



## Cyber Harassment and the Scope of Freedom of Speech

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### INTRODUCTION

Cyber harassment is now commonly recognized as socially pervasive and often severe in its harmful effects.<sup>1</sup> Cyber harassment is sometimes referred to by the relevant statutes without any further description beyond the listed elements of the offense.<sup>2</sup> But cyber harassment, as addressed herein, also encompasses what the law refers to, more specifically, as cyberbullying,<sup>3</sup> 'revenge porn,'<sup>4</sup> some instances of cyber invasion of privacy and 'sextortion,'<sup>5</sup> cyberstalking,<sup>6</sup> and to 'true threats' in the cyber realm.<sup>7</sup>

The case law addressing these forms of cyber harassment commonly, but largely mistakenly, assumes a conflict between meaningfully addressing the harms of cyber harassment and respecting the legitimate

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<sup>1</sup> See *infra* notes 15–22 and accompanying text.

<sup>2</sup> See *infra* notes 23–35 and accompanying text.

<sup>3</sup> See *infra* notes 47–56 and accompanying text.

<sup>4</sup> See *infra* notes 57–66 and accompanying text.

<sup>5</sup> See *infra* notes 67–88 and accompanying text.

<sup>6</sup> See *infra* notes 89–95 and accompanying text.

<sup>7</sup> See *infra* notes 96–103 and accompanying text. These forms of cyber harassment can of course overlap in any given case.

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free speech rights of cyber harassers. Judicial concerns over tradeoffs between the rights or interests of the targets of cyber harassment on the one hand, and free speech values on the other are, however, largely misplaced. In many cyber harassment cases, the values thought to be promoted by protecting speech are absent, or on balance actually supportive of the rights or interests of the targets of cyber harassment.

This Article briefly introduces the phenomena of cyber harassment, particularly as experienced by its targets.<sup>8</sup> Cyber harassment, as broadly understood herein, often involves substantial harms to its targets. The pervasiveness and frequent severity of the harms of cyber harassment have prompted the development of a complex regulatory network for the various forms of cyber harassment.<sup>9</sup> The legal regulation of cyber harassment is, however, again often thought, largely mistakenly, to be limited by the constitutional free speech interests of the cyber harassers.<sup>10</sup>

As it turns out, the relationship between the interests of the targets of cyber harassment and the scope and values of freedom of speech are widely and fundamentally misunderstood. In most typical cases of cyber harassment, the harassing language in question should not be classified as speech, in the constitutionally relevant sense, at all.<sup>11</sup> Simply put, such literal speech does not implicate any of the consensually or commonly cited basic reasons, values, or purposes underlying the constitutional protection of speech. Such literal speech amounts to a subcategory of speech that addresses matters of only personal interest or concern, which is itself also logically undeserving of distinctive constitutional free speech protection.<sup>12</sup>

Ironically, this means that the attention deservedly paid to the severe and pervasive harms of cyber harassment, as doubtless important as they are, are largely irrelevant to the crucial constitutional question of whether cyber harassment should be protected, to any degree, from regulation based on free speech claims. In the typical absence of any speech in the constitutional sense in the first place, prohibition of cyber harassment actually should not require any showing of severe harm to its targets.

There are, certainly, a class of judicial cases,<sup>13</sup> often involving youth offenders, in which the cyber harasser has legally cognizable interests

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<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Parts II–III.

<sup>11</sup> See *infra* Part III.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See, e.g., the discussion *infra* at notes 24–34 and accompanying text.

that argue against the imposition of criminal sanctions. But those interests can normally be accommodated by some sort of appropriate administrative, civil, or injunctive remedy, as distinct from a criminal sanction.

Finally, there may also be a rare class of cases in which the cyber harassment amounts to, or is at least inextricably entangled with, fully constitutionally protected speech.<sup>14</sup> In this, but only this, narrow subset of the cases, the courts should, under the currently dominant case law principles, sensitively apply some form of strict judicial scrutiny to the regulation, requiring both a compelling or overridingly important public interest, and a narrow tailoring of the speech regulation to that interest. The free speech interests of the targets of such harassment should, however, therein also be accommodated.

Overall, then, a careful analysis suggests that in most cyber harassment cases, free speech considerations are essentially absent. The severity of the harms of cyber harassment, along with the hateful or otherwise malicious state of mind of the literal speaker, thus actually do not enter into the question of whether, given the Free Speech Clause, cyber harassment can be reasonably regulated. Most cyber harassment can thus make no claim to any free speech protection at all. And the harms and the pervasiveness of cyber harassment are relevant only to the character that the legal regulation of cyber harassment should take.

#### I. CYBER HARASSMENT AND THE CASE LAW

Cyber harassment has come to be recognized as a substantial social problem. Perhaps four in ten Americans have experienced some form of online harassment.<sup>15</sup> A majority of surveyed American adults consider

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<sup>14</sup> For possible examples of this relatively rare category, see *Coleman v. Razete*, 137 N.E.3d 639, 641-42 (Ohio Ct. App. 2019) (combining both purely personal and broader justice and alleged fraud claims); *TM v. MZ*, 926 N.W.2d 900, 904-06 (Mich. Ct. App. 2018) (similar).

<sup>15</sup> See Monica Anderson, *Key Takeaways on How Americans View — and Experience — Online Harassment*, PEW RES. CTR. (July 11, 2017), <https://www.pewresearch.org/fact-tank/2017/07/11/key-takeaways>; MAEVE DUGGAN, *ONLINE HARASSMENT 2017*, at 3, PEW RES. CTR. (2017), [https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2017/07/PI\\_2017.07.11\\_Online-Harassment\\_FINAL.pdf](https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2017/07/PI_2017.07.11_Online-Harassment_FINAL.pdf); see also *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing data on an estimated ten million threats of or actual non-consensual postings of explicit images).

online harassment to constitute a major problem.<sup>16</sup> Women, in particular, are disproportionately targeted by cyber harassment.<sup>17</sup>

Unlike most other forms of harassment, cyber media posts tend to persist over time,<sup>18</sup> and to be cheaply and easily re-disseminated to any number of willing, or unwilling, recipients.<sup>19</sup> A leading expert, Professor Danielle Keats Citron, briefly summarizes the “devastating impact”<sup>20</sup> of cyber harassment in these terms:

[Cyber harassment] trashes victims’ professional reputations and careers, discourages on- and offline pursuits, disrupts both crucial and ordinary life choices, and causes physical and emotional harm . . . . [C]yber harassment interferes with victims’ ability to take full advantage of the economic, political, and social opportunities of our digital age.<sup>21</sup>

The case law clearly bears out these concerns.<sup>22</sup>

Consider, though, an unusual recent appellate case in which the text senders were female and the victim was male.<sup>23</sup> Despite these and other

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<sup>16</sup> See DUGGAN, *supra* note 15, at 4. An even larger majority of survey respondents want either the cyber technology firms and platforms or the government, or both, to move to reduce the problems. *See id.*; Issie Lapowski, *1 in 3 Americans Suffered Severe Online Harassment in 2018*, WIRED (Feb. 13, 2019, 6:00 AM), <https://www.wired.com/story/severe-online-harassment-2018-adl-survey>. *But cf.* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 254-55 (2014) (referring to “social attitudes that trivialize cyber harassment”).

<sup>17</sup> See CITRON, *supra* note 16, at 13.

<sup>18</sup> *See id.* at 4.

<sup>19</sup> *See id.* at 29.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; *see also* Mary Ann Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1261-69 (2017) (presenting survey data on targeted persons’ reactions and recounting several case histories). In general, focusing on the severity and pervasiveness of cyber harassment harms is most useful in motivating legal and cultural reform.

<sup>22</sup> *See infra* Part II. Of course, serious harassment can take the form of more or less direct personal contact or surveillance, as well as by telephone. *See, e.g.*, United States v. Waggy, 936 F.3d 1014, 1016-20 (9th Cir. 2019) (describing the defendant’s telephone speech and conduct in the context of discussing judicial issues of specific intent); *Ex parte* Barton, 586 S.W.3d 573, 585 (Tex. App. 2019) (a computer text messages and emails case, but discussing the case law of harassment via telephone calls and ultimately holding a Texas statutory prohibition of sending “repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another” to be unconstitutionally vague and overbroad). In Barton, the recipient was the defendant’s ex-spouse. *See Barton, supra* note 22, at 575-76.

<sup>23</sup> *See CITRON, supra* note 16, at 13.

quite atypical features, *In re JP*<sup>24</sup> repays sustained attention in some important respects.

The *JP* case involved Snapchat group messaging among four sixth- and seventh-grade girls.<sup>25</sup> Typically, Snapchat messages are more ephemeral and limited in dissemination than many other forms of cyber communication.<sup>26</sup> In this case, the girls “decided they did not like a 13-year-old boy, and fantasized via group text messages [among themselves] about killing him, his dog, and even his goldfish.”<sup>27</sup> The object of their animosity was not sent, was not intended to receive, did not receive,<sup>28</sup> and never actually read, any of the texts in question.<sup>29</sup>

One of the four girls, JP, was criminally charged under a Michigan statute that forbids the sending of text messages “intended to ‘terrorize, frighten, intimidate, threaten, harass, molest, or annoy’ another person.”<sup>30</sup> Finding no evidence of any relevant intent, the Michigan Court of Appeals dismissed the order in the case.<sup>31</sup> The court sensibly viewed the texts in question as more suitably addressed by school administration rules and policies than by criminal sanctions.<sup>32</sup>

For free speech purposes, though, it is useful to consider the actual character of the text-language conveyed within the four-member Snapchat group in question. After all, any possible free speech interests could be relevant to any potential public school administrative discipline.<sup>33</sup> As it happens, the language of the texts in the *JP* case, however patently adolescent, has much in common with the typical language of many online harassment cases.

Among the relevant texts, with Snapchat names herein added and with emojis and Bitmojis deleted, we have:

7UP: I WILL MARGARITA SQUARE UP LIKE[S]S HEAD

LADY GAGA: HAHAAHAAHHAHAGA

7UP: LETS GOOOOO

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<sup>24</sup> No. 344812, 2019 WL 4648450 (Mich. Ct. App. Sept. 24, 2019).

<sup>25</sup> *Id.* at \*1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at \*2.

<sup>33</sup> *See, e.g.,* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

LADY GAGA: WE SHOULD STAB HIM

DREAM RUINER: [EMOJIS]

7UP: YES . . .

7UP: MURDER HIM LET'S DO IT

LADY GAGA: AND HIS FAMILY AND HIS DOG

7UP: YEEEEESS

DREAM RUINER: MURDER HIM

LADY GAGA: AND HIS GOLDFISH

DREAM RUINER: XD

ME: What if he doesn't have a dog!!

7UP: WE WILL DRUG HIM THEN STAB HIM TO DEATH . . .<sup>34</sup>

The texts in question continued in this vein.<sup>35</sup>

Again granting the unusual nature of the *JP* case in important respects, it is important to bear in mind the general nature of the language, in its context, at issue. The point, ultimately, will not be to critique or to judge any language or any speaker. Rather, the point will be to hold the actual character of all cyber-harassing language up to the light of the commonly asserted reasons for constitutionally valuing instances of speech in general.<sup>36</sup>

As it turns out, much cyber-harassing language, as in *JP*, is speech in some literal sense, but not speech in the sense of any aptness to detectably embody or advance any of the typical reasons for constitutionally enshrining speech.<sup>37</sup>

The unavailability of any free speech claim on behalf of such literal speech should not change if we treat such cases as involving merely private or personal concerns among the persons involved.<sup>38</sup> Speech on

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<sup>34</sup> *JP*, 2019 WL 4648450, at \*1-2.

<sup>35</sup> *See id.*

<sup>36</sup> *See infra* Parts III–IV.

<sup>37</sup> *See id.* Crucially, if cyber harassment is somehow thought to involve meaningful autonomous self-realization by the harasser, then virtually any human behavior, however pathological, destructive, or felonious, would become speech for constitutional free speech purposes. This would obliterate any distinction between speech and conduct and turn the Free Speech Clause into an utterly indeterminate 'free behavior' clause. *See infra* notes 160–164 and accompanying text.

<sup>38</sup> *See infra* Part IV.

matters of merely private or personal concern is still, on our view, unworthy of constitutional protection under the Free Speech Clause.<sup>39</sup> In the relatively few cyber harassment cases not classifiable as speech on matters of private interest, the values relevant to speech will typically appear on both sides of the case, and indeed most conspicuously on the side not of the speaker-harasser, but on the side of the targets of cyber harassment.<sup>40</sup> In any further residue of the cyber harassment cases, some form of strict scrutiny, appropriately sensitive to the interests at stake, would normally be applied.<sup>41</sup>

If we analyze the cyber harassment cases broadly defined, we find that such cases may refer more specifically to cyberbullying,<sup>42</sup> to revenge porn,<sup>43</sup> to invasions of privacy with those privacy rights being explicitly

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<sup>39</sup> See *id.*

<sup>40</sup> See generally Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: The Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185 (2007). More specifically, a genuine free speech case will involve basic free speech interests, including the values of promoting a market for truth, democratic self-government, and personal autonomy or self-realization, normally on both sides of the case. See R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 336 (2001) [hereinafter *Why Free Speech*]. While all cyber harassers may be following their largely emotional impulses, they are doing so without the consent of the targets of their harassment, who can hardly “just avert their eyes,” as in *Cohen v. California*, 403 U.S. 15, 21 (1971). See also *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (captive home audience case).

<sup>41</sup> For an example of the test applied, see *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

<sup>42</sup> See, e.g., *New York v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).

<sup>43</sup> See, e.g., *People v. Austin*, No. 123910, 2019 WL 5287962 (Ill. Oct. 18, 2019); *Patel v. Hussain*, 485 S.W.3d 153 (Tex. Ct. App. 2016); *State v. VanBuren*, 214 A.3d 791 (Vt. 2019); see also Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014); Franks, *supra* note 21; Deanna Paul, *Is Revenge Porn Protected Speech? Lawyers Weigh In, and Hope for a Supreme Court Ruling*, WASH. POST (Dec. 26, 2019, 5:00 AM), <https://www.washingtonpost.com/nation/2019/12/26/is-revenge-porn-protected-speech-supreme-court-may-soon-weigh/>. For a sense of the status of revenge porn as a cultural issue, see Maureen Dowd, *Now Comes the Naked Truth*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/opinion/sunday/katie-hill-resigns-millennials-boomers.html>.

foregrounded,<sup>44</sup> to cyberstalking,<sup>45</sup> or to so-called ‘true threat’ cyber harassment cases.<sup>46</sup> The nature of the literal speech of course varies to some degree within each of these categories of cyber harassment.

Consider first the language and relevant context in the cyberbullying case of *People v. Marquan M.*<sup>47</sup> In this case, the New York Court of Appeals held an Albany County criminal cyberbullying statute overbroad in several respects,<sup>48</sup> applied strict scrutiny,<sup>49</sup> and struck down the regulation as facially invalid<sup>50</sup> on free speech grounds.<sup>51</sup> Our concern is not, however, with the court’s overbreadth analysis,<sup>52</sup> or with the result in the case. Overbreadth concerns are not ultimately fundamental. Rather, our concern at this point is merely to note the nature and context of the defendant’s literal speech, which constitute the basis of his constitutional free speech claim.

As recounted by the New York Court of Appeals,

Marquan M., a student attending Cohoes High School in Albany County, used the social networking website “Facebook” to

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<sup>44</sup> See, e.g., *Gilbreath v. State*, 650 So. 2d 10 (Fla. 1995); *Ex parte Lopez*, No. 09-17-00393-CR, 2019 WL 1905243 (Tex. Ct. App. Mar. 27, 2019) (not for publication). See generally Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH. U. L. REV. 1189, 1206-07 (2019) (on ‘sextortion’ in particular); Quinta Jurecic et al., *Sextortion: The Problem and Solutions*, BROOKINGS INST. (May 11, 2016), <https://www.brookings.edu/blog/techtank/2016/05/11/sextortion-the-problem-and-solutions>.

<sup>45</sup> See, e.g., *United States v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018); *United States v. Conlan*, 786 F.3d 380 (5th Cir. 2015); *United States v. Sayer*, 748 F.3d 425 (1st Cir. 2014); *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012); *United States v. Ackell*, No. 15-cr-123-01-JL, 2017 WL 2913452 (D.N.H. July 7, 2017) (not for publication); *United States v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015); *United States v. Cassidy*, 814 F. Supp. 2d 575 (D. Md. 2011); *State v. Relerford*, 104 N.E.3d 341 (Ill. 2017); *In re A.J.B.*, 929 N.W.2d 840 (Minn. 2019); *People v. Morocho*, 132 N.E.3d 806 (Ill. App. Ct. 2019); *State v. Shackelford*, 825 S.E.2d 689 (N.C. Ct. App. 2019).

<sup>46</sup> See, e.g., *United States v. Khan*, 937 F.3d 1042 (7th Cir. 2019); *United States v. Houston*, 683 F. App’x 434 (6th Cir. 2017) (not for publication); *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011); *State v. Crawford*, No. 1-16-0184, 2019 WL 3416749 (Ill. App. Ct. July 25, 2019); *State v. Khan*, 127 N.E.3d 592 (Ill. App. Ct. 2018); *McGuire v. State*, 132 N.E.3d 438 (Ind. Ct. App. 2019). For discussion, see Lyrrisa Barnett Lidsky, *#I-U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1888 (2018).

<sup>47</sup> 19 N.E.3d 480 (N.Y. 2014).

<sup>48</sup> See *id.* at 488.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> Classically, the implications of unconstitutional overbreadth are played out in *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

create a page bearing the pseudonym “Cohoes Flame.” He anonymously posted photographs of high-school classmates and other adolescents, with detailed descriptions of their alleged sexual practices and predilections, sexual partners and other types of personal information. The descriptive captions, which were vulgar and offensive, prompted responsive electronic messages that threatened the creator of the website with physical harm.<sup>53</sup>

The overbreadth doctrine is most at home in pragmatically accommodating otherwise prohibitable instances of broadly political speech that addresses some matter of public interest and concern.<sup>54</sup> But our main concern herein is again not with whether or how the overbreadth doctrine should be applied in this case. Instead, the aim, for the moment, is simply to bear in mind the above-described content and context of all the defendant’s literal speech in *Marquan M.*<sup>55</sup> That speech, along with other instances of literal speech in cyberspace, can then be classified as outside of the scope of ‘speech’ for free speech constitutional purposes, given the basic reasons for constitutionally protecting speech, as described below.<sup>56</sup>

Similarly classifiable is the literal speech in typical ‘revenge porn’<sup>57</sup> cases. In one such case, *Patel v. Hussain*,<sup>58</sup> the “appellee Nadia Hussain sued appellant Akhil Patel, alleging that after the couple broke up, Patel hounded her with a slew of offensive and threatening communications, hacked or attempted to hack her [social media] accounts, and posted secretly recorded sexual videos of Nadia on the Internet.”<sup>59</sup> There is in

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<sup>53</sup> *Marquan M.*, 19 N.E.3d at 484.

<sup>54</sup> See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (Vietnam War era anti-war protester arrest).

<sup>55</sup> The New York Court of Appeals added that the defendant’s literal speech “identified specific adolescents with photographs, described their purported sexual practices and posted the information on a website accessible world-wide . . . . [D]efendant used the . . . Internet to attack his victims from a safe distance, 24 hours a day, while cloaked in anonymity.” *Marquan M.*, 19 N.E.3d at 488.

<sup>56</sup> See *infra* Parts III–IV.

<sup>57</sup> See Citron & Franks, *supra* note 43, at 346; Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 690–92 (2016) (focusing on expanding the scope of speech categories excepted from free speech protection, as distinct from a concern as to what should count as speech, in the constitutional sense, for free speech purposes in the first place).

<sup>58</sup> 485 S.W.3d 153 (Tex. Ct. App. 2016).

<sup>59</sup> *Id.* at 157; see also *State v. Casillas*, 938 N.W.2d 74, 82 (Minn. Ct. App. 2019) (applying overbreadth doctrine and focusing on an irremediable lack of a statutory intent-to-harm requirement in striking down a revenge porn statute).

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this case, crucially, no suggestion of any intent, or any attempt, to convey any sort of factual question or claim, opinion, message, or view bearing, in the slightest, upon anything that could be claimed to be a subject of any potential public interest or concern,<sup>60</sup> or to otherwise implicate any basic free speech values.

Thus classifiable as well is the literal speech in the typical revenge porn case of *State v. VanBuren*.<sup>61</sup> According to the arresting police officer in the case,

[c]omplainant contacted police after she discovered that someone had posted naked pictures of her on a Facebook account belonging to Anthony Coon and ‘tagged’ her in the picture. Complainant called Mr. Coon and . . . ask[ed] that the pictures be deleted. Shortly thereafter, defendant called complainant back on Mr. Coon’s phone; she called complainant a “moraleless [sic] pig” and told her that she was going to contact complainant’s employer, a child care facility. When complainant asked defendant to remove the pictures, defendant responded that she was going to ruin complainant and get revenge.<sup>62</sup>

As it happened, the court in *VanBuren* accorded “full First Amendment protection”<sup>63</sup> to this revenge porn, but then determined that the Vermont statute criminalizing revenge porn survived strict scrutiny.<sup>64</sup> Again, the actual disposition of this case is not of central concern. Our focus is instead on the actual character and context of the posted image. The court’s characterizing this particular image posting as fully protected speech, with the content-based regulation thereof then being subject to strict scrutiny,<sup>65</sup> illustrates a much broader jurisprudential problem discussed below.<sup>66</sup> There is simply no functional or purposive reason for classifying this image posting as within the scope of ‘speech’ for free speech constitutional purposes.

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<sup>60</sup> For discussion, see *infra* Part IV.

<sup>61</sup> 214 A.3d 791 (Vt. 2019).

<sup>62</sup> *Id.* at 796.

<sup>63</sup> *See id.* at 800.

<sup>64</sup> *See id.* The court applied a test of strict scrutiny while explicitly recognizing that the relevant Vermont statute exempts all speech that is on a matter of public interest and concern. *See id.* at 810.

<sup>65</sup> *See id.* at 800.

<sup>66</sup> *See infra* Parts III–IV.

Some cyber harassment cases also choose to explicitly emphasize the privacy-related dimensions<sup>67</sup> of the literal speech or imagery in question. In a recent case,<sup>68</sup> the defendant was charged with the “unlawful disclosure or promotion of intimate visual material.”<sup>69</sup> This offense requires, among other considerations, lack of consent by the depicted person,<sup>70</sup> defined intimate exposure,<sup>71</sup> a reasonable expectation of privacy,<sup>72</sup> harm to the depicted person,<sup>73</sup> and a revelation of the identity of that depicted person.<sup>74</sup> As is typical, the image under the statute need not qualify as legally obscene<sup>75</sup> and for that narrow reason as unprotected under the Free Speech Clause.<sup>76</sup>

In this instance, the criminal information alleged that the defendant, “without the . . . consent of [the complainant], intentionally disclose[d] visual material, namely, photographs, depicting the complainant ‘with her buttocks exposed’ . . . .”<sup>77</sup> As in the *VanBuren* revenge porn case,<sup>78</sup> the court rejected a claim of substantial statutory overbreadth,<sup>79</sup> applied strict scrutiny in requiring a compelling governmental interest and narrow statutory tailoring to that interest,<sup>80</sup> and upheld the statute under this rigorous free speech test.<sup>81</sup>

Curiously, and again as in *VanBuren*,<sup>82</sup> the court imposed a rigorous strict scrutiny test<sup>83</sup> to the regulation in question despite an apparent awareness of the minimal, or more precisely, non-existent free speech values at stake.<sup>84</sup> The court recognized the absence of any statutory

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<sup>67</sup> See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

<sup>68</sup> *Ex parte Lopez*, No. 09-17-00393-CR, 2019 WL 1905243 (Tex. Ct. App. Mar. 27, 2019) (not for publication).

<sup>69</sup> *Id.* at \*1.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See generally *Miller v. California*, 413 U.S. 15 (1973).

<sup>76</sup> See *id.* at 23.

<sup>77</sup> *Ex parte Lopez*, No. 09-17-00393-CR, 2019 WL 1905243, at \*1 (second brackets added).

<sup>78</sup> See *supra* text accompanying notes 61–65.

<sup>79</sup> See *Lopez*, 2019 WL 1905243, at \*5.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *supra* note 64.

<sup>83</sup> See *Lopez*, 2019 WL 1905243, at \*5.

<sup>84</sup> See *id.*

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threat to uninhibited discussion of any public issue,<sup>85</sup> to any meaningful exchange of ideas,<sup>86</sup> and to pursuit of truth in particular.<sup>87</sup> Given these entirely reasonable judicial conclusions, it is natural to wonder why, at a very minimum, the regulation at issue should be tested by strict scrutiny.<sup>88</sup>

Similar concerns arise with respect to the cases decided under the rubric of ‘cyberstalking.’<sup>89</sup> As with other forms of cyber harassment, cyberstalking speech is not constitutionally protected if that speech can be shown to be integral to some other independently criminal conduct of any sort.<sup>90</sup> Here, we are of course interested in the nature and speech value of cyberstalking speech in itself, independent of any related, uncontroversially criminal activity.

As one might imagine, the circumstances prompting charges of cyberstalking vary widely.<sup>91</sup> But the following case scenario is hardly unique. Consider an excerpt from the cyberstalking case of *United States v. Conlan*.<sup>92</sup> In *Conlan*, after receiving unequivocal social rejections,<sup>93</sup> the defendant

then began an escalating, year-long campaign of email, text-message, social-media, telephonic, and face-to-face contact with JMP, her family, work colleagues, and church members. Many of the messages were hateful, threatening, and graphically sexual . . . . He told her that “things would get worse” and asked her to “send [him] a pretty picture once a week, that would keep [him] under control . . . . He also sent her a single-line email reciting her home address and repeatedly told her kill herself.<sup>94</sup>

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<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See, e.g.,* cases cited *supra* note 45.

<sup>90</sup> *See generally* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (regarding speech that is intended to motivate its audience to violate criminal antitrust laws); *United States v. Stevens*, 559 U.S. 460, 471 (2010); *United States v. Gonzalez*, 905 F.3d 165, 192 (3d Cir. 2018) (cyberstalking speech both defamatory and integral to independently criminal activity); *Commonwealth v. Carter*, 115 N.E.3d 559, 570 (Mass. 2019), *cert. denied*, 140 S. Ct. 910 (2020) (tragic involuntary manslaughter via allegedly inducing a suicide).

<sup>91</sup> *See* cases cited *supra* note 45.

<sup>92</sup> 786 F.3d 380 (5th Cir. 2015).

<sup>93</sup> *See id.* at 384.

<sup>94</sup> *Id.*

The cyberstalking cases are often decided through focusing on issues of required intent, vagueness, and overbreadth.<sup>95</sup> Our concern, however, is that free speech-based considerations should be addressed only to the extent that ‘speech’ for constitutional purposes is actually present in the case.

As a final sub-category<sup>96</sup> among the broad range of cyber harassment cases, consider the cyber-based ‘true threat’ case law.<sup>97</sup> The most familiar non-cyber true threat cases involve a recognizable element of political or social speech.<sup>98</sup> But the cyber harassment cases may or may not implicate any basic free speech values, or any political or other public concern, or any attempt to address any such matter.

Consider, for example, the recent ‘true threat’ case of *People v. Crawford*.<sup>99</sup> The court in *Crawford* summarized some crucial evidence by concluding that

Defendant sent Seiler several text messages . . . . [D]efendant’s text messages stated: “U GONE DIE;” “I WILL F\*\*\* MURDER U” . . . . “Don’t give a f\*\*\* who u tell . . . .” “GET READY TO MEET YOUR MAKER” . . . . “Its not a matter of ‘if I catch u but ‘when’ and when I do uts [sic] gone be ugly and im already prepared to go \*\*\* jail for doing it.”<sup>100</sup>

It is certainly true that ‘true threat’ cases may be complicated by, for example, issues of the statutorily necessary intent,<sup>101</sup> claims of mere hyperbole, or questions of the value of posting explicit disclaimers.<sup>102</sup>

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<sup>95</sup> See *id.*; *State v. Relerford*, 104 N.E.3d 341, 353-57 (Ill. 2017); *People v. Morocho*, 132 N.E.3d 806, 814 (Ill. App. Ct. 2019); *United States v. Ackell*, No. 15-cr-123-01-JL, 2017 WL 2913452, at \*1 (D.N.H. July 7, 2017) (not for publication); see also *State v. Crawford*, No. 1-16-0184, 2019 WL 3416749 (Ill. App. Ct. July 25, 2019) (discussing overbreadth in a cyberstalking and ‘true threat’ case).

<sup>96</sup> Plainly, the various categories of cyber harassment cases are often more overlapping than they are separate and discrete.

<sup>97</sup> See, e.g., cases cited *supra* note 46.

<sup>98</sup> See *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (Vietnam War era military draft case); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (cross burning case referring broadly to threats “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”). For a mixed political and non-political cyber threat case, see *United States v. Khan*, 937 F.3d 1042, 1046-47 (7th Cir. 2019).

<sup>99</sup> No. 1-16-0184, 2019 WL 3416749 (Ill. App. Ct. July 25, 2019).

<sup>100</sup> *Id.* at \*1 (asterisks in the original) (in addition to two overheard telephone death threats).

<sup>101</sup> For a partly inconclusive discussion, see *Elonis v. United States*, 135 S. Ct. 2001, 2009-12 (2015).

<sup>102</sup> For various permutations of this, see, e.g., cases cited *supra* note 46.

But lack of sufficient intent, the presence of hyperbole, and the presence of disclaimers do not add to the perhaps nonexistent constitutional speech value of the threats at issue. Nor do these considerations convert speech on matters of merely personal or private interest into speech on a subject of public interest or concern. Roughly put, announcing in a disclaimer that one's literal speech should not be taken seriously, or should not be taken as seriously as a reader otherwise might, does not add to that speech's First Amendment value.<sup>103</sup>

Overall, then, in many of the cyber harassment cases, regardless of type, the language of the harasser, in its context, does not seem worthy, on free speech grounds, of constitutionally shielding that harasser from any otherwise fully appropriate legal response. This result is not a matter of anyone's agreeing or disagreeing with any assertion of fact or opinion by the harasser. Immediately below, we consider more fundamentally why harassing language of the sort illustratively quoted above should not count, at all, as cognizable 'speech' for constitutional free speech purposes.

## II. CYBER-HARASSING SPEECH AS COMMONLY NON-SPEECH FOR FIRST AMENDMENT PURPOSES

The scope of what counts as speech, for First Amendment purposes, must have some limits. Otherwise, the Free Speech Clause would amount to an internally contradictory charter of some sort of universal behavioral libertarianism. For our purposes, though, no detailed theory of precisely what should count as 'speech' for First Amendment purposes is necessary.<sup>104</sup> For our purposes, all communication technologies can be accepted as transmitters of speech. And even some speech that is intended to be purely artistic and even, in some sense, unintelligible, can herein count as 'speech' within the scope of the First Amendment.<sup>105</sup>

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<sup>103</sup> But for very useful qualifications, see generally the exceptionally valuable ARTHUR M. MELZER, *PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING* (2014).

<sup>104</sup> See generally R. George Wright, *What Counts as Speech in the First Place?*, 37 PEPP. L. REV. 1217 (2010) [hereinafter *What Counts as Speech*].

<sup>105</sup> See MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 1, 4 (2017); Enrique Armijo, *The Freedom of Non-Speech*, 33 CONST. COMMENT. 291, 294 (2018) (on Lewis Carroll's 'nonsense' poem *Jabberwocky*). For background, see generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

Certainly, not all instances of cyber harassment can be uncontroversially disqualified as either legally obscene<sup>106</sup> or as prohibitable ‘fighting words,’ in the sense of words that “by their very utterance inflict injury.”<sup>107</sup> Cyber harassment need not even involve sexually explicit language, short of obscenity. And cyber harassment need not inflict immediate injury, at least to the ultimate target, where the actual recipient of the harassing message is a neighbor, business associate, or potential employer of the targeted person.<sup>108</sup>

It is still possible, however, to draw sensible judicial lines recognizing that much cyber-harassing literal speech simply should not count as ‘speech’ at all within the meaning of the First Amendment. And these lines should be manageable without any official assessment of the worth, legitimacy, justifiability, or fitness of any idea or viewpoint offered or entailed by the literal speech in question.<sup>109</sup>

As it turns out, some case law already recognizes a reasonably manageable distinction between literal speech that falls within the scope of the First Amendment coverage, and literal speech that does not, quite apart from any categorical or subject matter exceptions to freedom of speech for the kind of literal speech in question.<sup>110</sup>

Thus, outside the harassment context, cyber or otherwise, consider the opinion of Judge Richard Posner in the case of *Swank v. Smart*.<sup>111</sup> *Swank* involved a police officer employee discharge case in which the terminated officer raised a free speech claim.<sup>112</sup> Judge Posner in *Swank* recognized the officer’s need, under the public employee speech

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<sup>106</sup> See generally *Miller v. California*, 413 U.S. 15, 18 (1973) (material sent via mails to unconsenting and largely unknown recipients).

<sup>107</sup> See the first and typically underutilized prong of the misleadingly named ‘fighting words’ exception to free speech in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), and the relevant hopeful discussion in Franks, *supra* note 21, at 1315. For a non-cyber case of direct harassment, see the vulgar public argument case of *Kansas v. Hamilton*, No. 120729, 2019 WL 6223352 at \*3 (Kan. Ct. App. Nov. 22, 2019) (not for publication).

<sup>108</sup> We may here treat as an ‘utterance’ either the single act of sending a ‘message’ to one or many recipients, or the receipt and opening of the ‘message’ by any recipient.

<sup>109</sup> Perhaps the single greatest fear underlying the free speech case law is of a government’s penalizing or prohibiting disfavored messages in light of the government’s or anyone else’s fear or dislike of the ideas, viewpoint, or critical perspective expressed by that message. See generally *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

<sup>110</sup> For a controversial such discussion, see *United States v. Stevens*, 559 U.S. 460, 468-72 (2010) (federal statutory animal “crush video” case).

<sup>111</sup> *Smart v. Swank*, 898 F.2d 1247 (7th Cir. 1990).

<sup>112</sup> See *id.* at 1250.

discipline cases,<sup>113</sup> to show that the speech by the officer rose to the level of addressing some matter of public interest or concern.<sup>114</sup>

Fascinatingly, though, Judge Posner in *Swank* sensibly undertook an analysis of the logic of constitutionally protecting free speech more fundamental than a mere reliance on the distinctive requirements of the public employee speech discipline cases.<sup>115</sup> Much more broadly, Judge Posner looked to the idea of basic purpose and function underlying any distinctive constitutional protection for speech.

At this more basic level, Judge Posner argued that

The purpose of the free-speech clause . . . is to protect the market in ideas . . . broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions — scientific, political, or aesthetic — to an audience whom the speaker seeks to inform, edify, or entertain.<sup>116</sup>

Thus, as merely one implication, “[c]asual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected.”<sup>117</sup> Given that *Swank* itself involved just such casual chit-chat,<sup>118</sup> Judge Posner had no occasion to consider the broader implications of his logic.

Judge Posner did not deny that the literal speech at issue in *Swank* was “important to its participants.”<sup>119</sup> But importance in this sense does not imply the relevance of such speech, whatever its specific subject matter or perspectives thereon, to any attempt at “the advancement of knowledge, the transformation of taste, political change, [or] cultural expression.”<sup>120</sup> And these dimensions of cultural life are, Judge Posner observes, illustrative, if not exhaustive, of the “objectives, values, and consequences of the speech that is protected by the First Amendment.”<sup>121</sup>

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<sup>113</sup> See, e.g., *Connick v. Myers*, 461 U.S. 138, 142-49 (1983).

<sup>114</sup> See *Swank*, 898 F.2d at 1251. For further discussion of the possibility of extending the logic of the public employee speech discipline cases, with their requirement for speech on a matter of public concern, to the cyber harassment cases, see *infra* Part IV.

<sup>115</sup> See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For a discussion of the ‘public concern’ case law, see *infra* Part IV.

<sup>116</sup> *Swank*, 898 F.2d at 1250-51.

<sup>117</sup> *Id.* at 1251.

<sup>118</sup> See *id.* at 1249-50.

<sup>119</sup> *Id.* at 1251.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* For affirmative citations of Judge Posner’s exclusion of “casual chit-chat” from the scope of possible free speech protection, see *Trejo v. Shoben*, 319 F.3d 878, 887 (7th

Judge Posner's basic value approach is arguably too narrow in that he takes fostering a marketplace of ideas to exhaust all of the basic aims, purposes, or values underlying constitutional protection for speech.<sup>122</sup> There are other entirely plausible candidates for the status of basic values underlying freedom of speech, including meaningful democratic self-government<sup>123</sup> and promoting autonomy, self-realization, or self-fulfillment.<sup>124</sup> For our purposes, it is better to possibly err on the side of inclusiveness by recognizing all of the most commonly cited values that are thought to justify constitutional protection for speech.<sup>125</sup>

The basic intuition, though, that the constitutional enshrinement of speech should serve one or more purposes or values is entirely sensible. Any other approach would leave utterly mysterious why speech should sometimes be protected when there are meaningful personal and social costs in doing so. Not surprisingly, then, protecting speech is typically linked, directly or indirectly, to promoting one or more free speech purposes or values.<sup>126</sup>

This is not to suggest that courts should decide free speech cases, even in part, by referring directly and immediately to any basic underlying

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Cir. 2003) (involving some arguably harassing, though not cyber-harassing, speech as well); *Miller v. Cooper*, 116 F. Supp. 3d 919, 930 (W.D. Wis. 2015).

<sup>122</sup> See *supra* notes 116–117 and accompanying text.

<sup>123</sup> See generally ALEXANDER MEIKELJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

<sup>124</sup> See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); MARTIN REDISH, *FREEDOM OF EXPRESSION* (1984); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 *HARV. C.R.-C.L. L. REV.* 443 (1998); see also sources cited *infra* notes 160–164.

<sup>125</sup> For useful taxonomies and critiques of commonly endorsed values thought to underlie free speech protection, see, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Thomas Emerson, *Towards a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963); Kent Greenawalt, *Free Speech Justifications*, 89 *COLUM. L. REV.* 119 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 *U. ILL. L. REV.* 1015 (2015).

<sup>126</sup> For defenses of value-based — or very broadly functionalist — approaches, see, e.g., Leslie Kendrick, *Use Your Words: On the “Speech” in “Freedom of Speech,”* 116 *MICH. L. REV.* 667, 672 (2018) (“[S]ome value beyond speech itself is the reason that speech is important.”); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 *HARV. L. REV.* 2166, 2169 (2015) (recognizing “the goals traditionally associated with the First Amendment,” and arguing that “the Court should . . . recognize the purpose-driven and functionalist, rather than historical, nature of the distinction between high- and low-value speech” in particular); Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1255 (1995) (“First Amendment analysis is relevant only when the values served by the First Amendment are implicated.”); Schauer, *supra* note 105, at 1778 n.55 (2004) (quoting Post, *supra* note 126).

free speech values that may or may not be at stake in the case.<sup>127</sup> There is a place for useful “middle-range” judicial tests as well.<sup>128</sup> But failing to require, at any point, some sufficient linkage between case law tests or outcomes and the underlying reasons for according any special status to speech in the first place involves judicial arbitrariness at best.<sup>129</sup>

On reflection, no sufficiently meaningful such linkage exists, at any level, between typical cyber harassment cases, such as those discussed above,<sup>130</sup> and the most plausible candidates for the values sufficient to explain and justify any constitutional free speech protection.<sup>131</sup> Commonly, cyber harassment case incidents cannot reasonably be thought of even as attempts, successful or not, to engage in speech that, in context, even minimally implicates or advances any of the above basic reasons for constitutionally protecting speech in the first place. In fact, a stronger case can be made, in many instances, that regulating the cyber harassment at stake in the case would actually advance at least one recognizable free speech value, given in particular the interest of cyber harassment targets in their own autonomous self-realization.<sup>132</sup>

More specifically, in typical cases, and certainly in those cases surveyed above,<sup>133</sup> considerations such as a marketplace of ideas, democratic self-government and related democracy-enhancing concerns, and the value of one’s full and autonomous self-actualization are notably absent, where they do not actually cut in favor of the target of the harassment. Recall, in particular, representative samplings of the literal speech in the cases cited above.

In particular, consider the language in *JP*<sup>134</sup>: “I WILL MARGARITA SQUARE UP LIKE[S]S HEAD.”<sup>135</sup> Or the language in *Marquan M*<sup>136</sup>: “He anonymously posted photographs of high-school classmates and

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<sup>127</sup> See Wright, *What Counts as Speech*, *supra* note 104, at 1232 (citing Wright, *Why Free Speech*, *supra* note 40).

<sup>128</sup> See sources cited *supra* note 127.

<sup>129</sup> See *id.*

<sup>130</sup> See reported language and descriptions thereof *supra* Part II.

<sup>131</sup> For compendia thereof, see the authorities cited *supra* notes 123-125. For brief discussion along these lines addressing typical verbal harassment, but not cyber harassment, cases, see Wright, *What Counts as Speech*, *supra* note 104, at 1255 (citing *State v. Brown*, 85 P.3d 109, 112 (Ariz. Ct. App. 2004) (quoting *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988))).

<sup>132</sup> See generally sources cited *supra* note 124.

<sup>133</sup> See cases cited *supra* notes 106-131 & *infra* notes 135-149.

<sup>134</sup> See *supra* notes 24-35 and accompanying text.

<sup>135</sup> *In re JP*, No. 344812, 2019 WL 4648450, at \*1 (Mich. Ct. App. Sept. 24, 2019); see *supra* text accompanying note 34.

<sup>136</sup> See *supra* notes 47-56 and accompanying text.

other adolescents, with detailed descriptions of their alleged sexual practices and predilections, sexual partners, and other types of personal information.”<sup>137</sup> Or the description in *Patel*<sup>138</sup>: “Patel hounded her with a slew of offensive and threatening communications, hacked or attempted to hack her accounts, and posted secretly recorded sexual videos of Nadia on the Internet.”<sup>139</sup> Or the account in *VanBuren*<sup>140</sup>: “Complainant contacted police after she discovered that someone had posted naked pictures of her on a Facebook account belonging to Anthony Coon and ‘tagged’ her in the picture.”<sup>141</sup> Or the report in *Conlan*<sup>142</sup> that the defendant “sent [the targeted party] a single-line e-mail reciting her home address and repeatedly [telling] her to kill herself.”<sup>143</sup> Or, finally, the language in the *Crawford*<sup>144</sup> case, in which “defendant sent Seiler text messages that “U GONE DIE”; “I WILL F\*\*\* MURER YOU”; “Don’t give a f\*\*\* who you tell . . . .”<sup>145</sup>

Without attempting to pass judgment on any of the parties to these cases, and, crucially, before taking into account the gravity and pervasiveness of the various harms of cyber harassment, we can largely set aside the concern that “[e]ven if cyber harassment contributes little to free speech value,<sup>146</sup> its regulation must comport with First Amendment doctrine.”<sup>147</sup> If none of the basic values and purposes are meaningfully at stake in the above and many similar cases, as they clearly are not, there is no point to invoking constitutional free speech protection in the first place.

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<sup>137</sup> *People v. Marquan M.*, 19 N.E.3d 480, 484 (N.Y. 2014); see *supra* text accompanying note 53.

<sup>138</sup> See *supra* notes 57–60 and accompanying text.

<sup>139</sup> *Patel v. Hussain*, 485 S.W.3d 153, 157 (Tex. Ct. App. 2016); see *supra* text accompanying note 59.

<sup>140</sup> See *supra* notes 61–66 and accompanying text.

<sup>141</sup> *State v. VanBuren*, 214 A.3d 791, 796 (Vt. 2019); see *supra* text accompanying note 62; see also *supra* text accompanying note 77.

<sup>142</sup> See *supra* notes 92–94 and accompanying text.

<sup>143</sup> *United States v. Conlan*, 786 F.3d 380, 384 (5th Cir. 2015); see *supra* text accompanying note 74.

<sup>144</sup> See *supra* notes 99–100 and accompanying text.

<sup>145</sup> *People v. Crawford*, No. 1-16-0184, 2019 WL 3416749, at \*1 (Ill. App. Ct. July 25, 2019); see *supra* text accompanying note 100.

<sup>146</sup> For Professor Citron’s discussion, see Citron, *supra* note 16, at 193–99.

<sup>147</sup> *Id.* at 199 (going on to discuss, inter alia, strict scrutiny of the regulation of hateful speech). See also the multi-stage free speech analysis in Franks, *supra* note 21, at 1312 (revenge porn as potentially either unprotected, minimally protected, or else either surviving or not surviving a more rigorous strict scrutiny test of the speech regulation).

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The serious trap to avoid in this context is one of interpreting typical cyber-harassing language as intending to convey, however inarticulately, some broad, generalized theory, however detestable, of gender roles, dominance hierarchies, patriarchalism, or the legitimacy of cultural violence. Instances of cyber harassment are indeed among the various raw materials from which social theory can, in part, be constructed and tested. But contributions to social theory are neither intended by the typical cyber harassers, nor perceived by the typical target of cyber harassment. Cyber harassers are not, more specifically, seeking to contribute, as interlocutors, to any ongoing social discussion or debate.

It may be tempting to instead read broad social theory claims into obviously intensely personal cyber harassment. But cyber harassment cannot ordinarily be realistically interpreted as genuinely attempting to convey any interesting broader claim or proposition. Confusion in this respect may arise because thoughtful observers are provoked, or inspired, by cyber harassment to themselves construct descriptive or normative social theories to account for such phenomena. But we can be equally inspired by, for example, an earthquake, a storm at sea, or by a sunset to articulate our own general thoughts about the sublime and the beautiful.<sup>148</sup> But earthquakes do not intend any such message. Nothing like our own articulate reactive thoughts is even vaguely present in the natural phenomena themselves.

The serious harm of mistakenly investing typical cyber harassment with a broader intended social message implicating free speech values is that of unnecessarily and inappropriately shielding ordinary cyber harassment with the armor of the Free Speech Clause. Nor, running the argument in the other direction, do we honor the importance of freedom of speech by pretending that genuine free speech issues are present in cases where they are not.<sup>149</sup>

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<sup>148</sup> See, e.g., EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGINS OF OUR IDEAS OF THE SUBLIME AND THE BEAUTIFUL (Oxford Univ. Press rev. ed. 2015) (1757); IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND THE SUBLIME AND OTHER WRITINGS (Patrick Frierson & Paul Guyer eds., 2011) (1765). By analogy, we may be provoked to think about, say, class-based patriarchalism by one person's vulgar epithet addressed to an ex-spouse. But the speaker in such a case is typically not intending to convey any such broader implication. Nor does the typical target of such harassment react, meaningfully and primarily, at that broad social propositional level.

<sup>149</sup> For an argument in favor of protecting speech-trivial commercial trademarks for the sake of underlining the general seriousness of freedom of speech, see *National Review, Inc. v. Mann*, 140 S. Ct. 344, 346-48 (2019) (Alito, J., dissenting from denial of certiorari). There is a difference between sensibly applying free speech principles, and mechanically applying free speech principles where they are insufficiently relevant. The

Much cyber harassment thus involves speech in some literal sense, but not speech in the crucial free speech constitutional sense, for failure of such harassment to meaningfully implicate any of the basic reasons for specially protecting speech in the first place. As it turns out, though, there is another way of reaching this conclusion that draws upon two converging streams of free speech law, as we briefly consider below.

### III. TYPICAL CYBER HARASSMENT AS NOT ATTEMPTING TO ADDRESS ANY MATTER OF PUBLIC INTEREST OR CONCERN

For a number of years, the Supreme Court has drawn a significant distinction, in two separate contexts,<sup>150</sup> between speech that addresses a matter of public interest or concern, and speech that addresses a matter of only private or personal interest or concern.<sup>151</sup> Based on the cyber harassment case law we have considered, it is sensible to say that most cyber harassment speech would naturally be classified as speech on a subject matter of only private or personal interest. And the Court has indeed linked the distinction between public and merely private interest speech to the basic purposes and values underlying the constitutional protection of speech.<sup>152</sup>

The problem here, though, is that the Court has over time been flatly inconsistent on how much, if any, constitutional protection speech on

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latter judicial course tends, one might imagine, toward an eventual broad dilution, and confusion, of free speech standards.

<sup>150</sup> Some of the relevant such cases involve free speech limitations on the state tort law of libel. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-61 (1983) (plurality opinion). A greater number of such cases, however, involve possible free speech limits on the ability of government employers to discipline their public employees for reasons related to the latter's speech. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968).

<sup>151</sup> For background and for a way to helpfully address borderline cases, which turn out to be relatively rare in the cyber harassment area, see generally R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987). Speech that is clearly on a matter of public interest may have both public-spirited and personal motives. *See Fraternal Order of Police v. City of Camden*, 842 F.3d 231, 243 (3d Cir. 2016).

<sup>152</sup> *See, e.g., Lane v. Franks*, 573 U.S. 228, 235-36 (2014) (referring to the free speech purpose of assuring the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (referring to the value of public debate on public issues, self-government, and “a meaningful dialogue of ideas”); *Dun & Bradstreet*, 472 U.S. at 758-59 (again citing “the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” as echoed in *Franks*, 573 U.S. 228); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[F]ree and open debate is vital to informed decision-making by the electorate.” (quoting *Pickering*, 391 U.S. at 571-72)).

matters of merely private or personal interest or concern should receive. In some cases, the Court has suggested that such speech has little to no meaningful relationship to the basic reasons for protecting speech, and thus logically deserves no distinctive free speech protection.<sup>153</sup> But in other cases, the Court backs away from this sensible inference, and accords some only vaguely specified, but limited, free speech protection to speech on matters of merely personal interest.<sup>154</sup>

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<sup>153</sup> See, e.g., *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) (“[I]f the employee has not engaged in what can be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.” (quoting *Connick*, 461 U.S. at 146)); *Harris v. Quinn*, 573 U.S. 616, 653 (2014) (under *Pickering*, 391 U.S. 563, “employee speech is unprotected if it is not on a matter of ‘public concern’”); *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 600 (2008) (noting “the First Amendment protects public employee speech only when it falls within the core of First Amendment protection — speech on matters of public concern,” but then adding vague, rarely relevant qualifications); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (failure of the public employee to speak as a citizen on a subject of public concern leaves that employee with “no First Amendment cause of action based on his or her employer’s reaction to the speech”); *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 675 (1996) (briefly characterizing *Connick*, 461 U.S. 138, as holding that “speech on merely private employment matters is unprotected”); *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (“To be protected, the speech must be on a matter of public concern . . .”).

<sup>154</sup> E.g., *Franks*, 573 U.S. at 235 (noting “[s]peech by citizens on matters of public concern lies at the heart of the First Amendment,” thereby implicitly suggesting that some degree of free speech protection may be available beyond the center, core, or heart of the Free Speech Clause); *Snyder*, 562 U.S. at 451-52 (same); *Engquist*, 553 U.S. at 600 (ultimately conceding only “wide latitude” to the public employer, and referring to “the most unusual circumstances”); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986) (referring specifically to “the reduced constitutional value of speech involving no matters of public concern” (emphasis added)); *Dun & Bradstreet*, 472 U.S. at 761 (similarly referring to “the reduced constitutional value of speech involving no matters of public concern” (emphasis added)); *Rowland v. Mad River Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (public employee speech that is unrelated to matters of public concern as unprotected “absent the most unusual circumstances” (quoting *Connick*, 461 U.S. at 147)); see *id.* at 1013; *Connick*, 461 U.S. 147 (“We do not suggest . . . that [public employee] Myers’ speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.”); see also *Dun & Bradstreet*, 472 U.S. at 759 (while speech on matters of public interest is on “the highest rung” of the free speech protection hierarchy, and is therefore entitled to “special” free speech protection, “speech on matters of purely private concern is of less [but presumably not zero] First Amendment concern” (emphasis added)); *id.* at 760 (free speech protection for speech on matters of merely private concern); *State v. Culver*, 918 N.W.2d 103, 110-11 (Wis. 2018) (citing the basic free speech value discussion in *Snyder*, 562 U.S. at 452, as well as *Franks*, *supra* note 21, at 1339 (on the Court’s “heart” versus “lesser protected” distinction)) (“When purely private matters are the subject at hand, free speech protections are less rigorous . . .”).

Given this ongoing ambivalence and irresolution on the part of the Court, it is certainly open to argue, with straightforward logic, that most cyber harassment amounts to speech merely on matters of personal or private interest, that such speech has been seen<sup>155</sup> to not significantly implicate the basic reasons for constitutionally protecting speech in the first place, and that such cyber harassment thus deserves no free speech protection.

The ongoing judicial inconsistency regarding speech on matters of merely personal concern may reflect, in part, the Court's quite reasonable sense that there is a legally relevant distinction between, on the one hand, idle chit-chat or mere personal grievances, and, on the other hand, literal speech that is classifiable as obscene, or as inherently prohibitable speech in the form of perjury, extortion, blackmail, or bank robbery.<sup>156</sup> Doubtless such distinctions are often worth drawing.

The crucial difference, though, between, say, personal jabbering and a kidnapping ransom note has to do with the nature and magnitude of the harms that are typically involved. Personal jabbering typically does not involve social harms worth prohibiting. In contrast, most ransom note speech involves harms that are clearly more deserving of legal regulation.

But these differences in the magnitudes of the social costs of these two general types of literal speech do not also mean that personal chit-chat and mere personal grievance speech tends to promote the basic values or purposes of free speech more than, say, ransom note speech. Neither, in fact, does cyber harassment. And specifically, typical instances of cyber harassment are, in terms of their commonly imposed social costs, far closer to ransom note speech than to consensual chit-chat, while similarly not promoting any basic free speech purposes.

The ongoing judicial tendency to overextend free speech coverage to cover typical cyber harassment cases may also reflect a much broader tendency to err on the side of inclusion in free speech cases. There can be a sense that it is more important to protect unconventional and outcast literal speakers than to minimize the possibility of any unintended judicial diluting of legitimate free speech protection more generally, or of losing focus on the competing interests actually at stake in free speech cases. If so, the Court's occasional gestures at protecting

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<sup>155</sup> See *supra* Part III. See also the interstate cyber harassment case of *United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014) (“[T]he public has no legitimate interest in the private sexual activities of [the victim] or in the embarrassing facts revealed about her life . . . .” (quoting *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012))).

<sup>156</sup> For a contrast between speech on merely personal matters and legally obscene speech, see *Connick*, 461 U.S. at 147.

mere personal interest speech would reflect a broader inclination to err on the side of overextending free speech protection.<sup>157</sup> Better, though, would be to avoid erring in either direction, through attending to the basic reasons for constitutionally protecting speech in the first place.

In particular, as a matter of sheer logic, the courts cannot coherently extend the free speech value of autonomous self-realization, self-fulfillment, or self-perfection to encompass non-consensual and indeed anti-consensual cyber harassment. No doubt typical cyber harassers are following their impulses, or their pathologies. But if this harassing behavior is claimed to manifest the self-realization justification for protecting freedom of speech,<sup>158</sup> then the Free Speech Clause is immediately thereby reduced to self-contradictory incoherence. Virtually any verbal or non-verbal human behavior, however pointless, destructive, seriously criminal, or even self-destructive, would on the same inflated understanding also count as self-realizational speech for constitutional purposes. And that would, contrary to the purposes of the Free Speech Clause, obliterate any distinction between speech and social behavior in general. The Free Speech Clause cannot meaningfully amount to an incoherent free-behavior-by-everyone clause.<sup>159</sup>

Sensibly, advocates of autonomous self-realization as a basic free speech justification have avoided any such mistake. Autonomous self-realization cannot mean something like giving social vent to one's impulses, hostile or otherwise. Consider the classic declaration by Professor Thomas Emerson: "[F]reedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free."<sup>160</sup>

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<sup>157</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (deliberately lying about having been awarded the Congressional Medal of Honor); *Brown v. Entm't Merch.'s Ass'n*, 564 U.S. 786 (2011) (limits on access by minors to particular violent video games); *United States v. Stevens*, 559 U.S. 464 (2010) (including cases of so-called "animal crush" videos); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (commercial barroom nude dancing as constitutional speech); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion) (to similar effect as *Erie*, 529 U.S. 277). Of course, typical cyber harassment cases may well involve harms much more severe and pervasive than other sorts of literal speech.

<sup>158</sup> For background, see the more sensibly limited and circumscribed understandings of autonomous self-realization or self-development as articulated by the sources cited *supra* note 124.

<sup>159</sup> See *supra* note 125 (referencing sensible free speech purpose typologies).

<sup>160</sup> THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

Similarly, Professor Frederick Schauer, referring to the “self-development”<sup>161</sup> free speech value, holds that

a person who uses his faculties to their fullest extent, who is all that it is possible to be, is in some sense better off, and in an Aristotelian sense happier, than those whose development is stultified . . . . [I]t is the faculties of reason and thinking that are at the core of self-development.<sup>162</sup>

Or as Professor Kent Greenawalt has observed, “freedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as autonomy.”<sup>163</sup>

This developmental, flourishing-oriented understanding of autonomous self-actualization is classically embodied in Justice Brandeis’s claim that “[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties.”<sup>164</sup> Of course at some level of detail, there will be disagreements of emphasis in how the free speech value of autonomous self-realization is to be precisely understood. But it is even clearer that the mainstream discussions of this basic free speech value exclude, if they do not also directly oppose, the literal speech activities typically amounting to cyber harassment in its various forms.<sup>165</sup>

#### CONCLUSION

Cyber harassment in its various forms imposes substantial costs on many persons. Those substantial costs, and their unequal distribution, are plainly important in mobilizing support for legal and cultural responses to cyber harassment. It is important to recognize, however, that most forms and instances of cyber harassment do not implicate any

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<sup>161</sup> SCHAUER, *supra* note 125, at 54.

<sup>162</sup> *Id.*; see also JOHN STUART MILL, ON LIBERTY 121 (Gertrude Himmelfarb ed., 1974) (1859) (seeking “the highest and most harmonious development of [personal] powers to a consistent whole”).

<sup>163</sup> Greenawalt, *supra* note 125, at 143; see also Tsesis, *supra* note 125, at 1028 (“One of the most often stated rationales for protecting free speech is society’s obligation to safeguard the right of thoughtful and articulate persons to communicatively exercise their intellectual capacities”).

<sup>164</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

<sup>165</sup> See *supra* Part II; Koppelman, *supra* note 57, at 667-72, 684-92. Professor Koppelman discusses viewpoint-based restrictions on revenge porn, the proper scope of categorical exceptions to protected speech, such as libel and obscenity, and most importantly, revenge porn as actually impairing both the autonomous self-realization and the democratic citizen-efficacy of the targets of the revenge porn in question. See *id.*

of the commonly cited reasons for constitutionally protecting speech in the first place. Where any such reasons are in fact implicated in the cyber harassment cases, it is typically the meaningful autonomy and self-realization interests of the targets, rather than those of the harassers, that are at significant risk.