

# Free Speech and Civil Harassment Orders

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*Every year, U.S. courts entertain hundreds of thousands of petitions for civil harassment orders, i.e., injunctions issued upon the request of any person against any other person in response to words or behavior deemed harassing. Definitions of “harassment” vary widely, but an often-used statutory formula defines it as “a course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose.” Civil harassment statutes can protect the safety, privacy, and autonomy of victims, but when courts declare that speech is harassing, or issue injunctions against future speech on grounds that it would harass, they may violate constitutional rules against vagueness, overbreadth, and prior restraint. Unfortunately, civil harassment litigation includes structural features that cause courts to systematically underestimate the free speech dangers.*

*This Article proposes methods to interpret and apply civil harassment statutes that will avoid most serious free speech problems. The key is to define harassment as unconsented contact or surveillance that endangers safety and privacy. The long-established tort and criminal law concepts of battery, assault, threats, trespass, and intrusion into seclusion lie at the core of this definition. Conduct resembling outrage (intentional infliction of emotional distress) lies at the periphery. Speech about the victim directed to other listeners (especially defamation and malicious prosecution) falls outside the definition altogether. By focusing on the nature of the contact between the parties, rather than on the content of one party's allegedly harassing speech, courts will be better able to apply civil harassment statutes in a constitutionally acceptable manner.*

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## TABLE OF CONTENTS

INTRODUCTION.....	782
I. CIVIL HARASSMENT ORDERS IN THEORY AND PRACTICE .....	787
A. THE EVOLUTION AND STRUCTURE OF CIVIL HARASSMENT STATUTES.....	790
B. CIVIL HARASSMENT LITIGATION IN PRACTICE .....	796
II. FIRST AMENDMENT PROBLEMS POSED BY CIVIL HARASSMENT ORDERS.....	808
A. VAGUENESS .....	810
B. OVERBREADTH.....	817
C. PRIOR RESTRAINT .....	824
III. METHODS TO AVOID SPEECH VIOLATIONS.....	826
A. THE CORE AND PERIPHERY OF CIVIL HARASSMENT .....	828
B. REPLACING CONTENT WITH CONTACTS .....	838
C. INJUNCTIONS AGAINST CONTACT, NOT EXPRESSION .....	842
D. A CASE STUDY.....	843
IV. RECOMMENDATIONS .....	845
A. IDEAS FOR COURTS .....	847
B. IDEAS FOR LEGISLATURES .....	852
CONCLUSION .....	854
STATUTORY APPENDIX .....	856

## INTRODUCTION

Every year, U.S. courts entertain hundreds of thousands of petitions for what I call civil harassment orders.<sup>1</sup> Local jurisdictions apply various labels to these edicts—no-contact orders, restraining orders, protection orders, stalking orders, peace orders, and more—but all are injunctions issued upon the request of any person against any other person, regardless of their relationship, in response to words or behavior deemed harassing. Definitions of “harassment” vary widely, but an often-used statutory formula is a “course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose.”<sup>2</sup> Twenty-three states have statutes authorizing courts to issue civil harassment orders,<sup>3</sup> and some courts issue similar

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1. See *infra* Part I.B.1.

2. S.D. CODIFIED LAWS § 22-19A-4 (2012); see CAL. CIV. PROC. CODE § 527.6 (West 2012). BLACK’S LAW DICTIONARY 784 (9th ed. 2009) adopts a similar definition: “Words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.”

3. See *infra* Statutory Appendix.

orders through their general equitable powers in the absence of statutory authority.<sup>4</sup> Despite the prevalence of these orders and despite the considerable scholarly literature surrounding other areas of law that use the term “harassment” (most notably sexual harassment under Title VII), no previous legal scholarship has carefully examined civil harassment statutes.<sup>5</sup>

Civil harassment orders are cousins to domestic violence restraining orders, but they differ in important respects. Any person may seek a civil harassment order against any other person—whether or not they have had an intimate relationship—in response to a wide range of behavior, typically unspecified, that need not involve violence or threatened violence and can consist of words alone. Through an unlimited range of potential defendants, a tremendous breadth of covered conduct, and an extensive scope of available remedies, civil harassment statutes cast an extremely wide net.

Without a doubt, the net captures much conduct that may properly be deemed unlawful and remedied by an injunction against further unconsented contact. For example, Clifford De Louis of suburban Atlanta waged a campaign of aggravation against his next-door neighbor Alice Sheppard. When Sheppard or her family were in their yard, De Louis intentionally blared loud music from speakers pointed in their direction and ran his leaf blower even when there were no leaves. He stood in his driveway staring menacingly at Sheppard for long periods of time, made lewd crotch-grabbing gestures, and yelled inappropriate sexualized comments to her children.<sup>6</sup> In South Dakota, William Liechti disliked neighbor children who drove noisy four-wheelers. On several occasions he chased one of the children home, and on another occasion he cornered several of them in a parking lot with his pickup truck, forcing them to escape through a wheat field. He habitually watched them through binoculars, even when they were not driving their four-wheelers. On a single day, he drove by the neighbors’ house thirty-five times, and at times he would make four or five phone calls a day to the parents.<sup>7</sup>

In these and many other cases,<sup>8</sup> no-contact orders can forestall violence and protect the safety, privacy, dignity, and autonomy of victims—just as domestic violence orders can.<sup>9</sup> In most circumstances in which they are granted, the orders pose no constitutional problems. But

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4. See *infra* note 40 and accompanying text.

5. See *infra* notes 21–23 and accompanying text.

6. See *De Louis v. Sheppard*, 627 S.E.2d 846, 847 (Ga. Ct. App. 2006).

7. See *Schaefer ex rel. S.S. v. Liechti*, 711 N.W.2d 257, 259–60 (S.D. 2006).

8. For other examples of neighbors bedeviling each other, see Robert F. Blomquist, *Extreme American Neighborhood Law*, 45 GONZ. L. REV. 335 (2009).

9. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 119–25 (2005) (identifying benefits); see Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY L. 376 (2010) (compiling studies).

like any tool, they may be misused or overused. The risk of misuse has First Amendment ramifications when courts declare that speech itself is harassing, or issue injunctions against future speech on grounds that it would harass. For example:

- After an acrimonious divorce, an ex-wife called local police, prosecutors, and emergency shelters to express fears about her ex-husband (a police officer). She also wrote a letter to the editor of the local newspaper on the topic of domestic violence, which the ex-husband believed contained thinly veiled references to him. He responded with a civil harassment petition, claiming that the ex-wife's statements about him were false and had caused him substantial emotional distress. The trial court found harassment and enjoined the ex-wife from "knowingly and willfully making invalid and unsubstantiated allegations or complaints [about the ex-husband] to third parties."<sup>10</sup>
- A small-town mayor alleged harassment by a local resident because at a city council meeting the resident had been "asking questions, requesting copies of ordinances, telling council members they should resign so more qualified people could serve, making a racially insensitive remark, and staring at [the mayor] with 'little beady eyes.'"<sup>11</sup> The trial court ordered the resident to stay 100 yards away from the mayor, which prevented him from attending public meetings or conducting business in City Hall.<sup>12</sup>
- A woman posted material on a website decrying "all the bull[y]ing and harassing that goes on in our school system." She accused a middle school girl of being a bully, saying: "Wasn't this the student that harassed the Cantrell child? And we wonder why some kids hate to go to school." The girl's mother filed a petition on behalf of herself and her daughter. The trial court found harassment and ordered the writer "to cease entering comments on her website regarding [the girl] or other members of plaintiff's family."<sup>13</sup>

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10. *In re Marriage of Suggs*, 93 P.3d 161, 164 (Wash. 2004). Disclosure: I was counsel for the ex-wife. *See Evans v. Evans*, 76 Cal. Rptr. 3d 859, 863 (Cal. Ct. App. 2008) (deputy sheriff obtains order against ex-wife forbidding "false and defamatory" statements); *Thomas v. Quintero*, 24 Cal. Rptr. 3d 619, 624 (Cal. Ct. App. 2005) (landlord obtains order against activists who distributed "false and misleading" handbills mentioning landlord); *Bovi v. Parask*, No. C5-98-1616, 1999 WL 289245, at \*1 (Minn. Ct. App. May 11, 1999) (ex-wife obtains order forbidding ex-husband's new wife from making "false or misleading" reports about ex-wife to any person or law enforcement agency and from contacting ex-wife's employer or any potential employer).

11. *Gullickson v. Kline*, 678 N.W.2d 138, 139 (N.D. 2004).

12. *See id.* at 143; *see also Vill. of Tigerton v. Minniecheske*, 565 N.W.2d 586, 588 (Wis. Ct. App. 1997) (affirming a civil harassment order barring lawsuits against a municipality and its officers).

13. *Ramsey v. Harman*, 661 S.E.2d 924, 925 (N.C. Ct. App. 2008); *see Devereaux v. Rodriguez*, No. G038462, 2008 WL 2756476, at \*5 (Cal. Ct. App. July 16, 2008) ("The [trial] court [restraining order forbade] posting or publishing personal information about [petitioner] on the Internet or to any third party."); *Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651, at \*5 (Minn. Ct. App. Dec. 12, 2011) ("The [restraining order] . . . prohibits . . . [a]ny email or other electronic message contact with third-parties that contains any material concerning [petitioner] that affects or intends to adversely affect [her] safety, security, or privacy"); *Massey v. Wakely*, 2002 WL 378371, at \*1 (Wis. App. Mar. 12, 2002) (neighbor obtains order forbidding neighbor from using his likeness or publishing

- A political activist was gathering signatures to trigger a recall of a mayor. A city council member opposed the recall, publicly referring to the activist as “a bigot, fascist, homophobe, and Nazi.” The trial court issued an injunction against the council member, reasoning that his words “could be found annoying by a reasonable person.”<sup>14</sup>

Civil harassment law exhibits two traits that should trigger careful constitutional review. First, *Madsen v. Women’s Health Center* explained that courts should apply a “somewhat more stringent application of general First Amendment principles” to speech-restrictive injunctions than to speech-restrictive statutes.<sup>15</sup> Second, statutes with the potential to reach huge swaths of daily life often provoke judicial suspicion. For example, *United States v. Alvarez* invalidated a statute prohibiting individuals from falsely claiming to have earned military honors, in part because it applied to statements “made at any time, in any place, to any person.”<sup>16</sup> For the Supreme Court, “the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment.”<sup>17</sup> Despite the need for careful scrutiny, civil harassment decisions in practice often disregard or undervalue their impact on constitutional rights.

Many structural factors of civil harassment litigation lead to higher-than-usual risk of constitutional error. As with family law,<sup>18</sup> civil harassment law has a way of encouraging some judges to dispense free-wheeling, Solomonic justice according to their visions of proper behavior and the best interests of the parties. Judges’ legal instincts are not helped by the accelerated and abbreviated procedures required by the statutes. The parties are rarely represented by counsel, and ex parte orders are encouraged, which means courts may not hear the necessary facts and legal arguments.<sup>19</sup> Very few civil harassment cases lead to appeals, let alone appeals with published opinions.<sup>20</sup> As a result, civil harassment law tends to operate with a shortage of two things we ordinarily rely upon to ensure accurate decisionmaking by trial courts: the adversary system and appellate review.

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information concerning him).

14. *LaFaro v. Cahill*, 56 P.3d 56, 58 (Ariz. Ct. App. 2002); see *Svedberg v. Stamness*, 525 N.W.2d 678, 680 (N.D. 1994) (after a teenager calls a classmate “Dumbo” and builds snow figures making fun of his big ears, court issues no-contact order including ban on “any other conduct which injures the Petitioner, either physically or emotionally”).

15. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). See *infra* note 309 and accompanying text.

16. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

17. *Id.*; see *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (holding a third-party child visitation statute unconstitutional as “breathtakingly broad”).

18. See generally Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

19. See *infra* Part I.B.2.a.

20. See *infra* Part I.B.2.b.

These structural features also explain why, despite its extensive reach, civil harassment law has been virtually invisible to the bar, bench, and academia. The statutes are encountered by only a small segment of the private bar, none of the federal judiciary, and at most a sliver of the state appellate judiciary. No previous law review articles have focused exclusively on civil harassment statutes,<sup>21</sup> even though a thriving literature exists around domestic violence<sup>22</sup> and sexual harassment.<sup>23</sup> The current inattention echoes an observation made fifty years ago by the drafters of the Model Penal Code, when proposing a misdemeanor they called “Harassment”:

[This area] had received little systematic consideration by legislators, judges, or scholars. The penalties involved were generally minor, the defendants usually came from the lower social and economic levels, and appeals were consequently infrequent. . . . [Nonetheless,] [o]ffenses in this category affect a large number of defendants, involve a great proportion of public activity, and powerfully influence the view of public justice held by millions of people.<sup>24</sup>

Consequently, one goal of this Article is to help trial judges identify important issues that unschooled and unrepresented parties may not be

21. My research unearthed only two sources that devote more than a few paragraphs to civil harassment statutes. One is an acerbic essay by a Missouri trial judge, some of which is devoted to that state’s civil harassment statute. See David H. Dunlap, *Trends in Adult Abuse and Child Protection*, 66 UMKC L. REV. 1 (1997). The portion of the article dealing with civil harassment laments that the statute encourages petitions from “chronic malcontents, artful blame-shifters, professional victims, nonclinical paranoids and knavish opportunists . . . begging succor from the unavoidable woes of everyday life.” *Id.* at 4. A later article from the Journal of the Missouri Bar observed that Judge Dunlap expressed “a cynical view” (one might have said “a misanthropic view”) of civil harassment. Damon Phillips, *Civil Protection Orders: Issues in Obtainment, Enforcement and Effectiveness*, 61 J. Mo. B. 29, 38 (2005).

The other source is a valuable but unpublished empirical study of a year’s worth of civil harassment petitions in a single court of limited jurisdiction, prepared by that court’s staff attorney as a graduation requirement for the Court Executive Development Program of the National Center for State Courts. JOE TOMMASINO, PROTECTION ORDER OR CHAOS? THE TPO PROCESSING EXPERIENCE IN THE LAS VEGAS JUSTICE COURT AND ITS LARGER IMPLICATIONS FOR NEVADA LAW (May 2010), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=295>.

Beyond Judge Dunlap’s article and the Las Vegas study, civil harassment statutes receive only brief mentions within articles chiefly devoted to other statutes. See, e.g., Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 TEX. J. C.L. & C.R. 53, 75 (2009); Devon M. Largio, *Refining the Meaning and Application of “Dating Relationship” Language in Domestic Violence Statutes*, 60 VAND. L. REV. 939, 955 (2007).

22. See Therese A. Clarke, *Why Won’t Someone Help Me?: The Unspeakable Epidemic of Domestic Violence: An Annotated Bibliography*, 23 N. ILL. U. L. REV. 529, 529 (2003) (“As I began examining the literature in this area I realized that I could not cover it all. There is just too much.”).

23. See, e.g., CATHARINE A. MACKINNON & REVA B. SIEGEL, DIRECTIONS IN SEXUAL HARASSMENT LAW (2004); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001). Periodic updates can be found in the *Annotated Legal Bibliography on Gender*, published in most issues of the CARDOZO JOURNAL OF LAW & GENDER.

24. MODEL PENAL CODE § 250 introductory note (1980). On the importance of lower-profile legal proceedings, see Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325–27 (2012).

raising. Another is to invite greater scholarly attention to an understudied area.

This Article is organized as follows: Part I describes civil harassment statutes in theory and in practice. After exploring their history and language, this Part examines the structural and procedural features that lead courts to systematically underestimate the constitutional risks of civil harassment litigation.

Part II identifies the risks that civil harassment statutes pose to freedom of speech, using the familiar headings of vagueness, overbreadth, and prior restraint. Constitutional violations are sure to arise if statutes are interpreted and applied—as they often are—to allow injunctions (against any activity) in response to (unspecified) behavior that makes others feel (generally) bad.

Part III proposes ways to interpret and apply the statutes to avoid these problems. The key is a definition of harassment built around *unconsented contact or surveillance* that endangers *safety and privacy*. As used here, “contact” takes the meaning it has in the typical no-contact order: in-person interaction, or the direction of messages to the petitioner through other media including but not limited to phone, mail, messenger, or electronic communications. To determine which contacts endanger safety and privacy, courts may analogize to the long-established tort and criminal law concepts of battery, assault, threats, trespass, and intrusion into seclusion. This constellation of misconduct lies at the core of civil harassment. Conduct resembling outrage (intentional infliction of emotional distress) lies at its periphery. Speech directed to listeners other than the victim (especially alleged defamation or malicious prosecution) falls outside the definition altogether. This focus on unwanted contact—rather than on the content of allegedly harassing speech—allows courts to apply civil harassment statutes in a better-defined, content neutral manner and to avoid content based injunctions that amount to unconstitutional prior restraints.

Part IV offers concrete recommendations for judges applying existing statutes and for legislators considering new enactments or amendments.

## I. CIVIL HARASSMENT ORDERS IN THEORY AND PRACTICE

Statutes containing the word “harassment” address a bewildering range of activity.<sup>25</sup> This Article focuses on what I call civil harassment statutes: those allowing any person to obtain an injunction against any other person, regardless of their relationship, in response to behavior that causes feelings usually designated as harassment, annoyance, alarm, or emotional distress. The Statutory Appendix lists the twenty-three statutes fitting this description.

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25. See *infra* Part II.A.

This focus necessarily omits many statutes and legal doctrines that use the word “harassment” or similar terms that exist side-by-side with civil harassment statutes. Two of these are worth distinguishing at the outset because they are so well known.

(1) *Domestic Violence*. Most domestic violence statutes authorize no-contact orders between people within a statutorily defined relationship (such as marital, familial, cohabiting, or dating relationships). These statutes are distinguishable for two main reasons: First, civil harassment statutes and domestic violence statutes are designed to be complementary but non-overlapping statutory regimes. Most civil harassment statutes contain language ensuring that they do not apply within relationships covered by domestic violence statutes, channeling those matters into family court.<sup>26</sup> Second, aggression can be both more likely and more dangerous within an intimate relationship. The dynamics of the relationship may increase batterers’ reliance on violence and intimidation as means of domination, while the fact of an intertwined life and its disparities of power may make it difficult for victims to extricate themselves from the situation.<sup>27</sup> By contrast, civil harassment orders may be filed between any two people, whether or not their relationship is especially prone to violence or resistant to self-help.

(2) *Discriminatory Harassment*. Many discrimination laws forbid unkind conduct selectively directed at members of disfavored groups. For example, some criminal statutes apply the label “harassment” to hate crime laws that penalize defendants who select a victim based on group membership.<sup>28</sup> The most common use of the term “harassment” in discrimination law relates to employment. Title VII jurisprudence has adopted Catharine MacKinnon’s insight that some crassly sexualized behavior directed at women in the workplace should be viewed as sex discrimination.<sup>29</sup> This theory came to be known as “sexual harassment,” a term that covers quid pro quo demands for sexual services and the creation of a hostile work environment.<sup>30</sup> The concept of discriminatory harassment has been applied to other bases of discrimination (such as race<sup>31</sup> or failure to comply with gender norms<sup>32</sup>) and to other factual

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26. See, e.g., WASH. REV. CODE § 10.14.130 (2012).

27. See generally Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552 (2007).

28. See, e.g., N.Y. PENAL LAW § 240.31 (McKinney 2008) (“Aggravated Harassment in the First Degree”); WASH. REV. CODE § 9A.36.080 (“Malicious Harassment”); OKLA. STAT. tit. 21, § 850 (2012) (“Malicious Intimidation or Harassment”).

29. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–65 (1986); see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2076–87 (2003).

30. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–54 (1998).

31. See, e.g., *Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 795–96 (8th Cir. 2004).

32. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (discrimination against masculine



settings (such as schools<sup>33</sup>). Some authors have suggested extending the concept to online speech by way of an analogy to discriminatory harassment in places of public accommodation.<sup>34</sup>

Although both doctrines are legal responses to uncivil behavior, discriminatory harassment is a different animal than civil harassment. First, the goal of discrimination law is full societal participation by members of excluded groups. Discrimination statutes are not a “general civility code,”<sup>35</sup> but civil harassment statutes basically are.<sup>36</sup> In short, discriminatory harassment law asks *why* and *to whom* the defendant acts badly, questions that are largely irrelevant for civil harassment. Second, many discriminatory harassment laws apply in specific settings, like workplaces and schools, where captive audiences and hierarchical power dynamics lend themselves to discrimination and abuse of authority.<sup>37</sup> Civil harassment statutes apply across factual settings without regard to these features. Third, the predominant remedies for discriminatory harassment are criminal punishment and money damages, not injunctions. Some discrimination suits may seek injunctions against systemic discrimination, but this relief does not take the form of an individualized no-contact order. By contrast, no-contact orders are the primary (and often sole) remedy found in civil harassment statutes.

Although discriminatory harassment is distinguishable from civil harassment, there is one important area of overlap: overzealous application of either doctrine may abridge freedom of speech. As such, this Article hopes to spark a dialogue similar to the debate that began in the early 1990s when scholars began to explore previously unacknowledged free speech implications of discriminatory harassment law.<sup>38</sup>

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woman); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872 (9th Cir. 2001) (against feminine man).

33. See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653 (1999) (failure to remedy student-on-student sexual harassment violates Title IX); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73 (1992) (failure to remedy teacher-on-student sexual harassment violates Title IX); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003) (failure to remedy student-on-student sexual orientation harassment violates Equal Protection).

34. See generally Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012).

35. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“Title VII [is not] a general civility code.”); see *Davis*, 526 U.S. at 684 (Kennedy, J., dissenting) (same for Title IX); *Lopez v. Target Corp.*, 676 F.3d 1230, 1235 (11th Cir. 2012) (same for 42 U.S.C. § 1981); *Boneck v. City of New Berlin*, 22 F. App'x 629, 631 (7th Cir. 2001) (same for Americans with Disabilities Act).

36. This means that a supervisor who treats all employees terribly without regard to their group membership (the “equal opportunity harasser”) is not liable for discriminatory harassment but may be liable for civil harassment. See *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) (finding no liability for discriminatory harassment); *Williams v. Aona*, 210 P.3d 501, 515 (Haw. 2009) (finding possible liability for civil harassment).

37. See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (school); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 870 (Cal. 1999) (Werdegar, J., concurring) (workplace).

38. See Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious*

## A. THE EVOLUTION AND STRUCTURE OF CIVIL HARASSMENT STATUTES

In medieval England, a person who made threats could be ordered to post a “surety of the peace,” a sum to be held in escrow and subject to forfeiture in the event of future violence. In the United States, the concept remained on the books into the twentieth century, but it was seldom used and is now entirely obsolete.<sup>39</sup> Until the late 1970s, the primary legal responses to what we today call harassment were criminal punishment and tort damages.<sup>40</sup> The advent of domestic violence restraining orders—which combined elements of pre-existing criminal and tort laws with the enforceability of an injunction—gave rise to modern civil harassment statutes.

### 1. Criminal Harassment Statutes

Many states have criminal statutes forbidding activities called “harassment.” This Article does not address the propriety or constitutionality of criminal harassment laws.<sup>41</sup> However, opinions interpreting criminal harassment statutes can be persuasive authority for civil harassment statutes containing similar language. In addition, some civil harassment statutes incorporate by reference the definitions found in criminal harassment laws.<sup>42</sup>

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*Employee*, 19 U. ARK. LITTLE ROCK L. REV. 577, 631 n.355 (1997) (collecting authorities). See generally Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Nadine Strossen, *Regulating Workplace Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

39. See Kathleen G. McAnaney et al., *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 868–75 (1993).

40. Some state courts have granted analogous injunctions as remedies in cases alleging other civil claims. See, e.g., *Lassalle v. Daniels*, 673 So. 2d 704, 710 (La. Ct. App. 1996). New York’s experience shows how this approach can be unpredictable. In an influential opinion, a federal court applying New York law issued a no-contact order against an intrusive paparazzo who had been stalking Jacqueline Kennedy Onassis, reasoning that the state’s criminal harassment law implied a private cause of action. *Galella v. Onassis*, 487 F.2d 986, 998 (2d Cir. 1973). Later state cases repudiated that interpretation of the statute. See *New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 486 (S.D.N.Y. 2006) (collecting cases). Nonetheless, New York courts occasionally rely on common law theories like outrage or invasion of privacy to issue injunctions on harassment-type facts. See, e.g., *Flamm v. Van Nierop*, 291 N.Y.S.2d 189, 190–91 (N.Y. Sup. Ct. 1999); *Bingham v. Struve*, 591 N.Y.S.2d 156, 157 (N.Y. App. Div. 1992). These injunctions have included orders against demonstrators. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997); *Metro. Opera Ass’n, Inc. v. Local 100*, 239 F.3d 172, 173–75 (2d Cir. 2001).

41. Some of these statutes are discussed in Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyber-Stalking”* (2012) [hereinafter Volokh, *One-to-One*], available at <http://www.volokh.com/2012/05/30/one-to-one-speech-vs-one-to-many-speech-criminal-harassment-laws-and-cyber-stalking>.

42. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-1503(a)(6) (LexisNexis 2012) (incorporating MD. CODE ANN., CRIM. LAW § 3-803 (LexisNexis 2012)); MICH. COMP. LAWS § 600.2950a (2012) (incorporating MICH. COMP. LAWS § 750.411h (1998)).

The words “harass” and “harassment” appear in some older statutes, but for our purposes we may begin with the American Law Institute’s publication of the Model Penal Code in 1961. The American Law Institute proposed that states enact a misdemeanor titled “Harassment” to cover a hodgepodge of misconduct:

A person commits a petty misdemeanor if, with purpose to harass another, he:

- (1) makes a telephone call without purpose of legitimate communication; or
- (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or
- (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or
- (4) subjects another to an offensive touching; or
- (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.<sup>43</sup>

Most states now have statutes criminalizing one or more of the five types of harassment described in the Model Penal Code.

The drafters conceptualized harassment as a privatized form of disorderly conduct: “The instant section applies to harassment of another individual, while the crime of disorderly conduct covers the public-nuisance aspects of comparable behavior.”<sup>44</sup> The residual provision in subsection (5)—“any other course of alarming [but unspecified] conduct”—was proposed “as a hedge against the ingenuity of human beings in finding ways to bedevil their fellows.”<sup>45</sup> It was worded “in a designedly general way” to further “its purpose to proscribe forms of harassment that cannot be anticipated and precisely stated in advance.”<sup>46</sup> Examples of conduct intended to be proscribed by the section were “burning a cross on the lawn of a black family,” “leaving animal carcasses on a neighbor’s stoop,” and “shining a spotlight into a parked car in order to embarrass or frighten the occupants.”<sup>47</sup>

Although the drafters expressed no concern over the meaning of “harass” in the phrase “with purpose to harass another,” they

43. MODEL PENAL CODE § 250.4 (1980).

44. *Id.* § 250.4 cmt. 1. The Model Penal Code defines disorderly conduct as follows:

A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening, or in violent or tumultuous behavior; or (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

*Id.* § 250.2(1).

45. *Id.* § 250.4 cmt. 5

46. *Id.*

47. *Id.*

acknowledged that other terms—such as “no legitimate purpose”—invite “judicial exploration” because they are “hardly self-executing” and might even be found unconstitutionally vague.<sup>48</sup> Despite this imprecision, the drafters concluded,

[I]t is probably impossible to do any better. There is no realistic prospect of anticipating in a series of more specific provisions all the ways that persons may devise to harass others, and without a residual offense of this sort, many illegitimate and plainly reprehensible forms of harassment would not be covered.<sup>49</sup>

This value judgment—that it is better to enact a broader, vaguer law than to allow unforeseen bad actions to go unremedied—reappears in modern civil harassment statutes.

## 2. *Domestic Violence Restraining Order Statutes*

If criminal harassment is a substantive precursor to civil harassment statutes, domestic violence injunctions are their procedural ancestors. Domestic violence statutes allow a partner in an intimate relationship to obtain, upon proof of violence or threats, an injunction against further contact from the abusive partner.<sup>50</sup> The procedural innovation of the domestic violence injunction arose from the emerging understanding in the 1970s and 1980s of domestic violence as an escalating and ongoing process of subordination, rather than as a discrete criminal event. By intervening civilly at an early stage of the process, escalation might be prevented altogether if the aggressor obeys the injunction. If it is not obeyed, violations are more easily punished because they do not face the proof problems of an ordinary criminal prosecution. Just as it was easier to prosecute Al Capone for tax evasion than for murder, it can be easier to prosecute an aggressor for violating a no-contact order than for a crime of violence. A paper trail proves that the injunction was issued and served, and the fact of post-injunction contact will involve fewer and simpler credibility questions. The result is a short and relatively easy trial, made even easier because the propriety of the underlying order cannot be questioned due to the collateral bar rule and because a jury is likely to treat the fact of an order as character evidence against the accused.

Obtaining the no-contact order at the front end is also easier than obtaining a criminal conviction. The most important difference is the burden of proof, which requires only a preponderance of the evidence instead of proof beyond reasonable doubt. Next, victims may initiate their own actions, avoiding the potential bottleneck of an unsympathetic or overworked prosecutor. The domestic violence injunction statutes of all

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48. *Id.*

49. *Id.* § 250.4 cmt. 6.

50. See generally Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31 (2009).

states have procedures to facilitate self-help and access to justice, including waivers of court fees, pre-printed petition forms, rapidly scheduled hearings, regularized temporary restraining order provisions, and so on. Finally, the injunction decision is made by a judge rather than a jury. This matters not because juries will necessarily issue fewer or different orders than would a judge (an unknowable empirical question), but because empanelling a jury is slow and expensive. Judges sitting without juries can resolve cases more quickly, allowing more petitions to be processed.

Pennsylvania was the first state to adopt a modern domestic violence injunction statute in 1976, and all other states quickly followed suit.<sup>51</sup> Criminal law<sup>52</sup> and tort law<sup>53</sup> remain important aspects of the legal response to domestic violence, but the judicially issued no-contact order is “the single most commonly used legal remedy for domestic violence.”<sup>54</sup>

### 3. *Stalking Statutes*

A concern arose in the early 1980s that then-existing laws would not reach dangerously obsessed people, such as the deranged fan of a celebrity or the former (or would-be) intimate who insists on continued contact with a victim in hopes of renewing (or initiating) the relationship, exacting revenge, or exerting continued control.<sup>55</sup> Six murders in the late 1980s—television actress Rebecca Shaeffer was murdered by an obsessed fan, and five women in Orange County were murdered by their former spouses or boyfriends—led California to enact the first stalking law in 1990, which allowed criminal prosecution of anyone who “willfully, maliciously, and repeatedly follows . . . another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety.”<sup>56</sup>

The California legislature chose to make stalking a crime, a decision that reflected two concerns. First, truly obsessional people would not be

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51. Janice L. Grau, Comment, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703, 704–05 (1982). The National Network to End Domestic Violence has an excellent online resource to locate domestic violence laws. See WOMENSLAW.ORG, LEGAL STATUTES, [http://www.womenslaw.org/simple.php?sitemap\\_id=9](http://www.womenslaw.org/simple.php?sitemap_id=9) (last visited Mar. 15, 2013).

52. For variations on traditional criminal prosecution in domestic violence cases, see Burke, *supra* note 27, at 555; C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311, 330–35 (2012).

53. See generally MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001).

54. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008).

55. See generally A.J.R., Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507 (1984). The psychology of stalking is summarized in McAnaney et al., *supra* note 39, at 831–42; Paul E. Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 274 (2002).

56. CAL. PENAL CODE § 646.9(a) (2012).

deterred by an injunction. Indeed, several of the Orange County victims had obtained domestic violence injunctions or civil harassment orders against their killers. Second, the unwanted contact was viewed not only as a warning sign of future violent crime, but as a crime itself. The repeated unwanted visits, phone calls, or letters caused their own, separately cognizable legal harms.<sup>57</sup> At the urging of the U.S. Department of Justice, all fifty states and the federal government enacted criminal stalking statutes within three years.<sup>58</sup>

#### 4. Civil Harassment Statutes

Civil harassment statutes are designed in part to deal with stalking (following or surveillance that causes fear for one's safety), but they reach further because the usual definition of harassment extends to unspecified conduct that causes emotional distress other than fear for one's safety. The two ideas inevitably overlap: Many statutes include stalking-type language in their definitions of harassment, or vice versa.<sup>59</sup>

Civil harassment statutes expand beyond the blueprint of domestic violence injunctions in two ways. One expansion involves the *persons* covered by the statutes. In response to concerns that intimidation and unwanted contact may arise even between non-intimates,<sup>60</sup> these statutes eliminate any relationship requirement. Today, common pairings in civil harassment cases include disputes involving a person's current spouse/boyfriend/girlfriend against a former spouse/boyfriend/girlfriend, parents against their children's boyfriends/girlfriends, neighbor against neighbor, co-worker against co-worker, tenant against landlord, and miscellaneous acquaintances against each other.<sup>61</sup> The other expansion involves the *conduct* covered by the statutes. Domestic violence statutes authorize injunctions upon a showing of violence or threats, but that standard fails to capture lower-level aggression that can form an overall package of

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57. See McAnaney et al., *supra* note 39, at 882–83.

58. Anna-Rose Mathieson, *Every Move You Make: How Stories Shape the Law of Stalking*, 101 MICH. L. REV. 1589, 1594 (2003). Many states also authorize civil injunctions against stalking. A number of law review articles addressed stalking statutes shortly after this wave of adoptions. See, e.g., McAnaney et al., *supra* note 39; M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769 (1994); Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991 (1993); Suzanne L. Karbarz, Note, *The First Amendment Implications of Anti-Stalking Statutes*, 21 J. LEGIS. 333 (1995); Kimberly A. Tolhurst, Comment, *A Search for Solutions: Evaluating the Latest Anti-Stalking Developments and the National Institute of Justice Model Stalking Code*, 1 WM. & MARY J. WOMEN & L. 269 (1994).

59. Compare CAL. CIV. PROC. CODE § 527.6(b)(1) (West 2012) (stalking appears in definition of harassment), with IND. CODE § 35-45-10-1 (2012) (harassment appears in definition of stalking). Hawaii has a crime called “Harassment by Stalking,” HAW. REV. STAT. § 711-1106.5 (2009), while Massachusetts has a crime known as “Stalking by Harassment,” Commonwealth v. Alphas, 712 N.E.2d 575, 577–78 (Mass. 1999) (describing MASS. GEN. LAWS ch. 265, § 43).

60. Grau, *supra* note 51, at 726.

61. Dunlap, *supra* note 21, at 4; TOMMASINO, *supra* note 21, at 66–74.

control, domination, or intimidation. Following the lead of the residual harassment offense in the Model Penal Code, states began enacting statutes that refrained from specifying any particular conduct by the harasser.

California enacted the first civil harassment statute in 1978. The statute currently provides that “a person who has suffered harassment,” no matter from whom, may obtain an injunction upon proof of “a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.”<sup>62</sup> I will call this four-part definition—(1) a course of conduct; (2) directed at a victim; (3) resulting in harassment; (4) without legitimate purpose—“the California model.” The central drafting choice behind the California model is to avoid describing the acts that may constitute harassment. They are identified only by reference to their emotional effect on the victim, which in turn is only lightly specified as a form of low-level emotional distress.

Twenty-two other states enacted civil harassment statutes between 1984 and 2004, most of them following the California model.<sup>63</sup> The less precise variations are sparse or even circular. Some states replace “alarms, annoys, or harasses” with other formulas such as “harass[es] or intimidate[s]” (Wisconsin),<sup>64</sup> “alarms or causes distress” (Missouri),<sup>65</sup> “seriously alarms or disturbs consistently or continually bothers” (Hawaii),<sup>66</sup> or “seriously alarms, annoys, harasses, or is detrimental to such person” (Washington).<sup>67</sup> In Wyoming, an order may issue if, “with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to . . . [c]ommunicating . . . in a manner that harasses; . . . [or] engaging in a course of conduct that harasses another person.”<sup>68</sup>

Statutes constructed around the California model often include some combination of additional elements. Some list specific acts that per se constitute harassment, such as threats of violence, following, or repeated phone calls at inconvenient times.<sup>69</sup> Most require that the course of conduct actually cause emotional distress for the petitioner (a subjective

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62. CAL. CIV. PROC. CODE § 527.6.

63. See *infra* Statutory Appendix.

64. WIS. STAT. § 813.125(1)(b) (2011).

65. MO. REV. STAT. § 455.010(1)(d) (2012).

66. HAW. REV. STAT. § 604-10.5(a) (2009).

67. WASH. REV. CODE § 10.14.020(2) (2012).

68. WYO. STAT. ANN. § 6-2-506(b) (2012) (defining the violation); *id.* § 7-3-507 (authorizing injunction).

69. *E.g.*, CAL. CIV. PROC. CODE § 527.6(b)(1) (West 2012) (harassing course of conduct includes “following or stalking” and “making harassing telephone calls”); MINN. STAT. § 609.748(a)(1) (West 2009) (civil harassment includes “physical or sexual assault”); NEV. REV. STAT. § 200.591 (2011) (incorporating § 200.571(1)(a)(1) (2012)) (harassment includes making threats).

standard), could cause emotional distress for a reasonable person (an objective standard), or both.<sup>70</sup> Many have some variation of an intent requirement, whether it be a specific intent to harass,<sup>71</sup> intentional or knowing conduct,<sup>72</sup> or absence of legitimate purpose.<sup>73</sup> Many have constitutional savings clauses providing that protected speech or activity should not be considered part of a harassing course of conduct, or that orders should be written to avoid abridging freedom of speech.<sup>74</sup> While serving as useful reminders to trial courts, savings clauses cannot by themselves salvage an otherwise unconstitutionally vague or overbroad statute.<sup>75</sup>

The remedies authorized by the statutes are typically open-ended, allowing courts wide latitude to “enjoin the harassment,” no matter what form that might take.<sup>76</sup> Most specify some content that is preferred for the orders, such as a requirement to stay a certain distance away from the petitioner, not to communicate with the petitioner directly or through third parties, and not to keep the petitioner under surveillance.<sup>77</sup> Once an order is issued, most states require the court to forward the order to a statewide database accessible by law enforcement.<sup>78</sup> Violations may be punished as contempt of court, as a separate crime, or both.<sup>79</sup>

## B. CIVIL HARASSMENT LITIGATION IN PRACTICE

### 1. *The Volume of Civil Harassment Litigation*

No single reliable source tracks the total number of civil harassment petitions in the United States. While imperfect, the available measures indicate that the volume of civil harassment litigation is large. Five states compile judicial statistics that separately enumerate civil harassment petitions, as listed below in Table 1. If the five-state rate of 156 civil

70. See N.C. GEN. STAT. § 50C-1(6) (2009) (subjective); S.C. CODE ANN. § 16-3-1700(A) (2011) (objective); WASH. REV. CODE § 10.14.020(2) (both).

71. See, e.g., WYO. STAT. ANN. § 6-2-506(a)(ii); *Cates v. Donahue*, 916 A.2d 941, 944 (Me. 2007).

72. See, e.g., KAN. STAT. ANN. § 60-31a02 (2012); *Bailey v. Sanchez*, 990 P.2d 1194, 1199–200 (Haw. Ct. App. 1999).

73. Washington’s statute is unique in providing a nonexclusive list of factors for a court to consider when deciding whether the respondent acted with legitimate purpose. WASH. REV. CODE § 10.14.030.

74. See, e.g., CAL. CIV. PROC. CODE § 527.6(b)(1); WASH. REV. CODE §§ 10.14.020(1), 10.14.080(7), 10.14.190. Arizona eliminated its savings clause in 1996, but even without it, state courts interpret the statute not to reach “pure political speech.” *LaFaro v. Cahill*, 56 P.3d 56, 62 (2002).

75. *State v. Pierce*, 887 A.2d 132, 135 (N.H. 2005) (criminal harassment); *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (same).

76. See, e.g., ARIZ. REV. STAT. ANN. § 12-1809 (2012); WASH. REV. CODE § 10.14.080(3).

77. See, e.g., CAL. CIV. PROC. CODE § 527.6(b)(6); WASH. REV. CODE § 10.14.080(6).

78. See, e.g., CAL. CIV. PROC. CODE § 527.6(q)(3); WASH. REV. CODE § 10.14.110.

79. See, e.g., WASH. REV. CODE § 10.14.120 (contempt); *id.* § 10.14.170 (separate crime); *LeMay v. Leander*, 994 P.2d 546, 554–55 (Haw. 2000) (contempt); *State v. Inman*, 216 P.3d 121, 122–23 (Haw. Ct. App. 2009) (separate crime).



harassment petitions per 100,000 population held true across the twenty-three states with civil harassment statutes (which have a total population of approximately 140.6 million), there would be approximately 219,700 petitions filed annually.

TABLE I: CIVIL HARASSMENT PETITIONS FILED IN 2011  
FOR STATES WITH AVAILABLE STATISTICS

Jurisdiction	Civil Harassment Petitions Filed (per 100,000 population)	Domestic Violence Petitions Filed (per 100,000 population)
Minnesota <sup>80</sup> (pop. 5,303,925)	9918 (187)	10,965 (207)
Nevada <sup>81</sup> (pop. 2,700,551)	4931 (183)	11,583 (429)
South Dakota <sup>82</sup> (pop. 814,180)	1952 (240)	2508 (308)
Utah <sup>83</sup> (pop. 2,763,885)	777 (28)	4902 (177)
Washington <sup>84</sup> (pop. 6,724,540)	11,027 (168)	18,666 (278)
Five-state total (pop. 18,307,081)	23,674 (156)	37,041 (266)

When granted, civil harassment orders are to be conveyed to state law enforcement databases. Few of these databases distinguish no-contact orders that result from criminal sentences, conditions of bail, domestic violence orders, or civil harassment orders, but fortunately the Washington State Patrol database does. As of July 2012, it contained 15,802 currently enforceable civil harassment orders (613 temporary and 15,189 final).<sup>85</sup> If the other states with civil harassment statutes had a similar per capita volume of currently enforceable orders, there would be approximately 330,000 temporary or final civil harassment orders in effect at any one time.

80. MINN. JUDICIAL BRANCH, ANNUAL REPORT TO THE COMMUNITY 18 (2011). All population figures are taken from the U.S. census for 2010. See *Census Data*, DEP'T OF COMMERCE, U.S. CENSUS BUREAU (2010), available at <http://www.census.gov/2010census>.

81. NEV. JUDICIARY, ANNUAL REPORT 42-45 tbl. A7 (2011), available at <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/AOC-Files/Research-and-Statistics-Unit/2011-Annual-Report-of-the-Nevada-Judiciary>. Table 1 combines the volumes of the District Courts and Justice Courts.

82. S.D. UNIFIED JUDICIAL SYS., REPORT, at 10 tbl.B-7 (2011).

83. *Utah District Courts: FY 2011 Case Type by Court*, UTAH STATE COURTS, <http://www.utcourts.gov/stats/files/2011FY/district/o-Statewide.pdf>.

84. *Caseloads of the Courts of Washington*, WASH. COURTS, <http://www.courts.wa.gov/caseload>. Table 1 combines the volumes of the Superior Courts and courts of limited jurisdiction.

85. Response to author's Public Records Act request (on file with author).

State-level statistics do not indicate the percentage of filed petitions that are granted, but the numbers from Washington suggest that a petition is far more likely to be granted than denied. Assuming that most but not all orders will expire after the default duration of one year,<sup>86</sup> it would require a relatively high grant rate for approximately 11,000 annual petitions to result in 15,000 currently enforceable orders. The level of success for petitioners results in part from structural features of civil harassment litigation that encourage the issuance of orders, even at the risk of constitutional error.

## 2. *Procedural Features That Invite Constitutional Error*

### a. *Pro Se Litigants*

Overwhelmingly, the parties in civil harassment litigation represent themselves.<sup>87</sup> In one Missouri courtroom, 91% of the petitioners were pro se, as were 85% of respondents.<sup>88</sup> The overwhelming amount of self-representation is by design, drawing from the model of domestic violence injunction statutes. Most civil harassment statutes include provisions to assist indigent or unrepresented parties, including fee waivers and pre-printed petition forms.<sup>89</sup> Court access for the unrepresented is laudable, but it means that judges are deprived of their most commonly relied-upon source for identifying the controlling law: the briefing and arguments of counsel.

When describing respondent's conduct, pro se petitioners tend to emphasize what they find most bothersome, even if it is constitutionally protected or exceeds a court's power to remedy. For example, many petitioners in Las Vegas ask the court to impose prior restraints on respondents' speech to third parties. Among their requested forms of relief:

- “Refrain from badmouthing me and my family.”
- “Stay away from any online groups or websites that I may be a part of.”
- “Never use my name, verbally or written.”
- “Stop talking about me.”

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86. WASH. REV. CODE § 10.14.080(4)–(5) (2012). Washington courts have discretion to enter longer orders and to renew orders that are scheduled to expire.

87. See *Thomas v. Quintero*, 24 Cal. Rptr. 3d 619, 629 (Cal. Ct. App. 2005) (“[I]t is well known that, in reality, few people appearing at hearings on civil harassment petitions are represented by counsel.”); TOMMASINO, *supra* note 21, at 344.

88. Dunlap, *supra* note 21, at 5.

89. See, e.g., CAL. CIV. PROC. CODE § 527.6(v)(1) (West 2012) (“The Judicial Council shall develop forms instructions, and rules relating to matters governed by this section. The petition and response forms shall be simple and concise, and their use by parties in actions brought pursuant to this section shall be mandatory.”); MINN. STAT. ANN. § 609.748(3)(a) (West 2009) (“The court shall provide simplified forms and clerical assistance to help with the writing and filing of a petition under this section and shall advise the petitioner of the right to sue in forma pauperis.”).

- “I want the Court to prohibit [respondent] from all Internet access.”<sup>90</sup>

For their part, unrepresented respondents may not be able to recognize legally improper allegations or requests for impermissible relief and, as a result, fail to assert potentially winning statutory or constitutional objections. The predominance of unrepresented litigants threatens a breakdown of the adversarial process.<sup>91</sup> This is even more evident when courts rule on *ex parte* requests for temporary orders, which most statutes authorize courts to issue based solely on a petitioner’s affidavit.<sup>92</sup>

#### b. *Little Appellate Oversight*

Harassment orders, when granted, are very rarely appealed. In the Justice Courts of Las Vegas in 2008, only three out of 2034 non-domestic violence petitions resulted in an appeal.<sup>93</sup> No appellate court opinions interpret the Nevada statute—even though it was enacted in 1989. As a result, “the limited jurisdiction courts [of Nevada] have been operating in a vacuum and creating *ad hoc*, reactive solutions” to recurring problems.<sup>94</sup> The complete absence of appeals in Nevada is extreme, but other states also have few appellate decisions compared to the volume of petitions filed and orders granted. In South Dakota, for example, 8092 civil harassment petitions were filed from 2008–2011, but since the statute’s enactment in 1997 only seven petitions have led to reported appellate opinions.<sup>95</sup>

A number of factors contribute to the dearth of appeals. First and most important is that the parties are *pro se*. However daunting it may be for an untrained person to litigate in a local trial court, it will be more difficult to write an appellate brief describing a trial court’s legal errors. Unlike the trial court, the court of appeals has no local clerk’s window that distributes pre-printed forms. Second, because temporary orders last

90. TOMMASINO, *supra* note 21, at 98–99.

91. John C. Sheldon, *Thinking Outside of the Box About Pro Se Litigation*, 23 ME. B.J. 90, 91 (2008) (“[T]he adversarial method of resolving disputes . . . assumes that parties know the law, are adept at procedure and the rules of evidence, and can marshal significant facts, present their side of the case to the factfinder thoroughly and lance the arguments of the opponent. But *pro se* litigants are capable of little if any of that.”).

92. See WASH. REV. CODE § 10.14.085(1) (2012).

93. TOMMASINO, *supra* note 21, at 52 n.144. By contrast, approximately 15% of federal trial court decisions are appealed. See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 702 (2007).

94. TOMMASINO, *supra* note 21, at 55.

95. Of these, two affirmed the grant of an order, *White v. Bain*, 752 N.W.2d 203 (S.D. 2008); *Schaefer ex rel. S.S. v. Liechti*, 711 N.W.2d 257 (S.D. 2006), one reversed an order on the merits, *Shore v. Cruz*, 667 N.W.2d 312 (S.D. 2003), three reversed and remanded due to procedural irregularities, *March v. Thursby*, 806 N.W.2d 239 (S.D. 2011); *Judstra v. Donelan*, 712 N.W.2d 866 (S.D. 2006); *Goeden v. Daum*, 668 N.W.2d 108 (S.D. 2003), and one affirmed the denial of a motion to modify an unappealed order, *Sjomeling v. Stuber*, 615 N.W.2d 613 (S.D. 2000). None involved an appeal of a denied petition.

only weeks and final orders typically expire in a year or two, appeals of granted orders often become moot.<sup>96</sup> Third, many respondents may feel that the stakes are too low to justify the effort of appeal. It may on balance be easier to obey the order than to deal with more judicial proceedings. Fourth, disappointed petitioners almost never appeal. Fifth, parties represented by counsel will likely be advised against appealing, given a standard of review that one state describes as “extreme deference.”<sup>97</sup>

The lack of appeals contributes to trial court error in two independent ways. First, trial courts in some states have no guiding precedent, including any definitive narrowing or clarifying constructions for broadly worded statutes. Second, like everyone else, judges are on their best behavior when they know they are being watched.<sup>98</sup> Hence, even in states with some published civil harassment opinions from appellate courts, trial courts may more easily deviate from those opinions if they believe their rulings will not be reviewed. Some trial judges may take extra care with decisions unlikely to be appealed, knowing that they are the court of last resort. As described below, however, this laudable approach is not universal.

*c. Expedited Procedures*

Drawing on the domestic violence injunction model, the procedures for civil harassment petitions emphasize court access and speed. These are important virtues, but they may inadvertently dampen a court’s ability to recognize and navigate constitutional questions.

Petitioners may file in an easily accessible local court of limited jurisdiction, such as a municipal court, magistrate court, or justice of the peace court. Judges in such courts tend to have little experience with free speech questions, given their usual docket of traffic infractions, small claims, collections, and the like. In some states, courts of limited jurisdiction may be presided over by part-time judges or lay judges without law degrees.<sup>99</sup> Civil harassment statutes routinely provide for *ex parte* temporary orders within days of filing. Thereafter, the cases proceed on a rocket docket that sets a hearing on a final order within a few weeks. There is no mechanism for pre-hearing discovery. The proceedings are far less formal than an ordinary civil trial. They tend to more closely resemble small claims court: The customary rules of evidence do not apply, hearsay is tolerated, and there is no jury. The Constitution does not require civil harassment petitions to be resolved with the formality of a criminal trial, so expedited procedures have repeatedly

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96. See, e.g., *J.S. v. D.C.*, 368 S.W.3d 289, 292 (Mo. Ct. App. 2012); *Towner v. Ridgway*, 272 P.3d 765 (Utah Ct. App. 2012).

97. *Welytok v. Ziolkowski*, 752 N.W.2d 359, 370 (Wis. Ct. App. 2008).

98. JONATHAN HAIDT, *THE RIGHTeous MIND* 256 (2012) (“You don’t need a social scientist to tell you that people behave less ethically when they think nobody can see them.”).

99. See Adrian Vermeule, *Should We Have Lay Justices?*, 59 *STAN. L. REV.* 1569, 1573 (2007).

been upheld against procedural due process challenges.<sup>100</sup> Nonetheless, the informality may lead to prejudice when parties have little time to make their case and judges have little time to reflect.

Procedural irregularities were on full display in *Gullickson v. Kline*.<sup>101</sup> The petitioner Jody Gullickson, the mayor of a small North Dakota town, sought an order against resident John Kline because he allegedly disrupted a city council meeting by “by asking questions, requesting copies of ordinances, telling council members they should resign so more qualified people could serve, making a racially insensitive remark, and staring at Gullickson with ‘little beady eyes.’”<sup>102</sup> Gullickson’s testimony consisted of the trial court asking her if the contents of her affidavit were true, and she answered that they were. She then said that in addition to what she described in her affidavit, her husband and mother had told her that Kline had mistreated them. Kline was not allowed to cross-examine Gullickson regarding her affidavit, and his hearsay objection to the out-of-court statements of others was overruled. Kline argued in part that his behavior, if proven, was constitutionally protected, but the trial court never ruled on the free speech objection. When Kline began to testify in his defense, the trial judge cut him off:

THE COURT: Excuse me. Mr. McCabe [counsel for Kline], I don’t have an infinite amount of time for this hearing, so what I’m going to do is allow you to just tell me in the form of an offer of proof what the rest of any evidence you’re going to present is, cause I’ve got lots of other business on my calendar here . . . .<sup>103</sup>

The court did not allow Kline’s wife to testify or Kline’s attorney to make closing argument. When counsel asked if could “just get a one last ten second thing for the record,” the trial judge responded, “No, we’re done.”<sup>104</sup> At the end of this rapid-fire proceeding, the court signed a fill-in-the-blank order barring Kline from approaching within one hundred yards of Gullickson for two years, making it effectively impossible for him to visit City Hall or attend City Council meetings.<sup>105</sup>

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100. See *Mahmood v. Mahmud*, 778 N.W.2d 426, 432 n.14 (Neb. 2010) (collecting cases); *Skadberg v. Skadberg*, 644 N.W.2d 873, 876 (N.D. 2002) (direct testimony may be replaced by affidavits); *Marquette v. Marquette*, 686 P.2d 990, 996 (Okla. Civ. App. 1984) (same for domestic violence statute with analogous procedures); *Bachowski v. Salamone*, 407 N.W.2d 533, 537 (Wis. 1987) (civil harassment procedures do not violate due process).

101. 678 N.W.2d 138 (N.D. 2004).

102. *Id.* at 139.

103. *Id.* at 142.

104. *Id.*

105. Procedural shortcuts requiring reversal occurred in *Mahmood*, where the petition was granted solely on petitioner’s hearsay application with no sworn testimony taken from respondent. 778 N.W.2d at 432 (“[T]he proceedings were so informal that we have been left with no evidence at all.”). See *Devereaux v. Rodriguez*, No. G038462, 2008 WL 2756476, at \*7 (Cal. Ct. App. Jul. 16, 2008) (“[T]he trial court admitted it had not reviewed the [written submissions], it limited the testimony of the parties (often interrupting them) . . . and it refused to entertain any discussion or argument about the

Across the border in South Dakota, some trial courts hear sharply conflicting testimony but make no findings of fact or express credibility determinations. The only record generated from the hearings is an order, typically consisting of a preprinted form with boxes checked. The South Dakota Supreme Court has remanded some such decisions with instructions to make findings, noting that it cannot meaningfully review the judgments without them. The message is not sticking: Such decisions were issued in 2003 and 2006, yet the same problem still required correction in 2011.<sup>106</sup>

A procedural shortcut found in many courts could be called the non-order order. In these situations, the trial court finds no liability and refrains from entering an enforceable order, but warns the respondent to knock it off, implying that legal consequences would follow in the event of a violation. One example is *Judstra v. Donelan*,<sup>107</sup> a South Dakota dispute between a homeowner and a contractor. Both parties testified at the hearing on the homeowner's petition. The court made no factual findings or credibility determinations and denied the petition, but orally warned the contractor to behave himself. A few days later, the homeowner filed a new petition, alleging that the contractor "sneered" at her while exiting the courthouse after the first hearing.<sup>108</sup> At a second hearing, the judge exhibited anger from the bench over what he perceived to be a violation of his non-order order:

THE COURT: . . . I just heard this case not too long ago, and I dismissed the Protection Order, and I told Mr. Donelan, you stay away from her, don't go near her, don't go near her, don't go near her. . . .

. . . I dismissed it, and I'm making a finding that first of all, I warned him. I said you stay away from her, you do not go near her, you leave her alone, and I bet I said it ten times if I said it once, and she waited in the courtroom to give him a chance to leave the building, then she goes down and he specifically walks up to her and sneers at her and makes a face. That violated the Order that I gave him to get out of the courthouse, before he was even out of the courthouse, and I am granting a protection order for Ms. Judstra for three years against

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underlying harassment allegations."); *Nora v. Kaddo*, 10 Cal. Rptr. 3d 862, 864 (Cal. Ct. App. 2004) (court refused to hear non-party witnesses); *Hutchinson v. Boyle*, 753 N.W.2d 881, 882 (N.D. 2008) (trial court failed to rule on free speech defense); *Cusey v. Nagel*, 695 N.W.2d 697, 703 (N.D. 2005) (petitioner not allowed to testify); *Drake v. Drake*, No. 03A01-9610-CV-00312, 1997 WL 198776 (Tenn. App. Apr. 24, 1997) (same).

106. See *March v. Thursby*, 806 N.W.2d 239, 244 (S.D. 2011); *Judstra v. Donelan*, 712 N.W.2d 866 (S.D. 2006); *Goeden v. Daum*, 668 N.W.2d 108, 110 (S.D. 2003). The Court criticized the lack of findings in *Shore v. Cruz*, 667 N.W.2d 312, 315 (S.D. 2003), but found enough in the record to reverse without a remand. The problem is not limited to South Dakota. See *Edelen v. Bonamarte*, 162 P.3d 847 (Mont. 2007); *Towner v. Ridgway*, 182 P.3d 347, 351 (Utah 2008).

107. 712 N.W.2d 866 (S.D. 2006).

108. *Id.* at 867.

Mr. Donelan for stalking and for not even obeying my Order long enough to get out of the courthouse . . . .<sup>109</sup>

In a creative variation on the non-order order, some Las Vegas judges intentionally keep cases open without a decision as a method of controlling the parties without entering a final judgment.<sup>110</sup> Among other problems, this approach denies worthy petitioners the enforceability of an order recorded in a law enforcement database and denies worthy respondents the ability to appeal.

*d. Underestimation of Collateral Consequences*

Some judges may believe that a civil harassment order imposes no serious hardship: The petitioner wants to be left alone, it will be easy for the respondent to leave the petitioner alone, and so an order imposes little cost on anyone.<sup>111</sup> Take, for example, a petition filed by a seemingly delusional resident of Santa Fe, New Mexico, against New York-based talk show host David Letterman. The petition alleged that Letterman inflicted mental cruelty by thinking about the petitioner and using coded communications on his program that secretly referred to her. After reviewing the petition *ex parte*, a judge set the matter for a hearing and entered a standard form temporary order directing Letterman not to threaten, harm, alarm, or annoy the petitioner, not to approach within 100 yards, not to contact her by telephone or otherwise, and not to block her in public places or on roads.<sup>112</sup> Letterman would probably be quite happy to comply, since it appears that little good would come from contacting this particular petitioner. But there is more to an injunction than its terms; significant collateral consequences also attach upon the entry of a civil harassment order.<sup>113</sup> Here is a partial listing:

*Barred access to people and places near the petitioner.* To stay a fixed distance from a petitioner also requires staying away from anything else within that zone. Some civil harassment orders can make it unlawful for

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<sup>109</sup>. *Id.* at 868.

<sup>110</sup>. See TOMMASINO, *supra* note 21, at 64–65.

<sup>111</sup>. This dynamic can be seen in *Devereaux v. Rodriguez*, No. G038462, 2008 WL 2756476, at \*4 (Cal. Ct. App. Jul. 16, 2008): “The [trial] court did not inquire about the allegations asserted in the petition . . . [Instead] it asked Rodriguez if there was any reason why she should have anything to do with Devereaux. Rodriguez replied, ‘Absolutely not.’ The court inquired, ‘Then why don’t we just agree that you won’t?’” and granted the petition. See Dunlap, *supra* note 21, at 5 (“[J]udges readily afford protection to anyone, upon no further showing than a desire to be spared the company of designated others.”).

<sup>112</sup>. See Eugene Volokh, *Is This Some Solstice Fool’s Joke?*, THE VOLOKH CONSPIRACY (Dec. 21, 2005, 1:30 PM), <http://www.volokh.com/posts/1135193403.shtml>. The order was later vacated.

<sup>113</sup>. Collateral consequences of criminal convictions are discussed in Natapoff, *supra* note 24; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670 (2008).

people to remain in their own homes,<sup>114</sup> attend their own schools,<sup>115</sup> report to their own jobs,<sup>116</sup> or visit their own children.<sup>117</sup> Sometimes these results are not collateral consequences, but intended ones: Some petitions are used by parents to evade family court procedures for modifying child custody arrangements, or by landlords as a faster and easier alternative to eviction.<sup>118</sup>

*Firearms restrictions.* Under the Brady Bill, persons subject to certain civil harassment orders are prohibited from owning firearms.<sup>119</sup> This can affect not only firearms enthusiasts and hunters, but also the career options of police officers, service members, or others who are required to handle guns at work.<sup>120</sup>

*Background checks.* Like any civil judgment, a harassment order is placed into a publicly available court file, where it is available to credit reporting agencies and other data brokers. An adverse judgment can be harmful to one's credit, and it can also show up in background checks routinely performed by prospective employers and landlords. No current antidiscrimination law would bar an employer or landlord from taking adverse action against a person on the basis of a civil harassment order. Hence, some courts have acknowledged that the entry of a civil harassment order (like a criminal conviction) can be stigmatizing.<sup>121</sup>

*Future legal consequences.* A civil harassment order creates a new crime that can only be committed by the respondent. Actions that would otherwise be lawful—such as attending a school sporting event or placing a telephone call—become potentially criminal. Even if no criminal prosecution follows, other less extreme but nonetheless perilous legal consequences exist. The issuance of a past harassment order can be a

114. See, e.g., *Trummel v. Mitchell*, 131 P.3d 305 (Wash. 2006) (en banc).

115. See, e.g., WASH. REV. CODE § 10.14.040(7) (2012).

116. See, e.g., ME. REV. STAT. tit. 5 § 4655(1)(C-1)(2) (2011).

117. See, e.g., WASH. REV. CODE § 10.14.080(4).

118. See *Dunlap*, *supra* note 21, at 4 (some petitions seek to circumvent custody procedures), 122 (eviction procedures); TOMMASINO, *supra* note 21, at 58 (eviction procedures); see also *Mettling v. Hutchison*, No. 30139-7-III, 2012 WL 3629049 (Wash. App. Aug. 23, 2012) (civil harassment order issued on facts amounting to common law nuisance).

119. 18 U.S.C. § 922(g)(8) (2012). See, e.g., *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012); *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011). The federal firearms ban is a collateral consequence of any order, civil or criminal, that “restrains [defendant] from harassing, stalking, or threatening an intimate partner” and includes findings relating to use of force. 18 U.S.C. § 922(g)(8). The statute is not triggered by a bare “no contact” order that does not recite the necessary findings. *United States v. Sanchez*, 639 F.3d 1201 (9th Cir. 2011), but depending upon its wording a civil harassment order may suffice.

120. See, e.g., *Hayford v. Hayford*, 760 N.W.2d 503, 505 (Mich. Ct. App. 2008) (ban on firearms endangers respondent's profession as a gunsmith).

121. See, e.g., *Overstreet v. Kixmiller*, 120 S.W.3d 257, 259 (Mo. Ct. App. 2003); *Tibor v. Lund*, 599 N.W.2d 301, 305 (N.D. 1999). For comparison of the role of stigma in civil and criminal law, see W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011).



factor in favor of issuing a new order.<sup>122</sup> A judge in an unrelated criminal proceeding would be allowed to consider the existence of an earlier harassment order as an indicator of dangerousness, potentially affecting decisions on bail or sentencing.<sup>123</sup> Findings of harassment can lead to ineligibility for professional licenses that require an inquiry into the applicant's good moral character.<sup>124</sup> For respondents who are aliens, violation of a civil harassment order is grounds for deportation.<sup>125</sup> And many of these legal effects may persist even after the order expires.<sup>126</sup>

*Enforcement errors by police.* Officers who investigate alleged violations of no-contact orders may make unjustified arrests (or unjustified oral orders to move along) resulting from inattention, misinterpretation, or lack of accurate information. Several federal civil rights actions have been filed against police for arrests made when any reasonable reading of the order would show no violation. For example, officers in Idaho arrested a respondent for attending the same church service as petitioner, but if they had read the order it would have been clear that it did not prevent his presence.<sup>127</sup> Officers in Wisconsin arrested a respondent for not leaving a public meeting after the petitioner also entered the room, even though this did not constitute a forbidden approaching of the petitioner.<sup>128</sup>

*Enforcement errors by courts.* Courts sometimes give their orders surprising post hoc interpretations. For example, an elderly respondent in Washington, who had a history of badgering and threatening neighbors in his senior citizens' complex, was ordered to stay away from all of the building's residents (forcing him to move) and not to keep the residents under surveillance.<sup>129</sup> Thereafter, the respondent wrote about the building and its residents on his website, describing news he had heard about them through third parties.<sup>130</sup> The trial court held him in contempt, saying that writing about the residents constituted surveillance of them.<sup>131</sup> The

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122. See WASH. REV. CODE § 10.14.030(6).

123. See, e.g., *United States v. Hall*, ARMY 20030840, 2006 WL 6624335, at \*4 (A. Ct. Crim. App. Oct. 27, 2006) (in court martial, violation of no-contact order considered an aggravating factor at sentencing).

124. See, e.g., *Towell v. Steger*, 154 S.W.3d 471, 476 (Mo. Ct. App. 2005) (foster parenting); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 439 (Tex. 1998) (bar membership).

125. 8 U.S.C. § 1227(a)(2)(E)(ii) (2012).

126. Cf. *Nunez-Reyes v. Holder*, 646 F.3d 684, 688 (9th Cir. 2011) (expunged state criminal conviction not necessarily expunged for purposes of federal immigration law). *But see* *Hron v. Donlan*, 609 N.W.2d 379, 384 (Neb. 2000) (rejecting the argument that a civil harassment order imposes a stigma after its expiration).

127. *Beier v. City of Lewiston*, 354 F.3d 1058, 1061 (9th Cir. 2004).

128. *Wagner v. Washington Cnty.*, 493 F.3d 833, 837 (7th Cir. 2007) ("If we were to [find probable cause for this arrest], the possibilities for the Metzgers to use the injunction to harass *Wagner* would be limitless; the Metzgers could follow *Wagner* around town and force him to leave stores, restaurants, movie theaters, hospitals, et cetera.").

129. *Trummel v. Mitchell*, 131 P.3d 305, 307–09 (Wash. 2006).

130. *Id.* at 310.

131. *Id.* at 309–10.

judge ordered respondent to remove all references to residents from the website, but the respondent chose to be jailed for civil contempt rather than comply.<sup>132</sup>

In Ohio, a judge entered a standard domestic violence order barring a husband from doing anything that would cause his wife “to suffer physical and/or mental abuse, harassment, annoyance, or bodily injury.”<sup>133</sup> The husband complained about the ruling on Facebook, writing: “If you are an evil, vindictive woman who wants to ruin your husband’s life and take your son’s father away from him completely—all you need to do is say that you’re scared of your husband or domestic partner.”<sup>134</sup> The trial court found that his complaint about the legal system constituted contempt of the order not to harass his wife.<sup>135</sup> The court ordered the respondent to post an apology to his wife on Facebook—and to “friend” her to guarantee that she would have access to it.<sup>136</sup> These examples demonstrate the general principle that the contempt power is “uniquely . . . liable to abuse” because “the offended judge [is] solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.”<sup>137</sup>

*Expungement problems.* Final orders expire if not renewed, but law enforcement databases are notoriously erratic about expunging records, often continuing to report vacated warrants and reversed or expunged convictions.<sup>138</sup> Even if law enforcement databases are expertly managed to remove orders upon expiration, third parties who learned about the orders—such as credit reporting agencies—are under no legal obligation to cease reporting that the order had once existed.

The fact of collateral consequences should not be a basis to deny an otherwise justified civil harassment order. If serious misconduct has occurred that justifies judicial intervention, then the collateral consequences are part of the price of misbehavior. However, their existence is good reason for courts to think carefully before finding liability: A civil harassment order is not cost-free to the respondent.

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132. *See id.* at 305.

133. Kimball Perry, *Ex-Husband Gets Choice of Jail or a Facebook Apology*, USA TODAY, Feb. 23, 2012, <http://www.usatoday.com/news/nation/story/2012-02-23/facebook-apology-divorce-jail/53221786/1>.

134. *Id.*

135. *Id.*

136. *Id.*

137. *United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (internal quotation marks omitted).

138. *See, e.g., Hammons v. Scott*, 423 F. Supp. 618, 619 (N.D. Cal. 1976) (state continues to disseminate arrests without conviction); *Doe v. Herenton*, No. 07-2875 STA, 2008 WL 2704537 (W.D. Tenn. July 3, 2008) (same for charges that did not lead to conviction); *State v. Breazeale*, 31 P.3d 1155 (Wash. 2001) (same for convictions ordered expunged).

*e. Judicial Incentives*

*Madsen v. Women's Health Center, Inc.* observed a structural danger to free speech any time a court issues an injunction. A statute sets a general standard of conduct that will apply with equal force to the legislators who enact it, but an injunction will never apply to the judge who issues it. It always applies to another. For this reason, a speech-restrictive injunction is supposed to receive “somewhat more stringent application of general First Amendment principles” than a speech-restrictive statute.<sup>139</sup>

A separate incentive encourages judges to grant civil harassment orders in questionable cases. While the costs of a wrongly granted order fall on the respondent, the costs of a wrongly denied order fall on both the petitioner and on the judge. No one who needs to be re-elected or re-appointed wants to be the judge who denied a protective order in a case where the respondent later engages in headline-worthy violence. Wrongful denial could easily be portrayed as softness on crime—or its civil equivalent—and possibly insensitivity to women or obliviousness to domestic violence. It's better to be safe than sorry.

The Los Angeles County Superior Court recently revised its case management system to help reduce this political incentive. Court administrators sensed that civil harassment orders were granted in inordinate numbers, most often by judges with general civil dockets who would see such cases only sporadically. The Court's solution was to direct most civil harassment petitions to a single judge. The volume of petitions allowed her to develop expertise in the area, and gave her a better sense of which allegations truly merited an order. She was also chosen because her seniority allowed her greater de facto judicial independence. As a result, grants of petitions fell sharply, with no observable reduction in public safety.<sup>140</sup>

*f. Judicial Attitudes*

On a less concrete but still palpable level, the interplay of civil harassment and free speech principles may reinforce some judicial attitudes that discount constitutional values.

First, civil harassment petitions have the look and feel of domestic disputes. Even though the litigants are not intimate partners, they will have some sort of antagonistic personal history. The judge must function as peacemaker in a dispute where emotions run hot. Regulating such a relationship may seem to call more for the skills of a parent than of a

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139. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

140. Interview with Hon. Carol Boas Goodson, Judge, Superior Court of Los Angeles (Aug. 17, 2012) (on file with author).

lawyer. The old saw that there is no law in family law applies equally well to civil harassment.

Second, free speech lore is famous for its roster of unlikable defendants spouting unlikable expression: radicals, dissenters, heretics, bigots, pornographers, and character assassins. This is to be expected because a democratic government is unlikely to put much energy into suppressing well-liked speech. The respondent's speech in a civil harassment case may well be antisocial or uncivil. The less attractive the respondent, the easier it becomes to reject constitutional arguments as the last refuge of a scoundrel.

Third, throughout the modern history of the First Amendment, trial courts that were comfortable with existing routines needed convincing that seemingly mundane cases implicated freedom of expression. Not that long ago, the First Amendment was not about ordinary contempt of court, ordinary criminal conspiracy, or ordinary regulation of labor relations.<sup>141</sup> It was not about talking back to police officers or insulting the sensibilities of angry crowds.<sup>142</sup> It was not about commercial advertising or defamation.<sup>143</sup> Until, of course, it was about all of these things.<sup>144</sup> At each step of the way, some judges and lawyers were surprised to encounter speech arguments. The frontier has changed, but the dynamic is the same. In civil harassment law, as with family law, it still feels novel to raise serious speech concerns. Complicating matters is that judges in courts of limited jurisdiction tend to have less exposure to (and therefore experience with) sometimes complex free speech doctrines than do superior court judges or federal district judges.

All of the factors described above raise the likelihood of serious error in civil harassment cases. The next Part describes those errors in constitutional terms.

## II. FIRST AMENDMENT PROBLEMS POSED BY CIVIL HARASSMENT ORDERS

Allegations of civil harassment may be arranged in a continuum, with one end involving no speech at all (as when a respondent persistently but silently follows a petitioner), the other end involving

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141. See *Goldman v. United States*, 245 U.S. 474 (1918) (conspiracy); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (labor relations); *Patterson v. Colorado*, 205 U.S. 454 (1907) (contempt).

142. *Feiner v. New York*, 340 U.S. 315 (1951) (speech to angry crowd); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (speech to police).

143. *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial advertising).

144. See *Forsyth Cnty. v. The Nationalist Movement*, 505 U.S. 123 (1992) (applying the First Amendment to crowd control); *Houston v. Hill*, 482 U.S. 451 (1987) (to verbal challenge to police); *Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167 (1976) (to labor relations); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976) (to commercial speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (to defamation); *Thomas v. Collins*, 323 U.S. 516 (1945) (to contempt of court); *Stromberg v. California*, 283 U.S. 359 (1931) (to crime).

only speech (as when a respondent makes phone calls and sends letters and emails), and most cases involving some mixture of the two. Some early judicial statements proposed that a harassing course of “conduct” must by definition exclude all speech,<sup>145</sup> but this minority view has never been adopted. Most civil harassment statutes explicitly say that a course of conduct can include speech or other communication,<sup>146</sup> and courts typically view speech as potentially harassing even in the absence of such statutory language. The vast majority of petitions will allege at least some speech as part of the alleged harassment. Then, if granted, any no-contact order will make at least some speech impossible (that between respondent and petitioner). Free speech questions are therefore inevitable in civil harassment litigation.

Some courts have tried to avoid the unavoidable free speech questions through creative labeling. One approach is to imply that harassing speech constitutes its own proscribable category, like true threats, criminal solicitation, or obscenity.<sup>147</sup> This approach assumes its own conclusion. Moreover, it is legally incorrect. As then-Judge Alito wrote with regard to a school’s on-campus harassment code, “there is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”<sup>148</sup> It is occasionally argued that government may enjoin harassing speech because the regulation aims not at the content of the speech, but its “secondary effect” of causing emotional injury.<sup>149</sup> The secondary effects doctrine enjoys little respect,<sup>150</sup> and the Supreme Court has only

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145. See *Bachowski v. Salamone*, 407 N.W.2d 533, 541–42 (Wis. 1987) (Abrahamson, J., dissenting).

146. See, e.g., CAL. CIV. PROC. CODE § 527.6(b)(1) (West 2012) (“Course of conduct [includes] making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail.”); S.D. CODIFIED LAWS § 22-19A-8 (2012) (incorporating S.D. CODIFIED LAWS § 22-19A-1 (1992)) (“No person may . . . harass another person by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication.”); WYO. STAT. ANN. § 7-3-507 (2012) (incorporating WYO. STAT. ANN. § 6-2-506(b)(i) (1993)) (“Communicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses.”).

147. See, e.g., *State v. Mott*, 692 A.2d 360, 365 (Vt. 1997) (conviction for violating protective order) (“Defendant has no First Amendment right to inflict unwanted and harassing contact on another person.”); *State v. Thorne*, 333 S.E.2d 817, 819 (W.V. 1985) (criminal telephone harassment) (“Harassment is not a protected speech.”).

148. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3rd Cir. 2001) (Alito, J.); see *State v. Vaughn*, 366 S.W.3d 513, 520 (Mo. 2012) (rejecting the argument that “there is no constitutional right to harass an unwilling recipient”). The Supreme Court has recently rejected several attempts to recognize novel proscribable categories. See *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (false statements generally); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2731 (2011) (violent speech accessible to children); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (depictions of animal cruelty).

149. *Aguilar v. Avis Rent-A-Car Sys., Inc.*, 53 Cal. Rptr. 2d 599, 606 (Cal. Ct. App. 1996), *rev’d* 980 P.2d 846, 142 n.4 (1999).

150. See Daniel R. Aaronson et al., *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741 (2009); Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and*

used it to uphold restrictions on adult bookstores and theaters.<sup>151</sup> Whatever potential vitality the doctrine has outside that context, it could not apply to civil harassment cases because listener responses to speech are by definition primary effects, not secondary ones.<sup>152</sup> A final relabeling solution would be to say that respondent's behavior is conduct, not speech.<sup>153</sup> To be sure, harassment often involves nonexpressive conduct like following or surveillance. But our concern is for those cases where the respondent communicates. Relabeling the speech as conduct does not make it so.<sup>154</sup>

This Part examines the three First Amendment problems most likely to arise in civil harassment litigation: vagueness, overbreadth, and prior restraint. Its goal is not to argue that civil harassment statutes are unconstitutional on their face (although some could be), but to outline the many ways that civil harassment orders can be unconstitutional—or at the very least, pose significant constitutional questions—as applied.

#### A. VAGUENESS

A statute regulating behavior must be specific enough to allow ordinary people to understand what conduct is prohibited and to prevent arbitrary or discriminatory enforcement.<sup>155</sup> Vagueness violates due process, but it also “raises special First Amendment concerns” because a vague statute affecting expression has a chilling, self-censoring effect on speakers.<sup>156</sup> For civil harassment litigation, there are two relevant areas of vagueness concern: the statute itself and any order issued under it.

##### 1. *Vagueness of Statutes*

“Harassment” has no widely accepted legal definition.<sup>157</sup> Nearly two hundred state statutes contain with the words “harass” or “harassment”

*Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1212 (2002).

151. See *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 921 (2002); *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986); see also John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291 (2009).

152. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality); *id.* at 334 (Brennan, J., concurring); *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't.*, 533 F.3d 780, 789 (9th Cir. 2008).

153. See, e.g., *State v. Brown*, 85 P.3d 109, 112 (Ariz. App. 2004) (conviction for violating civil harassment order); *State v. Thorne*, 333 S.E.2d 817, 819 (W.V. 1985) (criminal telephone harassment) (“Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech.”).

154. See Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 194 (1994); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1336 (2005) [hereinafter Volokh, *Speech as Conduct*].

155. See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Winters v. New York*, 333 U.S. 507 (1948).

156. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997); *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

157. See generally Eugene Volokh, *The Dangerous Drift of “Harassment,”* in FROM DATA TO PUBLIC

in their official titles, and they cover a huge range of distinguishable conduct. Some statutes define harassment as threats to person or property, actual damage to property, fighting words, yelling or profanity, physical contact, hate crimes, impersonation, or following another person in a public place.<sup>158</sup> Some statutes identify precise activities as forms of harassment, such as distributing photos or videos of another person's genitals, filing a landlord-tenant lawsuit in bad faith, throwing bodily fluids at a prison guard, aiming a laser pointer into the eye of a human or an animal, placing an explosive device on a building, or handing unsanitary currency to a toll collector.<sup>159</sup> Some statutes protect identified people from harassment, including students, jurors, witnesses, bicyclists, referees at sporting events, neighborhood watch volunteers, tenants, debtors, and taxpayers.<sup>160</sup> Harassment is both something that hunters should not do to wildlife<sup>161</sup> and something that animal rights activists should not do to hunters.<sup>162</sup>

Courts have thus far rejected arguments that civil harassment statutes using the California model are unconstitutionally vague on their face,<sup>163</sup> but they are divided over the vagueness of similarly worded *criminal* harassment statutes.<sup>164</sup> This pattern may reflect the heightened

POLICY: AFFIRMATIVE ACTION, SEXUAL HARASSMENT, DOMESTIC VIOLENCE AND SOCIAL WELFARE (Rita J. Simon ed., 1996).

158. See ALASKA STAT. § 11.61.120 (2010) (fighting words); COLO. REV. STAT. § 18-9-111(1)(a) (2012) (physical contact); *id.* § 18-9-111(1)(b) (yelling or profanity); HAW. REV. STAT. § 711-1106(1)(b) (2009) (threats to property); *id.* § 711-1106.6 (impersonation); MD. CODE ANN., CRIM. LAW § 3-803 (LexisNexis 2012) (following another person in a public place); MONT. CODE ANN. § 45-5-221 (2011) (hate crimes); OR. REV. STAT. § 166.065(a)(c) (2011) (threats to a person); WASH. REV. CODE § 9A.36.080(1)(b) (2012) (damage to property).

159. See ALASKA STAT. § 11.61.118 (throwing bodily fluids at a prison guard); *id.* § 11.61.120(a)(6) (distributing photos or videos of another person's genitals); DEL. CODE ANN. tit. 21, § 4127(h) (2006) (handing unsanitary currency to a toll collector); HAW. REV. STAT. § 136-2 (aiming a laser pointer into the eye of a human or an animal); IOWA CODE § 708.7(1)(a)(2) (2011) (placing an explosive device on a building); TEX. PROP. CODE ANN. § 92.004 (West 2011) (filing a landlord-tenant lawsuit in bad faith).

160. See ALA. CODE § 13A-11-144 (2011) (referees); ARK. CODE ANN. § 17-24-505 (2009) (debtors); COLO. REV. STAT. § 12-14-106 (debtors); *id.* § 18-8-614 (jurors); CONN. GEN. STAT. § 54-82q (2012) (witnesses); FLA. STAT. § 843.20 (2012) (neighborhood watch volunteers); IDAHO CODE ANN. § 18-917A (2012) (students); *id.* § 163-4004 (taxpayers); LA. REV. STAT. ANN. § 32:201 (2009) (bicyclists); NEV. REV. STAT. § 118B.210 (2011) (tenants); N.D. CENT. CODE § 12.1-09-04 (2009) (jurors).

161. See COLO. REV. STAT. § 33-6-128.

162. See Frank J. Wozniak, *Validity and Construction of Statutes Prohibiting Harassment of Hunters, Fishermen, or Trappers*, 17 A.L.R. 5th 837 (2005). In North Carolina, harassment is also something that an animal rights activist should not do to wildlife in order to disrupt hunting. See N.C. GEN. STAT. § 113-295 (2009).

163. See, e.g., *Smith v. Martens*, 106 P.3d 28 (Kan. 2005); *State v. Hills*, 574 A.2d 1357 (Me. 1990); *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. Ct. App. 2006); *Curington v. Moon*, No. 22809, 2009 WL 1800373 (Ohio Ct. App. June 19, 2009); *Bachowski v. Salamone*, 407 N.W.2d 533, 537 (Wis. 1987).

164. Compare *City of Longmont v. Gomez*, 843 P.2d 1321, 1322 (Colo. 1993) (vague), and *State v. Bryan*, 910 P.2d 212, 216 (Kan. 1996) (vague), with *Snowden v. State*, 677 A.2d 33, 36 (Del. 1996) (not vague), and *State v. Fonseca*, 670 A.2d 1237, 1238 (R.I. 1996) (not vague). A good summary of the terrain can be found in the majority and dissenting opinions in *Galloway v. State*, 781 A.2d 851 (Md. 2001).

concern for the rights of the criminal accused: Courts are less tolerant of vague criminal laws than vague civil laws.<sup>165</sup> It also proves that vagueness, “like beauty, may be in the eye of the beholder.”<sup>166</sup>

We may begin by asking whether the unmodified words “harass” or “harassment” are vague. Courts disagree. The Second Circuit, ruling on a criminal statute forbidding harassment of hunters, said the word “harassment” is so vague that it “can mean anything”—indeed, it is so devoid of content that a court could not even propose a limiting construction.<sup>167</sup> The Wisconsin Supreme Court, upholding a civil harassment statute, said “harass” has a meaning that “can be readily ascertained by consulting a recognized dictionary.”<sup>168</sup> (The dictionary’s definition was “to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger.”<sup>169</sup>) A federal district court in Florida, considering a statute that would impose professional discipline on physicians who “unnecessarily harass a patient about firearm ownership,”<sup>170</sup> agreed that the word “harass” has an “ordinary meaning that [is] readily clear to persons of common intelligence,” although the court did not say what that meaning was.<sup>171</sup> The Florida statute was nonetheless unconstitutional, the court concluded, because the term “unnecessarily harass” was vague.<sup>172</sup> (By contrast, a majority of the Maryland Supreme Court found that the presence of the adverb “seriously” in the phrase “seriously annoys another person” helped save a criminal harassment statute from vagueness).<sup>173</sup> The Supreme Court of Texas, considering a lawyer discipline rule against harassment of jurors, decided that “harass” standing alone was unconstitutionally vague, but the vagueness would be cured if it was understood to incorporate the California model.<sup>174</sup> Inability of reasonable

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165. See *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 498–99 (1982) (“The Court has . . . expressed greater tolerance of [vague] enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1267 (3d Cir. 1992). Not all of the canons regarding vagueness point in the same direction when applied to civil harassment. While civil laws may tolerate more vagueness than criminal ones, civil harassment may best be understood as quasi-criminal. See *infra* note 196 and accompanying text. In free speech cases, “courts apply the vagueness analysis more strictly” and require “a greater degree of specificity and clarity than would be necessary under ordinary due process principles.” *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

166. *People v. Russell*, 630 N.E.2d 794, 796 (Ill. 1994).

167. *Dorman v. Satti*, 862 F.2d 432, 433 (2d Cir. 1988).

168. *Bachowski*, 407 N.W.2d at 537.

169. *Id.*

170. *Wollschlaeger v. Farmer*, No. 11-22026-Civ, 2012 WL 3064336, at \*1 (S.D. Fla. June 29, 2012).

171. *Id.* at \*14.

172. *Id.* at \*13–14.

173. *Galloway v. State*, 781 A.2d 851, 856 n.4 (Md. 2001).

174. *Comm’n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 439 (Tex. 1998).



people to agree on whether a word is vague strikes me as good evidence that it is.

The central difficulty with the California model is its choice to define harassment not in terms of respondent's forbidden acts, but in terms of petitioner's emotional responses. In *Coates v. City of Cincinnati*,<sup>175</sup> the Supreme Court found a criminal disorderly conduct statute unconstitutionally vague for precisely that reason. The statute forbade groups of three or more to "conduct themselves in a manner annoying to persons passing by."<sup>176</sup> Because "conduct that annoys some people does not annoy others," the statute relied upon an "unascertainable standard."<sup>177</sup> The vagueness was particularly offensive because it could criminalize assembly and expression "simply because [their] exercise may be 'annoying' to some people" (an overbreadth concern).<sup>178</sup> The *Coates* principle—that due process forbids prosecution for failure to be a mind reader—has been used to invalidate many criminal harassment or stalking laws as vague.<sup>179</sup>

One frequently proposed solution to the mind-reading problem is an intent element. Even if the respondent cannot read the petitioner's mind, the reasoning goes, he can read his own mind and then refrain from actions he intends to be harassing. Though this logic persuaded the drafters of the Model Penal Code<sup>180</sup> and some courts,<sup>181</sup> it is unsatisfying for several reasons. First, as several courts have noted, it is a non sequitur: Knowing one's mental state does not mean one knows which acts are forbidden by law.<sup>182</sup> This is doubly so when the definition of the mental

175. 402 U.S. 611 (1971).

176. *Id.* at 618 (alteration in original).

177. *Id.* at 614.

178. *Id.* at 615.

179. See *City of Longmont v. Gomez*, 843 P.2d 1321, 1325 (Colo. 1993) (criminal harassment); *State v. Bryan*, 910 P.2d 212, 220 (Kan. 1996) (criminal stalking); *State v. Sanderson*, 575 P.2d 1025, 1027 (Or. Ct. App. 1978) (criminal harassment); *City of Everett v. Moore*, 683 P.2d 617, 619 (Wash. Ct. App. 1984) (criminal telephone harassment). Texas courts have invalidated at least three different criminal harassment statutes for *Coates*-type vagueness, see *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983), *aff'd*, 723 F.2d 1164 (1984); *Long v. Texas*, 931 S.W.2d 285 (Tex. Crim. App. 1996); *May v. State*, 765 S.W.2d 438 (Tex. Crim. App. 1989).

180. MODEL PENAL CODE § 250.4 cmt. 6 (1980) (using "the overarching requirement of a purpose to harass another" to avoid vagueness).

181. See, e.g., *People v. Heilman*, 30 Cal. Rptr. 2d 422, 428 (Cal. Ct. App. 1994) (criminal stalking); *State v. Hills*, 574 A.2d 1357, 1359 (Me. 1990) (civil harassment); *State v. Koetting*, 616 S.W.2d 822, 824 (Mo. 1981) (criminal harassment); *Superior Sav. Ass'n. v. Cleveland Council of Unemployed Workers*, 501 N.E.2d 91, 96 (Ohio Ct. App. 1986) (civil injunction); *City of Seattle v. Huff*, 767 P.2d 572, 576 (Wash. 1989) (criminal telephone harassment); *Bachowski v. Salamone*, 407 N.W.2d 533, 538 (Wis. 1987) (civil harassment); see also M. Sean Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. CHI. L. REV. 1403, 1408–09 (1989).

182. See *Langford v. Omaha*, 755 F. Supp. 1460, 1462–63 (D. Neb. 1989) (disorderly conduct); *Kramer*, 712 F.2d at 178 (criminal harassment); *People v. Norman*, 703 P.2d 1261 (Colo. 1985) (criminal harassment); *State v. Blair*, 601 P.2d 766, 768 (Or. 1979) (criminal telephone harassment); *State v. Williams*, 26 P.3d 890, 895 (Wash. 2001) (criminal harassment).

state uses words that may be vague when used elsewhere in the same statute: “Intent to harass” is no less vague than “conduct that harasses.” Second, the argument confuses vagueness with overbreadth. It is certainly true that there will be fewer prosecutions for performing Act *X* with Intent *Y* than there would be for performing Act *X* without an intent requirement. But at best this addresses the overbreadth question of *how much* is prohibited, not the vagueness question of *what* is prohibited. Moreover, not all courts agree that intent requirements cure overbreadth.<sup>183</sup>

Third, in most areas of law, respondent’s mental state may be proven through inference from respondent’s actions, often on the theory that people intend to produce the foreseeable results of their actions. While valid in many settings, this concept comes with a troublesome pedigree when both the forbidden act and the forbidden intent are proven solely through evidence of a person’s speech. For example, the now-discredited line of espionage and syndicalism cases decided by the Supreme Court after World War I reasoned that the utterance of words criticizing the war effort simultaneously proves tendency to interfere with the war effort and intent to do so.<sup>184</sup> Modern cases reject this reasoning and invalidate statutes that rely on an irrebuttable presumption that a communication proves its own forbidden intent.<sup>185</sup>

Another type of intent element often claimed to cure vagueness is “no legitimate purpose” or similar language. While this theory has been accepted by some courts,<sup>186</sup> the ones that reject it<sup>187</sup> have the better of the argument. Labeling a purpose as “illegitimate” is no more definite than labeling an action as “misconduct”—which, by itself, would be

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183. See, e.g., *State v. Anonymous*, 389 A.2d 1270, 1273 (Conn. Super. Ct. 1978) (criminal harassment).

184. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (“[T]he language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war.”); *Schenck v. United States*, 249 U.S. 47, 51 (1919) (“Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”). Similar inferences from speech to intent were used to uphold prosecutions under the Sedition Act of 1798. See generally RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES (2012).

185. *Virginia v. Black*, 538 U.S. 343, 363–67 (2003) (hate crime statute); *Baker v. State*, 494 P.2d 68, 72 (Ariz. 1972) (criminal telephone harassment); *State v. Talley*, 858 P.2d 217, 230 (Wash. 1993) (same).

186. See *State v. Rucker*, 997 P.2d 1080 (Kan. 1999) (criminal stalking); *State v. Vaughn*, 366 S.W.3d 513, 522 (Mo. 2012) (criminal harassment); *People v. Stuart*, 100 N.Y.2d 412, 428 (N.Y. 2003) (criminal stalking); *Bachowski*, 407 N.W.2d at 538 (civil harassment).

187. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (“The qualification ‘without any lawful purpose of object’ [in a vagrancy statute] may be a trap for innocent acts.”); *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940) (“The phrase ‘without a just cause or legal excuse’ does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical.”); *Bolles v. People*, 541 P.2d 80, 83 (Colo. 1975) (criminal harassment); *City of Bellevue v. Lorang*, 992 P.2d 496, 502 (Wash. 2000) (criminal telephone harassment).

unconstitutionally vague.<sup>188</sup> The labeling exercise does not provide notice to the actor or limit discretion by the enforcer. At best, a “no legitimate purpose” element “disguises the constitutional difficulties of the statute but does nothing to resolve them.”<sup>189</sup>

Another argument for overcoming vagueness is more persuasive and has been accepted by more courts, but it too leaves some nagging unanswered questions. Under this approach, the *Coates* problem (the impossibility of reading a petitioner's mind) is supposedly defused by requiring instead that the respondent read the mind of an idealized reasonable person whose thoughts are presumptively known to all. For example, when the Kansas Supreme Court, following *Coates*, found vague a criminal statute forbidding conduct that “seriously alarms, annoys or harasses the [victim], and which serves no legitimate purpose,” it suggested in dicta that the problem could be solved by adding an objective component such as conduct that would “annoy, alarm, or harass a reasonable person.”<sup>190</sup> Many courts have agreed with this distinction, upholding harassment formulas that include a reasonable person standard.<sup>191</sup>

In many legal contexts (negligence being most prominent among them), we are comfortable imposing liability on people who deviate from what a reasonable person would do. Within free speech law, the proscribable categories of incitement, fighting words, true threats, and obscenity all involve predicting whether a reasonable person would react to the speaker's expression with obedience, anger, fear, or lust, respectively. Adherents to the original public understanding school of constitutional interpretation believe it is possible to know to a legal certainty what reasonable people thought the Constitution meant in 1789. American law is so comfortable with reasonable person tests that we call them “objective.”

A civil harassment statute with a reasonable person standard is a major improvement over those without them, but it does not entirely solve the problem. Even though the reasonable person is a legal staple, we are nowhere close to consensus on what the reasonable person believes and likely never will be.<sup>192</sup> The problem is especially pronounced when we ask under what circumstances the reasonable person will experience subjectively upsetting emotions. If the reasonable person is a person controlled by reason, the person may never feel “annoyed” or

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188. *State v. Adams*, 866 P.2d 1017, 1021 (Kan. 1994) (official misconduct).

189. *Bolles*, 541 P.2d at 83.

190. *State v. Bryan*, 910 P.2d 212, 216, 220 (Kan. 1996) (criminal stalking).

191. *See State v. Culmo*, 642 A.2d 90, 99 (Conn. 1994) (criminal stalking); *Johnson v. State*, 449 S.E.2d 94, 96 (Ga. 1994) (criminal stalking); *see also Boychuk*, *supra* note 58, at 779.

192. *See generally* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012).

“harassed.” For this reason, many legal references to the “reasonable” person are better understood as referring to the “ordinary” person, who comes complete with ordinary emotional responses (which may vary between ordinary people belonging to different social groupings, particularly those involving sex, age, and ethnicity).<sup>193</sup>

The next question is who decides how an ordinary person is supposed to feel. When a legal inquiry hinges on the emotional impact of expression, we typically rely on a jury.<sup>194</sup> The jury is presumed to comprise an emotionally fair cross section of the community. By contrast, civil harassment petitions are decided by a single judge. Even if we assume that judges, taken as a group, are emotionally ordinary, an individual judge may not be. Unlike a juror, a judge sitting in equity does not deliberate with others, aggregating reactions to form a presumably trustworthy sampling of public opinion. In the vast majority of unappealed cases, the trial judge’s inclinations are not even compared against the collective judgment of a three-judge appellate panel.<sup>195</sup>

Thus when invoked within the prevailing civil harassment procedures, the reasonable person standard may not fully eliminate vagueness and subjectivity from the California model. With that said, appellate courts are likely to continue to hold that the statutes are not vague on their faces. Such holdings settle a constitutional question, but many tough practical questions will remain for trial judges in actual cases. Without better guidance on how to exercise the discretion granted by these statutes, decisions at trial will devolve into “I know it when I see it.”

## 2. *Vagueness in Orders*

Vagueness questions may arise for individual injunctions issued pursuant to statutes that are not facially vague. An injunction functions as “a mini-criminal statute” because a violation leads to criminal prosecution.<sup>196</sup> Hence, the notion that vagueness is more tolerable in civil laws than criminal ones ought not apply when evaluating the clarity of an injunction.

Vagueness in a final order may present itself in several forms. Some injunctions recapitulate the language of the statute itself, as is typical with injunctions that purport to forbid future “harassment,” either by

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193. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the “reasonable woman” standard under Title VII).

194. See *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that juries are to determine whether sexual depictions “appeal to the prurient interest” and are “patently offensive”).

195. For a competing view, positing that juries may be poorly equipped to make such determinations, see RESTATEMENT (THIRD) OF TORTS § 45 cmt. i (Tentative Draft No. 5, 2007).

196. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 8, 35 (1978). Some courts have alluded to this concept by labeling civil harassment statutes as “quasi-criminal” and therefore “subject to the heightened definiteness requirement” applicable to criminal statutes. *Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. Ct. App. 2006).

using that term alone or by reference to the California model.<sup>197</sup> Some orders replace statutory terms with others that are equally or more pliable, such as an order forbidding “any other conduct which injures the Petitioner, either physically or emotionally.”<sup>198</sup> However they are phrased, orders that amount to “no more harassment” without specifying the acts to be avoided violate the rule against “obey the law” injunctions.<sup>199</sup> For much the same reason, orders forbidding future false statements—without specifying what they are—are unconstitutionally vague.<sup>200</sup>

The beauty of a no-contact provision, whether in a domestic violence injunction or a civil harassment order, is how easy it is to enforce. Nuanced judgments may be required for criminal prosecution (especially regarding intent), but it is fairly cut-and-dried to decide whether a respondent has ventured within a specified distance of a petitioner’s home or workplace, has attempted to contact petitioner, or has attempted to keep the petitioner under surveillance.<sup>201</sup> A civil harassment order lacking such specificity defeats its own purpose and is certain to result in varying interpretations, chilling effects, follow-up litigation, and surprises on motions for contempt.

#### B. OVERBREADTH

Where the vagueness doctrine concerns uncertainty, the overbreadth doctrine concerns scope. A law proscribing a real and substantial amount of protected expression is overbroad, whether it reaches the expression by accident or design.<sup>202</sup> To determine whether civil harassment statutes forbid speech that should be protected, it is useful to consider separately

197. Fiss, *supra* note 196, at 13 (“Preventive injunctions have been characteristically broad . . . [and often do] little more than track the prohibition of the appropriate statute or constitutional command.”).

198. *Svedberg v. Stamness*, 525 N.W.2d 678, 680 (N.D. 1994) (affirming order); see *In re Marriage of Suggs*, 93 P.3d 161, 165 (Wash. 2004) (describing an order against acts “designed for the purpose of annoying, harassing, vexing, or otherwise harming Andrew O. Hamilton and for no lawful purpose”).

199. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999); see FED. R. CIV. P. 65(d)(1)(C) (stating that injunctions must “describe in reasonable detail . . . the act or acts restrained”); *Payne v. Travenol Labs, Inc.*, 565 F.2d 895, 897 (5th Cir. 1978).

200. See, e.g., *Metro. Opera Ass’n, Inc. v. Local 100*, 239 F.3d 172, 174–78 (2d Cir. 2001) (injunction barring union from “fraudulent or defamatory representations” was vague); *Royal Oaks Holding Co. v. Ready*, No. C4-02-267, 2002 WL 31302015, at \*4 (Minn. Ct. App. 2002) (affirming a civil harassment order against distributing, publishing, or mailing offensive, obscene, threatening, or defaming material); *In re Marriage of Suggs*, 93 P.3d at 166 (stating that a civil harassment order forbidding “invalid and unsubstantiated” allegations or complaints to third parties “lacks the specificity demanded”).

201. See WASH. REV. CODE § 10.14.080(6) (2012).

202. “[O]verbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). A law is facially overbroad when it extends significantly beyond its permissible scope, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (ban on all “live entertainment”), or when it lacks “plainly legitimate sweep” to begin with, *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

speech “directed to the person of the hearer”<sup>203</sup> and speech to the world at large.

### I. *Speech to a Petitioner*

Findings of civil harassment that are premised on the respondent’s speech can be seen as inconsistent with the Supreme Court’s “longstanding refusal” to impose liability “because the speech in question may have an adverse emotional impact on the audience.”<sup>204</sup> Because listeners’ “reaction to speech is not a content neutral basis for regulation,”<sup>205</sup> the California model is especially likely to trigger free speech objections.

Much emotionally upsetting speech enjoys constitutional protection. But it is incorrect to say that listeners’ likely emotional reactions are never a basis to proscribe speech. Many of the categories of speech that may be penalized under the First Amendment—particularly true threats, fighting words, obscenity, and (arguably) incitement—are proscribable precisely because of their impact on listeners. So the real question is *which* adverse emotional responses are a forbidden basis for speech regulation. Unfortunately, the terms used in free speech cases to describe listeners’ emotional reactions tend to elide important distinctions.

Consider *Terminiello v. Chicago*,<sup>206</sup> where an angry crowd demonstrated outside an auditorium where a demagogue delivered a reactionary anti-Semitic speech. Police arrested the speaker for disorderly conduct. At trial, the jury was instructed that a defendant’s behavior

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203. *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)). See *Volokh, One-to-One*, *supra* note 41; *Volokh, Speech As Conduct*, *supra* note 154, at 1323.

204. *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988). See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”); *United States v. Eichman*, 496 U.S. 310, 318 (1990) (flag burning is protected even though “deeply offensive to many”); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” (internal quotation marks omitted)); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”). Lower courts agree. See *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*, 533 F.3d 780, 787 (9th Cir. 2008) (“If the statute . . . would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the ‘heckler’s veto.’”); *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978) (holding that Nazis could march in Skokie even though it would “seriously disturb” residents emotionally and mentally).

205. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

206. 337 U.S. 1 (1949).

“may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.”<sup>207</sup> The Supreme Court reversed the conviction. In its most widely quoted passage, the majority relied on a bit of verbal jujitsu to declare that the vices identified in the jury instructions were actually virtues: “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”<sup>208</sup>

*Terminiello* was right to observe that the jury instructions overstated their case. Some highly protected expression may give rise to anger, dispute, unrest, alarm, and even death. Think of Martin Luther’s ninety-five theses, *Common Sense*, “La Marseillaise,” or *The Communist Manifesto*. But *Terminiello* also overstated its case. The anger and alarm caused by exposure to challenging social ideas is different in kind from the anger and alarm that result from a drunkard shouting profanities in your face. Someday neuroscience may make it possible to distinguish among different angers and alarms by their neural patterns, but for now we must make do with verbal formulas. Unfortunately, the verbal formulas usually used in free speech literature—especially “emotional distress” and “offense”—are not as informative as they need to be.<sup>209</sup>

To date, no civil harassment statute has been invalidated as overbroad.<sup>210</sup> But criminal harassment statutes have been found overbroad when they lump together too many different adverse reactions to speech. For example, a Colorado criminal harassment statute forbade communication “in a manner likely to harass or cause alarm” when done “with intent to harass, annoy, or alarm.”<sup>211</sup> In finding the statute overbroad, the Colorado Supreme Court noted that speech provoking “alarm” is often entirely worthy: It should not be illegal “to forecast a storm, predict political trends, warn against illnesses, or discuss anything that is of any significance. . . . The First Amendment is made of sterner

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207. *Id.* at 3.

208. *Id.* at 4. A similar rhetorical device appeared in *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264–65 (3d Cir. 2002), which overturned a public school policy against on-campus student expression generating “ill will”: “As a general matter, protecting expression that gives rise to ill will—and nothing more—is at the core of the First Amendment.” *Id.* at 265.

209. The tendency to conflate different forms of psychic injury under an umbrella term is not unique to speech law. See DOBBS ET AL., 2 THE LAW OF TORTS § 381 (2001) (“Courts have long recognized that tortfeasors should be responsible for causing distress, emotional harm, anxiety, diminished enjoyment, loss of autonomy, and similar intangible harms. The exact form of the intangible harm seldom matters.”).

210. See *Dunham v. Roer*, 708 N.W.2d 552, 559 (Minn. Ct. App. 2006) (rejecting a facial overbreadth challenge).

211. *Bolles v. People*, 541 P.2d 80, 81 n.1 (Colo. 1975).

stuff.”<sup>212</sup> The Illinois Supreme Court found overbroad a statute that made it unlawful to make any telephone call “with intent to annoy another,” because it would criminalize instances where people’s wish to annoy others was perceived as legitimate, such as

a single telephone call made by a consumer who wishes to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another’s failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters.<sup>213</sup>

In short, “First amendment protection is not limited to amiable communications.”<sup>214</sup>

The requirement in almost all civil harassment statutes to show a course of conduct, rather than an isolated act,<sup>215</sup> alleviates but does not eliminate this problem. As messages are repeated beyond the point of diminishing returns, they may lose their expressive value, justifying greater regulation.<sup>216</sup> But before that point, repetition increases expressive value. This is why advertisers are willing to invest heavily in repetition. Calibrating the point at which repetition becomes excessive is difficult and will certainly vary with context. Under Title VII, the hostile environment form of sexual harassment can be established non-severe acts if they are repeated to the point of being “pervasive.”<sup>217</sup> By contrast, most civil harassment statutes define a course of conduct as two or more related instances<sup>218</sup>—a standard similar to RICO<sup>219</sup>—which may set the repetition bar too low. For example, a grandmother in New Mexico was worried about her sixteen-year-old granddaughter living with a twenty-two-year-old man. The grandmother called the man’s mother two or three times to seek her help in ending what she saw as an unhealthy relationship—even after the first call ended with the man’s mother saying she did not wish to speak to the grandmother and hanging up. The grandmother was convicted of criminal telephone harassment, but the

212. *Id.* at 83; see *State v. Johnson*, 191 P.3d 665, 668–69 (Or. 2008) (holding the fighting words provision of a criminal harassment statute overbroad under the state constitution’s free speech clause).

213. *People v. Klick*, 362 N.E.2d 329, 331–32 (Ill. 1977).

214. *Id.* at 332. *Accord* *State v. Brobst*, 857 A.2d 1253, 1255–56 (N.H. 2004).

215. Many states have statutes authorizing injunctions in response to single instances of violence or sexual assault, without proof of a larger course of conduct. See MINN. STAT. ANN. § 609.748(1) (West 2009); NEV. REV. STAT. § 200.378 (2011); WASH. REV. CODE § 7.90.005–900 (2012). I do not include these sexual violence restraining order statutes within my universe of civil harassment laws.

216. See Brownstein, *supra* note 154, at 200.

217. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1989)).

218. *E.g.*, *Beach v. Jeschke*, 649 N.W.2d 502, 503 (Minn. Ct. App. 2002); *State v. McCarthy*, 980 P.2d 629, 632 (Mont. 1999).

219. 18 U.S.C. § 1961(5) (2012); see *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985); *id.* at 527 (Powell, J., dissenting).



court of appeals reversed. The law “does not require that on a matter of such obvious importance and concern, one must take no for an answer and never call again.”<sup>220</sup> For much the same reason, a Missouri court recently found overbroad a criminal cyberharassment statute that forbade all “repeated unwanted communication to another person.”<sup>221</sup>

In sum, for civil harassment statutes to avoid overbreadth problems, they must define with greater precision the types of emotional distress they seek to avoid. Part III proposes that the emotions connected to safety and privacy are the proper area of legislative concern.

## 2. *Speech to Others About a Petitioner*

Speech directed to a wider audience is even more likely to enjoy constitutional protection than speech to a private audience of one. Here, it is helpful to separate speech alleged to harm reputation through falsehood from speech that allegedly creates different harms.

### a. *False Speech to Others Injuring Reputation*

Many petitioners allege that they were harassed by false statements to others that injured their reputation. These petitions typically seek orders like “stop talking to my boss,”<sup>222</sup> “stop reporting me to law enforcement,”<sup>223</sup> and “stop writing about me on the Internet.”<sup>224</sup> Using civil harassment standards to remedy defamation violates a host of well-established limitations on the defamation tort.

American law deliberately makes defamation difficult to prove. Through the tort’s common law development and its constitutionalization after *New York Times v. Sullivan*,<sup>225</sup> an array of substantive and procedural

220. *State v. Stephens*, 807 P.2d 241, 244 (N.M. Ct. App. 1991). The court also held that the grandmother’s threat to report the incident to the attorney general was not the type of threat that could support liability. *Id.* at 245.

221. *State v. Vaughn*, 366 S.W.3d 513, 519–20 (Mo. 2012). See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) (invalidating the portion of an injunction that prohibits “all uninvited approaches”). But see *Hill v. Colorado*, 530 U.S. 703, 733–35 (2000) (upholding a statute that forbids all unconsented “approaches”).

222. See *Hunley v. Hardin*, No. B210918, 2010 WL 297759, at \*1–2 (Cal. Ct. App. 2010); *Evans v. Evans*, 76 Cal. Rptr. 3d 859, 863–66 (Cal. Ct. App. 2008); *Faricy v. Schramm*, No. C8-02-689, 2002 WL 31500913, at \*1 (Minn. Ct. App. 2001); *Bovi v. Parask*, No. C5-98-1616, 1999 WL 289245, at \*1–2 (Minn. Ct. App. 1999); *Mills v. Funkhouser*, No. COA11-440, 2012 N.C. App. LEXIS 427, at \*1–3 (N.C. Ct. App. Apr. 3, 2012); *In re Marriage of Suggs*, 93 P.3d 161, 162–63 (Wash. 2003).

223. See *Elster v. Friedman*, 260 Cal. Rptr. 148, 149–51 (1989); *Smith v. Silvey*, 197 Cal. Rptr. 15, 16–18 (1983); *In re Marriage of Meredith*, 201 P.3d 1056, 1058–60 (Wash. Ct. App. 2009).

224. See, e.g., *Johnson v. Arlotta*, No. A11-630, 2011 WL 6141651, at \*1–2 (Minn. Ct. App. 2011); *Ramsey v. Harman*, 661 S.E.2d 924, 925 (N.C. Ct. App. 2008); Tom Parsons, *Arkansas Teen Accuses Mom of Facebook Harassment*, USA TODAY, Apr. 8, 2010, [http://www.usatoday.com/tech/news/2010-04-08-mom-facebook-harassment\\_N.htm](http://www.usatoday.com/tech/news/2010-04-08-mom-facebook-harassment_N.htm).

225. 376 U.S. 254 (1964). American defamation law has not followed an unbroken forward march towards greater restrictions on the tort, but that has been its overall trend. See generally NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* (1986).

rules limit defamation law to avoid its speech-inhibiting side effects. These limitations include: (a) truth as a defense, (b) protection for pure opinion, (c) the right to trial by jury, (d) various absolute privileges, including testimonial privilege and legislative privilege, (e) various qualified privileges, including fair comment, fair reporting, and statements in the interest of the audience, (f) the plaintiff's burden to prove falsity, (g) proof by clear and convincing evidence in some settings, (h) a mental state of actual malice—meaning knowledge of falsity or reckless disregard for the truth—as a requirement for some forms of liability and damages, (i) independent review of the record on appeal, and (j) most recently, anti-SLAPP statutes.<sup>226</sup>

By contrast, civil harassment is designed to be easy to prove. The burden of proof is low, the procedures are expedited, and the elements are few. None of the substantive and procedural limitations that have been carefully constructed around defamation law are present in civil harassment statutes. Therein lies the tension: A petitioner should not be able to evade the limits on defamation law (many of them constitutionally mandated) by redesignating the claim as civil harassment. The Supreme Court has consistently held that whenever the gist of a claim is injury to reputation, the plaintiff must adhere to the constitutional standards for defamation.<sup>227</sup> The same principle must apply when injury to reputation is the basis for a civil harassment petition.

*b. Non-Defamatory Speech to Others*

Speech about a petitioner may be emotionally distressing for reasons other than its defamatory effect on reputation, as with messages that condemn or express dislike for the petitioner. The Supreme Court has found such speech to be constitutionally protected, at least where the speech involves topics of public concern.<sup>228</sup> This is true even when the speech identifies individuals by name, discloses their addresses and phone numbers, and encourages others to contact them.<sup>229</sup> In cases not involving topics of public concern, protection is still often afforded, as in

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226. See generally ROBERT D. SACK, *SACK ON DEFAMATION* (4th ed. 2012); David A. Anderson, *First Amendment Limitations on Tort Law*, 69 *BROOKLYN L. REV.* 755 (2004).

227. See *Noel v. River Hills Wilsons, Inc.*, 7 Cal. Rptr. 3d 216, 224 (Cal. Ct. App. 2003) (“[P]laintiffs may not avoid the strictures of defamation law by artfully pleading their defamation claims to sound in other areas of tort law.”). See generally *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (outrage); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (false light invasion of privacy).

228. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932–34 (1982).

229. See *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419–20 (1971) (“Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature . . .”).

cases that reject liability for shunning by religious communities on grounds that meld concerns about speech, religion, and association.<sup>230</sup>

The Supreme Court most recently considered hurtful but non-defamatory speech in *Snyder v. Phelps*.<sup>231</sup> The Westboro Baptist Church, a tiny sect led by the Phelps family, pickets near military funerals to express their message that “God is killing American soldiers as punishment for the Nation’s sinful policies”<sup>232</sup>—a sentiment reminiscent of Abraham Lincoln’s Second Inaugural Address.<sup>233</sup> Shortly before the funeral of Marine Lance Corporal Matthew Snyder, church members demonstrated on public land near to, but not visible from, the funeral. The decedent’s father Albert Snyder learned the precise content of the protest signs (such as “Thank God for Dead Soldiers” and “You’re Going to Hell”) from later news reports, which caused him severe emotional distress. A jury awarded compensatory and punitive damages to Snyder, but the Supreme Court reversed. The Court’s opinion emphasized that Westboro’s speech related to topics of public concern. Some authors have argued, correctly in my view, that this focus was largely irrelevant to the outcome of the case.<sup>234</sup> Snyder’s theory was that Westboro disrupted his son’s funeral, but in fact it did not. If a plaintiff may recover damages for speech he learned about on the news, it makes the defendant’s speech effectively illegal everywhere and at any time.

Let us imagine instead that Westboro engaged in expression of purely private concern (e.g., “Albert Snyder is a bad man”) that was communicated to a large audience through picketing, television interviews, and websites.<sup>235</sup> Although Snyder may have encountered the message, it was not directed at him as that term is used in civil harassment statutes. It was simply speech about him. Snyder understandably does not wish to have such things said, but he should not have legal authority to forbid

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230. See generally Paul T. Hayden, *Religiously Motivated “Outrageous” Conduct: Intentional Infliction of Emotional Distress as a Weapon Against “Other People’s Faiths,”* 34 WM. & MARY L. REV. 579 (1993); Nicholas Merkin, *Getting Rid of Sinners May Be Expensive: A Suggested Approach to Torts Related to Religious Shunning Under the Free Exercise Clause*, 34 COLUM. J.L. & SOC. PROBS. 369 (2001). Non-religious shunning in the workplace is explored in Howard Zimmerle, Note, *Common Sense v. the EEOC: Co-Worker Ostracism and Shunning as Retaliation Under Title VII*, 30 J. CORP. L. 627, 639 (2005).

231. 131 S. Ct. 1207 (2011).

232. *Id.* at 1217.

233. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.bartleby.com/124/pres32.html> (“[I]f God wills that [the Civil War] continue until all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, . . . so still it must be said ‘the judgments of the Lord are true and righteous altogether.’”).

234. See Alan Brownstein & Vikram David Amar, *Afterthoughts on Snyder v. Phelps*, 2011 CARDOZO L. REV. DE NOVO 43, 44–45.

235. Although it was not an issue on appeal, Westboro included some such speech on its website. *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting).

Westboro from communicating with others who may be perfectly willing to listen. This may be an area where the remedy makes an important difference.<sup>236</sup> Even if an award of damages for such speech were allowed, a quasi-criminal injunction would not—for reasons that relate to the law of prior restraint.

### C. PRIOR RESTRAINT

A prior restraint is a government action making it unlawful to say certain things without individualized permission. Prior restraint problems arise for any civil harassment order that forbids speech with specified content, as in “Do not say *X* to petitioner” or “Do not say *Y* about petitioner.” Injunctions limiting speech are a “classic” form of prior restraint,<sup>237</sup> and prior restraints “are the most serious and the least tolerable infringement on First Amendment rights.”<sup>238</sup> This is true in significant part because the initial decision to impose a prior restraint is made by a bureaucrat or, in the case of an injunction, a single judge sitting in equity without a jury. When a prior restraint is enforced through a subsequent criminal prosecution, the community at large—in the form of the jury—has no say on the wrongfulness of the defendant’s speech (or of the government’s decision to ban it).<sup>239</sup> Its judgment is artificially limited to a fact question prepared in advance to favor the government, namely whether the defendant spoke without permission.

This description reveals the uncomfortable parallel between prior restraints and civil harassment orders. Compared to subsequent punishment for crimes of violence, civil harassment orders are easy to obtain and easy to enforce. These are their chief virtues. Compared to subsequent punishment for speech, prior restraints are also easy to obtain and easy to enforce. These are their chief vices.

Making matters worse is that an injunction against speech to third parties will inevitably be content based. The only genuinely content neutral injunction that could stop undesired speech about petitioner would be this: “Respondent may not communicate with anyone about

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236. See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 495–99, 505 (2011) (contrasting the need for precision in criminal law with the broader standards tolerated in tort law).

237. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.”). *Accord* *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (“Pentagon Papers”); *Near v. Minnesota*, 283 U.S. 697 (1931). Prior restraint problems can be especially acute for *ex parte* temporary orders, which are ubiquitous in civil harassment litigation. See Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971); *Carroll v. Princess Anne*, 393 U.S. 175 (1968); Fiss, *supra* note 196, at 28–29.

238. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

239. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1150 (1991); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 726–35 (2008).

anything.” Such an order would be overbroad in violation of the First Amendment, would violate the equitable rule that injunctions should reach only as far as the harm proven, and would be so irrational as to violate substantive due process. The only way to avoid those problems would be to limit the injunction to allow some speech, as in “do not tell lies about petitioner” or “do not say anything about petitioner.” Although such orders have, unfortunately, been issued, they are irredeemably content based.

The rule against speech-limiting injunctions has special application for defamation. The centuries-old maxim that “equity does not enjoin a libel” meant that the only remedy for defamation was an action at common law for damages.<sup>240</sup> Within the Bill of Rights, the Seventh Amendment guaranteed a right to a jury trial for common law damages actions (including defamation actions), and it was also widely understood that the First Amendment incorporated the ban on libel injunctions.<sup>241</sup> In 1916, Roscoe Pound argued that the law should allow a final injunction against repeating specific falsehoods proven to be defamatory at trial.<sup>242</sup> Some state courts follow Pound’s approach, but most have rejected it.<sup>243</sup>

In 2005, the Supreme Court was poised to decide whether final injunctions in defamation suits violate the First Amendment, but the Court avoided deciding that issue following the plaintiff’s untimely death. *Tory v. Cochran*<sup>244</sup> involved a fact pattern that often leads to civil harassment litigation: A client goes public with complaints about an attorney.<sup>245</sup> In this case the client (Tory) picketed against a lawyer (the well-known civil rights attorney Johnnie Cochran), holding signs saying such unflattering things as “You’ve been a BAD BOY, Johnnie L. Cochran” and “Unless You have O.J.’s Millions—You’ll be Screwed if you USE J.L. Cochran, Esq.”<sup>246</sup> Cochran did not rely on California’s civil

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240. See *Francis v. Flinn*, 118 U.S. 385, 389 (1886); *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987). See generally DAN B. DOBBS, 2 LAW OF REMEDIES § 7.2(14) (2d ed. 1993).

241. See SACK, *supra* note 226, § 10:6.1; RODNEY A. SMOLLA, 2 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15:57 (2012); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 163, 167, 172 (2007); Siegel, *supra* note 239, at 665.

242. Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 682 (1916).

243. See *Animal Rights Found. of Fla., Inc. v. Siegel*, 867 So. 2d 451, 457 (Fla. App. 2004) (invalidating a preliminary injunction against allegedly defamatory picketing as a prior restraint); Siegel, *supra* note 239, at 657. Compare *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 343 (Cal. 2007) (California allows final injunctions against proven defamations), with *Kramer v. Thompson*, 947 F.2d 666, 678–80 (3d Cir. 1991) (the Third Circuit held that Pennsylvania does not).

244. *Tory v. Cochran*, 544 U.S. 734 (2005).

245. See generally *Penney v. Isbell*, No. C053824, 2008 WL 607594 (Cal. Ct. App. Mar. 6, 2008); *Moskowitz v. Dunn*, No. A114649, 2007 WL 1454764 (Cal. Ct. App. May 18, 2007); *Lais v. Barber*, No. E037514, 2006 WL 1330774 (Cal. Ct. App. May 16, 2006).

246. *Cochran v. Tory (Cochran II)*, No. B159437, 2003 WL 22451378, at \*1 (Cal. Ct. App. Oct. 29, 2003).

harassment statute, instead framing his complaint as an ordinary tort suit for defamation and false light invasion of privacy.<sup>247</sup> However, the case proceeded much like a civil harassment petition. Tory represented himself. Cochran waived damages so that the matter would be tried without a jury. The only relief requested was an injunction, which the trial court granted. The order directed that in any public place, Tory could not say anything orally or in writing about Cochran or his law firm.<sup>248</sup> The California Court of Appeal upheld the injunction.<sup>249</sup> The Supreme Court granted review and heard argument, but a week later Cochran died, effectively eliminating any justification for the injunction.<sup>250</sup>

Whether or not the First Amendment forbids injunctions against defamation, under present law a civil harassment order barring specified content at the very least poses significant constitutional questions. Beyond that legal concern is a practical one: A defamation injunction is unlikely to stop a pattern of defamation undertaken for the purpose of causing distress. A defamation injunction, if allowed at all, would only forbid republication of the precise statements proven defamatory at trial. A harasser devoted to injuring the victim's reputation could simply invent a different lie that has not been enjoined.<sup>251</sup> The only truly efficacious injunction against a serial defamer would take the form of "do not tell lies about petitioner" or "do not say anything about petitioner." Such orders are hopelessly vague and overbroad, respectively.

### III. METHODS TO AVOID SPEECH VIOLATIONS

Part II described how civil harassment statutes can lead to constitutional violations as applied, even if the language of the statutes is not so fatally defective as to be facially invalid. The canon of constitutional avoidance counsels that statutes should be interpreted and applied in a way that avoids unconstitutional results and serious questions of constitutionality.<sup>252</sup> Serious constitutional questions are sure to arise under the California model, which authorizes injunctions (against anything) in response to (unspecified) behavior that makes others feel (generally) bad. Even if legislatures prefer for harassment to be judged against a general standard, as opposed to a precise rule, we can construct a much better standard than the California model.

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247. *Id.* at \*1-2.

248. *Cochran v. Tory*, No. BC239405, 2002 WL 33966354, at \*1-2 (Cal. Super. Ct. 2002); see Chemerinsky, *supra* note 241, at 161.

249. *Cochran II*, 2003 WL 22451378, at \*4.

250. Instead of dismissing certiorari, the Supreme Court issued a decision vacating the injunction because Cochran's death made it overbroad in comparison to any legitimate purpose. *Tory*, 544 U.S. at 738.

251. Chemerinsky, *supra* note 241, at 171-72.

252. See *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

The key to a constitutionally acceptable standard for civil harassment is the concept of *unconsented contact or surveillance* that threatens *safety and privacy*. As used here, contact has the meaning it takes in the typical no-contact order: in-person interaction or the direction of messages to the petitioner through other media such as phone, mail, messenger, or electronic communications. Privacy refers to freedom from surveillance or from intrusion into seclusion, as opposed to other privacy torts such as false light, misappropriation of likeness, or publication of private facts. While still flexible, this standard has far more substance than the California model. First, not every conceivable conduct will constitute harassment under this standard—only activity that results in contact with, or surveillance of the petitioner. Second, specifying the emotional harms that come from loss of safety and privacy—as opposed to sketchily defined emotional distress—ensures that a petitioner’s reasons for avoiding contact are those that society is prepared to endorse. It is proper to invoke the apparatus of government to protect safety and privacy, but not to enforce mere social preferences as occurs under the “annoy” standard. Third, this standard connotes that the proper remedy will be an order ending respondent’s contact with or surveillance of petitioner, not an order forbidding speech identified by its content.

This proposed standard for civil harassment avoids most constitutional problems. It also effectuates the legislative purposes behind civil harassment laws. For example, Washington’s definition of harassment is a sweeping variation of the California model: “Unlawful harassment” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.”<sup>253</sup> Yet the legislative findings tell us that the law’s goal is to remedy “repeated invasions of a person’s privacy” by authorizing injunctions “preventing all further unwanted contact between the victim and the perpetrator.”<sup>254</sup> Words like “privacy” and “unwanted contact” ought to appear in statutory definitions of harassment, not just in legislative findings. Minnesota and North Dakota, for example, define civil harassment in part as “intrusive or unwanted acts, words, or gestures that have a substantial adverse effect . . . on the safety, security, or privacy of another.”<sup>255</sup> South Carolina’s definition hinges upon “unreasonable intrusion into the private life of a targeted person.”<sup>256</sup> While these definitions remain open-

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253. WASH. REV. CODE § 10.14.020(2) (2012).

254. *Id.* § 10.14.010.

255. MINN. STAT. ANN. § 609.748 (West 2009); N.D. CENT. CODE § 12.1-31.2-01 (2009); see *Svedberg v. Stamness*, 525 N.W.2d 678, 686 (N.D. 1994) (Levine, J., dissenting) (“[T]he intent of the legislature was to protect the victims of stalking and intimidation from conduct by perpetrators which had put them in fear for their lives, their safety, their security.”).

256. S.C. CODE ANN. § 16-3-1700 (2011) (incorporating S.C. CODE ANN. § 16-3-1700(A) (1995)).

textured, they are a much more satisfying description of the problem the legislature seeks to solve.

This Part explains how to use this proposed standard to effectuate the purposes of civil harassment statutes while avoiding constitutional objections. It begins by fleshing out the standard through comparison with well-understood tort and criminal law concepts. It then offers an approach to evaluating harassment claims that mix speech and non-expressive conduct. If followed, this approach will in most cases ensure that liability for harassment rests on a content neutral basis (as required by *O'Brien*) and that a resulting injunction restricts no more speech than necessary (as required by *Madsen*). Finally, it addresses how to craft injunctions that act as constitutionally permissible no-contact orders instead of content-based prior restraints.

#### A. THE CORE AND PERIPHERY OF CIVIL HARASSMENT

Given the variety of conduct that might threaten safety and privacy, it is proper to define harassment through a somewhat flexible standard (in addition to any applicable bright-line rules). A standard can be applied more consistently—and in greater harmony with constitutional values—by identifying the conduct that falls at its core and at, or beyond, its periphery. By analogy, the constitutional standard “freedom of speech” is frequently described as having a core that protects expression relating to democratic self-government (including but not limited to speech about elections or the conduct of officer holders). At the periphery of the protected zone we find expression that is sometimes protected and sometimes not (such as commercial speech or false statements of fact). Beyond the periphery there is no free speech protection at all (for nonexpressive conduct). Protected speech remains a flexible standard, but having a sense of its core and periphery makes it far easier to navigate.

By reference to well-established legal concepts from tort and criminal law, we can identify the core of harassment as conduct resembling battery, assault, threats, trespass, or intrusion into seclusion (“BATTI” for short). Conduct resembling outrage (intentional infliction of emotional distress) lies at the periphery of the definition. Speech directed to persons other than the petitioner, especially defamation and malicious prosecution, falls outside the definition altogether. The analogy to well-known common law concepts is deliberate. As a legal term, harassment is very new.<sup>257</sup> Common law terms are very old. Centuries of development have given them agreed-upon contours that harassment thus far lacks.

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<sup>257</sup> *Black's Law Dictionary* had no entry for “harassment” before the Fifth Edition (1979). This inaugural entry duplicated the definition of criminal harassment from Model Penal Code § 250.4. The Sixth Edition (1990) added the California model to the definition, citing as its source a federal statute enacted in 1982 authorizing injunctions against harassment of crime victims or witnesses, 18 U.S.C.



*1. The Core: Safety and Privacy (BAATI)*

The contacts giving rise to the most justifiable civil harassment orders will be those that implicate safety and privacy: BATTI. It is no coincidence that these are many of the behaviors associated with domestic violence. Because the motivating concept behind civil harassment statutes was to expand domestic violence protections and procedures to other relationships, they should have their clearest application for conduct that resembles that model.

*a. Battery*

Common law battery—defined as unconsented harmful or offensive touching<sup>258</sup>—compromises both safety (through physical injury) and privacy (through invasion of personal space). Some civil harassment statutes expressly include battery within their definitions,<sup>259</sup> and the California model easily encompasses it. A law like Florida’s, that authorizes a no-contact order upon proof of “repeat violence,”<sup>260</sup> poses no serious definitional or constitutional problems. Nor would a civil harassment statute as applied to battery.

*b. Assault*

Common law assault is defined to include actions that cause imminent apprehension of harmful or offensive contact.<sup>261</sup> Assault law properly seeks to alleviate the petitioner’s fear of being physically harmed by the respondent, and civil harassment statutes may properly be used in the same circumstances.

Civil harassment statutes relax the sometimes-strict imminence requirement of common law assault, which supports liability only if the assailant’s actions imply that a battery will occur “almost at once” or with “no significant delay,” as when someone raises a clenched fist towards the head of another.<sup>262</sup> By contrast, civil harassment may be proven through a course of conduct that leads to fear of a battery that is more remote in time. Because the prospect of future but non-imminent battery injures safety and privacy, this statutory extension of the common law tort is consistent with the core concerns of harassment law.

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§ 1514. The Seventh Edition (1999) and subsequent editions deleted the Model Penal Code definition, leaving only the California model.

258. See RESTATEMENT (SECOND) OF TORTS § 13 (1965); see also DOBBS ET AL., *supra* note 209, §§ 33–37 (2000).

259. See, e.g., MINN. STAT. ANN. § 609.748.

260. FLA. STAT. § 784.046(1)(b) (2012); see VA. CODE ANN. § 19.2-152.8 (2012) (requiring proof of “an act of violence, force, or threat”).

261. See RESTATEMENT (SECOND) OF TORTS § 21; see also DOBBS ET AL., *supra* note 209, §§ 38–40.

262. See RESTATEMENT (SECOND) OF TORTS § 29(1) cmt. b.

c. *Threats of Violence*

Words alone do not make an actor liable for common law assault.<sup>263</sup> Nonetheless, most states have statutes criminalizing threats to injure persons or property, some of which are titled “Harassment.”<sup>264</sup> The threat concept is sufficiently well established that First Amendment law recognizes “true threats” as a category of words that may be proscribed for their content.<sup>265</sup> We punish true threats for the same reasons the common law punished assault: to protect “individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.”<sup>266</sup> This interest dovetails nicely with civil harassment law, some of which explicitly include threats of violence as a per se form of harassment liability.<sup>267</sup> Unlike “annoy,” threat-related formulations such as “place in fear of bodily injury” are not regarded as vague.<sup>268</sup>

A proscribable true threat must be a threat to inflict death, serious bodily injury, or serious property damage. Threatening to do a thing that one has a right to do, such as boycotting a business in response to raised prices, should not be a basis for liability. Nor should threatening to commit a minor legal infraction, such as jaywalking.<sup>269</sup> A statute that forbids threats to perform less culpable acts may pose vagueness or overbreadth problems. For example, a criminal harassment statute was found unconstitutional when it prohibited threats “to do any other act which is intended to substantially harm the person threatened . . . with respect to his or her . . . mental health.”<sup>270</sup> The law of extortion and blackmail explores the dividing line between lawful and unlawful threats, so it can provide a useful guide for civil harassment cases.<sup>271</sup>

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263. *Id.* § 31. For example, anonymous threatening telephone messages saying “I’m going to kick your ass” were not sufficiently imminent to constitute common law assault. *See* *Brower v. Ackerley*, 943 P.2d 1141, 1145 (Wash. App. 1997).

264. *E.g.*, HAW. REV. STAT. § 711-1106 (2009); OR. REV. STAT. § 166.065 (2011); UTAH CODE ANN. § 76-5-106.5 (LexisNexis 2012); WASH. REV. CODE § 9A.46.020 (2012).

265. *See generally* Paul T. Crane, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225 (2006); Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209 (1999); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283 (2001).

266. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

267. CONN. GEN. STAT. § 53a-182b(a) (2012); NEV. REV. STAT. § 200.571(1)(a) (2011); OR. REV. STAT. § 166.065(1)(c).

268. *See* *Long v. Texas*, 931 S.W.2d 285, 293 (Tex. Crim. App. 1996).

269. *See* *Wurtz v. Risley*, 719 F.2d 1438, 1442 (9th Cir. 1983); *State v. Carpenter*, 736 S.W.2d 406, 408 (Mo. 1987).

270. *State v. Williams*, 26 P.3d 890, 899 (Wash. 2001).

271. *See generally* *State v. Pauling*, 69 P.3d 331 (Wash. 2003); Walter Block, *Threats, Blackmail, Extortion and Robbery and Other Bad Things*, 35 TULSA L.J. 333 (2000); Stuart P. Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553 (2005).

The true threat standard is, generally speaking, a demanding one, as befits a doctrine that is most often employed as a basis for criminal prosecutions. This means that there may be some words that do not satisfy the true threat standard, yet may in context cause a reasonable victim to perceive threats of violence that do not appear on the surface, as when an obsessional stalker expresses messages like “I want to be with you always” or “I can’t live without you.” Threats of suicide by stalkers are quite common<sup>272</sup> and imply a capacity for violence, but they are not true threats to the victim under existing threat law. A pattern of such messages may be a proper subject for a civil harassment order because they affect a victim’s sense of safety and privacy. However, as a legal matter they should be viewed as intrusions into seclusion, rather than as threats. The alternative—to create different true threat standards for civil and criminal cases—would likely result in dilution of the true threat doctrine and a diminution of its protections in the cases for which it was designed.

The BATTI formula does not include fighting words, at least where that term refers to in-person speech likely to cause the listener to react with violence against the speaker.<sup>273</sup> This legal concept arouses suspicion in many quarters, particularly because the law ought to punish those who engage in violence rather than their victims.<sup>274</sup> However, fighting words in their most literal sense—words challenging another to fight—create an injury similar to the injury caused by true threats. These challenges portend violence by the speaker. Depending on the context, direct insults may properly be considered threatening to the extent they imply a danger to the listener’s safety, and hence can be the basis for a no-contact order. By contrast, insults that denigrate or mock without implying a true threat cause a different type of emotional distress that does not lend itself to relief through an injunction.

#### *d. Trespass*

In some older sources, a “trespass” simply means a wrongful act (as in “forgive us our trespasses”).<sup>275</sup> Battery, assault, and false imprisonment are sometimes referred to as “trespassory torts” because they imply a “trespass to the person.”<sup>276</sup> The concept of trespass upon bodily integrity

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272. See, e.g., *Sjomeling v. Stuber*, 615 N.W.2d 613, 615 (S.D. 2000).

273. See *Gooding v. Wilson*, 405 U.S. 518, 529–30 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

274. See generally KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* (1995); Burton Caine, *The Trouble with “Fighting Words”*: *Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 506 (2004); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1133 (1993).

275. See *Fernandes v. Portwine*, 56 P.3d 1, 6 (Alaska 2002) (“The broad meaning [of trespass] encompasses . . . unlawful interference with one’s person, property, or rights.”).

276. DOBBS ET AL., *supra* note 209.

is, as described above, consistent with the purposes of civil harassment law. In some settings, so is an analogy to the tort of trespass to land, i.e., entering or remaining on another person's real property without permission.<sup>277</sup> Some of the purposes of trespass law—to protect privacy against unwanted intrusions<sup>278</sup> and to prevent threatened or actual violence<sup>279</sup>—are an excellent match for civil harassment. Both provide legal enforceability to a person's decision as to who has permission to approach closely. For this reason, a provision keeping respondent away from petitioner's home is a standard feature of civil harassment orders, even if the harassment occurred elsewhere.

The match is imperfect, however, because trespass law keeps an unwanted visitor away from property, not from people. Its protection of personal safety and privacy is a pleasant side effect of its protection of the right of exclusive possession. Civil harassment petitioners should not settle for protection only in locations where they have a possessory interest; this would turn a protective order into a form of house arrest. Responding to this problem, civil harassment statutes could be viewed as a source of portable trespass zones around petitioners, wherever they are located. Many privacy advocates argue that American law in general needs to be more receptive to the idea of privacy outside of the home.<sup>280</sup> Civil harassment orders are one of the existing privacy protections that are sufficiently mobile to protect against privacy invasions even in public places.

A danger arises if the trespass metaphor is extended to resemble a legal power of the petitioner to command that all others stay away in all locations, for any reason or for no reason. In the absence of legislation (and sometimes even where legislation exists), there is no generalized duty to refrain from uninvited interactions with others.<sup>281</sup> One may approach strangers for conversation on the sidewalk, knock on their front doors, and direct unannounced phone calls, letters, or email to them as well.<sup>282</sup> If civil harassment statutes expand the common law of

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277. See RESTATEMENT (SECOND) OF TORTS §§ 158 (1965); see also DOBBS ET AL., *supra* note 209, §§ 49–58.

278. See *State v. Delgado*, 562 A.2d 539, 544 (Conn. App. Ct. 1989); *McCuller v. State*, 999 S.W.2d 801, 804 (Tex. App. 1999).

279. See *People v. Wyant*, 525 N.E.2d 591, 592 (Ill. App. Ct. 1988).

280. See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2009); Andrew D. Selbst, *Contextual Expectations of Privacy* 3 (2012), available at <http://ssrn.com/abstract=2093594>; Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) [hereinafter Solove, *A Taxonomy of Privacy*]; Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1088 (2002); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

281. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997) (questioning any “generalized right ‘to be left alone’ on a public street or sidewalk”); see also *Hill v. Colorado*, 530 U.S. 703, 750–53 (2000) (Scalia, J., dissenting).

282. See *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002) (right to

trespass to land in a way that alters these customary freedoms, they should require petitioner to have a strong reason for wishing to avoid otherwise lawful contact.

As it happens, existing trespass law contains several limitations to property owners' freedom to exclude without a reason. Civil rights laws prevent property owners from excluding for discriminatory reasons.<sup>283</sup> Constitutional guarantees, including due process and free speech, limit exclusion by governmental property owners.<sup>284</sup> The limitations that translate best into civil harassment are the rules of trespass into places ordinarily held open to the public, such as retail stores, restaurants, theaters, and taverns. In such places of public accommodation, visitors "have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void."<sup>285</sup> This legally presumed consent or license may be revoked for cause when there is "substantial evidence of the stay being prolonged, boisterous conduct, breach of the peace, blocking of entranceways, interference with the public, picketing, or other conduct which would revoke the implied consent of the owner by acts inconsistent with the purposes of the business or facility."<sup>286</sup>

This implied consent model maps well onto civil harassment law. At the outset, everyone has the implied consent of others to approach them in public (and even to knock on their doors, send them mail, or call their phones). A person may revoke that consent, but the withdrawal does not automatically become legally enforceable. The law should not issue injunctions to enforce social preferences, but it may do so when implied consent to approach is revoked for cause, as happens in circumstances threatening safety or privacy.

#### *e. Intrusion into Seclusion*

Trespass law keeps respondent's body at a suitable distance from petitioner, but trespass principles do not translate well into the realm of disembodied communication. It is not a common law trespass to direct an

pursue door-to-door canvassing); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (uninvited conversation is not a seizure); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (right to send unsolicited mail); *United States v. Perea-Rey*, 680 F.3d 1179, 1187 (9th Cir. 2012) ("knock and talk" is not a search).

283. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(A) (1964).

284. *See generally* *Virginia v. Hicks*, 539 U.S. 113 (2003) (exclusion from public housing project); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (from public library); *State v. Green*, 239 P.3d 1130 (Wash. Ct. App. 2010) (from public school).

285. *State v. Marcoplos*, 572 S.E.2d 820, 821–22 (N.C. Ct. App. 2002); *see In re Catalano*, 623 P.2d 228 (Cal. 1981); *People v. Leonard*, 465 N.E.2d 831, 834 (N.Y. 1984) (trespass law enforces only "lawful" orders to vacate). This understanding is reflected in the criminal trespass statutes of many states. *See, e.g.*, N.Y. PENAL LAW § 140.00(5) (McKinney 2008); WASH. REV. CODE § 9A.52.090(2) (2012).

286. *St. Louis Cnty. v. Stone*, 776 S.W.2d 885, 888 (Mo. Ct. App. 1989).

uninvited phone call, letter, or email to a recipient. However, the tort of intrusion into seclusion<sup>287</sup> may occur through improper physical presence and unwanted communications.<sup>288</sup> It too belongs at the core of harassment.

Civil harassment law should focus on intrusion into seclusion because “invasion of privacy” is such a multi-faceted term. In his influential 1960 article, William Prosser identified four separate privacy torts, and recently Daniel Solove discerned sixteen varieties of privacy interests.<sup>289</sup> The privacy tort relevant to civil harassment is intrusion into seclusion (one of Prosser’s four privacy torts), a concept that encompasses both intrusion into one’s physical space and unwarranted contact or surveillance. Stalking laws, with their focus on following and watching, highlight the interest in seclusion against threatening people. The California model is properly applied against similar behaviors.

Civil harassment statutes properly recognize that it is possible for an unwelcome intrusion to occur even when a person is in a public place. In this way, it is actually a step ahead of the tort law surrounding intrusion into seclusion, which often narrowly defines the legitimate areas in which seclusion may be expected.<sup>290</sup>

## 2. *The Periphery: Outrage*

The tort of outrage (also called intentional infliction of emotional distress) occurs when a person “by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another.”<sup>291</sup> This definition shares with the California model a focus on the victim’s reaction to unspecified or loosely specified conduct. The result is a tort that “fails to define the proscribed conduct beyond suggesting that it is very bad indeed.”<sup>292</sup> This makes outrage a poor tool for fleshing out the meaning of civil harassment.

287. See RESTATEMENT (SECOND) OF TORTS § 652B (1965) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”); see also DOBBS ET AL., *supra* note 209, § 580.

288. See Jeffrey F. Ghent, *Unsolicited Mailing, Distribution, House Call, or Telephone Call as Invasion of Privacy*, 56 A.L.R.3d 457 (1974).

289. See Solove, *A Taxonomy of Privacy*, *supra* note 280; see also William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Prosser’s four privacy torts were incorporated into the RESTATEMENT (SECOND) OF TORTS, § 652B–E. See generally Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007 (2010).

290. See Solove, *A Taxonomy of Privacy*, *supra* note 280, at 556–57.

291. RESTATEMENT (THIRD) OF TORTS § 45 (Tentative Draft No. 5, 2007). See generally DOBBS ET AL., *supra* note 209, §§ 385–89; Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983 (2008); Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982).

292. Givelber, *supra* note 291, at 43; see Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 196 (2010) (“[I]t has proven difficult to obtain crisp

The key to the Restatement definition of outrage is degree, not kind. The relevant conduct must be “extreme and outrageous”—“beyond the bounds of human decency”<sup>293</sup>—and the resulting emotional distress must be “severe”—“so severe that no reasonable man could be expected to endure it.”<sup>294</sup> This approach assumes that all forms of emotional distress may be meaningfully compared on a single scale: Seven units of grief are more severe than six units of humiliation or five units of betrayal. Even though all of these emotions are painful, a single scale compares apples with oranges. To avoid overbreadth, civil harassment statutes must be understood to apply to a subset of bad feelings, namely those that arise from threats to safety and privacy.

The outrage analogy is perilous because the tort itself (even without the complicating factor of an injunction) poses free speech problems, as seen in *Falwell* and *Snyder*. Some commentators argue that virtually every outrage claim involving speech would be unconstitutional:

Permitting recovery for unvarnished emotional distress cannot be reconciled with core First Amendment principles—no matter how we dress it up, the tort [of outrage] rests at bottom on the individual distress caused by the message of the speech and the sense of collective community outrage caused by the violation of accepted rules of civility. These are precisely the types of harms that modern First Amendment theory disqualifies as justifications for abridging speech.<sup>295</sup>

You may ask why, if outrage is such an unhelpful analogy, it belongs at the periphery of civil harassment, instead of outside it entirely. I locate it as a borderline concept because outrage is the source of the “emotional distress” language found in many civil harassment statutes. Legislatures intend for courts to analogize to the common law of outrage, and they routinely do.<sup>296</sup> While civil harassment laws are not straightforward codifications of outrage law, the comparison may sometimes be useful, if only because most people would find actions implicating the core of civil harassment to be outrageous.

The peripheral relationship between outrage and harassment may occasionally justify courts referring to outrage concepts as a gap filler. In practice, however, it is hard to envision proscribable harassment that does not include at least some behavior resembling the core concepts of

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and concrete guidance on the scope of the tort.”). *But cf.* Zipursky, *supra* note 236, at 499–505 (arguing that outrage is a well defined tort standard).

293. RESTATEMENT (THIRD) OF TORTS § 45, cmt. c. According to an oft-quoted passage from comment d to RESTATEMENT (SECOND) OF TORTS § 46 (1965), conduct reaches this level of extremity when, “the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” *Id.*; see DOBBS ET AL., *supra* note 209, § 386.

294. RESTATEMENT (SECOND) OF TORTS § 46, cmt. j. *Accord* RESTATEMENT (THIRD) OF TORTS § 45, cmt. i.

295. SMOLLA, *supra* note 241, § 12.8 (footnote omitted).

296. *See* Smith v. Silvey, 197 Cal. Rptr. 15, 18 (Cal. Ct. App. 1983); Ramsey v. Harman, 661 S.E.2d 924, 926 (N.C. Ct. App. 2008); Ellison v. Stam, 136 P.3d 1242, 1247–49 (Utah Ct. App. 2006).

battery, assault, threat, trespass, or intrusion into seclusion. In particular, it will be the rare harasser who can invent a way to behave beyond all bounds of decency without at least some intrusion into seclusion. Hence, courts should consider it a warning sign if the only tort or criminal analogy for an alleged pattern of harassment is non-BATTI outrage.

### 3. *Beyond the Bounds: Defamation and Malicious Prosecution*

Civil harassment orders that abridge freedom of speech are most likely to arise when a petitioner objects to what a respondent says to others. Unlike speech directed to the petitioner, which has the potential to threaten safety or privacy for reasons described above, speech directed to others—even when the petitioner is the subject matter of that speech—implicates distinctly different interests that are beyond the proper scope of civil harassment law.

#### a. *Defamation*

Injury to reputation falls outside the proper meaning of civil harassment for four simple reasons: First, defamation is the opposite of conduct directed to a petitioner. The publication element of defamation law requires “that the defamatory matter be communicated to someone other than the person defamed.”<sup>297</sup> Second, civil harassment is remedied through a no-contact order maintaining distance between petitioner and respondent. Such an order would not remedy defamation, which occurs as a result of respondent’s contacts with others. Third, the proper goal of harassment law is to avoid the types of emotional distress resulting from threats to safety and privacy, not from injury to reputation. Defamation may be emotionally distressing, but in a conceptually different way.<sup>298</sup> Fourth, defamation law is subject to significant constitutional limitations on liability for falsehood that cannot be evaded by reframing the allegations as harassment.

One could argue that civil harassment should include defamation due to the historic linkage between defamation and privacy. The connection is closest with regard to the privacy torts known as public disclosure of private facts<sup>299</sup> and presentation of facts in a false light,<sup>300</sup> which share with defamation a concern for control over one’s public image. These torts revolve around control over reputation, which is distinct from the interest in seclusion that is the proper focus of civil harassment law.

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297. RESTATEMENT (SECOND) OF TORTS § 577, cmt. b.

298. This explains why, in some states, allegations of defamation are by law excluded from the outrage tort. See Fraker, *supra* note 291, at 984.

299. See RESTATEMENT (SECOND) OF TORTS § 652D.

300. See *id.* § 652E.



This prevailing conception of reputation . . . is thus not about the “private” at all. By protecting a person’s reputation, defamation law protects a form of intangible property, his stature in the marketplace and the broader public sphere. Defamation law treats an individual’s reputation like the goodwill associated with a business, seeking to protect it as property that the individual has worked to develop or earn.<sup>301</sup>

Even though defamation is incompatible with the basic notion of unwanted contact, some civil harassment statutes expressly include defamation within their statutory definitions.<sup>302</sup> Even without such statutory language, some courts have been willing to treat defamation as harassment.<sup>303</sup> Defamation claims masquerading as harassment give rise to more constitutionally questionable harassment orders than any other fact pattern.

*b. Malicious Prosecution*

One group of allegedly false statements that civil harassment petitioners often seek to enjoin are respondents’ reports about petitioners to police, administrative agencies, or courts. The proper legal claims to assert against one who instigates criminal or civil charges without probable cause are malicious prosecution or similar variations on the theme of wrongful civil litigation.<sup>304</sup> Such claims are beyond the scope of civil harassment law for much the same reasons as defamation. The alleged wrongdoing is not contact with the petitioner that threatens safety or privacy, but speech to a third party: the government. Society’s strong interest in preserving open communication between citizens and the government finds expression in many legal rules, including the petition clause, common law immunities, and anti-SLAPP statutes. If necessary, the government may pursue its interest in receiving only truthful complaints through enforcement of false reporting and perjury laws; the civil harassment statute does not authorize petitioners to act as

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301. Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 415 (2004) (footnotes omitted).

302. See ARIZ. REV. STAT. § 12-1809(R) (2012); UTAH CODE ANN. § 76-5-106.5(1)(b) (LexisNexis 2012) (including in the definition of a harassing course of conduct communicating to *or about* a person and disseminating information about a person). The Bouvier Law Dictionary follows this pattern to define harassment as “conduct or communications to *or about* an individual . . . that is intended to inconvenience, alarm, or offend the victim.” THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 1173 (2011) (emphasis added).

303. See, e.g., *Herbst v. Herbst*, No. A05-945, 2006 WL 279100, at \*2 (Minn. Ct. App. Feb. 7, 2006); *State v. Noah*, 9 P.3d 858, 865 n.1 (Wash. Ct. App. 2000); *Bachowski v. Salamone*, 407 N.W.2d 533, 540 (Wis. 1987); *Lanetta v. Diana*, No. 2008AP3165, 2010 Wis. App. LEXIS 120, at \*3-6 (Wis. Ct. App. Feb. 9, 2010).

304. See DOBBS ET AL., *supra* note 209, §§ 585, 592.

private attorneys general to vindicate those interests. Injunctions purporting to limit a respondent's ability to litigate are improper.<sup>305</sup>

#### B. REPLACING CONTENT WITH CONTACTS

The problem of content neutrality lurks throughout much civil harassment litigation because the petitioner's emotional state is often a reaction to the content of respondent's speech. The constitutional evil of content discrimination can often be avoided in practice by recasting allegations about content as allegations about unwanted contact. Ending unconsented contact (regardless of the content that may be conveyed during the contact) is a permissible exercise of the government's power to regulate, on a content neutral basis, the noncommunicative aspects of expressive activity.

The expressive conduct doctrine, exemplified by *United States v. O'Brien*, recognizes that nonverbal activity (like burning one's draft card) can be communicative, but that the "nonspeech elements" of that activity may be subject to content neutral regulations—even though they have incidental impact on the ability to communicate—if the government interest is strong enough and the means are narrow enough.<sup>306</sup> *O'Brien's* form of intermediate scrutiny is usually regarded as functionally equivalent to the test used for governmental regulation of the time, place, or manner of expression.<sup>307</sup> Content neutrality should be evaluated the same way in civil harassment cases as in time, place, or manner cases. So should the strength of the government's interest (an intermediate "importance" test). The part of the test that considers the fit between means and ends, however, must be evaluated somewhat differently. Ordinarily a time-place-manner restriction is reasonable if the government's chosen methods to serve important content neutral goals do not restrict *substantially* more speech than necessary,<sup>308</sup> but under *Madsen* an analogous injunction—one that imposed the same terms but only upon judicially specified persons—must restrict *no* more speech than necessary.<sup>309</sup>

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305. DAN B. DOBBS, 1 LAW OF REMEDIES § 2.9(4) (2d ed. 1993).

306. 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.")

307. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("The *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'")

308. See *id.* ("[W]e reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content neutral interests but that it need not be the least restrictive or least intrusive means of doing so.")

309. *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765 (1994) ("[W]hen evaluating a content neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest"). *Accord* *Carroll v. Princess Anne*,

### I. Content Neutrality

Are civil harassment statutes content neutral? In form, most of them appear to be. They apply to both expressive and nonexpressive activity: Even statutes stating that a harassing course of conduct may include speech do not limit their scope to harassment through words. Next, the statutes do not identify, by reference to specified content, any particular speech to forbid (other than true threats, which are independently proscribable). The legislature's purpose is to protect petitioners' safety and privacy rather than to suppress particular content. Finally, "the fact that [an] injunction cover[s] people with a particular viewpoint does not itself render the injunction content or viewpoint based."<sup>310</sup>

Although the statutes may be content neutral, individual petitions and orders may be content based as applied<sup>311</sup> where petitioner's emotional distress arises from the communicative impact of respondent's message. But the true source of distress may be the fact of unwanted contact, rather than the content of messages delivered during that contact. If a respondent makes five phone calls a day after being asked to stop, a no-contact order could be proper whether the calls said "I hate you" or "I love you." For example, in *Welsh v. Johnson*,<sup>312</sup> the respondent anti-abortion protestor demonstrated outside the home of the petitioner clinic worker, telling her "God loves you and so do I."<sup>313</sup> These are ordinarily considered laudable sentiments—constitutionally protected ones, too. Yet the no-contact order was properly entered because it was triggered by contact, not content.

In practice, pro se petitioners are likely to describe the content of respondent's speech, and attribute their emotional distress to the content. An otherwise proper petition should not be denied merely because it contains some improper allegations. A court may control for this problem by mentally redacting each allegation that describes the content of (non-threatening) speech, so that the allegation amounts to a description of the time, place, and manner of the communication. The pattern of contact that remains, after excising the content, may be sufficient to justify a finding of harassment. If a court enters an order without considering what respondent said, the regulation should be content neutral.<sup>314</sup>

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393 U.S. 175, 183 (1968) ("[Speech-related injunctions] must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.").

310. *Madsen*, 512 U.S. at 763.

311. See Volokh, *Speech as Conduct*, *supra* note 154, at 1286 (content neutral statutes may become content based as applied).

312. 508 N.W.2d 212 (Minn. Ct. App. 1993).

313. *Id.* at 215–16.

314. See *State v. Noah*, 9 P.3d 858, 865 (Wash. Ct. App. 2000) ("Our inquiry is whether there was a

The proposal to replace content with contact may leave behind a nagging worry: Is it really possible? The identity of the speaker is part of a message's content,<sup>315</sup> and governmental control over who speaks is often treated as a control over content.<sup>316</sup> The pattern of repeated contact still communicates something—namely, that the respondent wants to be involved with (or control aspects of) petitioner's life. Ultimately, these concerns are not fatal because, if accepted, they would also leave us powerless to proscribe nonverbal stalking because it communicates the same message. Losing that message is an acceptable incidental cost of conduct regulation, assuming that regulation is otherwise valid.

## 2. Government Interest

The governmental interests in support of civil harassment orders are certainly important enough to satisfy intermediate scrutiny. Public safety is a very strong government interest, and it may be pursued through court orders that protect individuals' private safety.<sup>317</sup> Preserving seclusion is also an important interest. In upholding an ordinance against residential picketing, *Frisby v. Schultz* noted that "the State may legislate to protect [the] ability to avoid intrusions."<sup>318</sup> This interest may be stronger if the petitioner is a captive audience,<sup>319</sup> but in the absence of special circumstances making self-help unrealistic, the typical civil harassment petitioner is not a captive.<sup>320</sup>

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factual basis for the anti-harassment order, excluding consideration of the protected speech and picketing." (footnote omitted)); see also *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 795–96 (9th Cir. 2006) (citing *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998)) (ordinance is content based if it requires law enforcement officer to read a message).

315. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

316. See *Citizens United*, 130 S. Ct. at 899 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). See generally *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

317. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997).

318. *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988); see *Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government . . . to shut off discourse . . . [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

319. See *Hill v. Colorado*, 530 U.S. 703, 718 (2000) ("[O]ur cases have repeatedly recognized the interests of unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (holding that the state has "correspondingly greater" interest in protecting persons who are "vulnerable to injury"). See generally *Leslie Gielow Jacobs, The Public Sensibilities Forum*, 95 *Nw. U. L. Rev.* 1357 (2001); *Marcy Strauss, Redefining the Captive Audience Doctrine*, 19 *HASTINGS CONST. L.Q.* 85 (1991).

320. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (attendee at funeral is not a captive of nearby picketers); *Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (en banc) (persons present at a city park are not captives of traveling performers).

### 3. Tailoring

Most narrow tailoring questions will be resolved in conjunction with the remedy, discussed more below. The short version is that a content neutral no-contact order will ordinarily be a well-tailored remedy, even heeding the instruction from *Madsen* that an injunction affecting speech must affect no more expression than necessary.

One additional consideration, sometimes discussed as part of the government interest inquiry,<sup>321</sup> could become relevant during the tailoring inquiry: namely, whether the respondent's speech involves a topic of public concern. Some civil harassment decisions have stated that the First Amendment protects *only* speech on topics of public concern, so that harassing interpersonal communications may be enjoined without any need to consider the free speech clause.<sup>322</sup> This is clearly wrong: Speech on matters of private concern is "not totally unprotected by the First Amendment"<sup>323</sup> because freedom of speech serves values of self-fulfillment as well as those of democratic self-government.<sup>324</sup> The natural location within the *O'Brien* framework to consider the strength of a speaker's interests would be during the tailoring step, whose nature lends itself to a balance of competing interests. Moreover, whether the speech involves a matter of public concern does not seem to fit comfortably within the content neutrality and government interest steps.

Exactly how it should matter when speech is of wholly private concern is probably not susceptible of any grand statements. In the context of defamation suits, in 1971 a plurality of the Supreme Court in *Rosenbloom* said that plaintiffs must prove actual malice whenever a defendant's speech related to a matter of public concern;<sup>325</sup> in 1974 a majority in *Gertz* rejected this as a dividing line, saying instead that the actual malice standard is triggered only by plaintiff's status as a public or private figure;<sup>326</sup> and in 1985 a plurality in *Dun & Bradstreet* found that

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321. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (considering the presence or absence of a topic of public concern as part of the government interest inquiry).

322. See *State v. Brown*, 85 P.3d 109, 114 (Ariz. Ct. App. 2004) ("[Respondent's repeated entreaties . . . that they resume their relationship do not contain any such particularized political or social message warranting First Amendment protection."); *Brekke v. Wills*, 23 Cal. Rptr. 3d 609, 617 (Cal. Ct. App. 2005) ("[D]efendant's speech was between purely private parties, about purely private parties, on matters of purely private interest . . . [and this] is 'wholly without First Amendment concerns . . .'"); *Rzeszutek v. Beck*, 649 N.E.2d 673, 680–81 (Ind. Ct. App. 1995) ("[T]he person to person conversations between Lucy and her family members are largely unrelated to the market in ideas, and they are not protected by the first amendment.").

323. *Dun & Bradstreet*, 472 U.S. at 760. *Accord* *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("Most of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation." (internal quotation marks omitted)).

324. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591–92 (1982).

325. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54–57 (1971) (plurality).

326. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

actual malice would not be required when a private figure sued over allegedly defamatory statements of purely private concern.<sup>327</sup> The notion is used with a bit more precision in cases where government employees challenge adverse employment actions taken in response to their speech. In that arena, existing case law protects the employees only when they face retaliation in response to speech on matters of public concern.<sup>328</sup> In the context of outrage, *Snyder v. Phelps* found speech on a topic of public concern occupies “the highest rung” of constitutional protection.<sup>329</sup>

Given the unsettled state of the case law, the most that can be said is that speech of purely private concern might sometimes receive “less stringent”<sup>330</sup> protection than speech of public concern. Applying this notion to civil harassment orders creates a puzzle, however, because *Madsen* said courts should be “somewhat more stringent”<sup>331</sup> about speech-burdening injunctions. These conflicting instructions, which arose in different contexts, can best be harmonized by treating lack of public concern as one factor in determining whether an order restricts no more speech than necessary. A no-contact order barring speech directed to the petitioner will mostly reach speech on topics of purely private concern, such as “I love you” and “I hate you” messages. It will not prevent speech to other audiences, which is more likely to involve topics of public concern.

### C. INJUNCTIONS AGAINST CONTACT, NOT EXPRESSION

If harassment is found, any resulting injunction must not take the form of a prior restraint. Fortunately, an injunction that satisfies the *Madsen* test for reasonable “time, place, or manner” restrictions will not be a prior restraint.<sup>332</sup> A proper civil harassment petition may bar contact between a respondent and a petitioner, but must not hinder the respondent’s ability to speak to others—even in ways that the petitioner may dislike.

A no-contact order is content neutral: It bars contacts regardless of their content. This is a crucial fact, but a content neutral speech restriction is still a speech restriction and hence potentially unconstitutional. The ability to convey speech to one’s intended audience is part of expression; some might say it is the whole point. Hence laws that prevent directing a message to a particular audience are typically suspect, including those

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327. *Dun & Bradstreet*, 472 U.S. at 749.

328. See *City of San Diego v. Roe*, 543 U.S. 77, 80–81 (2004) (per curiam); *Connick v. Myers*, 461 U.S. 138, 145 (1983).

329. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick*, 461 U.S. at 145).

330. *Dun & Bradstreet*, 472 U.S. at 760.

331. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

332. See *Bl(a)ck Tea Soc’y v. City of Bos.*, 378 F.3d 8, 12 (1st Cir. 2004); *United States v. Kistner*, 68 F.3d 218, 221 n.7 (8th Cir. 1995); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1390 (D.C. Cir. 1990).

that make certain locations unavailable for speech.<sup>333</sup> Despite these concerns, the message that might be conveyed by the fact of contact that includes expression—“I am here whether you like it or not”—is also conveyed by nonexpressive conduct, making its loss an acceptable incidental effect of conduct regulation under *O'Brien*.

The remaining question under *Madsen* is whether a no-contact order suppresses more speech than necessary. It ordinarily will not. Ending the unconsented contact is necessary to the government’s goal of protecting petitioner’s safety and privacy. There will be questions in individual cases regarding the proper size of the buffer zone around a petitioner, or how to structure the injunction in a way that preserves a respondent’s ability to contact other people (such as children or co-workers) who may be situated closely in space to the petitioner. But as in *Madsen* itself, a content-neutral injunction against contact will not be problematic.

None of this reasoning can salvage a civil harassment order that limits a respondent’s communications with third parties. As explained above, these will arise most often when a petitioner’s allegations revolve around defamation or upsetting speech to third parties. Such orders will always be content based, so they cannot satisfy *Madsen*. They will also constitute prior restraints, because they are injunctions barring specified expression. The proper scope for civil harassment orders is to ban future contact with and surveillance of the petitioner—not to ban expression to others—even when petitioner is the subject matter of that expression. As a practical matter, obeying the rule against prior restraints causes no real harm for petitioners, because any injunction against specific utterances would inevitably be too narrow to provide the desired relief.<sup>334</sup>

#### D. A CASE STUDY

Most civil harassment petitions object to a course of conduct that contains both speech and nonexpressive conduct. *Petruska v. Applegate-Carlentine*<sup>335</sup> is a typical California case that makes a suitable case study for the methods described above.

The petitioners (immigrants from Hungary) alleged that the respondents (their next-door neighbors) did a variety of un-neighborly things: (1) trespassing onto petitioners’ yard and removing their plants; (2) complaining to the city that petitioners had erected an illegal eight-

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333. See, e.g., *Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004); Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 446–47 (1999) (noting that time, place, and manner restrictions may be unreasonable if they largely impair a speaker’s ability to reach her intended audience).

334. See Chemerinsky, *supra* note 251 and accompanying text.

335. No. B160936, 2003 WL 1984639 (Cal. Ct. App. Apr. 30, 2003). The text of this Article will use trial court terminology to refer to the Petruskas as “petitioners” and the Applegate-Carlentines as “respondents.”

foot fence, which inspectors found to be a lawful six-footer; (3) making other “unwarranted and unfounded complaints” to city code enforcers, leading the city to refuse any further investigations unless proof was submitted at the outset; (4) cursing at petitioners on a daily basis, calling them “fucking foreigners” and “foreign assholes,” even in the presence of petitioners’ three-year-old daughter; (5) trampling on petitioners’ flowerbeds; (6) playing extremely loud music early in the morning; and (7) obtaining a temporary ex parte civil harassment order against the petitioner husband for assaulting the respondent husband, which was vacated after the petitioner husband proved that he was in Hungary at the time.<sup>336</sup>

This record is sufficient to sustain a finding of civil harassment solely by reference to content neutral facts. Trespassing, stealing plants, and trampling on flower beds implicate the core concerns of trespass and intrusion into seclusion. The complaint regarding loud music involves the timing and volume of the sounds, not their content. Depending on the totality of the facts, intentionally making loud noises for the purpose of bothering others may be an intrusion into seclusion and hence a BATTI violation.

The complaints of profanity and insults are undeniably content based. In some settings profanity is constitutionally protected.<sup>337</sup> But depending on the context, such language may also be the type of fighting words that imply a true threat of violence, especially when combined with other evidence such as the speaker’s demeanor, expression, and volume in uttering the words.<sup>338</sup> The record in *Petruska* may well support such a finding, so these threatening words can be counted towards the unlawful course of conduct. In addition, these events may constitute intrusions into seclusion, which may be judged without reference to content. For example, an intrusion may exist if petitioners had asked respondents to stop speaking to them across the fence, but they continued to do so in a loud and unavoidable manner. More facts would be needed to satisfy this approach, but such facts would involve the timing and manner of the communication rather than its content.

Other allegations in the petition involved respondents’ speech to others, particularly complaints to city government and to the courts.<sup>339</sup> These allegations resemble (but probably do not rise to the level of)

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336. *Id.* at \*1–2.

337. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (“Fuck the Draft”); *Leonard v. Robinson*, 477 F.3d 347, 359 (6th Cir. 2007) (“God damn”); *People v. Boomer*, 655 N.W.2d 255, 256–57 (Mich. Ct. App. 2002) (the “cussing canoeist” case).

338. See *Raess v. Doescher*, 883 N.E.2d 790, 799 (Ind. 2008) (angry demeanor contributes to finding of common law assault); *City of Fargo v. Brennan*, 543 N.W.2d 240, 245 (N.D. 1996) (considering demeanor separately from content).

339. See *Petruska*, 2003 WL 1984639, at \* 1–2.



malicious prosecution. These should not be treated as harassment, for many reasons. Respondents' speech to the government is not contact with the petitioners. Malicious prosecution (like defamation) falls outside the periphery of the civil harassment standard. Speech to the government ought not be enjoined at all, and any such injunction goes beyond an order barring unwanted contact and surveillance.

Unfortunately, the trial court in *Petruska* included a clause in its final order that prohibited respondents from filing "false reports [about petitioners] with law enforcement or government agencies."<sup>340</sup> Remarkably, the Court of Appeals upheld this clause, despite an earlier published opinion holding unconstitutional a civil harassment order that enjoined complaints about a respondent to government agencies.<sup>341</sup> The *Petruska* order was justified (and the earlier decision distinguished) on the theory that respondents' false complaints were part of a larger course of harassing conduct.<sup>342</sup> This logic was faulty, as explained by a Texas court considering a criminal harassment statute:

[T]he First Amendment does not permit a legislature to create a new offense by simply adding unrelated protected activity to an ordinary criminal law. For example, the legislature could not pass a law making it a crime to (1) on one occasion physically assault a government official, and (2) on a separate occasion criticize the official's policies. While physical assaults can surely be punished, criticism of official policies constitutes protected expression and does not become actionable simply because it is incorporated into an offense definition alongside unprotected activity.<sup>343</sup>

Thus, courts should not rely on non-threatening content of speech as a basis for finding harassment, even if the speaker is also engaged in an otherwise proscribable course of nonexpressive conduct. *Petruska* involved harassing conduct that justified an order against future contact with the petitioners, but not an order against speech to others about the petitioners.

#### IV. RECOMMENDATIONS

The overarching recommendation of this Article is a familiar one: Eternal vigilance is the price of liberty. Civil harassment litigation is conducted within a structure that pressures judges to issue injunctions and lowers the safeguards we ordinarily rely upon to prevent constitutional error. The statutes can be improved in ways described below, but in any system of procedurally relaxed pro se litigation with extremely few appeals, there can ultimately be no substitute for trial judges who are alert to constitutional problems.

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340. *Id.* at \*2.

341. See *Smith v. Silvey*, 197 Cal. Rptr. 15, 18–20 (Cal. Ct. App. 1983).

342. *Petruska*, 2003 WL 1984639, at \*6.

343. *Long v. Texas*, 931 S.W.2d 285, 294 (Tex. Crim. App. 1996).

Readers may wonder whether my call for greater attention to free speech will cause too much genuine harassment to go unremedied, particularly harassment of women. There may well be instances where harassing activity in the world at large can be used to subordinate and deny full social participation by women, just as domestic violence does in the home and sexual harassment does in the workplace. Nonetheless, I do not believe that vigorous enforcement of the First Amendment in the civil harassment context is inconsistent with dignity and equality. First, no petitioner who can demonstrate genuine risks to safety or privacy will be denied a civil harassment order on free speech grounds. The petitions encountering significant First Amendment obstacles will be those not involving BATTI allegations, which are the core of civil harassment properly understood.

Second, harassment as defined by the California model (unlike domestic violence and stalking) leads to accusations against roughly equal numbers of men and women.<sup>344</sup> In the Las Vegas study, roughly 54% of respondents were male, 42% female, and 4% undetermined.<sup>345</sup> Of civil harassment cases in Utah with opinions available on Westlaw, four were female v. male,<sup>346</sup> three were female v. female,<sup>347</sup> two were male v. male,<sup>348</sup> and three were male v. female.<sup>349</sup> More empirical work would be needed to test the hypothesis, but women may well be the primary

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344. Domestic violence is most often perpetrated by men against women. See, e.g., Mili Patel, *Guarding Their Sanctuary on the Offense: Criminal Contempt Actions by Domestic Violence Victims in Private Capacity*, 18 CARDOZO J.L. & GENDER 141, 142 (2011). The pattern is less clear for stalking. Psychiatric studies indicate that obsession with former intimates—the most common source of stalking behavior—is equally likely in men or women. See Mullen, *supra* note 55, at 280. In a survey by the National Institute for Justice, 8% of women and 2% of men in the United States claimed to have been stalked. *Id.* at 286–87. Note that the survey asked, without using the words “stalking” or “harassment,” whether the person had been subject to repeated behavior by another person that made them significantly frightened or fearful of bodily harm. *Id.* A majority of stalked women have male stalkers, but stalked men are equally likely to be stalked by a male or a female; overall, around 14% of stalking victims were stalked by a person of the same sex. *Id.* at 295. What explains the disparity between obsessions (which occur equally in both sexes) and reports of having been stalked (which are more frequent for women)? It may be that men are more likely to act on their obsessional ideations. It may also be that reasonable women are more likely to experience fear from similar incidents. See generally Caroline Forrell, *Making the Argument that Stalking is Gendered*, 8 J. L. & SOC. CHALLENGES 52 (2006).

345. TOMMASINO, *supra* note 21, at 77. Las Vegas court forms do not record the sex (or race) of the petitioner.

346. Curtis v. Maese, No. 20090454-CA, 2010 WL 2728234, at \*1 (Utah Ct. App. July 9, 2010); J.C. v. Blaylock, No. 20080719-CA, 2009 WL 2624115, at \*1 (Utah Ct. App. Aug. 27, 2009); Abernathy v. Mzik, 167 P.3d 512, 513 (Utah Ct. App. 2007); Ellison v. Stam, 136 P.3d 1242, 1243–46 (Utah Ct. App. 2006).

347. McNeil v. Hone, 267 P.3d 947, 948 (Utah Ct. App. 2011); Bott v. Osburn, 257 P.3d 1022, 1023 (Utah Ct. App. 2011); Allen v. Anger, 248 P.3d 1001, 1002–04 (Utah Ct. App. 2011).

348. Towner v. Ridgway, 182 P.3d 347, 348 (Utah 2008); Coombs v. Dietrich, 253 P.3d 1121, 1122 (Utah Ct. App. 2011).

349. Shores v. Dantine, 268 P.3d 888, 888–89 (Utah Ct. App. 2012); Bryner v. Bryner, No. 20060405-CA, 2007 WL 1501916, at \*1 (Utah Ct. App. May 24, 2007); Bosen v. Bosen, No. 20030513-CA, 2004 WL 2688211 (Utah Ct. App. Nov. 26, 2004).

beneficiaries of First Amendment protection in civil harassment cases because in cases of alleged harassment based on pure speech (usually related to alleged defamation) female defendants may fall victim to sexist stereotypes of woman as gossips and talebearers. Civil harassment litigation has itself been used as a tool of aggression against women who speak out about perceived misconduct.<sup>350</sup> As some authors argued with regard to Title VII sexual harassment claims, women benefit from freedom of speech at least as much as men, and are at least as endangered by restrictions upon it.<sup>351</sup>

#### A. IDEAS FOR COURTS

##### 1. *Redact Speech with Non-Threatening Content from the Petition*

Most civil harassment statutes specify that constitutionally protected activity must not be treated as a basis for liability, and the Constitution itself would command the same result. The most reliable method to ensure that protected speech is not treated as harassment will be to excise the non-threatening content of respondent's alleged speech, replacing it with the bare fact of contact where something was communicated in a given time, place, and manner. If after this mental redaction the allegations still describe a pattern of unconsented contact or surveillance that threatens safety or privacy, an order may be proper.

##### 2. *Navigate from the Core to the Periphery*

At the core of civil harassment is conduct analogous to BATTI (battery, assault, threats, trespass, and intrusion into seclusion). A petition lacking any such allegations will likely rely on accusations of generalized outrageousness or of speech directed to others (especially defamation or malicious prosecution), neither of which presents a suitable basis for an injunction.

##### 3. *Aim Injunctions at Contact, Not Content*

Both temporary and final injunctions should be aimed at ending the unconsented contact or surveillance, not suppressing speech with forbidden content. A no-contact, no-surveillance order accomplishes this goal. There should never be clauses in a civil harassment order that enjoin particular speech according to its content.<sup>352</sup>

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350. See, e.g., *In re Marriage of Suggs*, 93 P.3d 161, 162–63 (Wash. 2004) (en banc) (finding, at trial, ex-wife's complaints of threatening behavior by her ex-husband to be harassment, and enjoining them).

351. See Strauss, *supra* note 38, at 50; Strossen, *supra* note 38, at 781.

352. See, e.g., *R.D. v. P.M.*, 135 Cal. Rptr. 3d 791, 800 (Cal. Ct. App. 2011) (affirming an order that allows respondent to speak about petitioner, but not to her).

#### 4. *Impose Reasonable Limiting or Clarifying Constructions*

For courts struggling to apply a statute with potentially vague terms, reasonable limiting constructions may salvage its constitutionality. For example, a New Hampshire court found that the phrase “for no legitimate purpose” in a criminal harassment statute must be understood in context to mean “under circumstances that would cause a reasonable person to fear for his or her safety.”<sup>353</sup> A Kansas court qualified the phrases “alarm” and “substantial emotional distress” in a civil harassment statute to mean “reasonable apprehension of bodily harm.”<sup>354</sup> Ohio’s statute on its face can be satisfied by any pattern of conduct causing “mental distress,” but the state’s courts recognize that the statute was “not enacted for the purpose of alleviating uncomfortable situations, but to prevent the type of persistent and threatening harassment that leaves victims in constant fear of physical danger.”<sup>355</sup> Such limiting constructions may avoid potentially unconstitutional applications of statutes.

#### 5. *Consider Interactions with Anti-SLAPP Statutes*

Many states have enacted statutes to curtail SLAPP suits (Strategic Litigation Against Public Participation), civil actions whose primary purpose is not to enforce rights but to silence critics through the burdens of litigation.<sup>356</sup> A civil harassment petition is most likely to raise SLAPP concerns when the alleged harassment consists in whole or in part of speech to others. Whether a given state’s anti-SLAPP statute applies to its civil harassment statute will depend on details of its statutory language.<sup>357</sup>

#### 6. *Use Equitable Discretion*

As with any injunction, a civil harassment order is an exercise of a court’s equitable discretion. Courts should therefore be alert to ordinary principles of equity, such as the requirements that there be a showing that misconduct would be repeated absent an injunction, that legal remedies would be inadequate, that a remedy should respond only to the offense proven, and that a remedy should not be overbroad.<sup>358</sup>

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353. *State v. Porelle*, 822 A.2d 562, 566 (N.H. 2003).

354. *Wentland v. Uhlarik*, 159 P.3d 1035, 1041–42 (Kan. Ct. App. 2007). Some statutes contain similar limitations on their face. *E.g.*, OR. REV. STAT. § 163.730(1) (2011) (“‘Alarm’ means to cause apprehension or fear resulting from the perception of danger.”); VT. STAT. ANN. tit. 12, § 5131(8) (2012) (“‘Threatening behavior’ means acts which would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death.”).

355. *Howard v. Wilson*, 928 N.E.2d 1180, 1182 (Ohio Ct. App. 2010).

356. *See SACK, supra* note 226, §§ 10:11.2, 16:2.3. *See generally* George W. Pring & Penelope Canan, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996) (introducing the SLAPP acronym).

357. *Compare* *Thomas v. Quintero*, 24 Cal. Rptr. 3d 619, 626 (Cal. Ct. App. 2005) (California’s anti-SLAPP statute may be invoked in civil harassment cases), *with* *Emmerson v. Weilep*, 110 P.3d 214, 216–17 (Wash. Ct. App. 2005) (Washington’s may not).

358. *See* Brendan D. Cummins, *The Thorny Path to Thornhill: The Origins at Equity of the Free*

### 7. *Red Flag Fact Patterns*

Certain fact patterns are more likely than others to raise free speech concerns.

#### a. *Defamation and Speech to Others*

Civil harassment statutes must not be used as a shortcut to avoid the numerous common law and constitutional limitations on the tort of defamation. If the gist of petitioner's complaint is that respondent is saying things to others that are harmful to petitioner's reputation, the case belongs on the regular civil calendar as a defamation action. The same applies when a petitioner objects to respondent's statements to others for reasons other than injury to reputation. Such statements may cause emotional distress, but it is not the type of distress that can be remedied through a no-contact order.

#### b. *Internet*

No special rules are needed to analyze alleged harassment involving the Internet. Threats or intrusions using electronic means may be evaluated as if they used older technologies like face-to-face speech, phone calls, or letters. Some states have recently enacted so-called cyber-harassment or cyber-bullying statutes that in most cases will not alter how a court rules on a civil harassment petition. When properly drafted,<sup>359</sup> such statutes do little more than ensure that previously existing harassment laws extend to online interactions, which the California model already does.

With that said, Internet communications are expression, so regulating them implicates the First Amendment. Except where petitioner alleges something akin to computer hacking, allegations of online harassment hinge on the content of speech. The usual rules should apply: Excise non-threatening content to see whether the remaining pattern is unconsented contact that threatens safety or privacy. The precise mode of electronic communication may matter. Emails, texts, instant messages, and similar messages sent to a unique address of the petitioner may legitimately be considered contacts, just as a phone call would be. But writings on social media sites, blogs, or other web-related venues that have larger audiences are speech about the petitioner, rather than speech to the petitioner. They are no more "directed at" the petitioner within the meaning of the statutes than is the publication of a book or newspaper.<sup>360</sup>

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*Speech Overbreadth Doctrine*, 105 YALE L.J. 1671, 1676 (1996).

359. See Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, MO. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2097684>.

360. See, e.g., *Towner v. Ridgway*, 182 P.3d 347, 352 (Utah 2008) (interpreting a civil harassment order to allow online speech about petitioner, as distinguished from online communications to petitioner).

c. *Public Officials and Public Figures*

Like anyone else, public officials (elected office holders and high-ranking government employees) and public figures (celebrities) deserve safety and privacy. But the general public also has a constitutionally protected interest in talking about them and sometimes to them. This public interest finds expression in *New York Times Co. v. Sullivan*<sup>361</sup> and its progeny, which establish that (1) civil lawsuits wielded by people in positions of power can resemble sedition prosecutions; and (2) people who reap the benefits of public power or notoriety need to develop thick skin.

*Public Figures as Petitioners.* The murders of John Lennon and Rebecca Shaeffler show how celebrities may face heightened risks from obsessional stalkers. They may also have a legitimate need for protection from intrusive paparazzi. Like the rest of us, however, paparazzi and news photographers have a First Amendment right to take pictures from publicly available places.<sup>362</sup> Proof of harassment will require more than the mere fact of photography, but no-contact orders could be proper against paparazzi who trespass, follow, or intrude into seclusion.

*Public Officials as Petitioners.* The murders of Mayor George Moscone and Councilmember Harvey Milk in San Francisco and the attempted murder of Representative Gabrielle Giffords in Tucson show how public officials also face dangers from obsessional stalkers. However, civil harassment petitions by public officials raise concerns not present in petitions by private parties. Speech directed to public officials is often an exercise of the First Amendment right to petition for redress of grievances.<sup>363</sup> It is also likely to involve matters of public concern. A court should ensure that a no-contact order is necessary for the public official's safety and is not simply a means to shut down a gadfly or a pesky political opponent. If harassment is properly found, the scope of an injunction protecting a public official may need to be structured differently than one protecting a private person. For example, an injunction to protect a public official may need to be more limited in space or time, or contain express exceptions allowing petitioner to attend public meetings, conduct business in public buildings, or to send written correspondence.

*Police as Petitioners.* Police officers are public officials to whom the foregoing cautions apply, but civil harassment petitions by the police raise additional concerns. When police officers file civil harassment petitions, respondents tend to be community members criticizing alleged police misconduct,<sup>364</sup> which is undoubtedly a topic of public concern.

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361. 376 U.S. 254 (1964).

362. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 367–68 (2011).

363. See generally RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE (2012).

364. See generally *Hunley v. Hardin*, No. B210918, 2010 WL 297759 (Cal. Ct. App. Jan. 27, 2010) (upholding an order forbidding a citizen from making complaints about a police officer); *Morrisseau v.*

Even if a respondent is not engaged in protected speech and is engaged in behavior that is genuinely harassing, police officers have less need for preventive injunctions. They have the power of arrest, are typically armed, and are in an excellent position to protect themselves from actual breaches of the peace. More worrisome is the risk that an unscrupulous officer could obtain an order against a suspect, and then undertake enforcement of the order as a means to avoid the Fourth Amendment's probable cause requirements.

*d. Institutional Litigants*

Most civil harassment statutes authorize "persons" to file petitions on behalf of themselves or their dependent children. Whether institutional litigants (such as businesses, corporations, government agencies, or associations) have standing will be a question of statutory interpretation.<sup>365</sup> In those states allowing petitions by or against institutional litigants,<sup>366</sup> several concerns may be present.

*Institutional Petitioners.* As a general matter, it seems unlikely that institutional entities need protection from civil harassment because emotional states like fear, annoyance, or alarm are "exhibited by natural persons, not by legal fictions."<sup>367</sup> When an institutional petitioner complains about a respondent's speech to third parties, it will likely involve public denunciation of the institution, through picketing, leafleting, or the like, which is likely to involve topics of public concern. Moreover, equity may counsel against granting a civil harassment order to an institution, whose interests are often fully satisfied through criminal trespass law.<sup>368</sup> It is faster and cheaper to convey a trespass notice to an unruly visitor than to get an injunction that authorizes virtually identical

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Andrade, No. B172407, 2005 WL 100946 (Cal. Ct. App. Jan. 19, 2005) (six police officers sought civil harassment order against picketing and online speech by community activist). Cf. Staples v. Michaud, 836 A.2d 1288 (Me. 2003) (civilian sought order against police chief).

365. See, e.g., FCC v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011) (holding that corporations are "persons," but that they lack "personal privacy" under the federal Freedom of Information Act); United States v. Havelock, 664 F.3d 1284, 1286 (9th Cir. 2012) (en banc) (corporation is not a "person" under criminal threat statute).

366. E.g., ME. REV. STAT. ANN. tit. 5, § 4653 (2011) ("A person who has been a victim of harassment, including a business, may seek relief by filing a sworn complaint . . ."); Royal Oaks Holding Co. v. Ready, No. C4-02-267, 2002 WL 31302015, at \*1 (Minn. Ct. App. Oct. 7, 2002) (respondent is real estate development company); Vill. of Tigerton v. Minniecheske, 565 N.W.2d 586, 588-89 (Wis. Ct. App. 1997) (respondent is municipal corporation).

367. Diamond View Ltd. v. Herz, 225 Cal. Rptr. 651, 655-56 (Cal. Ct. App. 1986) (holding that a limited partnership that owns taverns may not seek a civil harassment order against an unruly patron). Despite this restriction on statutory standing, California allows businesses to seek injunctions based on tort theories such as nuisance or interference with business expectancy. See Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 343 (Cal. Ct. App. 2007).

368. Cf. Marquez-Luque v. Marquez, 238 Cal. Rptr. 172, 174 (Cal. Ct. App. 1987) (denying a landlord's civil harassment petition where an eviction statute provides adequate remedies).

enforcement. A trespass notice is also less burdensome to the individual because it is a private communication between the property owner and the excluded person that does not carry the same collateral consequences of a court order. If an institution's human employees or agents are individually stalked or harassed, they would have standing to obtain orders on their own behalf that could have the (acceptable) collateral consequence of keeping the harasser off the institution's premises.

*Institutional Respondents.* The institutional respondents most often sued for civil harassment have been protest groups, particularly anti-abortion and animal rights activists.<sup>369</sup> The concerns present in cases like *Madsen* and *Schenck* will be present here because activists' speech is very likely to be directed to the general public and involve topics of public concern. As with injunctions against criminal gangs, there will often be serious due process concerns regarding notice and opportunity to be heard.<sup>370</sup> The unhappy history of the labor injunction in the early twentieth century serves as a cautionary tale. During the *Lochner* era, when injunctions against union activity were commonplace, the *New York Times* called the labor injunction a "Gatling gun on paper."<sup>371</sup> Before these injunctions were reined in by the Norris-LaGuardia Act of 1932 and their state counterparts,<sup>372</sup> typical union activities—such as picketing, leafleting, and advocating boycotts—were enjoined on vague grounds that bore striking similarity to the modern theory of civil harassment.<sup>373</sup> Petitions seeking civil harassment orders against unions and other associations should be scrutinized with great care.<sup>374</sup>

## B. IDEAS FOR LEGISLATURES

### I. *Statute or No Statute*

The first question for a legislature is whether to enact a civil harassment law at all. One thing is certain: If a civil harassment statute is enacted, it will be used—a lot. In 2003, Oklahoma reimposed a

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369. See, e.g., *Huntingdon Life Sci., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 29 Cal. Rptr. 3d 521, 530–33 (Cal. Ct. App. 2005). Due to statutory limitations on civil harassment in some states, these cases are often premised on common law theories.

370. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 611–12 (Cal. 1997). Similar problems were posed by labor injunctions, which were often "addressed to anyone who happened to get actual notice" of them. See FISS, *supra* note 196, at 16.

371. Daniel Novak, *The Pullman Strike Cases: Debs, Darrow, and the Labor Injunction*, in *AMERICAN POLITICAL TRIALS* 119, 135 (Michal R. Belknap ed., 1994).

372. See 29 U.S.C. § 104 (2006); CAL. CIV. PROC. CODE § 527.3 (West 2012).

373. See generally Cummins, *supra* note 358; Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63 (2001).

374. In 2011, Arizona expanded its civil harassment statute to expressly reach union activity and defamation; constitutional challenges to the law are pending. See *United Food & Commercial Workers Local 99 v. Brewer*, No. CV-11-921-PHX-GMS, 2011 WL 4801887 (D. Ariz. Oct. 11, 2011).



relationship requirement on its civil harassment statute because metropolitan counties were “being overrun with requests for protective orders.”<sup>375</sup> States should consider the capacities of their court systems and make a clear-eyed decision about which social problems deserve to be judicial priorities.

## 2. *Statutory Text*

When creating a civil harassment statute or amending an existing one, legislatures should not adopt the California model as the definition of harassment. It is not difficult to draft language explaining that harassment consists of unconsented contact or surveillance with a petitioner (not every type of conduct), that this contact must cause the emotions related to fear for one’s safety and intrusion into one’s privacy (not every type of emotional distress), and that the remedy is an order against contact with the petitioner (not against identified speech). Course of conduct requirements may benefit from borrowing the Title VII concept of “severe or pervasive” behavior, rather than a RICO-like “two or more” formula.

Legislatures should also consider specifying what does *not* constitute civil harassment—or what terms may *not* be included in an order—because hurried trial court procedures often prevent courts from identifying them. Consider Minnesota. Its statute is one of the few that deviates significantly from the California model, including a requirement of “intrusive” acts that have substantial adverse effect on “safety, security, or privacy of another.”<sup>376</sup> This language strongly suggests that the Minnesota legislature intended for civil harassment orders to issue in response to BATTI violations, not defamation (because false speech to others is not an intrusion, and because it affects reputation rather than safety, security, or privacy). Despite this, available Minnesota decisions reveal numerous civil harassment orders purporting to enjoin defamation—most of them upheld on appeal.<sup>377</sup> Such errors could be reduced through explicit statutory language directing that (a) defamation may not be considered a form of harassment; and (b) orders may not restrict speech about the petitioner to third parties. Constitutional savings clauses cannot hurt, but

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375. Press Release, Oklahoma House of Representatives, House Endorses Stricter Enforcement of Victim Protective Orders (May 23, 2003); see OKLA. STAT. tit. 22, §§ 60.1–2 (2012).

376. MINN. STAT. ANN. § 609.748(a)(1) (West 2009).

377. See generally Johnson v. Arlotta, No. A11-630, 2011 WL 6141651 (Minn. Ct. App. Dec. 12, 2011); Johnson v. Luppino, No. A05-1557, 2006 WL 1461070 (Minn. Ct. App. May 30, 2006); Herbst v. Herbst, No. A05-945, 2006 WL 279100 (Minn. Ct. App. Feb. 7, 2006); Dunham v. Roer, 708 N.W.2d 552 (Minn. Ct. App. 2006); Thompson v. Olson, No. A04-1477, 2005 WL 1432133 (Minn. Ct. App. June 21, 2005); Royal Oaks Holding Co. v. Ready, No. C4-02-267, 2002 WL 31302015 (Minn. Ct. App. Oct. 7, 2002); Faricy v. Schramm, No. C8-02-689, 2002 WL 31500913 (Minn. Ct. App. Nov. 12, 2001); Bovi v. Parask, No. C5-98-1616, 1999 WL 289245 (Minn. Ct. App. May 11, 1999); Beahrs v. Lake, No. C3-97-2222, 1998 WL 268075 (Minn. Ct. App. May 26, 1998).

they cannot be expected to carry the weight on their own. Washington's statute, for example, contains several constitutional savings clauses, but they did not prevent a trial court from enjoining alleged defamation, and a court of appeals from affirming the order, before ultimate reversal by the state supreme court.<sup>378</sup>

A statute along these lines might read like this:

It is unlawful to engage in a pattern of severe or pervasive unconsented contact with, or surveillance of, a person that endangers the person's safety or privacy and would endanger the safety or privacy of a reasonable person. The alleged pattern may not include constitutionally protected speech or activity and communications to third parties that do not involve threats to the petitioner's safety. The court may remedy the violation only through an order forbidding future contact with or surveillance of the petitioner. The order must avoid unnecessary restriction on the freedoms of speech, press, and petition.

### 3. *Statutory Title*

Finally, let me suggest that any new statute not use the term "harassment" because the word invites overuse. Consider Utah: Its statute incorporates the California model, authorizing an injunction in response to a course of conduct that would cause a reasonable person to suffer emotional distress.<sup>379</sup> It goes even further by including speech "about" the petitioner within its definition.<sup>380</sup> Yet despite its facial breadth, Utah has a dramatically lower rate per capita rate of civil harassment petitions than the other states that keep statistics.<sup>381</sup> Why the difference? It may relate to social factors unique to Utah, or to other statutory limitations. But some of the difference may flow from the statute's title, which is not "Harassment" but "Stalking." That choice signals to the populace, in a way the statutory text may not, what type of behavior the legislature intends to forbid.

## CONCLUSION

Civil harassment statutes can be a valuable tool to protect against unconsented contact or surveillance that endangers safety and privacy. But the wide scope of their language, in the procedural context where they are applied, invites unconstitutional applications. The invitation

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378. See generally *In re Marriage of Suggs*, 93 P.3d 161 (Wash. 2004). In 2011, the Washington legislature considered a bill to expressly exclude from a course of conduct any "communications to a third party that do[] not involve threats to the petitioner or petitioner's family's safety." S.B. 5579, 62d Leg., 2011 Reg. Sess. (Wash. 2011). This provision was ultimately replaced with language indicating that a course of conduct must exclude "constitutionally protected free speech," which was largely redundant of the statute's existing constitutional savings clause. 2011 Wash. Sess. Laws 1950-51.

379. See UTAH CODE ANN. § 77-3a-101 (LexisNexis 2012) (incorporating UTAH CODE ANN. § 76-5-106.5(2)).

380. See *id.*

381. See *supra* Table 1.

should be declined. The First Amendment recognizes that all members of society “are exposed to a great deal of unpleasant speech—to insults and unkindness and verbal viciousness—against which the only recourse is to develop emotional resiliency. The law cannot intervene in every case where someone’s feelings are hurt, nor would most citizens want it to.”<sup>382</sup>

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382. See Lidsky & Garcia, *supra* note 359 (internal punctuation and footnote omitted).

## STATUTORY APPENDIX

Twenty-three states with over 140 million inhabitants (representing approximately 45% of the U.S. population) have statutes that allow any person to obtain an injunction against any other person, without regard to relationship, in response to unspecified behavior that causes forms of emotional distress other than fear of violence.<sup>383</sup> This Appendix identifies these statutes and their leading cases. It emphasizes the language within each statute that defines harassment in open-textured terms. Many of the statutes contain additional elements (such as subjective or objective standards of emotional distress, intent elements, or constitutional savings clauses) or specify some harassing behaviors (such as phone calls or following) not quoted here.

**I. Arizona (enacted 1984)****1984 Ariz. Sess. Laws ch. 262**

An injunction may issue upon a showing of “harassment.” ARIZ. REV. STAT. ANN. § 12-1809(R) (2012). “Harassment” is “a series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose.” *Id.*

Representative cases: *LaFaro v. Cahill*, 56 P.3d 56 (Ariz. Ct. App. 2002).

**2. California (enacted 1978)****1978 Cal. Stat. ch. 1307**

An injunction may issue upon a showing of “harassment.” CAL. CIV. PROC. CODE § 527.6 (West 2012). “Harassment” includes “a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.” *Id.* § 527.6(b)(3).

Representative cases: *R.D. v. P.M.*, 135 Cal. Rptr. 3d 791 (Cal. Ct. App. 2011); *Huntingdon Life Sci., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 29 Cal. Rptr. 3d 521 (Cal. Ct. App. 2005); *Brekke v. Wills*, 23 Cal. Rptr. 3d 609 (Cal. Ct. App. 2005); *Byers v. Cathcart*, 67 Cal. Rptr. 2d 398 (Cal. Ct. App. 1997); *Smith v. Silvey*, 197 Cal. Rptr. 15 (Cal. Ct. App. 1983).

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<sup>383</sup> Statutes authorizing no-contact orders, without a relationship requirement, in response to actions causing fear of violence include: ALASKA STAT. § 18.65.850 (2010) (incorporating ALASKA STAT. § 11.41.270 (2010)); COLO. REV. STAT. § 13-14-102 (2012); N.H. REV. STAT. ANN. § 633:3-a (LexisNexis 2007); N.M. STAT. ANN. § 40-13-3 (2011) (incorporating N.M. STAT. ANN. § 30-3A-3 (2004)); OR. REV. STAT. § 163.735 (2011) (incorporating OR. REV. STAT. § 163.732 (2011)); VT. STAT. ANN. tit. 12, § 5133 (2012) (incorporating VT. STAT. ANN. tit. 12, § 5131).

### **3. Georgia (enacted 1993)**

#### **1993 Ga. Laws 1534**

An injunction may issue upon a showing of “stalking.” GA. CODE ANN. § 16-5-94 (2012). The statutory definition of “stalking” incorporates a definition of “harassment”:

A person commits the offense of stalking when he or she . . . contacts another person . . . without the consent of the other person . . . for the purpose of harassing and intimidating the other person. . . . For the purposes of this article, the term “harassing and intimidating” means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person’s safety or the safety of a member of his or her immediate family, by establishing a pattern of harassing and intimidating behavior, and which serves no legitimate purpose.

*Id.* § 16-5-90(a)(1).

Representative cases: *Pilcher v. Stribling*, 647 S.E.2d 8 (Ga. 2007); *Thornton v. Hemphill*, 686 S.E.2d 263 (Ga. Ct. App. 2009); *De Louis v. Sheppard*, 627 S.E.2d 846 (Ga. Ct. App. 2006).

### **4. Hawaii (enacted 1986)**

#### **1986 Haw. Sess. Laws ch. 69**

An injunction may issue upon a showing of “harassment.” HAW. REV. STAT. § 604-10.5 (2009). “Harassment” includes an “intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose.” *Id.* § 604-10.5(a)(2).

Representative cases: *Williams v. Aona*, 210 P.3d 501 (Haw. 2009); *Bailey v. Sanchez*, 990 P.2d 1194 (Haw. Ct. App. 1999).

### **5. Kansas (enacted 2002)**

#### **2002 Kan. Sess. Laws ch. 141**

A “protection from stalking order” may issue upon a showing of “stalking.” KAN. STAT. ANN. § 60-31a06 (2012). “Stalking” is defined by reference to “an intentional harassment of another person,” which means “a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.” *Id.* § 60-31a02.

Representative cases: *Smith v. Martens*, 106 P.3d 28 (Kan. 2005); *Wentland v. Uhlarik*, 159 P.3d 1035 (Kan. Ct. App. 2007).

### **6. Maine (enacted 1987)**

#### **1987 Me. Laws ch. 515**

An injunction may issue upon a showing of “harassment.” ME. REV. STAT. ANN. tit. 5, § 4653 (2011). “Harassment” includes “without

reasonable cause, [engaging] in any course of conduct with the intent to harass . . . another person . . . after having been notified, in writing or otherwise, not to engage in such conduct by” a law enforcement officer or court. *Id.* tit. 5, § 4651(C) (incorporating ME. REV. STAT. ANN. tit. 17-A, § 506-A).

Representative cases: *Staples v. Michaud*, 836 A.2d 1288 (Me. 2003); *State v. Hills*, 574 A.2d 1357 (Me. 1990).

**7. Maryland (enacted 2002)**  
**2002 Md. Laws ch. 26**

A “peace order” may issue upon a showing of “harassment.” MD. CODE ANN., CTS. & JUD. PROC. § 3-1503(a)(6) (LexisNexis 2012). “Harassment” includes “maliciously engag[ing] in a course of conduct that alarms or seriously annoys the other: (1) with the intent to harass, alarm, or annoy the other; (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and (3) without a legal purpose.” *Id.* § 3-803.

Representative cases: *Davidson v. Seneca Crossing Section II Homeowner’s Ass’n, Inc.*, 979 A.2d 260 (Md. Ct. Spec. App. 2009).

**8. Michigan (enacted 1992)**  
**1992 Mich. Pub. Acts No. 262**

A “personal protection order” may issue upon a showing of “stalking.” MICH. COMP. LAWS § 600.2950a(1) (2012). “Stalking” means “a willful course of conduct involving repeated or continuing harassment of another individual.” *Id.* § 750.411h(d). “Harassment” means “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress.” *Id.* § 750.411h(c).

Representative cases: *Lamkin v. Engram*, 815 N.W.2d 793 (Mich. Ct. App. 2012); *Pobursky v. Gee*, 640 N.W.2d 597 (Mich. Ct. App. 2001); *Kampf v. Kampf*, 603 N.W.2d 295 (Mich. Ct. App. 1999).

**9. Minnesota (enacted 1990)**  
**1990 Minn. Laws ch. 461**

An injunction may issue upon a showing of “harassment.” MINN. STAT. ANN. § 609.748 (West 2009). “Harassment” includes: “repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another.” *Id.* § 609.748(a)(1).

Representative cases: *Dunham v. Roer*, 708 N.W.2d 552 (Minn. Ct. App. 2006); *Kush v. Mathison*, 683 N.W.2d 841 (Minn. Ct. App. 2004); *Welsh v. Johnson*, 508 N.W.2d 212 (Minn. Ct. App. 1993).

**10. Missouri (enacted 1980; extended to harassment 1986)****1980 Mo. Laws ch. 461, 1986 Mo. Laws S.B. No. 450**

An “order of protection” may issue upon a showing of “abuse.” Mo. REV. STAT. § 455.032 (2012). “Abuse” is defined to include “harassment,” which means “engaging in a purposeful or knowing course of conduct involving more than one incident that alarms or causes distress to an adult or child and serves no legitimate purpose.” *Id.* § 455.010(1)(d).

Representative cases: Schwalm v. Schwalm, 217 S.W.3d 335 (Mo. Ct. App. 2007); Vinson v. Adams, 188 S.W.3d 461 (Mo. Ct. App. 2006); Overstreet v. Kixmiller, 120 S.W.3d 257 (Mo. Ct. App. 2003).

**11. Montana (enacted 1993)****1993 Mont. Laws ch. 292**

An “order of protection” may issue upon a showing of “stalking.” MONT. CODE ANN. § 40-15-102(2)(a) (2011). “Stalking” occurs when a person “purposely or knowingly causes another person substantial emotional distress . . . by repeatedly . . . harassing . . . the stalked person.” *Id.* § 45-5-220(1).

Representative cases: Jordan v. Kalin, 256 P.3d 909 (Mont. 2011).

**12. Nebraska (enacted 1992)****1992 Neb. Laws LB 1098**

A “harassment protection order” may issue upon a showing of “harassment.” NEB. REV. STAT. § 28-311.09(1) (2012). “Harass” means “to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose.” *Id.* § 28-311.02(2)(a).

Representative cases: Mahmood v. Mahmud, 778 N.W.2d 426 (Neb. 2010).

**13. Nevada (enacted 1989)****1989 Nev. Stat 897**

An injunction may issue upon a showing of “harassment” or “stalking.” NEV. REV. STAT. ANN. § 200.591(1) (2011). “Harassment” occurs when, “[w]ithout lawful authority, the person knowingly threatens . . . [t]o do any act which is intended to substantially harm the person threatened or any other person with respect to his or her physical or mental health or safety.” *Id.* § 200.571(1). “Stalking” occurs when one, “without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel . . . harassed.” *Id.* § 200.575(1).

Representative cases: None.

**14. North Carolina (enacted 2004)****2004 N.C. Sess. Laws s. 1**

A “civil no-contact order” may issue upon a showing of “unlawful conduct.” N.C. GEN. STAT. § 50C-5 (2009). “Unlawful conduct” is defined to include “stalking,” which includes “harassing . . . another person without legal purpose with the intent to . . . [c]ause that person to suffer substantial emotional distress by placing that person in fear of . . . continued harassment.” *Id.* § 50C-1(6)–(7).

Representative cases: *St. John v. Brantley*, 720 S.E.2d 754 (N.C. Ct. App. 2011); *Ramsey v. Harman*, 661 S.E.2d 924 (N.C. Ct. App. 2008).

**15. North Dakota (enacted 1993)****1993 N.D. Laws ch. 125**

A “disorderly conduct restraining order” may issue upon a showing of “disorderly conduct.” N.D. CENT. CODE § 12.1-31.2-01 (2009). “Disorderly conduct” is defined as “intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person.” *Id.* § 12.1-31.2-01(1).

Representative cases: *Hoggarth v. Kropp*, 790 N.W.2d 22 (N.D. 2010); *Wetzel v. Schlenvogt*, 705 N.W.2d 836 (N.D. 2005); *Baker v. Mayer*, 680 N.W.2d 261 (N.D. 2004).

**16. Ohio (enacted 1992)****1992 Ohio Laws 144 H 536**

An “anti-stalking protective order” may issue upon a showing of a violation of the criminal statute titled “menacing by stalking.” OHIO REV. CODE ANN. § 2903.214 (LexisNexis 1993). That crime is defined as “a pattern of conduct [to] knowingly cause another [person] to believe that the offender will . . . cause mental distress to the other person.” *Id.* § 2903.211(A).

Representative cases: *Howard v. Wilson*, 928 N.E.2d 1180 (Ohio Ct. App. 2010); *Smith v. Wunsch*, 832 N.E.2d 757 (Ohio Ct. App. 2005).

**17. South Carolina (enacted 1995)****1995 S.C. Acts Act No. 94**

A “restraining order” may issue upon a showing of “harassment in the first or second degree.” S.C. CODE ANN. § 16-3-1750(A) (2011). These crimes require a showing of “a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress.” *Id.* § 16-3-1700(A)–(B).

Representative cases: None.



**18. South Dakota (enacted 1997)****1997 S.D. Sess. Laws ch. 131**

A “protection order” may issue upon a showing of “stalking.” S.D. CODIFIED LAWS § 22-19A-8 (2012). “Stalking” includes to “[w]illfully, maliciously, and repeatedly harass another person by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication.” *Id.* § 22-19A-1. To harass is to engage in “a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose.” *Id.* § 22-19A-4.

Representative cases: None.

**19. Tennessee (enacted 1979, extended to harassment 1993)****1979 Tenn. Pub. Acts ch. 350****1993 Tenn. Pub. Acts ch. 435**

An “order of protection” may issue upon a showing of “stalking.” TENN. CODE ANN. § 36-3-601, 602(a) (2012). “Stalking” includes “a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel . . . harassed.” *Id.* § 39-17-315(a)(4). “Harassment” means “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress.” *Id.* § 39-17-315(a)(3).

Representative cases: None.

**20. Utah (enacted 2001)****2001 Utah Laws ch. 276**

A “civil stalking injunction” may issue upon a showing of “stalking.” UTAH CODE ANN. § 77-3a-101 (LexisNexis 2012). “Stalking” means to “intentionally or knowingly engage[] in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person . . . to suffer . . . emotional distress.” *Id.* § 76-5-106.5(2).

Representative cases: *Towner v. Ridgway*, 182 P.3d 347 (Utah 2008); *Bott v. Osburn*, 257 P.3d 1022 (Utah Ct. App. 2011); *Allen v. Anger*, 248 P.3d 1001 (Utah Ct. App. 2011); *Ellison v. Stam*, 136 P.3d 1242 (Utah Ct. App. 2006).

**21. Washington (enacted 1987)****1987 Wash. Stat. ch. 280**

An “order of protection” may issue upon a showing of “unlawful harassment.” WASH. REV. CODE § 10.14.040 (2012). “Unlawful harassment” is “a knowing and willful course of conduct directed at a

specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.” *Id.* § 10.14.020(2).

Representative cases: *Trummel v. Mitchell*, 131 P.3d 305 (Wash. 2006); *In re Marriage of Suggs*, 93 P.3d 161 (Wash. 2004); *State v. Noah*, 9 P.3d 858 (Wash. Ct. App. 2000).

**22. Wisconsin (enacted 1983)**  
**1983 Wis. Sess. Laws Act 336**

An injunction may issue upon a showing of “harassment.” WIS. STAT. § 813.125 (2011). Harassment includes engaging “in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.” *Id.* § 813.125(1)(b).

Representative cases: *Bachowski v. Salamone*, 407 N.W.2d 533 (Wis. 1987); *Welytok v. Ziolkowski*, 752 N.W.2d 359 (Wis. Ct. App. 2008).

**23. Wyoming (enacted 1993)**  
**1993 Wyo. Sess. Laws ch. 92**

An “order of protection” may issue upon a showing of “stalking.” WYO. STAT. ANN. § 7-3-507(a) (2012). “Stalking” is committed if, “with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to any combination of the following: [c]ommunicating . . . in a manner that harasses; [or] otherwise engaging in a course of conduct that harasses another person.” *Id.* § 6-2-506(b). To “harass” means “to engage in a course of conduct . . . directed at a specific person or the family of a specific person, which the defendant knew or should have known would cause a reasonable person to suffer substantial emotional distress, and which does in fact seriously alarm the person toward whom it is directed.” *Id.* § 6-2-506(a)(ii).

Representative cases: None.