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# Communication in Cyberspace

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## COMMUNICATION IN CYBERSPACE\*

NANCY LEONG\*\* & JOANNE MORANDO\*\*\*

*This Article examines a persistent and pervasive problem in cybercrime law. What counts as “communication” on the Internet? Defining the term is particularly important for crimes such as cyberstalking, cyberharassment, and cyberbullying, where most statutes require a showing that the alleged perpetrator “communicated” with the victim or impose a similar requirement using slightly different language.*

*This Article takes up the important task of defining “communication.” As a foundation to our discussion, we provide the first comprehensive survey of state statutes and case law relating to cyberstalking, cyberharassment, and cyberbullying. We then examine the realities of the way people use the Internet to develop a definition of “communication” that reflects those realities. That is, we aim to provide effective tools by which prosecutors can address wrongful conduct without punishing innocuous behavior or chilling speech. We conclude by proposing a model statute that appropriately defines “communication.” We recommend that state legislatures adopt the statute or modify existing laws to match it in pertinent part and demonstrate how the statute would apply in a range of situations.*

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## INTRODUCTION

“Elizabeth Long needs to stop bitching about how she almost killed herself and go ahead and do it.”<sup>1</sup> This message was posted anonymously and broadcast over a 1.5-mile radius, reaching thousands of individuals who had downloaded an app called Yik Yak.<sup>2</sup> During a series of events that would become known as “GamerGate,” Zoe Quinn was forced to leave her home, fearing for her safety, after her address was posted online.<sup>3</sup> This act of revealing personal information and documents to the public online is called

1. Alyson Shontell, *How Two Georgia Fraternity Brothers Created Yik Yak, a Controversial App that Became a ~\$400 Million Business in 365 Days*, BUS. INSIDER AUSTL. (Mar. 13, 2015, 1:12 AM), <http://www.businessinsider.com.au/the-inside-story-of-yik-yak-2015-3> [<http://perma.cc/H6G5-XPBB> (dark archive)].

2. *Id.*

3. Alex Hern, *Zoe Quinn on Gamergate: ‘We Need a Proper Discussion About Online Hate Mobs’*, GUARDIAN (Sept. 12, 2014), <http://www.theguardian.com/technology/2014/sep/12/zoe-quinn-gamergate-online-hate-mobs-depression-quest> [<http://perma.cc/4S6A-SS26>].

“doxxing,”<sup>4</sup> and it has become increasingly common in recent years.<sup>5</sup> Brianna Wu, who owns a video game company and develops video games, woke up to the following message posted to Twitter: “Guess what bitch? I now know where you live. You and Frank [her husband] live at [REDACTED].”<sup>6</sup> A fake Twitter account titled “Anita Needs to Die” features a profile picture of Anita Sarkeesian, a feminist commentator, with photoshopped black eyes and a bloody nose.<sup>7</sup>

In the past, statutes criminalizing behavior such as threats, stalking, and harassment generally require that the speaker “communicate” with the target.<sup>8</sup> It is easy to establish that communication took place when the behavior takes the form of a phone call or letter directed at the target. But the Internet, along with various social media platforms and apps, has enabled other forms of directing abuse at targets for which “communication” cannot be defined simply as direct messages from one person to another. Understanding the ways people communicate on the Internet is vitally important to create effective laws that regulate harmful online speech and conduct.

In this Article, we present an original empirical survey and analysis of two types of such laws in the federal code and all fifty states: cyberstalking laws that prohibit a pattern of online behavior that poses a “credible threat of harm,”<sup>9</sup> and cyberharassment laws that prohibit online activity that torments or distresses its target.<sup>10</sup> We also discuss, although we do not include in our empirical survey,

4. *Id.*

5. Andrew Quodling, *Doxxing, Swatting and the New Trends in Online Harassment*, CONVERSATION (April 21, 2015, 4:11 PM), <http://theconversation.com/doxxing-swatting-and-the-new-trends-in-online-harassment-40234> [<http://perma.cc/HX4J-GZDB>].

6. Ian Miles Cheong, *Game Developer Brianna Wu Driven from Home After Death Threats and Doxxing*, GAMERANX (Oct. 10, 2014), <http://www.gameranx.com/updates/id/24642/article/game-developer-brianna-wu-driven-from-home-after-death-threats-and-doxxing/> [<http://perma.cc/X9Y7-JW96>]. In almost all republications and screenshots of doxxing occurrences, the information at issue has been removed or redacted to avoid further dispersing the private information. *See, e.g., id.*

7. Although now deleted, a screen capture of the Twitter account can be found at Carly Smith, *GamerGate: A War on Women Hiding Behind a Mask of “Ethics”*, INDIEWIRE (Oct. 17, 2014, 11:30 AM), <http://blogs.indiewire.com/womenandhollywood/gamergate-a-war-on-women-hiding-behind-a-mask-of-ethics-20141017> [<http://perma.cc/9WVAJ-XWSG>].

8. *See, e.g., infra* notes 17–24 and accompanying text (discussing the recent *Elonis* decision and whether or not the defendant communicated with the target).

9. *See State Cyberstalking and Cyberharassment Laws*, NAT’L CONF. OF ST. LEGISLATURES (Jan. 12, 2015), <http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx> [<http://perma.cc/2PRJ-RRWQ>] [hereinafter *Cyberharassment Laws*].

10. *See id.*

cyberbullying laws that specifically target harassment and bullying among minors.<sup>11</sup> These three categories of laws are related and often overlap, so the distinction among them is not always clear.<sup>12</sup> More importantly, however, all three are intended to address essentially the same problem—the use of the Internet to engage in speech and behavior that seriously damages people’s lives.

When we consider the behavior that these laws are designed to prevent, the need to define “communication” becomes clear. For example, a law designed to prohibit cyberharassment would be overly narrow if its scope were limited to emails. A harasser has many other ways of communicating with a target, such as through Facebook posts and messages, Tweets, blog posts, and blog comments.<sup>13</sup> At the same time, a law designed to prohibit cyberharassment would be decidedly overbroad—and would violate the First Amendment—if it prohibited *all* negative speech about an individual on the Internet.<sup>14</sup>

Our project, then, is to develop a definition of “communication” that will allow for the punishment of harmful speech without sweeping in innocuous speech or running afoul of the First Amendment. There are, of course, other issues that must be resolved in order to draft effective cyberharassment and cyberstalking statutes—for example, the mental state necessary for criminalization, the frequency and severity of harmful speech, and the effect of such speech on the victim.<sup>15</sup> Defining what “communication” means in the online world, however, is uniquely critical for cyberharassment statutes because the other elements are, for the most part, well

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11. *See id.* We did not engage in a census of state cyberbullying laws for this project, primarily because, in some instances, the legislative history of cyberstalking and cyberharassment laws indicates an intention to address the problem of cyberbullying with these broader laws. *See* Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 *BERKELEY TECH. L.J.* 1103, 1121–22 (2011). Moreover, other commentators have systematically examined such laws. *See* Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 *VAND. L. REV.* 845, 857–64 (2010). Our conclusions about what should count as communication for purposes of cyberstalking and cyberharassment statutes would, however, apply equally well to cyberbullying statutes, perhaps with the addition of forums unique to minors (for example, an intranet message board available exclusively to students at a particular school).

12. *See Cyberharassment Laws*, *supra* note 9.

13. *See* Jacqueline D. Lipton, *Cyberbullying and the First Amendment*, 14 *FLA. COASTAL L. REV.* 99, 105 (2012) (“Online bullying takes a variety of different forms, some of which bear a closer resemblance to physical bullying than others.”).

14. *See* King, *supra* note 11, at 848 (“[W]e must be cautious not to erode the freedom of speech guaranteed by the First Amendment.”); *see also* Bd. of Airport Comm’rs of L.A. v. *Jews for Jesus, Inc.*, 482 U.S. 569, 575, 577 (holding that a regulation prohibiting “all” First Amendment activities was “substantially overbroad”).

15. *See, e.g.*, sources cited *infra* note 27–28.

defined in other areas of criminal law and it is appropriate to use the same or similar standards in the cyberharassment context.

We conclude that “communication” on the Internet should be defined as any online behavior—including, but not limited to, speech—by an individual who recklessly disregarded a reasonable likelihood that the target would discover it. We select this standard for a number of reasons. The use of a recklessness standard with respect to an individual’s mental state strikes a balance between a standard requiring actual knowledge—which would in many instances be very difficult for the prosecution to prove—and mere negligence—which risks criminalizing accidental behavior.<sup>16</sup> By defining communication as behavior performed with reckless disregard for the likelihood that the target will find out about it, we sweep in behavior that an individual knew the target of the behavior would discover, as well as behavior that an individual consciously disregarded the likelihood that the target would discover.

Moreover, this approach is consistent with the United States Supreme Court’s recent decision in *Elonis v. United States*.<sup>17</sup> *Elonis* involved a defendant who posted violent statements about his ex-wife on Facebook.<sup>18</sup> The *Elonis* district court jury found that the defendant’s statements would have caused a reasonable person to interpret the statements as real threats, and he was convicted under the federal threats statute.<sup>19</sup> The issue on appeal in *Elonis* was whether the government must prove that the perpetrator *intended* to threaten the target, or whether the prosecutor need only show that a reasonable target would have felt threatened and in fact felt threatened.<sup>20</sup> At oral argument, the justices seemed skeptical that the prosecution would have to prove intent to threaten, with Justice Alito noting that to do so “sounds like a roadmap for threatening a spouse and getting away with it.”<sup>21</sup> Justice Kagan instead suggested a

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16. See, e.g., DAVID CRUMP ET AL., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES § 3.08(B)(2)(1) (2d ed. 2010) (“In many other countries it is considered inappropriate to apply the criminal law to merely negligent acts since the concept of moral culpability is not sufficiently invoked for people who are just careless.”).

17. 135 S. Ct. 2001 (2015).

18. *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013), *rev’d*, 135 S. Ct. 2001 (2015).

19. See 18 U.S.C. § 875 (2012); *Elonis*, 730 F.3d at 323.

20. See *Elonis*, 730 F.3d at 323 (“This case presents the question whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats.”).

21. Transcript of Oral Argument at 59, *Elonis v. United States*, 135 S. Ct. 2001 (2014) (No. 13-983), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-983\\_4f57.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-983_4f57.pdf) [http://perma.cc/95UR-6ZYE].

recklessness standard, which would be easier for the prosecution to prove.<sup>22</sup>

The Court held that whether “a reasonable person would regard *Elonis*’s communications as threats” was not sufficient to establish intentional communication because “criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.”<sup>23</sup> Ultimately, however, *Elonis* is perhaps most noteworthy for what it did not decide—is recklessness sufficient to convict someone under the federal threats statute, or must the prosecution show knowledge? This shortcoming creates substantial confusion: the lower courts do not know which standard to apply on remand, and thus the Supreme Court will likely have to address the issue again.<sup>24</sup>

The uncertainty left by *Elonis* does not directly implicate our purpose in this Article. Rather, it speaks to whether a perpetrator intends statements to threaten,<sup>25</sup> while our concern is with whether a perpetrator intends or ignores the likelihood that statements will be discovered by the subject. We think, however—and will explain in more detail in the body of the Article—that a consistent recklessness standard strikes the right balance between the dual intent requirements of the intent to threaten or engage in harmful speech and the intent to communicate.

Finally, a note about terminology. While our survey of state laws and cases examines the way that communication is defined for cyberharassment and cyberstalking statutes, we will use the term “cyberharassment” to refer collectively to both of these types of statutes. When we are referring only to cyberharassment statutes, and not to cyberstalking statutes, we will make that clear in individual instances. In some cases, our analysis will also apply to cyberbullying statutes, given that those statutes also examine what constitutes electronic communication. Although we did not specifically review

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22. *Id.* at 8.

23. *Elonis*, 135 S. Ct. at 2012.

24. Nancy Leong, *Guest Blog: Nancy Leong, The Anticlimax of Elonis v. United States*, HAMILTON & GRIFFIN ON RTS. (June 8, 2015), <http://hamilton-griffin.com/guest-blog-nancy-leong-the-anticlimax-of-elonis-v-united-states/> [<http://perma.cc/9RBY-F57M>] (noting that the majority in *Elonis* stated “it [was] not necessary to consider any First Amendment issues”).

25. *Elonis*, 135 S. Ct. at 2004 (“Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication . . .”).

those statutes in our empirical survey, we note where our discussion extends to cyberbullying statutes as well.

The Article proceeds as follows. In Part I, we discuss the importance of defining “communication” on the Internet. We survey the relevant scholarly literature on electronic communication, noting that no previous work has examined in detail what it means to “communicate” on the Internet in light of the myriad ways of doing so. We then examine the realities of how people use the Internet to convey information to one another and explain what it should mean to “communicate” online, taking into account these realities.

In Part II, we undertake an original empirical survey of statutes criminalizing cyberharassment, categorizing the way that “communication” is currently statutorily defined and judicially interpreted. We first survey the way “communication” is defined in state statutes relating to cyberharassment and develop a typology of such statutes. We then examine the ways that state courts have interpreted the meaning of “communication” according to these statutes.

Finally, Part III develops an agenda for implementing a better definition of “communication.” We point out the defects in existing laws, describe how they can be ameliorated, and propose statutory language that legislators should use in passing new or amending old cyberharassment statutes. Ultimately, these proposals will yield cyberharassment laws that accurately reflect the way that people use the Internet.

## I. WHAT QUALIFIES AS COMMUNICATION?

This Part considers what should qualify as “communication” on the Internet for purposes of cyberharassment statutes. It surveys the existing scholarly literature, which has not examined this issue in great detail. It then examines the way that people use the Internet, taking account of existing technology in a way that neither scholars nor judges have thus far. Ultimately, we adopt a practical definition of “communication” based on the way people actually transmit and receive information via the Internet.

### A. *A Neglected Element of Cyberharassment*

The evolution of cyberharassment law has presented many novel issues for legal debate, including questions of constitutionality,<sup>26</sup>

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26. Considerable scholarship focuses on what is necessary to make such cyberharassment statutes compliant with the requirements of the First Amendment. *See*

burdens of proof,<sup>27</sup> and the feasibility of implementation.<sup>28</sup> While each of these considerations is essential to the formation of the law, we must still ask a foundational question: What specific conduct is the legislature trying to criminalize? The answer to that question lies in how we define “communication,” or, put differently, what it means to communicate online.

Policymakers and scholars have considered two different approaches to defining “communication.” The first is target-centric—it examines how the target of the communication is affected or

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generally Andrew B. Carrabis & Seth D. Haimovitch, *Cyberbullying: Adaptation from the Old School Sandlot to the 21st Century World Wide Web—The Court System and Technology Law’s Race To Keep Pace*, 16 J. TECH. L. & POL’Y 143, 145–46 (2011) (analyzing First Amendment concerns of Florida’s cyberbullying laws in contrast to the seminal cases of free speech in public schools); Lyrisa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 700 (2012) (presenting “a First Amendment primer to guide law-makers”); Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 705 (2012) (discussing the interaction between the First Amendment and a school’s ability to punish off-campus cyberbullying); King, *supra* note 11, at 848 (2010) (offering “suggestions for how cyberbullying laws can be crafted to address the problem of online bullying while not eroding First Amendment freedoms”).

27. See, e.g., Kori Clanton, *We Are Not Who We Pretend To Be: ODR Alternatives to Online Impersonation Statutes*, 16 CARDOZO J. CONFLICT RESOL. 323, 340–41 (2014) (noting the difficulty in the plaintiff or victim having the burden of identifying a perpetrator that operated in anonymity); David Gray, Danielle Keats Citron & Liz Clark Rinehart, *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 745–46 (2013) (discussing Fourth Amendment implications in securing evidence of cybercrime); Aimee Fukuchi, Note, *A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharassment Law*, 52 B.C. L. REV. 289, 289 (2011) (proposing burden-shifting devices because the prosecution is procedurally disadvantaged in proving the details of the crime that are “peculiarly within the knowledge of the accused”).

28. We note, moreover, that while many student authors have made interesting and relevant contributions relating to feasibility of implementation, the issue is relatively lacking in commentary by established academics and practitioners. See, e.g., Heather Benzmilller, Note, *The Cyber-Samaritans: Exploring Criminal Liability for the “Innocent” Bystanders of Cyberbullying*, 107 NW. U. L. REV. 927, 927 (2013) (discussing the need to criminalize the role of the bystander that escalates the cyberbullying); Cassie Cox, Comment, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws*, 54 JURIMETRICS J. 277, 277, 286–87 (2014) (noting the difficulties in proving the required culpable mental state); Arthur Gaus, Comment, *Trolling Attacks and the Need for New Approaches to Privacy Torts*, 47 U. S.F. L. REV. 353, 353–54 (2012) (proposing that a tort regime be the primary way to deal with cyberharassment as Internet anonymity makes traditional criminal culpability difficult); Kate E. Schwartz, Note, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 409–10 (2009) (noting the myriad types of cyber victimization and proposing a legislative scheme that anchors liability to the culprit’s intent and the harm the victim suffered).

reached by that communication.<sup>29</sup> The second is speaker-centric—it examines the means or platform that the speaker uses to communicate.<sup>30</sup> Yet, a clear definition of communication requires incorporating both approaches.

In a target-centric discussion of cyberharassment, the focus is on the wide variety of ways that harassers can harm their targets.<sup>31</sup> Targets can be harassed directly<sup>32</sup> or indirectly.<sup>33</sup> Jacqueline Lipton notes that “cyberbullying comes in a variety of different forms, not all of which involve direct communications with the victim . . . . [O]ne key difference between victimizing an individual in the real world and online is that the [online] victim is not always the direct recipient of the threatening or harassing communications.”<sup>34</sup> A cyberharasser can recruit friends or other online networks to execute an attack,<sup>35</sup> assuming that the content of the interaction will find its way to the intended target.<sup>36</sup> The target’s personal information can be revealed

29. For example, Massachusetts requires communication directed at a person that “seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress.” MASS. GEN. LAWS ch. 265, § 43(a)(1) (West, Westlaw through 2015 Legis. Sess.).

30. For example, Ohio requires only that the speaker “post a message with purpose to urge or incite another.” OHIO REV. CODE ANN. § 2903.211 (LEXIS through 2015 legislation).

31. See, e.g., DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 29 (2014) (discussing cyberharassment’s ability to affect the “‘victims’ professional reputations and careers, discourage[] on- and offline pursuits, disrupt[] both crucial and ordinary life choices, and cause[] physical and emotional harm”); Cox, *supra* note 28, at 277 (noting that “cyberstalkers can use a wider range of methods, from tracking victims through social media to impersonating targeted individuals”).

32. Direct harassment was an issue in the *Elonis* case. See *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013), *rev’d*, 135 S. Ct. 2001 (2015). *Elonis* posted violent statements about his ex-wife, including “I’m not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.” *Id.* at 324; see also *infra* Section I.A.1.

33. Indirect cyberharassment has very little in common with real-world harassing activities. See Lipton, *supra* note 11, at 1112 (“Laws targeted at real world activities often do not translate well when applied to cyberspace.”).

34. Lipton, *supra* note 13, at 105.

35. For a discussion of the unique ways the Internet encourages harmful group-think, see Scott Hammack, Comment, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 82 (2002).

36. One reporter described this as “crowd-sourced revenge” when her number was posted on Craigslist in the personals section, leading to hours of people calling her. Kashmir Hill, *What Are the Legal Penalties for Using Craigslist To Crowd-Source Revenge?*, FORBES (Sept. 8, 2011, 1:47 PM), <http://www.forbes.com/sites/kashmirhill/2011/09/08/what-are-the-legal-penalties-for-using-craigslist-to-crowd-source-revenge/> [<http://perma.cc/8NEQ-HQV2>]. Most infamous was the case of an ex-boyfriend posting to Craigslist under the guise of his ex-girlfriend seeking to play out a “rape fantasy.” Kashmir Hill, *A Reason Not to Respond to Rape Fantasy Ads on Craigslist*, ABOVE THE LAW (Feb. 16, 2010, 10:12 AM), <http://abovethelaw.com/2010/02/a-reason-not-to-respond-to-rape->

online.<sup>37</sup> A cyberharasser can post false information under the target's name.<sup>38</sup> Some of this conduct is online behavior that leads to offline harassment.<sup>39</sup>

The speaker-centric approach to defining online communication involves an examination of the means or platform that the speaker is using to engage in speech or other online behavior.<sup>40</sup> For example, one scholar defines cyberharassment as speech channeled through “e-mails, blogs, instant messenger messages, text or video messages, chat rooms, on-line social networks, or other websites.”<sup>41</sup> Yet even this

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fantasy-ads-on-craigslist/ [http://perma.cc/7C8W-SHES]. Tragically, the ad asked for and attracted “a real aggressive man with no concern for women” who raped the woman. *Id.*

37. This phenomenon, known as “doxxing,” became the focus of cyberharassment debates following Gamergate in 2014. “[D]oxxing[] involves scouring the Internet for personal data (or documents, the source of the word ‘doxx’)—like a person’s name, address, occupation, Twitter or Facebook profile—and then publicly [posting] that information.” Emily Bazelon, *The Online Avengers*, N.Y. TIMES MAG. (Jan. 15, 2014), [http://www.nytimes.com/2014/01/19/magazine/the-online-avengers.html?\\_r=0](http://www.nytimes.com/2014/01/19/magazine/the-online-avengers.html?_r=0) [http://perma.cc/426K-Y9X4 (dark archive)]. In the 2014 Gamergate controversy, many outspoken female gamers, developers, and activists were doxxed as retaliation for their public stances on Gamergate. See Alex Hern, *Felicia Day’s Public Details Put Online After She Described Gamergate Fears*, GUARDIAN (Oct. 23, 2014), <http://www.theguardian.com/technology/2014/oct/23/felicia-days-public-details-online-gamergate> [http://perma.cc/D3WU-E2SV] (discussing how minutes after Felicia Day posted about Gamergate, her address and personal email were posted in the comments section to her original post). Though not relevant to our discussion here, there has been some interesting debate over the social utility for doxxing as a way to publicly shame poor behavior (or at least what the online community views as poor behavior). See Bazelon, *supra*.

38. Some victims are effectively forced to include a disclaimer on their resume explaining the negative results the employer will find should they Google their names. See Danielle Keats Citron, *How Cyber Mobs and Trolls Have Ruined the Internet—and Destroyed Lives*, NEWSWEEK (Sept. 19, 2014 12:56 PM), <http://www.newsweek.com/internet-and-golden-age-bully-271800> [http://perma.cc/5W4Y-QPUW] (describing one student’s troubling experience with cyberharassment, during which, at one point, “75 percent of the links appearing on the first page of a search of her name were the attack sites and disparaging posts”).

39. See generally Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009) (describing various methods of cyberharassment); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 655–56 (2012) (noting the many ways that cyberharassers can reach their targets); Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra*, 80 DENV. U. L. REV. 1, 1 (2002) (explaining one incident of how “online threats led to offline harassment”).

40. All but five states that have statutes that address cyberharassment use a target-centric method. See ALA. CODE § 13A-6-90.1 (West, Westlaw through 2015 Act 499); KAN. STAT. ANN. § 21-5427 (West, Westlaw through 2015 Sess.); MINN. STAT. ANN. § 609.749 (West, Westlaw through 2015 1st Spec. Sess.); MISS. CODE ANN. § 97-45-15 (West, Westlaw through 2015 Reg. Sess.); S.D. CODIFIED LAWS § 22-19A-1 (West, Westlaw through 2015 Legis. Sess.).

41. Bradford W. Reynolds, Billy Henson & Bonnie S. Fisher, *Stalking in the Twilight Zone: Extent of Cyberstalking Victimization and Offending Among College Students*, 33

definition from three years ago is outdated because it does not include app-based technology. As technology has evolved, it is clear that cyberstalking laws cannot be limited to email or other “one-on-one private forum[s]” as it once was.<sup>42</sup> The original laws concerning cyberstalking and cyberharassment often drew parallels to offline conduct criminalized under stalking and harassment laws, and in some instances, drew the exact language from those statutes.<sup>43</sup>

It is important to define “communication” as it relates to cyberactivity to prevent the all-too-easy comparison to real-world criminalized activities. Lipton notes the difficulty in analogizing some types of online communication to offline analogs.<sup>44</sup> For example, one might argue that gathering on a social networking site, such as Facebook, to make fun of a cyberbullying victim is analogous to gossiping about the victim out of her earshot.<sup>45</sup> But Lipton explains that the analogy is imperfect: “online conduct has the potential to be cut-and-pasted all over the Internet, so it is much more likely that a victim could ultimately access a transcript even when that person is not the intended recipient of the communications.”<sup>46</sup> Likewise, the harm of online bullying is in some ways greater: “One feature of online communications is their tendency to become permanent viral records of comments about an individual.”<sup>47</sup> As columnist Amy Harmon observes, the myriad forms of communication available on the Internet enable cyberbullies “to be both less obvious to adults and

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DEVIANT BEHAV. 1, 1 (2012) (citing Bradford W. Reyns, *A Situational Crime Prevention Approach to Cyberstalking Victimization: Prevention Tactics for Internet Users and Online Place Managers*, 12 CRIME PREVENTION & COMMUNITY SAFETY 99, 99–118 (2010)).

42. Joanna Lee Mishler, Comment, *Cyberstalking: Can Communication via the Internet Constitute a Credible Threat and Should an Internet Service Provider Be Liable if It Does?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 115, 118 (2000) (noting that cyberstalking can take place “in public forums, rather than personal e-mail” and that “traditional anti-stalking laws should [therefore] be modified to accommodate activity on the Internet”).

43. For example, Arizona still bases its cyberharassment statute on offline conduct by criminalizing electronic communication through “wire line, cable, wireless or cellular telephone call, a text message, an instant message or electronic mail.” See ARIZ. REV. STAT. ANN. § 13-2916 (West, Westlaw through 2015 First Reg. Sess.).

44. Lipton, *supra* note 13, at 108.

45. *Id.*

46. *Id.* at 108–09. See *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (“Here ‘the crucial element separating legal innocence from wrongful conduct’ is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that *the communication contains a threat.*” (emphasis added) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994))); see also *id.* at 2012 (“Put simply, the mental state requirement the Court approved in *Hamling* turns on whether a defendant knew the *character* of what was sent, not simply its contents and context.”).

47. Lipton, *supra* note 13, at 109.

more publicly humiliating, as gossip, put-downs, and embarrassing photos are circulated among a wide audience of peers with a few clicks.”<sup>48</sup>

As technology evolves and becomes more pervasive, the effects of cyberharassment will too, and the law should grow to include these new forms of harassment. Laws must not be so narrowly constructed as to accidentally exclude any potentially harassing conduct. Indeed, the possibilities for communication—and thus the possibilities for cyberharassment—via the Internet are so numerous that it is virtually impossible to name them all, and new apps are emerging every day.<sup>49</sup>

Stakeholders beyond the legal academy have likewise attempted to list the ways in which cyberharassment occurs. The legislature and groups that promote particular public policies often adopt similar approaches. For example, the National Conference of State Legislatures offers one such definition: “Cyberharassment usually pertains to threatening or harassing email messages, instant messages, or to blog entries or websites dedicated solely to tormenting an individual.”<sup>50</sup> A similar attempt to achieve clarity through specificity also emerges in the state statutes that we examine in Section II.B.2.<sup>51</sup> While some statutes are silent as to what “communication” means, many statutes (ineffectively) attempt to govern the way people interact online with an inclusive list of what should count as “communication.”

What is missing from the literature is a focused examination of what we mean when we discuss “communication” on the Internet. While not every cyberharassment statute in existence uses the word “communication,” most impose a similar requirement using slightly different language.<sup>52</sup> The concept of “communication” is integral to

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48. Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound from Afar*, N.Y. TIMES, Aug. 26, 2004, at A1.

49. See Richard Larson, *10 New Social Media Apps To Watch for 2015*, SOC. MEDIA TODAY (Jan. 6, 2015), <http://www.socialmediatoday.com/content/10-new-social-media-apps-watch-2015> [<http://perma.cc/4BMT-WJSW>] (“Social media and mobile [apps] are still growing segments in the tech world. New apps for media lovers who are on the go are being created all the time.”).

50. *Cyberharassment Laws*, *supra* note 9. Despite having been updated two months prior to the writing of this Article, this definition does not include apps. Yet apps are frequent vehicles for cyberharassment. Recall an example from the Introduction of this Article: when harassers told Elizabeth Long “to stop bitching about how she almost killed herself and go ahead and do it.” Shontell, *supra* note 1. The definition does not directly address these statements because they were posts on a community forum in an app.

51. See *infra* Section II.B.2 and Appendix.

52. See, e.g., N.C. GEN. STAT. § 14-196.3 (2013) (“Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part

determining what conduct we find worthy of criminalization. For example, take someone who writes a lengthy series of disparaging and violent comments about another person online, but does so in a forum where the other person is virtually certain never to see it—say, in a private, unshared Google document.<sup>53</sup> No information has been transmitted to the subject of the speech, and we doubt that many people would view the speech in question as worthy of criminalization.

By focusing on communication, we capture what is wrong with cyberharassment, cyberstalking, and cyberbullying—that the target finds out about the speech and subsequently experiences fear, disruption, and emotional distress. These are the harms against which statutes that criminalize threats and other speech are designed to protect.<sup>54</sup> As Justice O’Connor explained in *Virginia v. Black*<sup>55</sup>: “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] 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>56</sup> Understanding the ways that people communicate on the Internet, and importing that understanding into our cyberharassment statutes, is critical to addressing the harms caused by cyberharassment.

### B. Internet Interaction

This Section develops a typology of the myriad ways that people communicate online and explains which categories should count as “communication.” We divide online communication into five categories based on whether and how the target of the communication would know of the existence of a particular instance of Internet behavior.<sup>57</sup> While our specific contemporary examples—Facebook, Twitter, Snapchat, and LinkedIn—will eventually become

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by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.”); see also *infra* Section II.B.2 and Appendix.

53. See *Change Your Sharing Settings*, GOOGLE, [https://support.google.com/docs/answer/2494886?hl=en&ref\\_topic=4671185](https://support.google.com/docs/answer/2494886?hl=en&ref_topic=4671185) [<https://perma.cc/HEP5-UA7Q>].

54. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (noting states’ authority to punish threats and how certain policies function to protect against these types of harms).

55. *Id.*

56. *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

57. We use the word “behavior” in this section to encompass both speech and other forms of online activity. For example, hacking into someone’s Facebook account could likely qualify as means of communicating with that person, but the word “speech” is somewhat inapt.

outdated as technology changes, the categories themselves are designed to be flexible.

Today, technology allows people to engage in a wide variety of activities that include simultaneously sharing information with many friends, acquaintances, or other contacts; engaging with websites by making comments or posting original content; instant messaging; and professional and social networking. Additionally, various apps allow specialized types of communication. For example, one allows people to track their friends' location,<sup>58</sup> while another provides an anonymous forum for communication related to a particular institution of higher education.<sup>59</sup> People communicate on the Internet to perform their work functions, complete their school assignments, keep in touch with family, meet potential romantic partners, socialize with new and existing acquaintances, and virtually every other purpose of human interaction. At the touch of a button, the Internet enables us to get in touch with almost anyone, anywhere on the planet, nearly instantaneously.

Social networking is an increasingly popular subset of online interaction. Several social networking apps have reached over one million users in less than six months from their launch dates.<sup>60</sup> Some of the top social media websites have over two-hundred million users, including Facebook, Twitter, LinkedIn, and Instagram.<sup>61</sup> According to Facebook's website, "People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to

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58. *Find My Friends*, APPLE, <https://www.apple.com/apps/find-my-friends/> [<http://perma.cc/T5CG-HJYG>]; see also Jonny Evans, *iOS 7: Making Find My Friends Useful and Less Creepy*, COMPUTERWORLD (May 21, 2014, 9:13 AM), <http://www.computerworld.com/article/2476314/apple-ios/ios-7--making-find-my-friends-useful-and-less-creepy.html> [<http://perma.cc/E72V-M68K>].

59. YIK YAK, <http://www.yikyakapp.com> [<http://perma.cc/XQH4-WGJQ>]; see also Jonathan Mahler, *Who Spewed That Abuse? Anonymous Yik Yak App Isn't Telling*, N.Y. TIMES (Mar. 8, 2015), <http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse.html> [<http://perma.cc/7UMV-4HQC> (dark archive)].

60. Alyson Shontell, *Here's How Long It Took 15 Hot Startups To Get 1,000,000 Users*, BUS. INSIDER (Jan. 8, 2012, 8:01 AM), <http://www.businessinsider.com/one-million-users-startups-2012-1?op=1> [<http://perma.cc/FD34-2E2K>].

61. Shea Bennett, *Facebook, Twitter, Instagram, Pinterest, Vine, Snapchat—Social Media Stats 2014*, SOCIALTIMES (June 9, 2014, 3:00 PM), <http://www.adweek.com/socialtimes/social-media-statistics-2014/499230> [<http://perma.cc/A7JW-JP6A>].

share and express what matters to them.”<sup>62</sup> Facebook has over 1.25 billion monthly users.<sup>63</sup>

On Facebook, users can be “friends,” which allows them access to one another’s information, pictures, and Internet posts.<sup>64</sup> Users can privately message one another regardless of whether they are Facebook friends.<sup>65</sup> Users can link posts to their Facebook friends by tagging the Facebook friend’s username, which then alerts the Facebook friend that someone has posted about them.<sup>66</sup> Given the popularity of Facebook, we will use that website’s different communication options as the primary examples for each category of communication, though the categories are by no means limited to Facebook and similar websites.

We have divided online communication into five categories: (1) Direct, which occurs when a speaker sends information directly to the target of the communication; (2) Tagging, which occurs when the speaker takes action to call the communication to the attention of the target; (3) Mutual Forum, which relies on the fact that the speaker and target are both users of the same online forum and thus are reasonably likely to see each other’s posts during routine usage of the forum; (4) Likely Discovery, which occurs when a speaker knows of or recklessly disregards a substantial likelihood that the subject will discover the speech; and (5) Discovery in Fact, which encompasses online speech or behavior by the speaker that the target did *in fact* find out about, but that does not fall into any of the first four categories.

### 1. Category 1: Direct

Direct communication occurs when a speaker sends information directly to the target of the communication. On Facebook, a personal message from the speaker to another user would be in this category.<sup>67</sup> Other forums that use direct person-to-person communication

62. *About Facebook*, FACEBOOK, [https://www.facebook.com/facebook/info?tab=page\\_info](https://www.facebook.com/facebook/info?tab=page_info) [<http://perma.cc/LR8D-GP6L>].

63. Emil Protalinski, *Facebook Passes 1.23 Billion Monthly Active Users*, NEXT WEB (Jan. 29, 2014), <http://thenextweb.com/facebook/2014/01/29/facebook-passes-1-23-billion-monthly-active-users-945-million-mobile-users-757-million-daily-users/> [<http://perma.cc/ED5X-6RF3>].

64. *See Adding Friends*, FACEBOOK, <https://www.facebook.com/help/360212094049906/> [<http://perma.cc/8VMY-8TRL>].

65. *Sending a Message*, FACEBOOK, <https://www.facebook.com/help/326534794098501/> [<http://perma.cc/2FF4-JFQH>] [hereinafter *Sending a Message*].

66. *See Tagging*, FACEBOOK, <https://www.facebook.com/help/366702950069221/> [<http://perma.cc/R8FV-TNNM>] [hereinafter *Tagging*].

67. *See Sending a Message*, *supra* note 65.

include email, personal messages on Google<sup>68</sup> and LinkedIn,<sup>69</sup> direct tweets via Twitter,<sup>70</sup> and direct Snapchats.<sup>71</sup>

## 2. Category 2: Tagging

Tagging communication occurs when the speaker takes action to call the communication to the attention of the target. A Facebook example within this category occurs when a user creates a public post and attaches the username of a Facebook friend.<sup>72</sup>

A speaker “tags” a target by using an “@” symbol before the username of the target.<sup>73</sup> When a speaker tags a target, the target receives an automatic notification of the communication by the website that the speaker tagged them either in a public post or in a post that is visible to the target.<sup>74</sup> Other users can also see when a speaker tags a target.<sup>75</sup>

Other forums that use this method of tagging communication include Instagram,<sup>76</sup> Vine,<sup>77</sup> Twitter,<sup>78</sup> and LinkedIn.<sup>79</sup>

68. *Contacting People Through Google+*, GOOGLE, <https://support.google.com/plus/answer/3547351?hl=en> [<http://perma.cc/YGH3-52QN>].

69. *Communicating with LinkedIn Members*, LINKEDIN, [https://help.linkedin.com/app/answers/detail/a\\_id/137/bid/247/pid/246](https://help.linkedin.com/app/answers/detail/a_id/137/bid/247/pid/246) [<https://perma.cc/WEJ6-4698>].

70. A user can tweet directly to another user by including in their message “@” followed by the other person’s username. For example, a tweet can be sent directly to President Obama (or, at least, to a staffer who is manning his Twitter account) simply by beginning the message with “@BarackObama.” The tweet will appear in other users’ news feeds if they follow both the sender and President Obama. Users who do not follow both parties can still find and view the tweet by performing a variety of searches, but it will not automatically appear in their news feeds. See *Getting Started with Twitter*, TWITTER, <https://support.twitter.com/articles/215585> [<http://perma.cc/7SV4-D3A6>] (“Try posting a message mentioning a celebrity or person you admire—they often respond to fans.”).

71. Snapchat allows users to send photos directly to another user by using their phone’s contacts or by entering a username. *Finding and Adding Friends*, SNAPCHAT, <https://support.snapchat.com/a/find-friends> [<http://perma.cc/5Y5F-DFUF>].

72. See *Tagging*, *supra* note 66.

73. *How Do I Mention People, Pages or Groups in a Post or Comment?*, FACEBOOK <https://www.facebook.com/help/218027134882349> [<http://perma.cc/S4KX-UQ4U>] [hereinafter *Mentioning People*].

74. See *id.*

75. See *id.*

76. *Tagging*, INSTAGRAM, <https://help.instagram.com/186952328121982/> [<http://perma.cc/R8LB-NMPR>].

77. *Vine I.I.*, VINE, <http://blog.vine.co/post/55515209255/vine-11> [<http://perma.cc/8RWP-D6DE>].

78. *Getting Started with Twitter*, TWITTER, <https://support.twitter.com/articles/215585> [<http://perma.cc/7SV4-D3A6>].

79. *Mention People and Companies in Your Updates*, LINKEDIN, [https://help.linkedin.com/app/answers/detail/a\\_id/34936/~/-mention-people-and-companies-in-your-updates---frequently-asked-questions](https://help.linkedin.com/app/answers/detail/a_id/34936/~/-mention-people-and-companies-in-your-updates---frequently-asked-questions) [<http://perma.cc/WJR4-HF5W>].

### 3. Category 3: Mutual Forum

Mutual Forum communication does not alert the target that the speaker has posted information about them. Instead, it relies on the fact that the speaker and target are both users of the same online forum and are reasonably likely to see each other's posts during routine usage of the forum. On Facebook, communication in this category occurs if the speaker and the target are Facebook friends, but the speaker does not tag the target of the online post.<sup>80</sup> Because the speaker and the target are using the same forum (Facebook), it is likely that the target would see the post herself. Additionally, if the speaker and the target are both members of the same "Facebook group," it is likely that the target would see a post the speaker made on that group's page.<sup>81</sup> And finally, on many forums—including Facebook—the forum will send everyone who is tagged in a post or has commented on that post a notification when a new comment appears in the thread.<sup>82</sup> This often widens the audience for new comments, thus increasing the likelihood that users of the same forum will see each other's posts.

Other social networking websites that allow users to see one another's posts within the forum include LinkedIn,<sup>83</sup> Twitter,<sup>84</sup> Instagram,<sup>85</sup> Vine,<sup>86</sup> and Snapchat.<sup>87</sup> In each of these forums, the target is likely to see postings about himself because the speaker and target are connected by their association through the social networking website.

### 4. Category 4: Likely Discovery

Discovery-based communication does not require the speaker and the target of a particular online post to be users of the same forum. On Facebook, for example, the Likely Discovery category would include situations in which the speaker and the target are not Facebook friends. In such situations, Tagging communication could

80. See *Tagging*, *supra* note 66.

81. See *Group Basics*, FACEBOOK, <https://www.facebook.com/help/162866443847527/> [<http://perma.cc/4QNH-JT9V>].

82. See *Mentioning People*, *supra* note 73.

83. See *LINKEDIN*, *supra* note 79.

84. See *FAQs about Following*, TWITTER, <https://support.twitter.com/articles/14019> [<https://perma.cc/UZ4F-C24G>].

85. See *INSTAGRAM*, *supra* note 76.

86. *Getting Started*, VINE, <http://help.vine.co/about%20vine#channels> [<http://perma.cc/52VU-7BFS>].

87. *Viewing Snaps*, SNAPCHAT, <https://support.snapchat.com/a/view-snaps> [<https://perma.cc/8UTX-KZJR>].

not occur because users have to be Facebook friends in order to tag one another; therefore, the target could not receive an automatic alert from the website about the speaker's post.<sup>88</sup> Likewise, the speaker and target are not using the same forum because they are not Facebook friends, making Mutual Forum communication impossible.

Nonetheless, the speaker might still know of or recklessly disregard a substantial likelihood that the target would discover the speech, enabling what we have dubbed "Likely Discovery" communication. For example, if the speaker and the target have mutual acquaintances in real life and the speaker is Facebook friends with many of these real-life acquaintances, then the speaker may have exhibited reckless disregard that the target would learn about the communications. Indeed, even if the target did not use Facebook at all, the post about the target could still fall into this category. As we have previously noted, Facebook automatically sends notifications to everyone who is tagged in or who has commented on a post when anyone writes a new comment—this increases the audience for a given comment and in some instances broadens the types of communication that would fall into the category of Likely Discovery.<sup>89</sup>

Another example of Likely Discovery communication could occur if the speaker knows that the target has a Google alert on her own name—perhaps because the target has written a blog post about using Google alerts that the speaker has read—and the speaker still chooses to post threatening comments about the target in a forum that he knows a Google alert will pick up.<sup>90</sup>

Factors that indicate that the speaker knew or recklessly disregarded a substantial likelihood that the target would discover the communication include: the speaker knew that the target uses the forum; the speaker knew that people close to the target use the forum; the speaker knew that the target has a Google or mention

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88. See *Mentioning People*, *supra* note 73.

89. See *id.* ("The person, Page or group you mention may get a notification, and the post or comment will appear on their Timeline."). While we use Facebook as an example, other forums also employ somewhat similar notification systems. For the sake of time and space, we will not list them all.

90. A Google alert sends an email notification any time that Google finds a new posting about any selected topic on the Internet. If someone places a Google alert on their name, it allows people to learn when content including their name is posted on the web. See *Create an Alert*, GOOGLE, <https://www.google.com/alerts> [<http://perma.cc/WRU8-7FAR> (dark archive)] ("Once your alert is set up, you'll start getting emails any time we find new search results for your keywords.").

alert on her own name;<sup>91</sup> or the speaker could easily have learned that the target frequents the comments section of a public forum such as a public blog. The inquiry is not a mechanical one; the question is simply whether, taking into account all the relevant circumstances, the speaker knew of, or recklessly disregarded, a substantial likelihood that the target would find out about the communication.

#### 5. Category 5: Discovery in Fact

The Discovery in Fact category includes online speech or behavior by the speaker that the target did *in fact* find out about, but that does not fall into any of the first four categories. Speech in this category might include public comments on a website that the speaker has no reason to know the target reads, or posts on a social networking forum that the speaker has no way of knowing the target uses. It might include speech on the so-called “Darknet,” where many sites are difficult to access and do not appear with a simple Internet search.<sup>92</sup> It might include speech on protected social media accounts to which neither the target nor any of the target’s acquaintances have access. That is, this category includes speech about the target that the speaker would not have expected the target to learn about.

#### C. “Communication”

In our view, the first four categories of speech we discuss in the previous section—Direct, Tagging, Mutual Forum, and Likely Discovery—should all qualify as communication for purposes of cyberharassment statutes. The first two categories are relatively straightforward. If a speaker sends a direct message to her target, no matter whether she uses email, instant messaging, Twitter direct messaging, and so forth, she demonstrates a desire to call the content of the message to the target’s attention.<sup>93</sup> Likewise, by tagging the

91. *See id.*

92. *See* Dean Walsh, *A Beginner’s Guide to Exploring the Darknet*, HUBPAGES, <http://electronician.hubpages.com/hub/A-Beginners-Guide-to-Exploring-the-Darknet> (last updated Apr. 18, 2015) [<http://perma.cc/SEQ7-DXBL>] (“The ‘Dark Web’ or ‘Darknet’ is part of the Deep Web, because its contents are not accessible through search engines.”).

93. In *Elonis*, for instance, the defendant commented several times on his ex-sister-in-law’s posts on Facebook. For example, when the sister posted: “Halloween costume shopping with my niece and nephew should be interesting,” *Elonis* commented, “Tell [their son] he should dress up as matricide for Halloween. I don’t know what his costume would entail though. Maybe [Tara *Elonis*’s] head on a stick?” *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013), *rev’d*, 135 S. Ct. 2001 (2015). Under our analysis, *Elonis*’s posts would clearly qualify as communication, although after the Supreme Court’s decision the prosecution would still need to prove an as-yet-to-be-determined mental state. *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015) (providing that the Court would

target of a message, the speaker has taken affirmative steps to ensure that the target receives the message. In both situations, the speaker's choice of medium clearly reveals a desire for the target to learn about the message as well as the decision to convey the message in a way that makes it likely that the target will in fact learn about the message.

The third category—Mutual Forum Communication—should also qualify as “communication” for purposes of statutes criminalizing cyberharassment. While the speaker has not taken the same affirmative steps to draw the communication to the target's attention as with person-to-person, or tagging communication, the choice of a mutual forum in itself reveals the speaker's intent and desire for the target to learn of the speaker's comments. That is: Why would a speaker post something on Facebook or LinkedIn—knowing that the target of the post also uses the same forum—unless the speaker wanted the target to learn about the communication?

Likely Discovery should also qualify as communication. This is the most attenuated means of communication, but we believe that it is also culpable conduct. If the speaker knows that the target of the communication reads a specific blog, has a Google alert on her name, or has friends who will alert her to a Facebook post, then any post by the speaker is likely a subtle way of drawing the target's attention to the communication. To exempt this category of communication would be to provide an easy end-run around prosecution for speakers who wish to torment or terrify their targets. The speaker could simply post in such a way that they know the target would find about it—thereby accomplishing the goal of disrupting the target's life—yet could evade prosecution by claiming that they used a public forum. This would be the case regardless of whether they knew to a certainty that it was a forum where the target would eventually discover the communication. This fourth category of communication is the most neglected by current statutes and judicial decisions, and as a result we will focus many of our recommendations on the ways statutes should be amended to include this category. To do so is to engage in the

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await “a decision below” before deciding whether recklessness was a sufficient mental state). Ultimately, the Court did not consider whether Elonis's statements about injuring patrons and employees of a local park, his estranged wife, police officers, a kindergarten class, and an FBI agent were in fact “communications.” *Id.* at 2001, 2007–09. Instead, the Court focused on the intent element of the cyberharassment statute. *Id.* at 2001, 2008 (“This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements.”).

essential task of ensuring that our statutes actually reflect the realities of how people communicate on the Internet.

We do *not* believe that the final category of speech, Discovery In Fact, should fall within the ambit of cyberharassment statutes. Such speech occurs online but does not involve a situation in which the speaker disregarded a substantial likelihood that the target would learn of the communication. If the subject of a communication does *in fact* learn about a communication—but the author of the communication would not reasonably have anticipated that the subject would do so—it does not evince the intent to disrupt the subject’s life in the same manner as the other four modes of communication.

If a speaker has a Tumblr,<sup>94</sup> for example, that functions mainly as a diary, and the Tumblr is not well-read (it is not followed by any other Tumblrs, it has never received any reblogs,<sup>95</sup> no one ever comments on the Tumblr, and it appears very low in Google search results as the result of limited activity on the page) then absent other circumstances, the author of the Tumblr would not expect the subject of a particular post to ever actually read the post.

A more difficult scenario occurs when a speaker does not know that the target uses a mutual forum and the target then discovers a post. In that case, the court would have to determine whether the author recklessly disregarded the likelihood that the target would discover the post. Factors outside of the actual mutual forum would need to be considered to determine whether it was reasonable for the target to learn of the post. Such factors may include: (1) whether the target is an active user of other social networking sites; (2) whether the friends or family of the target are active users of social networking sites; (3) how often the author’s page is viewed; and (4) the target’s age and access to the Internet. If the speaker did not disregard the likelihood that the target would likely find out about the communication, then this discovery in fact situation would not qualify as communication.

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94. Tumblr allows users to create their own blogs where they can post content such as “text, photos, quotes, links, music, and videos.” *About*, TUMBLR, <https://www.tumblr.com/about> [<http://perma.cc/8ARH-L5ZV>].

95. A reblog occurs when one Tumblr posts material that has already appeared on another Tumblr. *See Blog Customization*, TUMBLR, [https://www.tumblr.com/docs/en/blog\\_customization](https://www.tumblr.com/docs/en/blog_customization) [<https://perma.cc/D4CV-R7PE>]. Using the Tumblr interface, this can be accomplished at the touch of a button. *See id.* (“Just click on the avatar or the username of the blog you’re interested in . . . . Scroll through its posts, like and reblog as you please . . . .”).

If, however, the target *did in fact* learn about the post, and then experienced the disruption to his life that cyberharassment statutes are designed to guard against, our definition of communication would not result in finding criminal liability. We accept this result as an unfortunate byproduct of the need to balance the importance of effective cyberharassment statutes with the importance of not convicting people for engaging in speech that they did not intend to function as harassment, stalking, or bullying.

## II. STATE CYBERCRIME LAW AND COMMUNICATION

This Part examines how communication is treated within our current cyberharassment regime. We consider how “communication” is statutorily defined and judicially interpreted by presenting original empirical research, compiled in the Appendix.<sup>96</sup> Specifically, we survey cyberharassment and cyberstalking statutes in all fifty states and federal law, then summarize the ways that these statutes have been interpreted by courts.

### A. *The Emerging Problem of Cyberharassment*

Cyberharassment is a pervasive social problem. A recent poll found that 73% of adults have witnessed someone else being harassed online and 40% have personally experienced harassment.<sup>97</sup> Twenty-five percent of people have seen someone physically threatened online, and 8% have personally experienced physical threats over the Internet.<sup>98</sup> Eighteen percent have witnessed someone be stalked, and 8% had been stalked themselves.<sup>99</sup> In total, 18% of people have been the targets of “more severe” forms of harassment such as “being the target of physical threats, harassment over a sustained period of time, stalking, and sexual harassment.”<sup>100</sup> In particular, young women aged eighteen to twenty-four experience some of the more severe types of harassment at disproportionately high levels: 26% of women in that age range had been stalked online, and 25% had been the targets of

96. *See infra* Appendix.

97. MAEVE DUGGAN, ONLINE HARASSMENT 2 (2014), [http://www.pewinternet.org/files/2014/10/PI\\_OnlineHarassment\\_72815.pdf](http://www.pewinternet.org/files/2014/10/PI_OnlineHarassment_72815.pdf) [<http://perma.cc/G6K2-282L>].

98. *Id.*

99. *Id.*

100. *Id.* at 2–3. “The U.S. Department of Justice statistics suggest that 850,000 American adults—mostly women—are targets of cyber-stalking each year, and 40 percent of women have experienced dating violence delivered electronically.” Marlis Silver Sweeney, *What the Law Can (and Can’t) Do About Online Harassment*, ATLANTIC (Nov. 12, 2014), <http://www.theatlantic.com/technology/archive/2014/11/what-the-law-can-and-cant-do-about-online-harassment/382638/> [<http://perma.cc/U7QW-Z2WQ>].

online sexual harassment.<sup>101</sup> In addition, 6% of students aged twelve to eighteen reported that they had been victims of cyberbullying.<sup>102</sup>

These statistics are matched by anecdotes that reveal the problematic nature of cyberharassment as well as its pervasiveness, especially—although not exclusively—for women. In early 2014, Amanda Hess chronicled the experience of a number of women on the Internet who had received threats of violence and other serious harm, including her own experience with a man on Twitter who threatened to decapitate her, and law enforcement's lackluster response.<sup>103</sup> Since Hess's article, a number of other people—mostly women—have shared similar experiences.<sup>104</sup> A particularly disturbing manifestation has emerged recently in the form of GamerGate, in which several prominent women in the gaming community received threats of death and other violence.<sup>105</sup> Indeed, one of the authors has substantial experience with online harassment perpetrated by an anonymous individual she never met.<sup>106</sup> As Hess and others have

101. DUGGAN, *supra* note 97, at 3–4.

102. JILL DEVOE & CHRISTINA MURPHY, NAT'L CTR. FOR EDUC. STATISTICS, STUDENT REPORTS OF BULLYING AND CYBER-BULLYING: RESULTS FROM THE 2009 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY, at tbl.1.1 (2011), <http://nces.ed.gov/pubs2011/2011336.pdf> [<http://perma.cc/GL7R-FYMJ>].

103. Amanda Hess, *Why Women Aren't Welcome on the Internet*, PAC. STANDARD (Jan. 6, 2014), <http://www.psmag.com/health-and-behavior/women-arent-welcome-internet-72170> [<http://perma.cc/NJ7L-U73Z>].

104. See, e.g., Jill Filipovic, *Let's Be Real: Online Harassment Isn't 'Virtual' for Women*, TALKING POINTS MEMO (Jan. 10, 2014, 6:00 AM), <http://talkingpointsmemo.com/cafe/lets-be-real-online-harassment-isn-t-virtual-for-women> [<http://perma.cc/L5U9-4THV>].

105. See, e.g., Jay Hathaway, *What Is GamerGate, and Why? An Explainer for Non-Geeks*, GAWKER (Oct. 10, 2014, 9:20 AM), <http://gawker.com/what-is-gamergate-and-why-an-explainer-for-non-geeks-1642909080> [<http://perma.cc/P9BD-V9UH>]; Zoe Quinn, *5 Things I Learned as the Internet's Most Hated Person*, CRACKED (Sept. 16, 2014), <http://www.cracked.com/blog/5-things-i-learned-as-internets-most-hated-person/> [<http://perma.cc/SJ5C-E6YV>]; Nick Wingfield, *Feminist Critics of Video Games Facing Threats in 'Gamer Gate' Campaign*, N.Y. TIMES (Oct. 15, 2014), [http://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html?\\_r=0](http://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html?_r=0) [<http://perma.cc/KD6V-RPHB> (dark archive)]; Brianna Wu, *No Skin Thick Enough: The Daily Harassment of Women in the Game Industry*, POLYGON (July 22, 2014, 11:36 AM), <http://www.polygon.com/2014/7/22/5926193/women-gaming-harassment> [<http://perma.cc/LT2S-PC4B>]; Brianna Wu, *Why Gamer Gate Trolls Won't Win*, BOS. GLOBE (Mar. 4, 2015), <https://www.bostonglobe.com/magazine/2015/03/04/brianna-why-gamergate-trolls-won-win/l2V0PjfDRSf4Fm6F40i9YM/story.html> [<http://perma.cc/9MF6-AM6C> (dark archive)].

106. See, e.g., Nancy Leong, *Anonymity and Abuse*, FEMINIST L. PROFESSORS (Nov. 19, 2013), <http://www.feministlawprofessors.com/2013/11/anonymity-abuse/> [<http://perma.cc/CYD7-D7DH>]; Nancy Leong, *Consequences and Conclusions*, FEMINIST L. PROFESSORS (Dec. 17, 2013), <http://www.feministlawprofessors.com/2013/12/consequences-conclusions/> [<http://perma.cc/MLS3-Y5RN>]; Nancy Leong, *Identity and Ideas*, FEMINIST L. PROFESSORS (Nov. 12, 2013), <http://www.feministlawprofessors.com/2013/11/identity-ideas/> [<http://perma.cc/2QWT-BLYG>]; Nancy Leong, *Privilege and Passivity*, FEMINIST L.

explained, online harassment has serious consequences, particularly for women:

[N]o matter how hard we attempt to ignore it, this type of gendered harassment—and the sheer volume of it—has severe implications for women’s status on the Internet. Threats of rape, death, and stalking can overpower our emotional bandwidth, take up our time, and cost us money through legal fees, online protection services, and missed wages.<sup>107</sup>

Given the seriousness of the harm caused by cyberharassment, an effective legal response is especially important.

These personal stories have also provided powerful evidence that, in general, law enforcement is poorly educated about online harassment and ill-equipped to deal with most cyberharassment.<sup>108</sup> Quantitative data show that cyberharassment is quite rarely prosecuted—for example, Danielle Citron’s examination of government data reveals only about twenty-five online threat prosecutions per year<sup>109</sup>—and the host of recent threats against several women made during GamerGate have yet to yield any convictions as of the time this Article goes to print.<sup>110</sup>

Despite the pervasiveness of problematic online behavior, online harassment that employs social media platforms is a new problem for courts. There are only a few cases in which a victim has found success in the courtroom, and these rare victories generally involve

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PROFESSORS (Dec. 4, 2013), <http://www.feministlawprofessors.com/2013/12/privileging/> [<http://perma.cc/C7KQ-R2Z3>].

107. Hess, *supra* note 103.

108. *Id.* (describing how even “larger law enforcement agencies have little capacity or drive to investigate” cyberharassment crimes).

109. Danielle Citron, *United States v. Elonis and the Rarity of Threat Prosecutions*, FORBES (Dec. 3, 2014, 12:37 AM), <http://www.forbes.com/sites/daniellecitron/2014/12/03/united-states-v-elonis-and-the-rarity-of-threat-prosecutions/> [<http://perma.cc/RFA4-EA3Z>] (“There were on average 25 threat cases pursued to trial or plea a year for the past six years.”).

110. Admittedly the failure to prosecute the people threatening victims such as Sarkeesian, Wu, Quinn, and others is not solely attributable to existing laws. Much of the harassment directed at them is clearly criminal under any definition, and the issue is with tracking down the perpetrator electronically or, in some instances, simply getting law enforcement to act. Other conduct, however, is more ambiguous, and both high-profile targets like Sarkeesian, Wu, and Quinn as well as non-famous individuals would benefit from clarification of legal elements including the one we address here—the meaning of communication. See Caitlin Dewey, *Why Is It Taking So Long To Identify the Anonymous GamerGate Trolls?*, WASH. POST (Oct. 17, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/17/why-is-it-taking-so-long-to-identify-the-anonymous-gamergate-trolls/> [<http://perma.cc/RK5V-82QX>].

particularly severe instances of harassment.<sup>111</sup> The most common form of harassment that courts have upheld as cyberharassment is the public release of sexually explicit photographs and videos of the victim.<sup>112</sup> Courts might also find guilt where the harasser has released the victim's private information.<sup>113</sup> It is rare that courts will find guilt where there is only one instance of a harassing action or if that action is not severe.<sup>114</sup>

Yet it should be noted that no matter how severe the harassment, a court cannot take action if the statute is not properly constructed to protect the victim. This can occur if a statute is found unconstitutional,<sup>115</sup> or—the problem that our Article addresses—if the statute does not have a clear definition of what it means to communicate. For example, in *People v. Barber*,<sup>116</sup> the defendant posted nude photos of his ex-girlfriend online and sent those photos

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111. See, e.g., *United States v. Osinger*, 753 F.3d 939, 941 (9th Cir. 2014) (involving a defendant who created a false Facebook account featuring sexually explicit photographs of the victim, and sent emails to the victim's co-workers and friends also containing explicit photographs); *United States v. Sayer*, 748 F.3d 425, 428–29 (1st Cir. 2014) (involving a defendant who made sexual Craigslist ads, MySpace accounts, and posted sexual acts of the victim on pornography sites); *People v. Kucharski*, 987 N.E.2d 906, 910–11 (Ill. App. Ct. 2013) (involving a defendant who hacked his ex-girlfriend's MySpace page and posted a photo of her bending forward wearing only thong underwear and posted her phone number and address).

112. See, e.g., *Kucharski*, 987 N.E.2d at 910–11 (involving a defendant who, after hacking his ex-girlfriend's MySpace page, posted sexually explicit photographs of her along with her contact information).

113. See Greg Miller & David Maharaj, *N. Hollywood Man Charged in 1st Cyber-Stalking Case*, L.A. TIMES (Jan. 22, 1999), <http://articles.latimes.com/1999/jan/22/news/mn-523> [<http://perma.cc/GDD5-KCKM>]. In fact, the first cyberstalking conviction in California was based on the release of personal information. *Id.* In that case, the defendant “told numerous men everything from the address of [the victim's] apartment to her physical description, her phone number and how to bypass her home security system.” *Id.*

114. As an example of one success, an Ohio court found a defendant guilty where she had posted one comment that the victim “[m]olested a little boy.” *State v. Ellison*, 900 N.E.2d 228, 229–30 (Ohio Ct. App. 2008). Notably, Ohio had a very expansive cyberharassment statute providing that “no person shall make or cause to be made a telecommunication . . . with purpose to abuse, threaten, or harass another person.” *Id.* at 230 (citing OHIO REV. CODE ANN. § 2917.21(B) (LEXIS through 2008 Reg. Sess.)).

115. See, e.g., *United States v. Cassidy*, 814 F. Supp. 2d 574, 588 (D. Md. 2011) (involving a defendant who had made a Twitter account and tweeted hundreds of messages about the victim and was charged under the interstate stalking statute, which was found to be an unconstitutional content-based restriction on speech as applied to the defendant); *People v. Marquan*, 19 N.E.3d 480, 484–86 (N.Y. 2014) (involving a defendant who posted information about his classmates' sexual practices on Facebook, but the court held that the law was overbroad because it had “a wide array of applications that prohibit types of protected speech far beyond the cyberbullying of children”).

116. No. 2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014).

to her employer, entirely without her consent.<sup>117</sup> New York, as a state without a cyberharassment statute referencing online communication, charged Barber with aggravated harassment in the second degree.<sup>118</sup> While the court found Barber's actions "reprehensible," it was unable to hold him accountable because the material was not "communicated directly" with the victim.<sup>119</sup> Ultimately, the court found it insufficient that the victim saw that he had posted the photos online and had sent the email to her employer.<sup>120</sup>

While statistics of cyberharassment trials, convictions, and pleas are non-existent at worst and incomplete at best, it is universally acknowledged that "[convictions are] a paltry number given the estimated number of [cyberharassment] cases a year."<sup>121</sup> Both a cause and a consequence of the lack of prosecution of cyberharassment is that many important issues remain unaddressed by the courts. As a result, law enforcement agencies may remain unsure of what constitutes a crime and prosecutors may hesitate to press charges. Consequently, a great deal of problematic online behavior remains unpunished.<sup>122</sup> One element notably lacking in clarity is the meaning of "communication." Using the categories designed in Part I as a foundation, the subsequent sections of this Article address this problem.

### B. Criminalizing Cyberharassment

In this Section, we evaluate the current treatment of cyberharassment in criminal law. We first consider threshold issues of constitutionality. We then present an original empirical survey of state cyberharassment laws based on how communication is defined in those statutes, and discuss the way that courts have interpreted these statutes.

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117. *Id.* at \*2. This phenomenon has become known as "revenge porn," where a person will post sexually explicit photos or videos of his or her ex-significant other, intending to publically humiliate them. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

118. *Barber*, 2014 WL 641316, at \*1. Barber was also charged with two other offenses that were dismissed on other grounds. *Id.* at \*3-5, \*7-9.

119. *Id.* at \*1, \*4.

120. *Id.* at \*6 ("[The defendant] merely posted photographs to his Twitter account, where Ms. Batch saw them, and sent them to other parties, who apparently showed them to her.").

121. Citron, *supra* note 109.

122. See Sweeney, *supra* note 100 (describing how a lack of on-point precedent and a lack of police training contribute to less prosecution of online harassment).

### 1. Constitutionality

Like all laws, cyberharassment statutes must survive constitutional scrutiny. The Supreme Court maintains that “basic principles of freedom of speech and press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”<sup>123</sup> Nonetheless, the Court has also made clear that developments in technology influence the appropriate interpretation of constitutional rights.<sup>124</sup> The First Amendment, then, need not be intentionally blind to the way the Internet has changed the way we interact with one another.

This constitutional backdrop makes clear that cyberharassment can be criminalized via carefully drawn statutes. The Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious, or public concern.<sup>125</sup> But speech integral to criminal conduct is a long-established category of unprotected speech.<sup>126</sup> For example, “speech is not protected by the First Amendment when it is the very vehicle of the crime itself” such as in crimes of perjury, bribery, extortion and threats, and conspiracy.<sup>127</sup> Likewise, when speech contains “true threats,” as the speech criminalized by cyberharassment statutes often does, that speech is also unprotected.<sup>128</sup> Although the Supreme Court has never clearly

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123. *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

124. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2494–95 (2014) (holding that police may not execute a warrantless search of a cell phone incident to an arrest, and, more generally, acknowledging evolving technology as a consideration in constitutional analysis); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that law-enforcement use of a thermal imaging camera in specific circumstances constitutes a search under the Fourth Amendment); *see also* Nancy Leong, *Constitutional Rights in the Digital Age*, HUFFINGTON POST (July 19, 2014, 4:22 PM), [http://www.huffingtonpost.com/nancy-leong/constitutional-rights-in-first-amendment\\_b\\_5601216.html](http://www.huffingtonpost.com/nancy-leong/constitutional-rights-in-first-amendment_b_5601216.html) [<http://perma.cc/UZ9D-PMVH>] (“The Court’s decision in *Riley* rested on a simple premise: Cell phones are different from ordinary physical objects.”).

125. *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (holding that speech relating to a public issue even when causing emotional distress, such as picketing at a funeral, was protected by the First Amendment).

126. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a criminal statute.”); *United States v. Sayer*, 748 F.3d 425, 433–34 (1st Cir. 2014).

127. *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) (citing 18 U.S.C. § 1621 (1964)).

128. *United States v. Watts*, 349 U.S. 705, 707–08 (1969) (“Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.”).

defined what a true threat is, lower courts have adopted a variety of tests.<sup>129</sup>

Challengers to cyberharassment statutes therefore raise two primary arguments: (1) that the statute is void for vagueness; and (2) that the statute is overbroad by punishing protected speech.<sup>130</sup>

Courts have declared criminal laws unconstitutionally vague using two different approaches.<sup>131</sup> First, the statute may be unenforceable if it is too vague for the average citizen to understand what conduct is criminalized.<sup>132</sup> Second, a statute may fail to describe explicit standards for when it applies, “thus authorizing or even encouraging arbitrary and discriminatory enforcement.”<sup>133</sup> Invalidating vague statutes avoids “punishing people for behavior that they could not have known was illegal; . . . subjective enforcement of laws based on arbitrary and discriminatory enforcement by government officers; and . . . any chilling effect on the exercise of First Amendment freedoms . . . .”<sup>134</sup>

When analyzing vagueness, courts apply a “practical rather than hypertechnical” test.<sup>135</sup> When the statute does not provide explicit

129. For example, some courts consider a series of factors in determining whether speech constitutes a true threat, including: (1) the reaction of the recipient of the speech; (2) “whether the threat was conditional”; (3) whether the speaker communicated the speech directly to the recipient; (4) whether the speaker “had made similar statements” in the past; and (5) whether the recipient “had reason to believe” the speaker could engage in violence. *Jones v. State*, 347 Ark. 409, 420 (2002) (quoting *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (determining that a student’s rap song threatening violence to another student was a true threat)). Other courts use a “reasonable person” test, explaining: “[I]f a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression . . . [then] the message conveys a ‘true threat.’” *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997) (citing *United States v. Smith*, 928 F.2d 740, 741 (6th Cir. 1991), *cert. denied*, 502 U.S. 852 (1991)), *cert. denied*, 522 U.S. 883 (1997).

130. See *Sayer*, 748 F.3d at 430 (stating that the defendant challenged the constitutionality of the cyberstalking statute as “overbroad in violation of the First Amendment [and] unconstitutionally vague”).

131. *People v. Kucharski*, 987 N.E.2d 906, 918 (Ill. App. Ct. 2013) (“First, the statute may fail to provide the kind of notice that would enable a person of ordinary intelligence to understand what conduct is prohibited. Second, a statute may be declared unconstitutionally vague if it fails to provide explicit standards for those who apply it, thus authorizing or even encouraging arbitrary and discriminatory enforcement.” (quoting *People v. Law*, 782 N.E.2d 247, 249–50 (Ill. 2002))).

132. *Id.* (stating a statute may be void for vagueness if “the statute may fail to provide the kind of notice that would enable a person of ordinary intelligence to understand what conduct is prohibited” (quoting *Law*, 782 N.E.2d at 249)).

133. *Id.* (quoting *Law*, 782 N.E.2d at 250).

134. *United States v. Osinger*, 753 F.3d 939, 945 (9th Cir. 2014) (third alteration in original) (quoting *United States v. Kilbride*, 584 F.3d 1240, 1256 (9th Cir. 2009)).

135. *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012) (quoting *United States v. Biocic*, 928 F.2d 112, 114 (4th Cir. 1991)).

standards of enforcement, “ordinary meaning and common sense” determine whether the statute “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”<sup>136</sup>

Analysis of the federal cyberstalking statute demonstrates the way these constitutional principles play out in practice.<sup>137</sup> The statute prohibits using “any interactive computer service . . . to engage in a course of conduct that causes substantial emotional distress . . . .”<sup>138</sup> The federal cyberstalking statute is not unconstitutionally vague because it “provide[s] sufficient notice” of the “respective prohibitions” and citizens “need not guess what terms such as ‘harass’ and ‘intimidate’ mean.”<sup>139</sup> Further, the government is only required to show that the totality of the defendant’s conduct “evidenced a continuity of purpose” to achieve the criminal end.<sup>140</sup>

For example, in *United States v. Osinger*,<sup>141</sup> the defendant’s “threats, creation of a false Facebook page with sexually explicit photographs” of the victim, and emails to the victim’s “co-workers and friends containing explicit photographs evinced [an] ‘intent to . . . cause substantial emotional distress . . . .’ ”<sup>142</sup> Accordingly, the court held that the statute was not unconstitutionally vague because the defendant “could . . . have known [his conduct] was illegal.”<sup>143</sup>

Complementing the Ninth Circuit’s decision in *Osinger*, in *Vines v. City of New York*,<sup>144</sup> the Southern District of New York held that statutes that criminalize intentional communication with the intent to “annoy or alarm” are unconstitutional on both freedom of speech and vagueness grounds.<sup>145</sup> The court noted that other courts had found

136. *Id.* (quoting *United States v. Petrillo*, 332 U.S. 1, 8 (1947)).

137. *See* 18 U.S.C. § 2261A (2012).

138. *Id.*

139. *United States v. Bowker*, 372 F.3d 365, 380 (6th Cir. 2004), *vacated*, 543 U.S. 1182 (2005); *see* 18 U.S.C. § 2261A (providing for criminal liability when the person acts “with intent to kill, injure, harass, or intimidate another person”); *United States v. Shepard*, No. 12-10253, 2014 WL 2750117, at \*1 (9th Cir. June 18, 2014) (mem.); *Osinger*, 753 F.3d at 944–45; *United States v. Sayer*, 748 F.3d 425, 436 (1st Cir. 2014); *People v. Sucic*, 928 N.E.2d 1231, 1242–44 (Ill. App. Ct. 2010).

140. *Shrader*, 675 F.3d at 311 (quoting 18 U.S.C. § 2266(2) (2012)). Additionally, “the statute does not impose a requirement that the government prove that each act was intended in isolation to cause serious distress or fear of bodily injury to the victim.” *Id.* (citing 18 U.S.C. § 2266(2) (2012)).

141. 753 F.3d 939 (9th Cir. 2014).

142. *Id.* at 945 (quoting 18 U.S.C. § 2261A(2) (2012)).

143. *Id.* (quoting *United States v. Killbride*, 584 F.3d 1240, 1256 (9th Cir. 2009)).

144. 305 F. Supp. 2d 289 (S.D.N.Y. 2003).

145. *See id.* at 295, 300–02 (“[The statute] is therefore unconstitutional to the extent it prohibits communications, made with the intent to annoy or alarm . . . .”). New York State

that determining what language would classify as to “annoy or alarm” was too vague of a determination because it would depend on the person receiving the communication.<sup>146</sup>

In contrast, the Sixth Circuit has held that “[a]ny vagueness associated with the word ‘annoy’ [is] mitigated by the fact that the meanings of ‘threaten’ and ‘harass’ can easily be ascertained and have generally accepted meanings.”<sup>147</sup> Thus, the court “suggests that the words annoy, abuse, threaten or harass should be read together to be given similar meanings.”<sup>148</sup>

The Supreme Court has not addressed this specific language issue. Lower courts, however, have either taken the inclusion approach or have simply read the word “annoy” out of the statute, holding that the remainder is sufficiently specific to survive scrutiny.<sup>149</sup>

A criminal law may violate the First Amendment if it restricts general speech that is not a “true threat”<sup>150</sup> or “fighting words.”<sup>151</sup> But the federal cyberstalking statute does not prohibit protected speech because it is the conduct rather than the speech that is prohibited.<sup>152</sup> The conduct governed by cyberharassment statutes is not protected by the First Amendment<sup>153</sup> because the statutes only prohibit conduct

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courts have similarly held. *See* *People v. Golb*, 15 N.E.3d 805, 813–14 (N.Y. 2014) (“[W]e conclude that [the statute] is unconstitutional under both the State and Federal Constitutions, and we vacate defendant’s convictions on these counts.”).

146. *See Vines*, 305 F. Supp. 2d at 300–01 (citing *People v. Dupont*, 486 N.Y.S.2d 169, 176 (N.Y. App. Div. 1985)). Additionally, the court found intent to “annoy or alarm” to be protected under the Constitution because communication that alarms or annoys does not constitute fighting words or true threats and, therefore, that the speech at issue was “fully protected speech that may not be proscribed or punished.” *Id.* at 299–300 (citing *Virginia v. Black*, 538 U.S. 343, 360 (2003)) (“[The defendant’s] communications do not fall into one of the defined categories of unprotected speech . . . [accordingly] such communications are fully protected speech that may not be proscribed or punished.” (citations omitted)).

147. *United States v. Bowker*, 372 F.3d 365, 383 (6th Cir. 2004) (citing *Staley v. Jones*, 239 F.3d 769, 791–92 (6th Cir. 2001)), *vacated on other grounds*, 543 U.S. 1182 (2005) (mem.).

148. *Id.*

149. *See, e.g., id.* at 382–83 (“[T]he words annoy, abuse, threaten or harass should be read together to be given similar meanings.”).

150. *Watts v. United States*, 394 U.S. 705, 708 (1969).

151. *Cohen v. California*, 403 U.S. 15, 20 (1971).

152. *See* 18 U.S.C. § 2261A (2012) (providing criminal liability for those who “place [a target] under surveillance” or “place a person . . . in reasonable fear of death, or serious bodily injury”); *see also* *State v. Hemmingway*, 825 N.W.2d 303, 309 (Wis. Ct. App. 2012) (“[I]ntimidating conduct serves no legitimate purpose and merits no First Amendment protection.”).

153. *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004).

with both “malicious intent on the part of the defendant and substantial harm” to the target.<sup>154</sup>

The federal cyberstalking statute specifically criminalizes “a course of *conduct* that causes substantial emotional distress”<sup>155</sup> and provides: “[t]he term ‘course of conduct’ means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose.”<sup>156</sup> Thus, the requirement of two or more acts relates to the criminalized conduct rather than the speech itself.<sup>157</sup> The element of threatening intent also clarifies what speech the cyberharassment statute prohibits.<sup>158</sup> Therefore, the threat element narrows the punishable behavior “such that the defendant must ‘knowingly and without lawful justification’ specifically intend to ‘harass’ the [target] by transmitting the threat.”<sup>159</sup>

Only one federal district court has held that the indictment of a defendant under the federal cyberstalking statute violated the First Amendment.<sup>160</sup> In *United States v. Cassidy*,<sup>161</sup> the prosecution indicted an individual for tweets and blog posts that were critical of a “well-known religious figure” and that questioned the subject’s “character and qualifications as a religious leader.”<sup>162</sup> In the specific context of the particular indictment, the court held that the indictment violated the First Amendment, but explicitly declined to consider whether the cyberstalking statute was facially invalid.<sup>163</sup>

Thus, cyberharassment and cyberstalking statutes can be drafted in a manner that complies with the requirements of the First Amendment. And, in general, the federal courts have found that the federal cyberstalking statute is drafted in such a way.

154. *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (citing 18 U.S.C. § 2261(2)(A) (2012)).

155. 18 U.S.C. § 2261A(2)(B)(iii).

156. 18 U.S.C. § 2266(2) (2012).

157. *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014).

158. *People v. Sucic*, 928 N.E.2d 1231, 1241 (Ill. App. Ct. 2010). Threats are not protected under the First Amendment. *See id.* (“Therefore, the element of speech in the cyberstalking statute, the threat, does not fall within the protections of the First Amendment.”).

159. *Id.* (quoting 720 ILL. COMP. STAT. ANN. 5/12-7.5 (West 2008)).

160. *United States v. Cassidy*, 814 F. Supp. 2d 574, 587–88 (D. Md. 2011) (“In this case, the Court concludes that the statute is unconstitutional as applied . . .”).

161. *Id.*

162. *Id.* at 583.

163. *Id.* at 587–88 (“In this case, the Court concludes that the statute is unconstitutional as applied, and thus it is unnecessary to address the parties’ arguments as to whether . . . [the statute] is facially invalid.”).

## 2. Statutory Definitions of Communication

This Section examines how cyberharassment statutes currently define “communication.” All cyberharassment statutes have three elements: intentional mens rea with respect to the making of the communication, threatening or harassing communication, and the victim’s knowledge of the communication. We divided the current statutes into five categories based on how communication is statutorily defined. A chart containing all the statutes is appended to this Article.<sup>164</sup>

### a. *Category 1: No Reference to Online Communication*

Some states do not refer to online communication in any criminal statutes. This is true in six states: Delaware, Maine, Nebraska, New Jersey, New Mexico, and New York.<sup>165</sup>

### b. *Category 2: Undefined “Electronic Communication”*

Sixteen states—Alabama, Alaska, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Missouri, Montana, North Dakota, Rhode Island, South Dakota, Utah, Vermont, and Virginia—criminalize threatening “electronic communication,” but do not define electronic communication.<sup>166</sup> Of these statutes, only Florida, Rhode Island, and Virginia have separate “Cyberstalking” or “Harassment by Computer” statutes.<sup>167</sup> All other states in Category 2 include electronic communication within the “Harassment” or “Stalking” statute.<sup>168</sup>

164. See *infra* Appendix.

165. Westlaw searches for various categories of “online communication” returned no results for these states.

166. ALA. CODE § 13A-6-90.1 (West, Westlaw through 2015 Act 499); ALASKA STAT. § 11.41.270 (LEXIS through 2015 legislation); CONN. GEN. STAT. § 53a-182b (West, Westlaw through 2015 Reg. Sess.); FLA. STAT. § 784.048 (Supp. 2015); HAW. REV. STAT. ANN. § 711-1106 (LEXIS through 2015 Sess.); IDAHO CODE § 18-7906 (LEXIS through 2015 Sess.); IND. CODE ANN. § 35-45-2-2 (West, Westlaw through 2015 First Reg. Sess.); IOWA CODE § 708.7 (West, Westlaw through 2015 Reg. Sess. 2015); MO. REV. STAT. § 565.225 (West, Westlaw through 2015 1st Reg. Sess.); MONT. CODE ANN. § 45-5-220 (West, Westlaw through July 2015 Sess.); N.D. CENT. CODE § 12.1-17-07 (LEXIS through 2015 Reg. Legis. Sess.); 11 R.I. GEN. LAWS § 11-52-4.2 (LEXIS through Jan. 2015 Sess.); S.D. CODIFIED LAWS § 22-19A-1 (West, Westlaw through 2015 Legis. Sess.); UTAH CODE ANN. § 76-5-106.5 (LEXIS through 2015 Gen. Sess.); VT. STAT. ANN. tit. 13, § 1027 (LEXIS through 2015 Reg. Sess.); VA. CODE ANN. § 18.2-152.7:1 (2014).

167. FLA. STAT. § 784.048; 11 R.I. GEN. LAWS § 11-52-4.2; VA. CODE ANN. § 18.2-152.7:1.

168. See *supra* note 166 and accompanying text.

*c. Category 3: Statutorily Specified Communication*

Nine states—Arizona, Colorado, Georgia, Kansas, Kentucky, New Hampshire, Pennsylvania, Washington, and West Virginia—criminalize and define threatening “electronic communication” with an inclusive list of ways to electronically communicate.<sup>169</sup> However, these statutes omit many types of communication in their definitions. For example, Arizona defines electronic communication as only “a wire line, cable, wireless or cellular telephone call, a text message, an instant message or electronic mail.”<sup>170</sup>

*d. Category 4: All Direct Victim Communication*

Twelve states—California, Louisiana, Maryland, Massachusetts, Mississippi, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, and Wyoming—and federal law define threatening communication to include all types of communication, but require that the threatening language be directed at a particular target.<sup>171</sup> Interpretation of the statutory language “directed at a person” varies from state to state.

For example, Louisiana defines electronic communication as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.”<sup>172</sup> The statute defines electronic mail as “use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video

169. ARIZ. REV. STAT. ANN. § 13-2916 (West, Westlaw through 2015 1st Reg. Sess.); COLO. REV. STAT. § 18-9-111 (LEXIS through 2015 Reg. Sess.); GA. CODE ANN. § 16-5-90 (2011); KAN. STAT. ANN. § 21-5427 (West, Westlaw through 2015 Sess.); KY. REV. STAT. ANN. § 508.130 (West, Westlaw through 2015 Reg. Sess.); N.H. REV. STAT. ANN. § 644:4 (West, Westlaw through 2015 Reg. Sess.); 18 PA. STAT. AND CONS. STAT. ANN. § 2709 (West, Westlaw through 2015 Reg. Sess.); WASH. REV. CODE ANN. § 9.61.260 (West, Westlaw through 2015 Spec. Sess.); W. VA. CODE § 61-3C-14a (West, Westlaw through 2015 Reg. Sess.).

170. ARIZ. REV. STAT. ANN. § 13-2916(E).

171. 18 U.S.C. § 2261A (2012); CAL. PENAL CODE § 653m (West 2010); LA. STAT. ANN. § 14:40.3 (West, Westlaw through 2015 Reg. Sess.); MD. CODE ANN., CRIM. LAW § 3-805 (LEXIS through 2015 Legis. Sess.); MASS. GEN. LAWS ch. 265, § 43 (West, Westlaw through 2015 Legis. Sess.); MISS. CODE ANN. § 97-45-15 (West, Westlaw through 2015 Reg. Sess.); N.C. GEN. STAT. § 14-196.3 (2013); OHIO REV. CODE ANN. § 2903.211 (LEXIS through 2015 legislation); OKLA. STAT. tit. 21, § 1172 (West, Westlaw through 2015 1st Reg. Sess.); OR. REV. STAT. ANN. § 166.065 (West, Westlaw through 2015 Reg. Sess.); TENN. CODE ANN. § 39-17-308 (Supp. 2012); TEX. PENAL CODE ANN. § 42.07 (West, Westlaw through 2015 Legis. Sess.); WYO. STAT. ANN. § 6-2-506 (LEXIS through 2015 Legis. Sess.).

172. LA. STAT. ANN. § 14:40.3(1).

recorder, or other electronic means . . . .”<sup>173</sup> This communication must, however, be “sent to a person identified by a unique address or address number and received by that person.”<sup>174</sup>

Other state statutes take similar approaches. For example, Mississippi criminalizes all types of electronic mail or electronic communication with “another, repeatedly, whether or not conversation ensues.”<sup>175</sup> Similarly, in its stalking statute, Wyoming criminalizes “[c]ommunicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means”<sup>176</sup> when those communications are “*directed at a specific person.*”<sup>177</sup>

*e. Category 5: Reasonable Victim’s Knowledge of Communication*

Seven states—Arkansas, Illinois, Michigan, Minnesota, Nevada, South Carolina, and Wisconsin—have stalking or harassment statutes that do not require a statement to be made directly to the person.<sup>178</sup> Instead, they criminalize any statement made that would cause a reasonable recipient to feel threatened.<sup>179</sup> For example, Nevada criminalizes any “display or distribut[ion] of information in a manner that substantially increases the risk of harm or violence to the victim.”<sup>180</sup> Similarly, although Minnesota does not have a separate cyberstalking statute, the general stalking statute criminalizes “any communication made through any available technologies”<sup>181</sup> that “the actor knows or has reason to know would cause the victim under the

173. *Id.* § 14:40.3(2).

174. *Id.*

175. MISS. CODE ANN. § 97-45-15(b).

176. WYO. STAT. ANN. § 6-2-506(b)(i).

177. *Id.* § 6-2-506(a) (emphasis added).

178. *See* ARK. CODE ANN. § 5-71-217 (LEXIS through 2015 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-7.5 (West, Westlaw through 2015 Reg. Sess.); MINN. STAT. § 609.749 (West, Westlaw through 2015 1st Spec. Sess.); NEV. REV. STAT. ANN. § 200.575 (West, Westlaw through 2015 legislation); S.C. CODE ANN. § 16-3-1700 (Supp. 2014); WIS. STAT. § 947.0125 (2015).

179. *See, e.g.*, S.C. CODE ANN. § 16-3-1700(C) (“‘Stalking’ means a pattern of words . . . intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person’s position to fear [harm].”). Category 5 differs from Category 1 in the following ways: the states in Category 1 do not have online communication within their criminal statutes, and the state statutes in Category 5 explicitly include language about online communication. *See supra* notes 165, 178 and accompanying text.

180. NEV. REV. STAT. ANN. § 200.575.

181. MINN. STAT. § 609.749(1b)(b).

circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated.”<sup>182</sup>

### 3. Judicial Definitions of Communication

This Section explains how courts have defined the term “communication” in cases involving online behavior. Just as different cyberstalking statutes define communication differently, case law defining communication varies based on the statutory requirements.

All of the courts that have considered the issue have held that emails sent to the target satisfy the requirement of direct communication with the victim.<sup>183</sup> Moreover, an Internet message can be a “true threat” not protected by the First Amendment, even without being sent directly to the victim.<sup>184</sup>

In New York, a state trial court went a step further and held that messages in a newsgroup, similar to a blog, also qualify as a direct communication. In *People v. Munn*,<sup>185</sup> the defendant posted a message asking readers to kill a police sergeant and all other members of the NYPD.<sup>186</sup> The message was in a “newsgroup,” posted daily and read by a group of regular participants, but open to be read by anyone with a computer and online capabilities.<sup>187</sup> The court found that defendant’s posting on an Internet newsgroup “with the complainant’s name . . . transformed the communication to one not only intended for the general public, but specially generated to be communicated to the complainant.”<sup>188</sup> Therefore, the court determined that communications in a public newsgroup message

182. *Id.* § 609.749(1).

183. See *United States v. Bowker*, 372 F.3d 365, 374, 388 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005) (mem.); *People v. Munn*, 688 N.Y.S.2d 384, 385–86 (N.Y. Crim. Ct. 1999); *M.G. v. C.G.*, No. O-00000-00, 2008 WL 1869738, at \*3 (N.Y. Fam. Ct. Apr. 28, 2008); *Barson v. Commonwealth*, 726 S.E.2d 292, 294 (Va. 2012). Florida, however, has held that changing an email password and appropriating emails is not cyberstalking because it is not electronic communication directed at the victim, as required by the statute. *Young v. Young*, 96 So. 3d 478, 479 (Fla. Dist. Ct. App. 2012) (per curiam).

184. See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (“Here ‘the crucial element separating legal innocence from wrongful conduct’ is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that *the communication contains a threat.*” (emphasis added) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994))); *People v. Diomedes*, 13 N.E.3d 125, 135 (Ill. App. Ct. 2014) (“However, the first amendment permits restrictions on some forms of speech, including ‘true threats’ . . .”).

185. 688 N.Y.S.2d 384 (N.Y. Crim. Ct. 1999).

186. *Id.* at 385.

187. *Id.* at 386 (citing *Reno v. ACLU*, 521 U.S. 844, 850–51 (1997)).

188. *Id.*

qualified as written communication directed at the person for purposes of harassment.<sup>189</sup>

But other courts' failure to use a definition of communication that reflects the way people actually use the Internet results in missed opportunities to convict individuals who have clearly engaged in online behavior that terrorized their victims.

In *State v. Ellison*,<sup>190</sup> for example, the defendant posted a picture of the target to MySpace with a caption stating that the target "liked to molest little boys."<sup>191</sup> The MySpace post was available to the public but not sent directly to the target.<sup>192</sup> The relevant Ohio statute prohibited "telecommunication . . . with [the] purpose to abuse, threaten, or harass another person,"<sup>193</sup> and the trial court convicted the defendant of "telecommunications harassment."<sup>194</sup>

On appeal, however, the Ohio Court of Appeals determined that "the statute creates a specific-intent crime: the state must prove the defendant's specific purpose to harass."<sup>195</sup> The court held that direct contact with the target was not necessary, but that the state must prove the intent of the defendant was to harass the target.<sup>196</sup> The defendant claimed, and the court agreed, that the intent of the defendant was to warn the public of the target's character and not to harass the target.<sup>197</sup> The court reversed the conviction.<sup>198</sup>

*Ellison* reveals a misplaced focus on the intent of the defendant rather than—in keeping with the purpose of cyberharassment statutes in general, which is to avoid disruption and fear in innocent citizens' lives—a focus on whether a threatening or severely distressing message was communicated to the target. Such communication should be the focus. After all, the point of cyberharassment statutes is to prevent the harms arising from such communication.

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189. *Id.*

190. 900 N.E.2d 228 (Ohio Ct. App. 2008).

191. *Id.* at 229.

192. *Id.* ("Ellison allowed for public, rather than private, viewing of her MySpace page.")

193. *Id.* at 230.

194. *Id.* at 229–30.

195. *Id.* at 230.

196. *Id.* at 230–31 ("[W]e decline to hold that a direct contact is required to establish a telecommunication under the statute.")

197. *Id.* at 231 ("Thus, we hold that the state failed to establish that Ellison had made a telecommunication with the purpose to harass, where she had a legitimate purpose for posting the accusation against [the target] on the Internet, and where Ellison did not directly telecommunicate with [the target].")

198. *Id.*

By way of further example, prosecutors have simply declined to press charges because of the inadequacy of statutory tools at their disposal. In September of 2006, Lori Drew became concerned that Megan Meier, a thirteen-year-old neighbor, was spreading rumors about her daughter.<sup>199</sup> Drew created a false MySpace account in the name of “Josh Evans.”<sup>200</sup> Drew used the MySpace account to pretend to be a sixteen-year-old boy and to flirt with Meier.<sup>201</sup> “Josh Evans” began sending Meier negative messages on October 15, 2006, and continued throughout the next day.<sup>202</sup> On October 16, “Josh Evans” sent Meier a message stating that “[t]he world would be a better place without you.”<sup>203</sup> Additional MySpace members whose profiles reflected links with the “Josh Evans” profile also began to send Meier disparaging messages.<sup>204</sup> Subsequently, Meier’s mother discovered that her daughter had hanged herself in her bedroom closet.<sup>205</sup> Missouri prosecutors did not press charges because they could not prove Drew intended to cause emotional distress.<sup>206</sup> Yet again, this focus is misplaced. The disruption to Meier’s life is the harm that the statute is intended to prevent, and consequently the prosecution should focus on the nature of the communication.<sup>207</sup>

199. Jennifer Steinhauer, *Woman Who Posed as Boy Testifies in Case that Ended in Suicide of 13-Year-Old*, N.Y. TIMES (Nov. 20, 2008), <http://www.nytimes.com/2008/11/21/us/21myspace.html?fta=y> [<http://perma.cc/CA83-L7XA> (dark archive)].

200. *The Story of Megan Meier*, MEGAN MEIER FOUND., <http://www.meganmeierfoundation.org/megans-story.html> [<http://perma.cc/LRL3-HU97>] [hereinafter *Megan Meier*].

201. *See id.*

202. *Id.*

203. *Id.*

204. *See id.* (“‘They are posting bulletins about me’ . . . [saying] ‘Megan Meier is a slut. Megan Meier is fat.’”).

205. *Id.*

206. *Prosecutor: No Criminal Charges in MySpace Suicide*, FOX NEWS (Dec. 3, 2007), <http://www.foxnews.com/story/2007/12/03/prosecutor-no-criminal-charges-in-myspace-suicide/> [<http://perma.cc/YF8H-EL9N?type=live>].

207. A similar example of unprosecuted cyberharassment occurred in Tampa, Florida in 2012. There, an ex-mistress, Paula Broadwell, sent anonymous threatening emails to the wife of David Petraeus, with whom she had an affair. Matthew Lysiak, *Menacing Emails Sent by David Petraeus’ Ex-Mistress Paula Broadwell to Socialite Jill Kelley Promised to Make the Apparent Rival ‘Go Away’*, N.Y. DAILY NEWS (Nov. 20, 2012, 2:30 AM), <http://www.nydailynews.com/news/national/broadwell-emails-kelley-sinister-previously-reported-article-1.1204956> [<http://perma.cc/CPW8-9QZ3> (dark archive)]. In the emails, Broadwell touted her military background in a threatening manner and boasted of having “powerful” friends. *Id.* The target saw the emails as death threats, specifically one in which Broadwell vowed to “make [her] go away.” *Id.* But prosecutors never filed charges, again, because of the focus on intent rather than the focus on communication and the disruption it causes. *See* Pete Williams, *Paula Broadwell Won’t Face Cyberstalking Charges in Petraeus Scandal*, NBC NEWS (Dec. 18, 2012, 10:49 AM), <http://investigations.nbcnews>

Finally, the recent passage of statutes that strive to criminalize the phenomenon known as “revenge porn” also reveal the deficiencies in current cyberharassment statutes.<sup>208</sup> Revenge porn—more accurately known as “non-consensual pornography”—consists of online posting of nude pictures of another person without that person’s consent.<sup>209</sup> Often, although not always, the person who posts the pictures is an angry ex-partner.<sup>210</sup> Some websites exist solely for the purpose of posting non-consensual pornography.<sup>211</sup> Posting such pictures is often a mechanism of communication. For example, the website MyEx.com invites users to post links to the email address, phone number, Facebook page, LinkedIn page, and other information of people depicted in uploaded photos.<sup>212</sup> Therefore, other users can send threatening and harassing messages to the person depicted in the photos, with the result that the person depicted would find out about the pictures and potentially realize who uploaded them. It is difficult to imagine a clearer way to communicate hatred or contempt to the person depicted in the photos. But such activity would not be covered under most of the aforementioned statutory schemes. Thus, the example of non-consensual pornography reveals the shortcomings of cyberharassment statutes as a tool to address many forms of online abuse.

### III. UPDATING THE MEANING OF “COMMUNICATION”

This Part first briefly articulates the problems associated with the lack of a clear and up-to-date statutory definition of

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.com/\_news/2012/12/18/15995676-paula-broadwell-wont-face-cyberstalking-charges-in-petraeus-scandal [http://perma.cc/XQM3-25D6].

208. Citron & Franks, *supra* note 117, at 346.

209. *Id.*

210. *Id.*

211. See, e.g., *MyEx.com Get Revenge! Naked Pics of Your Ex*, MYEX.COM, <http://www.myex.com> [http://perma.cc/L8DL-SP4A]. Another popular site, IsAnybodyUp.com, averaged thirty million views a month at its peak. Daniel Kreps, *Revenge-Porn Site Owner Hunter Moore Pleads Guilty, Faces Prison Time*, ROLLING STONE (Feb. 20, 2015), <http://www.rollingstone.com/culture/news/revenge-porn-site-owner-hunter-moore-pleads-guilty-faces-prison-time-20150220> [http://perma.cc/YFG8-XKY2]. IsAnybodyUp.com shut down in 2012 because of intense public pressure. *Id.* Note that while the website founder was indicted and eventually pled guilty, it was not on charges related specifically to the protection of revenge-porn victims, “as many states’ cyber-laws still haven’t been revamped to confront the relatively new phenomenon.” Jessica Roy, *Revenge-Porn King Hunter Moore, the ‘Most Hated Man on the Internet,’ Is Going to Jail*, N.Y. MAG. (Feb. 19, 2015, 1:34 PM), <http://nymag.com/daily/intelligencer/2015/02/revenge-porn-hunter-moore-jail.html> [http://perma.cc/ELN9-WX77].

212. See *Submit Pics and Stories of Your Ex*, MYEX.COM, <http://www.myex.com/add-your-ex/> [http://perma.cc/3MRT-D2CN].

“communication.” It then proposes a definition that can be used by both legislatures and courts, and finally, offers concrete examples that demonstrate why this definition is sensible.

*A. Statutory Proposal*

As we have explained, the myriad ways that people interact on the Internet requires a careful and precise definition of “communication” in cyberharassment statutes.<sup>213</sup> As we have argued, such a definition should include any form of online behavior where a reasonable person knew or recklessly disregarded a reasonable likelihood that the target would learn about the behavior.<sup>214</sup>

Currently, many cyberharassment statutes—including the federal statute—define cyberharassment by focusing on the *use* of an electronic communications device to engage in a “course of conduct.”<sup>215</sup> We think that altering the federal statute and others like it to criminalize communication that focuses on the interaction between the speaker and the target is more effective and realistic in light of changing technology.

We propose the following language to describe the interaction between the speaker and the target:

An individual commits the crime of cyberharassment when he or she knowingly and repeatedly engages in online communication about the target in a manner that a reasonable person would find threatening or in a manner that would cause a reasonable person severe emotional distress, and that the target did in fact find threatening or severely emotionally distressing.

(a) “Communication” is defined as speech or conduct using any electronic medium when the individual knew or recklessly disregarded a substantial likelihood that the target would learn about the speech or conduct;

(b) “Repeatedly” means more than once.

The first part of the statute closely tracks the language in existing cyberharassment statutes whose constitutionality courts have

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213. *See supra* Section I.C.

214. *See supra* Part I.

215. 18 U.S.C. § 2261A(B)(iii) (2006); ALASKA STAT. § 11.41.270 (LEXIS through 2015 legislation); FLA. STAT. § 784.048 (Supp. 2015); MD. CODE ANN., CRIM. LAW § 3-805 (LEXIS through 2015 Legis. Sess.).

upheld.<sup>216</sup> By requiring that the speech is either threatening or severely emotionally distressing, the statute avoids criminalizing speech that is merely annoying or disparaging. Thus, this language focuses on speech whose prohibition, as Justice O'Connor articulated in *Virginia v. Black*,<sup>217</sup> “‘protect[s] 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>218</sup>

Key to our project is subsection (a), which defines communication. We employ a definition that includes only speech or conduct when the perpetrator either knew there was a substantial likelihood that the target would find out about the speech or conduct or recklessly disregarded a substantial likelihood that the target would find out about the speech. This definition goes to the heart of the harms caused by threatening or distressing communications on the Internet. If the perpetrator knows or disregards a substantial likelihood that the target will find out about a particular instance of online behavior, the behavior is closely akin to the type of direct communication (e.g., letters or phone calls) that were criminalized in the pre-Internet world. In the next Section, we explain how our statute—and its careful and precise definition of communication—will apply to a range of behavior on the Internet.

### B. Examples

Finally, we turn to the task of articulating how our proposed definition of communication would play out in the context of several examples spanning a range of social media platforms. In each instance, we demonstrate that the speaker knew or recklessly disregarded the reasonable likelihood that the subject would learn of the speech and, therefore, that the activity should count as communication. We demonstrate not only that the test works across existing platforms but also that it can accommodate new platforms as well.

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216. See *supra* notes 178–82 and accompanying text.

217. *Virginia v. Black*, 538 U.S. 343 (2003).

218. *Id.* at 359–60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

*Example 1: Allison is Facebook friends with Brenda. Allison writes a post about Brenda on Facebook that is visible to all of Allison's Facebook friends.*

This example qualifies as communication under our definition. Even if Allison does not tag Brenda in the post, people often see their friends' posts on Facebook while browsing their own news feeds—the average American now spends forty minutes per day on Facebook,<sup>219</sup> and some check far more frequently.<sup>220</sup> Additionally, Allison and Brenda's mutual friends would likely inform Brenda of the post, or ask her questions about it if the post was at all interesting or salacious. In the unlikely event that Allison believed that Brenda would not find out about the post, Allison would have had to recklessly disregard the amount of time and how most people use Facebook as well as the likelihood that mutual friends would alert Brenda of the post's existence. A post made with such reckless disregard should qualify as communication.

*Example 2: Cesar and Dave are not Facebook friends, but they have many mutual Facebook friends. Cesar and Dave attend the same high school. Cesar writes a post about Dave.*

Under our proposed statutory language, this example likewise qualifies as communication. Even though Dave may never see the Facebook post himself, the many mutual friends of Cesar and Dave make it likely that Dave would find out about the post. On Facebook, it is easy to tell how many mutual friends one shares with another person, regardless of whether one is friends with that person.<sup>221</sup> Thus, Cesar would have to recklessly disregard the readily available information that he and Dave had multiple mutual friends in order to

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219. Joshua Brustein, *Americans Now Spend More Time on Facebook than They Do on Their Pets*, BLOOMBERG (July 23, 2014), <http://www.bloomberg.com/bw/articles/2014-07-23/heres-how-much-time-people-spend-on-facebook-daily> [<http://perma.cc/6FR3-A6XN>].

220. Stephen Marche, *Is Facebook Making Us Lonely?*, ATLANTIC (May 2012), <http://www.theatlantic.com/magazine/archive/2012/05/is-facebook-making-us-lonely/308930/> [<http://perma.cc/VXT4-X5ND>] (“Among 18-to-34-year-olds, nearly half check Facebook minutes after waking up, and 28 percent do so before getting out of bed.”).

221. See *People You May Know*, FACEBOOK, <https://www.facebook.com/help/50128333322485/> [<https://perma.cc/AQF8-VGBF>].

believe that none of the mutual friends would alert the subject to the communication.

*Example 3: Ed writes one post about Frida on Reddit.*

Reddit is a website that bills itself as “the front page of the Internet.”<sup>222</sup> It is divided into a large number of forums, all of which are publicly accessible and in any of which anyone can write a post of any length.<sup>223</sup> The site constantly updates itself, making certain content more or less visible depending on the number of views the content has received and the time since the posting.<sup>224</sup> All posts are publicly available until the post is removed by their creators.<sup>225</sup>

If Ed writes one post about Frida on Reddit, his post should not qualify as communication because it is a single incident and Frida is unlikely to find out about it. If the isolated post is the only thing Ed has ever written about Frida, neither Frida nor people close to her would have any reason to be on alert for a posting about her. Further, if Ed’s post was the only thing he had written about Frida, it is unlikely that even if someone close to Frida saw the blog that they would tell her about it. And perhaps most importantly, Reddit contains an enormous amount of ever-changing information. Absent unusual circumstances not present in our hypothetical, the post about Frida would not become prominent. In this instance, Ed has not recklessly disregarded a reasonable likelihood that Frida would find out about the Reddit post.

*Example 4: Gary creates a blog dedicated to writing disparaging and threatening posts about Holden.*

Anyone with access to the Internet can create a blog. While some blogs cost money to create and maintain, many platforms, such as Tumblr, Blogspot, and Blogger, allow people to create blogs for free.<sup>226</sup> The settings on a particular blog may allow comments from

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222. *Reddit: The Front Page of the Internet*, REDDIT, <http://www.reddit.com> [<http://perma.cc/SE5T-SSY7>].

223. *Can Anyone Post on Reddit?*, REDDIT, <https://reddit.zendesk.com/hc/en-us/articles/205166565-Can-anyone-post-on-Reddit-> [<https://perma.cc/VK4V-4HDM>].

224. *See What is Reddit?*, REDDIT, <https://reddit.zendesk.com/hc/en-us/articles/204511479-What-is-Reddit-> [<http://perma.cc/637Q-KKZF>].

225. *See id.*

226. *See, e.g.*, TUMBLR, *supra* note 94.

viewers, or the blog may exist only as a forum for the author of the blog. While blogs may be public or private, a public blog can be viewed by anyone and the posts are available until they are taken down by the owner of the blog.

A blog dedicated to negative commentary about Holden should qualify as communication so long as the blog is public. If the blog is public, it is likely that someone who knows Holden may see the blog since the posts remain online until the author takes them down. Additionally, most people “Google” themselves occasionally in order to know what is on the Internet about them.<sup>227</sup> Some even have Google or mention alerts on their names.<sup>228</sup> And others, such as potential dates<sup>229</sup> or potential employers,<sup>230</sup> also Google people. Given all of these possible avenues for learning about the blog via Internet searches, Gary’s creation of the blog about Holden should qualify as communication because it is reasonably likely that Holden would find out about the blog.

*Example 5: Ida creates a Craigslist ad that includes Jaliah’s phone number and address and states that Jaliah is willing to have sex for money.*

Craigslist is a website that allows anyone to post an ad that is made available to the public online.<sup>231</sup> The website categorizes the

227. *Majority of Online Americans ‘Google Themselves’*, PEW RES. CTR. (Sept. 27, 2013), <http://www.pewresearch.org/fact-tank/2013/09/27/majority-of-online-americans-google-themselves/> [<http://perma.cc/LJ37-S53Z>] (finding that as of 2013, fifty-six percent of Americans admit to Googling themselves online).

228. *See, e.g., Kashmir Hill, Please, I Beg You, Put a Google Alert on Your Name*, FORBES (Sept. 18, 2009, 11:26 AM), <http://www.forbes.com/sites/kashmirhill/2009/09/18/google-alerts/> [<http://perma.cc/MJ3K-TJUT>] (explaining the importance of Google alerts).

229. *See Roy Uphold, Why You Should Never Google Someone Before a First Date (Video)*, ELITE DAILY (June 4, 2015, 9:15 AM), <http://elitedaily.com/women/never-admit-google-person-first-date/1051472/> [<http://perma.cc/5D2R-D3GR>] (cautioning against Googling someone before a date as a universal experience); *see also* Joanna Person, *So, Tell Me Everything I Know About You*, N.Y. TIMES (Sep. 14, 2008), [http://www.nytimes.com/2008/09/14/fashion/14love.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2008/09/14/fashion/14love.html?pagewanted=all&_r=1) [<http://perma.cc/4JLY-YX74>] (dark archive)] (describing humorous repercussions of Googling someone before a date).

230. Susan P. Joyce, *What 80% of Employers Do Before Inviting You for an Interview*, HUFFINGTON POST (Mar. 1, 2015, 7:45 AM), [http://www.huffingtonpost.com/susan-p-joyce/job-search-tips\\_b\\_4834361.html](http://www.huffingtonpost.com/susan-p-joyce/job-search-tips_b_4834361.html) [<http://perma.cc/SLV3-N2KN>] (showing that eighty percent of employers Google potential employees).

231. Craigslist is a website of “[l]ocal classifieds and forums—community moderated, and largely free.” *About*, CRAIGSLIST, <https://www.craigslist.org/about/> [<https://perma.cc/4A9P-N8BX>].

postings by topic, such as “For Sale,” “Wanted,” “Housing,” “Casual Encounters,” and so forth.<sup>232</sup> The ads are visible to anyone on the Internet, although in some instances they expire after a specified length of time, such as a week.<sup>233</sup> Posts often include contact information for the party who has (supposedly) created the advertisement.<sup>234</sup>

Ida’s Craigslist posting about Jaliah qualifies as communication. The posting itself would solicit calls to Jaliah’s phone number and in-person visits to her address. As a result, Jaliah would likely find out about the Craigslist posting even though she might not see it herself. Ida’s posting of Jaliah’s contact information would establish Ida’s knowledge of a reasonable likelihood that Jaliah would be contacted and, therefore, that Jaliah would discover the posting.

*Example 6: Keith and Leah both use Twitter. Keith writes several public tweets about Leah threatening to harm her and her family. He mentions Leah by her full name but does not include her Twitter handle. Keith and Leah each have about five-hundred Twitter followers, but they do not have any Twitter followers in common.*

While this is a close case, we believe that this example should qualify as communication. Admittedly Keith has not used the “@” symbol to call Leah’s attention to his tweets, and the lack of mutual followers diminishes the likelihood that anyone will mention the tweets to Leah. With that said, there are a number of ways that Leah could find out about the tweets, such that she is reasonably likely to do so. Given that the tweets are public, Leah could find the tweets by Googling her name.<sup>235</sup> She could also find them by using Twitter’s search function to search for her name.<sup>236</sup> Because the tweets are threatening, it is possible that one of Keith’s Twitter followers would reach out to Leah and alert her to the tweets. And, as in Example 4,

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232. *See id.*

233. *See Expirations by Posting Type*, CRAIGSLIST, [http://www.craigslist.org/about/help/posting\\_lifespans](http://www.craigslist.org/about/help/posting_lifespans) [<https://perma.cc/M4AZ-V2KU>].

234. *See How to Post*, CRAIGSLIST, [http://www.craigslist.org/about/help/how\\_to\\_post](http://www.craigslist.org/about/help/how_to_post) [<http://perma.cc/L9NC-ADYR>].

235. *See Hill, supra* note 228.

236. One can do this simply by typing a user’s name or Twitter handle into the search bar within Twitter. *See Using Twitter Search*, TWITTER, <https://support.twitter.com/articles/132700#> [<http://perma.cc/B7G9-Z7EC>].

another person might Google Leah's name, find the tweets, and let Leah know the tweets exist.

*Example 7: Mike creates a Snapchat video threatening Nick. Mike is not friends with Nick or any people who know Nick.*

Snapchat is a cell phone application that allows users to post photos and videos within the application.<sup>237</sup> Other users who also have the application can view the videos and photos of people from their phone contact list.<sup>238</sup> In order to view a user's Snapchat photo or video, a person must have the phone number and be accepted as a friend by the person who posts the video.<sup>239</sup> All photos and videos are available, at most, for 24 hours from the time of posting.<sup>240</sup> Each photo or video may be viewed multiple times within the allotted time period.<sup>241</sup>

The Snapchat video should not qualify as communication. First, Nick would be very unlikely to see the video himself. Because Snapchat users are friends through cell phone numbers, the only people that would have access to the Snapchat video would be Mike's close friends who have his cell phone number. Here, Mike has not accepted Nick or any of Nick's friends to be able to view his Snapchat photos or videos. Additionally, Snapchat videos expire and are inaccessible after twenty-four hours. This further decreases the likelihood that Nick will find out about the video. Thus, this should not qualify as communication. Indeed, even if Nick did *in fact* find out about the video through some unusual set of circumstances, Mike did not disregard a reasonable likelihood that he would do so, and thus the test for communication is not satisfied.

#### CONCLUSION

New technology creates new ways of interacting and requires a more robust definition of communication. Here, we have established a definition of communication that addresses existing means of online

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237. Elyse Betters, *What's the Point of Snapchat, and How Does it Work?*, POCKET-LINT (JAN. 29, 2015), <http://www.pocket-lint.com/news/131313-what-s-the-point-of-snapchat-and-how-does-it-work> [<http://perma.cc/R9MC-KEWS>].

238. Snapchat allows users to send photos directly to another user by using their phone's contacts or by entering a username. SNAPCHAT, *supra* note 71.

239. Betters, *supra* note 237.

240. *Id.*

241. *Id.*

interaction and can adapt to new ones. Incorporating this definition of communication into statutes criminalizing cyberharassment will improve the efficacy of those statutes at detecting and punishing problematic online behavior that rises to a level that society deems worthy of criminal sanction.

## APPENDIX

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Alabama	2	“[I]nitiates communication, verbally, electronically, or otherwise . . . .”	ALA. CODE § 13A-6-90.1 (West, Westlaw through 2015 Act 499); ALA. CODE § 13A-11-8 (West, Westlaw through 2015 Act 499)
Alaska	2	“[S]ending mail or electronic communications to that person; . . . .”	ALASKA STAT. § 11.41.270 (LEXIS through 2015 legislation)
Arizona	3	“ ‘[E]lectronic communication’ [including] wire line, cable, wireless or cellular telephone call, a text, an instant message, or electronic mail.”	ARIZ. REV. STAT. ANN. § 13-2916 (West, Westlaw through 2015 1st Reg. Sess.)
Arkansas	5	Communication of any kind made through “electronic means” (cites local bulletin, chat room, social media, instant messaging).	ARK. CODE ANN. § 5-71-217 (LEXIS through 2015 Reg. Sess.)
California	4	“[T]elephones, cellular phones, computers, video recorders, facsimile machines, pagers, personal digital assistants, smartphones, and any other device that transfers signs, signals, writing, images, sounds, or data.”	CAL. PENAL CODE § 653m (West 2010)
Colorado	3	“[C]ommunication with a person . . . anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, [or] computer system . . . .”	COLO. REV. STAT. § 18-9-111 (LEXIS through 2015 Reg. Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Connecticut	2	“[C]omputer network”	CONN. GEN. STAT. ANN. § 53a-182b (West, Westlaw through 2015 Reg. Sess.)
Delaware	1	N/A	N/A
Federal	4	“[U]ses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce . . . .”	18 U.S.C. § 2261A (2012)
Florida	2	“[M]eans to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication . . . .”	FLA. STAT. § 784.048 (Supp. 2015)
Georgia	3	“[C]ommunication in person, by telephone, by mail, by broadcast, by computer, by computer network, or by any other electronic device; . . . .”	GA. CODE ANN. § 16-5-90 (2011)
Hawaii	2	“[T]elephone calls, facsimile transmissions, or any form of electronic communication . . . including electronic mail transmissions . . . .”	HAW. REV. STAT. ANN. § 711-1106 (LEXIS through 2015 Sess.)
Idaho	2	“Sending mail or electronic communications . . . .”	IDAHO CODE § 18-7906 (LEXIS through 2015 Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Illinois	5	“ ‘Electronic communication’ means any transfer of signs, signals, writings, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system . . . [i]ncluding, but not limited to, a telephone, cellular phone, computer, or pager, which communication includes, but is not limited to, e-mail, instant message, text message, or voice mail.”	720 ILL. COMP. STAT. ANN. 5/12-7.5 (West, Westlaw through 2015 Reg. Sess.)
Indiana	2	“[U]ses a computer network . . . .”	IND. CODE § 35-45-2-2 (West, Westlaw through 2015 First Reg. Sess.)
Iowa	2	“Communicates with another by telephone, telegraph, writing, or via electronic communication . . . .”	IOWA CODE § 708.7 (West, Westlaw through 2015 Reg. Sess.)
Kansas	3	“[I]mpart a message by any method of transmission, including, but not limited to: Telephoning, personally delivering, sending or having delivered, any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer; . . . .”	KAN. STAT. ANN. § 21-5427 (West, Westlaw through 2015 Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Kentucky	3	“[Use of] computers, the Internet or other electronic network, cameras or other recording devices, telephones or other personal communications devices, scanners or other copying devices, and any device that enables the use of a transmitting device.”	KY. REV. STAT. ANN. § 508.130 (West, Westlaw through 2015 Reg. Sess.)
Louisiana	4	“[A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by wire, radio, computer, electromagnetic, photoelectric, or photo-optical system . . . use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means . . . .”	LA. STAT. ANN. §§ 14:40.3(A)(1-2) (West, Westlaw through 2015 Reg. Sess.)
Maine	1	N/A	N/A
Maryland	4	“[T]ransmission of information, data, or a communication by the use of a computer or any other electronic means” such as “information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a system that provides access to the Internet and cellular phones.”	MD. CODE ANN., CRIM. LAW § 3-805 (LEXIS through 2015 Legis. Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Massachusetts	4	“[C]onduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.”	MASS. GEN. LAWS ch. 265, § 43 (West, Westlaw through 2015 Legis. Sess.)
Michigan	5	“[A]ny medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication . . . .”	MICH. COMP. LAWS ANN. § 750.411s (West, Westlaw through 2015 Reg. Sess.)
Minnesota	5	“[A]ny communication made through any available technologies . . . [or] other objects . . . .”	MINN. STAT. ANN. § 609.749 (1b)(b) (West, Westlaw through 2015 1st Spec. Sess.)
Mississippi	4	“[E]lectronic mail or electronic communication”	MISS. CODE ANN. § 97-45-15 (West, Westlaw through 2015 Reg. Sess.)
Missouri	2	“[C]ommunication by any means”	MO. REV. STAT. § 565.225 (West, Westlaw through 2015 1st Reg. Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Montana	2	“[E]lectronic communication . . . or any other action, device, or method”	MONT. CODE ANN. § 45-5-220 (West, Westlaw through July 2015 Sess.)
Nebraska	1	N/A	N/A
Nevada	5	“[U]se of an Internet or network site, electronic mail, text messaging or any other similar means of communication . . . .”	NEV. REV. STAT. ANN. § 200.575 (West, Westlaw through 2015 legislation)
New Hampshire	3	“[I]mpart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer.”	N.H. REV. STAT. ANN. § 644:4 (West, Westlaw through 2015 Reg. Sess.)
New Jersey	1	N/A	N/A
New Mexico	1	N/A	N/A
New York	1	N/A	N/A
North Carolina	4	“Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.”	N.C. GEN. STAT. § 14-196.3 (2013)
North Dakota	2	“Communicates in writing or by electronic communication a threat . . . .”	N.D. CENT. CODE § 12.1-17-07 (LEXIS through 2015 Reg. Legis. Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Ohio	4	“[A]ny electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system . . . .”	OHIO REV. CODE ANN. § 2903.211 (LEXIS through 2015 legislation)
Oklahoma	4	“[A]ny type of telephonic, electronic or radio communications, or transmission of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, cable, radio, electromagnetic, photoelectronic or photo-optical system or the creation, display, management, storage, processing, transmission or distribution of images, text, voice, video or data by wire, cable or wireless means, including the Internet.”	OKLA. STAT. tit. 21, § 1172 (West, Westlaw through 2015 1st Reg. Sess.)
Oregon	4	“[E]lectronic mail, the Internet, a telephone text message or any other transmission of information by wire, radio, optical cable, cellular system, electromagnetic system or other similar means.”	OR. REV. STAT. ANN. § 166.065 (West, Westlaw through 2015 Reg. Sess.)
Pennsylvania	3	“[E]lectronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission”	18 PA. STAT. AND CONS. STAT. ANN. § 2709 (West, Westlaw through 2015 Reg. Sess.)
Rhode Island	2	“[Electronic] communication by computer or other electronic device”	11 R.I. GEN. LAWS § 11-52-4.2 (LEXIS through Jan. 2015 Sess.)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
South Carolina	5	“[A]ny transfer of signs, signals, writings, images, sounds, data, intelligence, or information of any nature transmitted in whole or in part by any device, system, or mechanism including, but not limited to, a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.”	S.C. CODE ANN. § 16-3-1700 (Supp. 2014)
South Dakota	2	“[A]ny verbal, electronic, digital media, mechanical, telegraphic, or written communication”	S.D. CODIFIED LAWS § 22-19A-1 (West, Westlaw through 2015 Legis. Sess.)
Tennessee	4	“[I]ncluding, but not limited to, text messaging, facsimile transmissions, electronic mail or Internet services . . . .”	TENN. CODE ANN. § 39-17-308 (Supp. 2012)
Texas	4	“[T]ransfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system.”	TEX. PENAL CODE ANN. § 42.07 (West, Westlaw through 2015 Legis. Sess.)
Utah	2	“[U]ses a computer, the Internet, text messaging, or any other electronic means to commit an act that is a part of the course of conduct.”	UTAH CODE ANN. § 76-5-106.5 (LEXIS through 2015 Gen. Sess.)
Vermont	2	“[T]elephone calls or other electronic communications”	VT. STAT. ANN. tit. 13, § 1027 (LEXIS through 2015 Reg. Sess.)
Virginia	2	“[U]se a computer or computer network to communicate . . . .”	VA. CODE ANN. § 18.2-152.7:1 (2014)

<b>Jurisdiction</b>	<b>Category</b>	<b>Communication Language</b>	<b>Citation</b>
Washington	3	“[E]lectronic communication”	WASH. REV. CODE ANN. § 9.61.260 (West, Westlaw through 2015 Spec. Sess.)
West Virginia	3	“[D]elivered or transmitted to a specific person . . . .”	W. VA. CODE § 61-3C-14a (West, Westlaw through 2015 Reg. Sess.)
Wisconsin	5	“[A]ny transfer of signs, signals, writing, images, sounds, data or intelligence of any nature, or any transfer of a computer program . . . .”	WIS. STAT. § 947.0125 (2015)
Wyoming	4	“Communicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means . . . .”	WYO. STAT. ANN. § 6-2-506 (LEXIS through 2015 Legis. Sess.)

