

However, in implementing this cross-application, a court cannot just robotically import every Fourth Amendment conclusion into the First Amendment context. What may appear reasonable in one setting, may not be reasonable in another. For example, under the *Katz* standard, courts have found no reasonable expectation of privacy for passengers in a car[284] or items left on privately owned farmland.[285] While individuals in such situations may not possess a reasonable expectation of privacy from searches by law enforcement, they certainly should from harassment by stalkers.[286]

More narrow language than "reasonable expectation of privacy" could be used in the proposed provision—perhaps limiting its reach exclusively to communications delivered to a victim's cellphone, work, or home. But such limiting language would ultimately fail victims by not capturing the varied and creative ways stalkers may seek to reach them. For instance, the previous list neglects to mention vehicles, a space where victims possess a strong expectation of privacy from stalkers. Accordingly, rather than attempting to list every possible location where a stalker could harass a victim, the wiser course is simply to prohibit any unwanted one-to-one communications that intrude on spaces where victims possess a reasonable expectation of privacy. In doing so, the second element of the proposed provision provides an adequate safeguard

281. *See, e.g.*, State v. Shackelford, 264 N.C. App. 542, 546, 825 S.E.2d 689, 693 (2019); State v. Mazur, 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 4440576, at *2 (2018) (unpublished table decision) (showing defendant's stalking occurred right outside plaintiff's home).

282. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 755–56.

283. *See, e.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018); Kyllo v. United States, 533 U.S. 27, 40 (2001); United States v. Whitaker, 820 F.3d 849, 852–853 (7th Cir. 2016); United States v. Ziegler, 474 F.3d 1184, 1189–90 (9th Cir. 2007). *See generally* 3A CHARLES ALAN WRIGHT & SARAH N. WELLING, FED. PRAC. & PROC. CRIM. § 663 (4th ed. 2010) (examining various applications of the reasonable expectation of privacy in the context of the home and workplace).

284. Rakas v. Illinois, 439 U.S. 128, 148–49 (1978).

285. United States v. Ramapuram, 632 F.2d 1149, 1156 (4th Cir. 1980).

286. Moreover, unlike in the Fourth Amendment context where a court decides whether the government violated a defendant's reasonable expectation of privacy, in the proposed provision's application that question will be left to the jury. *See supra* note 211. A court will only intervene to determine that a reasonable expectation of privacy did not exist if it was overturning a jury verdict that violated the First Amendment. This process will reduce the impact of Fourth Amendment case law, as, in most cases, whether a "reasonable expectation of privacy" existed will depend on the jury's opinion, uninfluenced by past precedent.

against abusive applications of the law, while still remaining flexible enough to match the variety of situations that arise in the real world.

To illustrate this element's application, consider the cases of *Dugan* and *Mazur*. In *Dugan*, the defendant's harassing letters intruded on the most private of the victim's spaces, her home.[287] As such, the situation would clearly satisfy the reasonable expectation of privacy requirement included in the proposed provision's second element. In contrast, the speech at issue in *Mazur* never reached a location where the victim would expect to possess a reasonable expectation of privacy because it never left the defendants' yard.[288] Therefore, under the proposed provision, the decorations at issue would never have been included in evidence during the defendants' trial. As previously explained, the speech in *Mazur* was likely constitutionally protected, since it fell under the definition of symbolic conduct.[289] And, because the decorations comprised one-to-many speech, punishing the defendants for erecting them would have been constitutionally problematic.[290] To avoid this problem, the proposed provision's second element uses the Supreme Court's guidelines on restricting speech that invades privacy to remain narrowly tailored and avoid extending too far into protected speech.

3. Communications That Cause Substantial Emotional Distress Receive Less First Amendment Protection

With only the first two elements, the proposed provision still is not narrowly tailored enough. Consider the situation in *Rowan* where the government prohibited unwanted mail.[291] An advertiser who violated that statute and sent unwanted mail to a recipient's house would have violated the first two elements of the statute—directing a communication to a nonconsenting recipient and directing the communication to a location (the recipient's home) where the recipient possessed a reasonable expectation of privacy. Accordingly, an additional element is needed to ensure that the proposed provision is adequately limited to only stalking communications, which raises the question: What separates a merely overenthusiastic advertiser from a true stalker? The critical difference is that the stalker's communications inflict substantial emotional distress upon the victim.

According to the Restatement (Second) of Torts, substantial emotional distress occurs when a defendant's "extreme and outrageous conduct" causes

287. Dugan v. State, 451 P.3d 731, 735 (Wyo. 2019).

288. State v. Mazur, 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 4440576, at *3 (2018) (unpublished table decision) (showing defendant's stalking occurred right outside plaintiff's home).

289. *See supra* notes 175–81 and accompanying text.

290. *See supra* notes 254–64 and accompanying text.

291. Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 737–38 (1970).

"severe emotional distress to another."[292] Under this standard, a plaintiff's suffering must rise to the level of "such substantial . . . or enduring quality that no reasonable person in civilized society should be expected to endure it."[293] When compared to the symptoms of stalking behavior, the tort of substantial emotional distress presents a striking resemblance. As previously discussed, stalking results in post-traumatic stress disorder, insomnia, depression, and terror, as well as measurable economic effects such as loss of pay from missed days of work.[294] Furthermore, the fact that stalking statutes were passed following the public's awareness of the problem demonstrates that the distress caused by stalking is one society does not expect victims to endure.

Though the substantial emotional distress tort has fallen out of favor in recent years,[295] the traditional standard is still available and may even fit better in the stalking context than elsewhere. Following the Supreme Court's decision in *Snyder*, which reversed the defendants' convictions for intentionally inflicting emotional distress because the speech at issue involved a matter of public concern,[296] state courts began dismissing intentional infliction of emotional distress cases on First Amendment grounds.[297] But nowhere in *Snyder* did the Court strike down the traditional tort.[298] Rather, the Supreme Court left the tort intact for proper application. Thus, when speech discussing matters of nonpublic concern causes intentional emotional offense, its punishment does not offend the First Amendment.[299]

While scholars have opposed criminally punishing the infliction of substantial emotional distress,[300] this Comment does not advocate for transforming the tort itself into a crime. Rather, the existence of the tort, and the Supreme Court's decision to leave it intact, provides important context to the use of "substantial emotional distress" in the proposed provision. First, it reveals that speech inflicting substantial emotional distress is yet another category of speech that the government possesses an enhanced ability to restrict. While a state could not justify a stalking statute on emotional distress alone, when combined with the principles underlying the other two elements in the proposed provision, they work together to further minimize the First

292. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

293. Hughes v. Pair, 209 P.3d 963, 976 (Cal. 2009) (quoting Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 821 (Cal. 1993)).

294. *See supra* notes 23–28, 45 and accompanying text.

295. Gordon, *supra* note 62, at 1.

296. 562 U.S. 443, 458–59 (2011).

297. Gordon, *supra* note 62, at 1.

298. *See id.* at 3–4.

299. *Snyder*, 562 U.S. at 451–52 ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern . . . .").

300. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 788–89.

Amendment impact of the entire restriction. Second, the background of substantial emotional distress shows that the term refers to a discrete and well-defined type of speech, one whose impact closely mirrors the impact of stalking. When considered in conjunction with the other two elements, the substantial emotional distress element provides additional tailoring to the proposed provision, further narrowing its breadth.

C. *Putting It All Together*

Now that each element of the proposed provision has been detailed, its usefulness may be further explored by examining how it would apply to the facts in *Mazur* and *Shackelford*. As previously discussed, the communications at issue in both *Mazur* and *Shackelford* are constitutionally protected and thus should not come within the purview of a properly limited stalking statute.[301]

In *Mazur*, the State presented evidence of the yard decorations, including the large googly eyes, a frog statue with oversized eyes, and a pig statue with its butt in the air.[302] However, if the State had proceeded under the properly limited proposed provision, this evidence would never have been introduced and the Mazurs' constitutionally protected speech[303] would have been uninfringed. The first element of the proposed provision requires the defendant to direct a communication to a victim who the defendant knows or has reason to know does not consent to receiving the communication. The Mazurs may have satisfied this first element since they were intentionally trying to communicate with their neighbors by using offensive yard ornaments and decorations.[304] Due to the hostility between the two parties, the Mazurs certainly knew that the neighbors had not consented to receiving these insults. Additionally, the messages these symbols attempted to convey—racially charged insults about the neighbors' appearance and that the Mazurs were watching them[305]—could foreseeably cause substantial emotional distress to a reasonable person, satisfying the third element of the proposed provision. However, the Mazurs' communications fail to satisfy the second element: directing communications to reach an individual at a location where they possess a reasonable expectation of privacy. While the neighbors' home was, regrettably, directly across from the Mazurs, subjecting them to frequent viewings of the harassing decorations, the decorations themselves never left the confines of the Mazurs' yard.[306] Indeed, the neighbors' reasonable expectation

301. *See supra* Part II.
302. *See supra* notes 107–17 and accompanying text.
303. *See supra* notes 287–90 and accompanying text.
304. *See supra* notes 115–17 and accompanying text.
305. *See supra* notes 107–09, 115–17 and accompanying text.
306. *See supra* notes 107–09, 115–17 and accompanying text.

of privacy could not extend to someone else's private property.[307] Therefore, the proposed provision would protect the Mazurs' constitutional right to display symbolic decorations on their property, regardless of the message expressed.[308]

As for *Shackelford*, the proposed provision also ensures that the defendant's Google Plus posts expressing his feelings for Mary would remain protected. Like in *Mazur*, the *Shackelford* defendant would satisfy part of the first element since, after being contacted by the pastor, he possessed actual knowledge that Mary did not wish him to contact her and thus would not consent to receive any further communications from him.[309] Similarly, the *Shackelford* defendant also likely met the third element—inflicting substantial emotional distress—since a reasonable person would understandably be severely disturbed by having a total stranger expressing an obsession with them, discussing their future marriage, attempting to incite their jealousy, and mentioning their family.[310] But, while disturbing, since these social media posts simply expressed the defendant's personal feelings to the world at large, they comprise constitutionally protected speech.[311] They were not directed to Mary, as required by the first element. Mary had to actively seek out the posts to discover their content. Accordingly, the proposed provision does not cover these protected communications.

Furthermore, the second element also ensures that the proposed provision does not implicate the *Shackelford* defendant's posts by restricting the proposed provision's reach to speech that intrudes on spaces where a victim possesses a reasonable expectation of privacy. While Mary may have possessed a reasonable expectation of privacy to her own instant messaging inbox,[312] she could not reasonably have extended that same expectation to other individuals' social media feeds. In a way, Mr. Shackelford's social media posts were akin to a newspaper left on a bench in a public park. While Mary could go to the park, read the newspaper, and suffer substantial emotional distress from its contents, she could not successfully argue that its location constituted a private space. Similarly, Mr. Shackelford's personal Google Plus content stream, which was only viewable to those who chose to access it, could not function as a location

307. It is worth noting that the Supreme Court has upheld a ban on residential picketing, in part, due to concerns about the privacy of the home, as well as the issue of the residents being a captive audience. *See* Frisby v. Schultz, 487 U.S. 474, 486–87 (1988). However, unlike *Frisby*, the Mazurs were not some group of outsiders standing on a public street in front of someone's home. Rather, they were homeowners in their own right who erected yard decorations on their own private property, although living across the street from the victims. Thus, it is unclear how *Frisby*'s concerns would apply in this context.

308. *See supra* notes 254–64 and accompanying text.

309. *See supra* notes 128–32 and accompanying text.

310. *See supra* notes 140–41 and accompanying text.

311. *See supra* notes 171–74 and accompanying text.

312. *See supra* note 263.

where Mary had a reasonable expectation of privacy. Once again, the second element of the proposed provision ensures that a defendant's First Amendment rights are adequately protected.

IV. POTENTIAL PITFALLS: ADDRESSING SELECT CRITICISMS TO THE PROPOSED PROVISION

While the proposed provision would ensure that none of the protected speech in *Mazur* or *Shackelford* would incur punishment, it still lies open to a variety of criticisms. However, when properly construed, the proposed provision is narrowly tailored enough to survive the most likely objections.

A. *Criticism One: None of the Proffered Principles Alone Justify a Content-Based Restriction*

Starting with the theory underlying the proposed provisions, critics might note that none of the referenced doctrines alone are sufficient to uphold a content-based criminal conviction. For instance, the Supreme Court's decisions on unwanted one-to-one communications all involved content-neutral restrictions: *Rowan* upheld restrictions on all unwanted mailings, regardless of the message;[313] *Frisby v. Schultz*[314] upheld restrictions on residential picketing, regardless of the message;[315] and *Hill* upheld restrictions on unwanted personal communications near a health clinic, regardless of the message.[316] Because the restrictions in these cases were content-neutral, they were not subject to strict scrutiny.[317] Thus, a critic might contend that cross-applying these content-neutral principles to a content-based restriction misconstrues precedent.

But including a content-based distinction in a stalking statute is unavoidable. Determining whether a communication should fall under the label of "stalking" requires a court to examine the content of the message and the identity of the individual who sent the message—two evaluations that the Supreme Court has found create a content-based restriction.[318] The state cannot escape this requirement by simply banning repeated communications regardless of their content since such a broad law would prove overly inclusive and cover nonstalking communications like spam mail.[319] Accordingly, some sort of content-based restriction is necessary to ensure that the law is narrowly tailored to cover actual stalking behavior. This does not doom the proposed provision,

313. Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 738 (1970).

314. 487 U.S. 474 (1988).

315. *Id.* at 488.

316. Hill v. Colorado, 530 U.S. 703, 713–14 (2000).

317. *See* Galloway, *supra* note 223, at 910–11.

318. *See id.* at 910 (providing a list of the five types of content-based restrictions recognized by the Supreme Court).

319. *See supra* notes 267–68 and accompanying text.

however. Because the purposes behind stalking laws are so compelling,[320] legislatures can embrace content-based restrictions and the strict scrutiny that comes with it, provided that the proposed law is sufficiently narrow.

Because the Supreme Court has recognized that states have an enhanced ability to regulate unwanted one-to-one communications, limiting the statute to only unwanted one-to-one communications results in a narrowly tailored end product. Indeed, the same reasoning applies to the other principles—speech which invades one's privacy and speech that inflicts substantial emotional distress also receive less First Amendment protection. While none of these doctrines standing alone could justify a content-based restriction, together they represent the intersection of three distinct areas of lesser-protected speech. When combined, these doctrines outline a narrowly tailored area of speech, one that resembles the precise type of speech that stalking laws seek to prohibit.[321] Strict scrutiny exists to uphold narrowly tailored laws that advance a compelling interest and only minimally impact protected speech, even when those laws create a content-based restriction.[322] Because the proposed provision satisfies these criterion, it should survive strict scrutiny.

B. *Criticism Two: The Proposed Provision Is Overinclusive*

To determine whether a stalking law is overinclusive—in other words, whether it prohibits an unacceptably wide swathe of constitutionally protected speech—a court would likely begin with the classic test case: unwanted communications directed by a constituent to their political representative.[323] But each element of the proposed provision contains language that should prevent it from applying in such a case.

First, element one requires the constituent to know that the representative did not consent to the communication. Yet, in running for elected office, the representative places themself in a position to receive communications decrying their voting record and expressing opposing views on political matters.[324] Accordingly, constructive consent exists for constituents to send their representative communications containing the constituents' opinions on the representative's performance.[325] And while the representative can choose not to open the offensive letters, constructive consent to receiving such letters exists

320. *See supra* notes 220–37 and accompanying text.

321. *See supra* Section III.B.

322. *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982).

323. *See supra* notes 241–42 and accompanying text.

324. *See In re* Welfare of A.J.B., 929 N.W.2d 840, 853 (Minn. 2019); People v. Relerford, 104 N.E.3d 341, 355–56 (Ill. 2017); Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 744–45.

325. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 744–45.

until the moment a representative leaves office.[326] Therefore, the first element alone prevents the proposed provision from violating the classic test.

But element two provides even more protection. In order to violate element two, a constituent would have to direct the communications to a space where the representative possesses a reasonable expectation of privacy. As long as the constituent is using legal means to express their disagreement with a representative, they will not violate this rule. After all, representatives cannot reasonably expect to have a level of privacy that prevents receipt of most constituent communications; receiving communications from constituents lies at the core of an elected official's responsibilities. However, if the constituent's actions somehow go beyond the representative's public life, and intrude into truly personal areas, such as persistently calling the cellphone of the representative's teenage daughter, the representative and his daughter should receive the same protection as any other citizen who suffers from dangerous stalking behavior. Current First Amendment jurisprudence does not hold otherwise.[327]

Finally, element three imposes an additional burden on representatives accusing a constituent of sending stalking communications—the representative must prove that the communications were likely to cause substantial emotional harm. The test to determine "substantial emotional harm" asks whether the communications were so extreme that they exceeded all bounds that society usually tolerates.[328] As a society, the United States tends to extend a high degree of tolerance toward political speech, regardless of how distasteful it may be.[329] After all, the marketplace of ideas theory, which undergirds modern First Amendment jurisprudence,[330] requires society to tolerate all sides of a debate in order to arrive at the truth.[331] While modern political polarization may have

326. Of course, this does not mean that a political candidate must consent to receiving the most extreme forms of speech. The First Amendment does not require representatives submit to threats or harassing telephone calls to their home. *See id.* But, in the majority of situations, representatives are likely unable to decline receipt of directed one-to-one speech from political opponents. For example, politicians who have tried to block detractors on Twitter have not been successful. *Can Elected Officials Block Critics on Their Social Media Pages?*, FIRST AMEND. WATCH, https://firstamendmentwatch.org/deep-dive/can-elected-officials-block-critics-on-their-social-media-pages/ [https://perma.cc/E4NJ-M5DY] (last updated Mar. 24, 2020).

327. *See, e.g.*, Hott v. State, 400 N.E.2d 206, 207–08 (Ind. Ct. App. 1980) (upholding a defendant's conviction for inflicting vulgarity-filled late-night calls to the homes of the chief of police and the prosecutor).

328. *See* Hughes v. Pair, 209 P.3d 963, 976 (Cal. 2009).

329. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 744–45.

330. Hilary Schronce Blackwood, *Regulating Student Cyberbullying*, 40 RUTGERS L. REV. 153, 173–75 (2012–2013).

331. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas[,] . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground

damaged this ideal,[332] the Supreme Court has remained steadfast in extending First Amendment protections to even the most outrageous of expressions.[333] Hence, a prosecutor would struggle to prove that a defendant's expression of their political views to an elected official was outside the bounds of what society tolerates, particularly when such an argument contradicts the entire theory predicating modern First Amendment jurisprudence.

Now, certainly, an extreme situation could arise that warrants an exception to this principle.[334] If a constituent's actions expanded so far beyond mere political communication that they satisfied all three elements of the proposed provision, then they should fall under the stalking statute. And courts have upheld convictions on extreme constituent communications in the past.[335] In such a case, however, the constituent would have left the marketplace of ideas far behind and instead be engaging in truly dangerous stalking behavior. Limiting such speech does not pose a significant threat to democratic governance or the search for truth. But, generally, for most political communications, the third element would provide strong protection, especially when combined with the limits in the first two elements.

C. *Criticism Three: The Proposed Provision Is Underinclusive*

In contrast to the previous allegation, a critic might also suggest that the proposed provision is underinclusive because it does not cover three relevant situations that routinely occur in stalking cases: (1) the stalker sends food deliveries or other gifts to a victim's home, work, or other private location; (2) the stalker posts compromising photos of the victim on the internet; or (3) the stalker intercepts the victim at a public location where the victim could not maintain a reasonable expectation of privacy because, due to the public nature

upon which [people's] wishes safely can be carried out."); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881–82 (1963).

332. *See* EMILY EKINS, CATO INST., THE STATE OF FREE SPEECH AND TOLERANCE IN AMERICA: ATTITUDES ABOUT FREE SPEECH, CAMPUS SPEECH, RELIGIOUS LIBERTY, AND TOLERANCE OF POLITICAL EXPRESSION 25 (2017), https://www.cato.org/sites/cato.org/files/survey-reports/pdf/the-state-of-free-speech-and-tolerance.pdf [https://perma.cc/Y92K-8ZCC] (noting that a large percentage of citizens feel the need to censor themselves); Max Boot, *Conservatives Have a 'Cancel Culture' of Their Own*, WASH. POST (July 10, 2020, 10:24 AM), https://www.washingtonpost.com/opinions/2020/07/10/conservatives-have-cancel-culture-their-own/ [https://perma.cc/ECX5-38JV (dark archive)] (describing attempts by the left and the right to silence speech they do not agree with).

333. Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019) (reversing the U.S. Patent and Trademark Office's decision to deny a copyright to the brand "Fuct" because it "disfavors certain ideas"); Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (allowing a band to copyright a racial slur as their name because "[s]peech may not be banned on the ground that it expresses ideas that offend"); Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (protecting Westboro Baptist Church's ability to conduct a vitriolic protest at a U.S. service member's funeral).

334. *See supra* note 327 and accompanying text.

335. *Id.*

of the location, any individual might choose to go there.[336] However, each of these actions can be remedied through laws that do not implicate First Amendment rights and thus need not be addressed by the proposed provision.

In the first situation, gifts delivered without any other expressive meaning do not contain sufficient communicative aspects to transform them into protected speech. As the *Shackelford* court noted, the defendant's mere delivery of cupcakes to the victim did not comprise First Amendment activity as it included no communicative aspects.[337] Thus, a state can prohibit such deliveries without infringing upon free speech, and a proposed provision dedicated solely to prohibiting stalking communications need not address this situation.

As for the second situation, where a harasser posts compromising photos of a victim on the internet (commonly referred to as revenge porn), it too should not fall under an anti-stalking statute. While revenge porn perpetrators often possess similar motivations to stalking defendants, their actions are distinct. Therefore, even though the government likely can prohibit revenge porn without violating the First Amendment,[338] it should not attempt to do so under the same statute that prohibits stalking communications. After all, the broader a statute, the less likely it is to be narrowly tailored and the greater the likelihood it fails constitutional scrutiny. Accordingly, the wisest solution is to write two different laws, one for revenge porn and one for stalking communications, rather than creating a bloated, catch-all statute for both.

Finally, in the third situation, a state can prohibit a stalker from continually following a victim.[339] Once again, such a restriction concerns only physical activity and presents no First Amendment problems. Indeed, such a regulation applies regardless of whether the location is a public or private place and whether the defendant speaks to the victim or not. As a result, while such a restriction should be included in any adequate stalking statute, it does not belong in a provision specifically focused on communicative activities.

D. *Criticism Four: The Proposed Provision Includes One-to-Many Speech*

Another criticism is that the proposed provision covers one-to-many speech, while Volokh's theory limits itself to one-to-one speech.[340] After all, the provision only requires that the speech be directed to an individual, not that the speech be exclusively received by the individual. One could easily imagine a situation where a defendant directs communication to a victim, but in such a way that third parties can also witness the harassing communications. Indeed,

336. Mullen et al., *supra* note 239, at 1245–46.
337. State v. Shackelford, 264 N.C. App. 542, 561, 825 S.E.2d 689, 701 (2019).
338. *See supra* note 205 and accompanying text.
339. Guy, *supra* note 15, at 992–93.
340. *See* Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 222, at 738–39.

that is exactly what occurred in *Mazur*.[341] Thus, a critic could argue that by allowing the statute to potentially include one-to-many speech, the proposed provision sweeps too broadly and implicates speech involved in persuasion, debate, and the marketplace of ideas—speech that the First Amendment vigorously protects.[342]

This critique, however, suffers from two fatal flaws. First, requiring that the victim alone receive the communication could frustrate the purpose of stalking legislation. Under such a regime, a defendant could escape all consequences by simply ensuring that, in addition to the victim, some third party also witnessed the distressing communication. Second, because the statute only applies to communications that the defendant directs to a location where the recipient enjoys a reasonable expectation of privacy, such as home or work,[343] the likelihood of third parties also receiving that same communication is small. In situations where third parties are likely to witness the communication, such as the neighborhood street in *Mazur*, the victim, in contrast, is unlikely to possess a reasonable expectation of privacy. Indeed, the decorations in *Mazur* do not fall under the proposed provision's scope precisely because the victim would have possessed no reasonable expectation of privacy toward decorations placed on another's lawn.[344]

Furthermore, the problem of a third party being present also existed in cases where the Supreme Court upheld restrictions on unwanted speech. In *Rowan*, for instance, a third party visiting a victim could have easily viewed an unwanted mailing that was opened by the victim in the third party's presence, but the existence of such a hypothetical situation never entered the Court's analysis.[345] So too could third parties have accompanied a nonconsenting patient in *Hill* and thus have been denied access to information presented by a protestor within one hundred feet around a healthcare facility.[346] Again, the Court took no notice of such a scenario. Instead, both cases focused on to whom the communication was primarily directed. If courts reviewing the proposed provision adopt a similarly reasonable perspective, then they should have no difficulty in finding that the proposed provision is sufficiently limited.

That does not mean victims lack all protection from severely emotionally disturbing speech that is broadcast to the world. It just means that, in general, instances of hurtful one-to-many speech do not comprise classic stalking

341. State v. Mazur, 261 N.C. App. 538, 817 S.E.2d 919, 2018 WL 4440576, at *2–3 (2018) (unpublished table decision).

342. *See supra* notes 262–64 and accompanying text.

343. *See supra* Section III.B.2.

344. *See supra* Section III.B.2.

345. *See* Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 737–38 (1970).

346. *See* Hill v. Colorado, 530 U.S. 703, 708–09 (2000).

behavior. Take for instance *Hustler Magazine v. Falwell*,[347] where Falwell, a prominent evangelical pastor, sued a tabloid for defamation after it published a satirical article describing him having "a drunken incestuous rendezvous with his mother in an outhouse."[348] This article was an example of one-to-many speech that severely disturbed Falwell. However, the appropriate legal remedy was not a stalking law; it was defamation—albeit, an unavailable remedy in that particular case because of Falwell's status as a public figure.[349] But the fact remains that victims have ways to protect themselves from unwanted, emotionally disturbing one-to-many speech, it simply should not come from stalking statutes.

CONCLUSION

Today, courts and legislatures struggle to find the appropriate balance to strike when prohibiting stalking communications. On one side of the divide stand millions of victims who require the state's help to adequately protect themselves from genuine and serious harm. On the other side is the defendants' right to free speech, a right that lies at the heart of our nation's Constitution. While difficult, this dilemma need not prove impossible. By limiting stalking laws to cover only unwanted communications directed by a defendant to a victim that violate the victim's expectation of privacy and place the victim in substantial emotional distress, legislatures can enact a statute that complies with established First Amendment principles. Moreover, the precise contours created by these principles will allow courts to find that the statute survives strict scrutiny because its narrowly tailored restrictions advance a compelling state interest: protecting citizens from harassment and harm. Ultimately, by finding a way to achieve the state's critical objectives while still complying with existing precedential boundaries, the proposed provision invokes the Supreme Court's timeless admonishment that though "the Constitution protects against invasions of individual rights, it is not a suicide pact."[350]

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347. 485 U.S. 46 (1988).

348. *Id.* at 47–48.

349. *Id.* at 50.

350. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

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