

# POLITICAL HACKTIVISM: DOXING & THE FIRST AMENDMENT

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*“The intensity and complexity of life . . . have rendered necessary some retreat from the world . . . but modern enterprise and invention have, through invasions [of] privacy, subjected [people] to mental pain and distress, far greater than could be inflicted by mere bodily injury.”*<sup>1</sup>

—Louis Brandeis (1890)

## I. INTRODUCTION

On December 16, 2016, Tanya Gersh answered her phone—on the other end, she heard nothing but gunshots.<sup>2</sup> She hung up. Moments later, her phone rang again. “This is how we can keep the Holocaust alive,” the voice on the other end said.<sup>3</sup> “We can bury you without touching you.”<sup>4</sup> Several days later, Gersh received a voicemail saying, “You are surprisingly easy to find on the Internet—and in real life.”<sup>5</sup> Gersh was caught in the eye of a neo-Nazi “troll storm.”<sup>6</sup>

These calls and messages marked the beginning of a months-long harassment campaign orchestrated by the *Daily Stormer*, the world’s largest neo-Nazi website. This campaign began after Sherry Spencer—the mother of the prominent neo-Nazi Richard Spencer—claimed Gersh was “spear heading” a campaign against the Spencers’ local

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1. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

2. Luke O’Brien, *The Making of an American Nazi*, THE ATLANTIC (Dec. 2017), <https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/> [<https://perma.cc/2W6J-T297>].

3. *Id.*

4. *Id.*

5. Mallory Simon & Sara Sidner, *An Avalanche of Hate: How a Montana Mom Became the Target of a Neo-Nazi Troll Storm*, CNN (July 11, 2017, 12:37 PM), <https://www.cnn.com/2017/07/10/us/avalanche-of-hate-daily-stormer-lawsuit/index.html> [<https://perma.cc/XWE8-9CFN>].

6. *Id.* An internet “troll,” most commonly, is someone who “intentionally antagonizes others online by posting inflammatory, irrelevant, or offensive comments or other disruptive content.” *Definition of Troll*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/troll> (last visited Sept. 30, 2019).

business.<sup>7</sup> Acting in the Spencers' defense, Andrew Anglin posted Gersh's name, address, and phone number on the *Daily Stormer*, urging the site's readers to "hit 'em up."<sup>8</sup> It didn't take long for the trolls to start swarming. "All of you deserve a bullet through your skull[s]," one email read.<sup>9</sup> Another message contained a picture of Gersh's twelve-year-old son superimposed over the gates of Auschwitz.<sup>10</sup>

What happened to Gersh is known as *doxing*. Doxing is a form of cyber-harassment that involves "the public release of personal information that can be used to identify or locate an individual," such as the person's home address, email address, phone number, or other contact information.<sup>11</sup> In a doxing campaign, the initial post will often be innocuous; it may only be a person's name and their cellphone number. But the intent behind the post is often clear: it is a request for internet trolls to harass the named individual.<sup>12</sup>

Gersh has filed a first-of-its-kind lawsuit against Anglin in the District of Montana. Gersh's complaint seeks general and punitive damages from Anglin for orchestrating this religiously-motivated troll storm.<sup>13</sup> Anglin argues that doxing is protected by the First Amendment, thereby barring Gersh's suit.<sup>14</sup>

This article argues that the First Amendment does not prevent the States from enforcing well-crafted civil and criminal anti-doxing statutes. Part II of this article proposes two anti-doxing statutes—one civil, one criminal—that would likely survive a First Amendment challenge. Part III explains how existing precedent does not prevent the government from regulating and punishing doxing. Part IV addresses likely counter-arguments to this article.

"In the old days, Andrew Anglin would have burned a cross on [Tanya Gersh's] front lawn," said Richard Cohen, the President of the

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7. See Sherry Spencer, *Does Love Really Live Here?*, MEDIUM (Dec. 15, 2016). Since this article was authored, Medium has removed Ms. Spencer's article because it violated the blogging website's terms and conditions.

8. O'Brien, *supra* note 2.

9. *Id.*

10. *Id.*

11. Julia M. MacAllister, *The Doxing Dilemma: Seeking A Remedy for the Malignant Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2453 (2017).

12. Svana M. Calabro, *From the Message Board to the Front Door: Addressing the Offline Consequences of Race-and Gender-Based Doxing and Swatting*, 51 SUFFOLK U. L. REV. 55, 58 (2018) (noting that the implications of a dox are well-known in certain corners of the internet).

13. See Complaint at 61-62, *Gersh v. Anglin*, No. 9:17-CV-00050-DLC-JCL (D. Mont. Apr. 18, 2017).

14. Kristine Phillips, *Founder of Neo-Nazi Site Daily Stormer Argues "Troll Storm" Against Jewish Woman is Free Speech*, WASH. POST (Dec. 3, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/12/03/neo-nazi-argues-that-troll-storm-against-jewish-woman-is-free-speech> [https://perma.cc/9UZC-4CG4].

Southern Poverty Law Center.<sup>15</sup> Today, however, neo-Nazis can threaten, degrade, and harass racial and ethnic minorities from the comfort of their own homes. Freedom of speech is undoubtedly a bedrock principle in our constitutional democracy; but it should not be interpreted in a way that protects speech that causes severe emotional harms, undermines equality, and decreases meaningful public discourse.<sup>16</sup>

## II. PROPOSED ANTI-DOXING STATUTES

“Doxing is a prevalent problem that does not yet occupy an explicit space within criminal statutes or tort law.”<sup>17</sup> This section proposes two anti-doxing statutes—one criminal, one civil—that would likely survive a First Amendment challenge.

### A. CRIMINAL PROHIBITION OF DOXING

(a) *It is unlawful to post another person’s personally identifying information online with the intention that others will use that information to harass the identified person, and the identified person is actually harassed.*

(b) *It is unlawful to post another person’s personally identifying information online with the intention that others will use that information to harass the identified person because of their race, religion, sex, or national origin, and the identified personal is actually harassed.*

(c) *For the purposes of this section,*

(1) *“Harass” is defined as any activity that causes the targeted person to suffer severe emotional distress.*

(2) *“Personally identifying information” includes only such information that would allow the identified person to be located, contacted, and harassed, including the person’s:*

(A) *home address;*

(B) *work address;*

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15. Jenny Jarvie & Jaweed Kaleem, *Neo-Nazi Website Unleashed Internet Trolls Against a Jewish Woman, Lawsuit Says*, L.A. TIMES (Apr. 18, 2017, 6:13 PM), <http://www.latimes.com/nation/la-na-neonazi-website-lawsuit-20170418-story.html> [https://perma.cc/J82R-2SAL].

16. See Mary Ellen Gale, *Reimagining the First Amendment*, 65 ST. JOHN’S L. REV. 119, 184 (1991) (arguing that the harms of “racism, sexism, and similar prejudices” are not taken seriously enough under existing free speech jurisprudence, and that the government should be able to “regulate speech to combat the harms done [by] speakers [who] perpetuate prejudice and repression,” such as “silencing the voices of targeted victims, undermining equality, and decreasing both individual liberty and democratic dialogue”).

17. Victoria McIntyre, *“Do(x) You Really Want to Hurt Me?”: Adapting IIED as a Solution to Doxing by Reshaping Intent*, 19 TUL. J. TECH. & INTELL. PROP. 111, 133 (2016).

- (C) *phone number;*
- (D) *email address; or*
- (E) *any other information that would allow the identified person to be located, contacted, and harassed.*

(d) *This section does not apply in any circumstance in which its application would substantially chill protected First Amendment activity. Whether applying this statute would substantially chill protected First Amendment activity is an issue for the trial judge.*

(e) *Any person who violates subsection (a) is subject to a maximum penalty of 30 days in jail, a fine of up to \$1,000, or both.*

(f) *Any person who violates subsection (b) is subject to a maximum penalty of 90 days in jail, a fine of up to \$5,000, or both.*<sup>18</sup>

#### B. CIVIL REMEDY FOR THE ONLINE POSTING OF PERSONALLY IDENTIFYING INFORMATION

- (a) *In a civil matter, the defendant shall be liable to the plaintiff if*
- (1) *the defendant posted the plaintiff's personally identifying information on the internet with the intention that others would use that information to harass the identified person, and*
  - (2) *the plaintiff suffered emotional or economic harm due to the defendant's posting.*
- (b) *For the purposes of this section, it is presumed that the defendant acted with the requisite mens rea if*
- (1) *the plaintiff is a member of a protected class, and*
  - (2) *the defendant posted the plaintiff's personally identifying information on a website that espouses the belief that one race is superior to others.*
- (c) *For the purposes of this section,*
- (1) *"Harass" is defined as any activity that causes the targeted person to suffer severe emotional distress.*
  - (2) *"Personally identifying information" includes only such information that would allow the identified person to be located, contacted, and harassed, including the person's:*
    - (A) *home address;*
    - (B) *work address;*
    - (C) *phone number;*
    - (D) *email address; or*
    - (E) *any other information that would allow the identified person to be located, contacted, and harassed.*
- (d) *This section does not apply in any circumstance in which its application would substantially chill protected First Amendment activity.*

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18. Imposing heightened punishment for racially motivated crimes is a constitutional practice. *Wisconsin v. Mitchell*, 508 U.S. 476, 484–90 (1993).

*Whether applying this statute would substantially chill protected First Amendment activity is an issue for the trial judge.*

C. THESE STATUTES WOULD LIKELY SURVIVE A FIRST AMENDMENT CHALLENGE

These statutes contain three important themes: (1) heightened mens rea requirements; (2) specific definitions sections; and (3) exception clauses. The heightened mens rea requirements ensure the statutes cover only “true threats,” which receive no First Amendment protection. The definitions sections ensure these statutes punish only those who cause significant harm. And the exceptions clauses decrease the likelihood of a successful facial challenge.

1. *The Mens Rea Requirements*

The First Amendment does not protect “true threats.”<sup>19</sup> True threats are “statements 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.”<sup>20</sup> These statutes’ mens rea requirements should allow them to fall into the First Amendment’s true-threats exception.<sup>21</sup> In other words, these statutes, by their terms, only punish defendants that post personally identifying information “with the *intention* that others will use that information to harass the identified person.” This is meant to be a difficult standard to meet. And the “with the intention” requirement ensures that the statutes will cover only the “narrow class of true threats . . . [that] may be constitutionally proscribed.”<sup>22</sup> By targeting only this narrow class of harmful speech, these statutes prevent emotional distress without unduly hampering public discourse.

2. *The Definition Sections*

These statutes prohibit doxing only if *harassment* follows. And the statutes further define “harass[ment]” as “any activity that causes

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19. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part and dissenting in part); *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

20. *Black*, 538 U.S. at 359 (emphasis added).

21. Whether doxing amounts to a true threat depends on context. Publishing the names and addresses of abortion providers on WANTED-style posters, for example, amounts to a true threat. *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002). Posting a Jewish person’s personal information on a neo-Nazi website should be considered a true threat. *See Complaint*, *supra* note 13. The touchstone is whether “a reasonable observer would construe [the communication] as a true threat to another,” *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012), and I believe any reasonable person would consider what happened to Tanya Gersh to be a true threat.

22. *See Elonis*, 135 S. Ct. at 2028 (Thomas, J., dissenting).

the targeted person to suffer severe emotional distress.” This language ensures the statutes proscribe activity only if it causes real-world harm. In *Virginia v. Black*,<sup>23</sup> the Court noted that the true-threats exception “protects individuals from the fear of violence” and “from the possibility that the threatened violence will occur.”<sup>24</sup> By banning only those internet postings that were intended to produce and actually produce emotional distress, these statutes fall within the boundaries of the First Amendment.<sup>25</sup>

These statutes also only prohibit doxers from posting “personally identifying information” that would “allow the identified person to be located, contacted, and harassed.” This language ensures that the statutes will apply only when a person’s “substantial privacy interests are being invaded in an . . . intolerable manner.”<sup>26</sup> By limiting the definition of personally identifying information in this way, the statute will likely be triggered only when the doxer infringes on the identified person’s protected privacy expectations.<sup>27</sup>

### 3. *The Exceptions Clause*

Each statute also contains an exception clause, which states that the statute “does not apply in any circumstance [that] would substantially chill protected First Amendment activity.” If this section were not added, the statute would likely be susceptible to a facial challenge.<sup>28</sup> But with this section, the courts are free to set aside the statute when stronger First Amendment values take precedence.

## III. EXISTING FIRST AMENDMENT PRECEDENT ALLOWS THE GOVERNMENT TO REGULATE DOXING

This section proceeds in two parts. Part A argues that existing precedent allows the government to regulate doxing, because doxing is—almost always—between private parties on matters of private con-

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23. 538 U.S. 343 (2003).

24. *Id.* at 360 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)).

25. *See id.* at 362–63 (acknowledging that the States can ban acts done with “the intent to intimidate”); *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring) (noting that speech that “cause[s] serious emotional stress” or may “lead to a violent confrontation” is not protected by the First Amendment).

26. *Cohen v. California*, 403 U.S. 15, 21 (1971); *see also State v. Burkert*, 174 A.3d 987, 1001–03 (N.J. 2017).

27. *See, e.g., Burkert*, 174 A.3d at 998–99 (illustrating types of harassing conduct that receive no First Amendment protection); *id.* at 1002 (reading New Jersey’s anti-harassment statute narrowly to “save it from constitutional infirmity” under the First Amendment).

28. *Cf. Schad v. Borough of Mount Ephriam*, 452 U.S. 61, 66 (1981) (allowing the defendants to challenge an ordinance by “rely[ing] on the [potential] impact of the ordinance on the expressive activities of others . . .”).

cern. Part B argues that anti-doxing legislation is consistent with the purposes underlying the First Amendment.

A. *COX BROADCASTING CORP. v. COHN* AND ITS PROGENY ALLOW STATE LEGISLATURES TO ENACT WELL-CRAFTED ANTI-DOXING PROHIBITIONS

The United States Supreme Court has consistently held that members of the press cannot be held liable for accurately reporting publicly available information.<sup>29</sup> In *Smith v. Daily Mail*,<sup>30</sup> for example, the Court held that the government could not constitutionally punish a newspaper for publishing “truthful information about a matter of public significance” unless it had a “state interest of the highest order.”<sup>31</sup> Before this standard will apply, however, two things must be true: (1) the defendant must be a member of “the press,” and (2) the information must be of public concern.<sup>32</sup>

The above-mentioned statutes do not offend this principle. In the overwhelming majority of cases, these statutes will not target members of the press, and the published information will not be of public concern. And the courts have consistently held that a defendant can be held liable for publicizing “highly offensive” information that is “not of legitimate concern to the public.”<sup>33</sup> The typical case will look like Tanya Gersh’s case, as described in this article’s Introduction. It is difficult to imagine a case in which a person’s contact information would be of public importance. And if an unusual case arises—where the doxer is a press member and the posted information is of public concern—the statutes’ exception clause would allow the court to set the statute aside.

B. ANTI-DOXING LEGISLATION IS CONSISTENT WITH THE PURPOSES UNDERLYING THE FREE SPEECH CLAUSE.

These statutes, moreover, would not offend any of the purposes underlying the Free Speech Clause. At its core, the First Amendment is meant to ensure “uninhibited, robust, and wide-open”<sup>34</sup> debate on

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29. See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

30. 443 U.S. 97 (1979).

31. *Smith v. Daily Mail*, 443 U.S. 97, 103 (1979).

32. *Fla. Star*, 491 U.S. at 533; *State v. Brown*, 85 P.3d 109, 111 (Ariz. Ct. App. 2004) (holding that speech between ex-lovers was not of sufficient public concern to warrant First Amendment protection); see GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 1150–52 (6th ed. 2009).

33. See RESTATEMENT (SECOND) OF TORTS § 652(D) (AM. LAW INST. 1977).

34. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

matters that are “of public concern.”<sup>35</sup> Consistent with that tradition, these statutes do not allow the government to “insulate itself from . . . critical views,”<sup>36</sup> “drive certain ideas or viewpoints from the marketplace,”<sup>37</sup> or suppress matters that are “of public importance.”<sup>38</sup> The civil statute does no more than provide private parties a private remedy for private harms. And the criminal statute applies only when a person discloses another person’s contact information with the intention that others will harm the named individual, and when harm actually follows. These statutes are narrowly tailored to regulate only a narrow class of speech that brings real-world harm and has very little, if any, social value.

These statutes are also necessary because the harms of doxing cannot be cured through counter-speech.<sup>39</sup> A troll storm is like quicksand: the more you fight it, the worse it becomes. A troll isn’t interested in what you have to say; he is interested in causing you mental pain and anguish. These statutes do not inhibit public discourse; they prevent participants in public discourse from being driven out of the marketplace of ideas by online harassers.

#### IV. COUNTER-ARGUMENTS CONSIDERED.

##### A. AREN’T THERE ALREADY FEDERAL STATUTES THAT CAN ADDRESS DOXING?

*Response:* No, not really. There are currently two federal statutes that could potentially address the problem of doxing: the Interstate Communications Statute<sup>40</sup> and the Interstate Stalking Statute.<sup>41</sup> These statutes, however, are all woefully inadequate to prevent doxing because their terms are underinclusive and they are rarely enforced.<sup>42</sup>

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35. *Connick v. Myers*, 461 U.S. 138, 145 (1983); see generally James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–98 (2011); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 626–46 (1990).

36. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 889 (2d ed. 1988).

37. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

38. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968).

39. Tribe, *supra* note 36, at 889.

40. 18 U.S.C. § 875 (2018).

41. 18 U.S.C. § 2261A (2018).

42. See generally MacAllister, *supra* note 11, at 2466–75; see also *infra* notes 44–57 and accompanying text.

### 1. *The Interstate Communications Statute*

Section 875(c) of the Interstate Communications Statute criminalizes the online transmission of “any communication containing any threat to kidnap . . . or . . . injure [a] person . . . .”<sup>43</sup> By its terms, this statute is far too underinclusive to prevent doxing. The statute only criminalizes explicit threats to kidnap or injure a person. But in many instances of doxing, an actor may never convey an explicit threat to kidnap or injure, but the victim could still have good reason to be terrified.<sup>44</sup> A dox may contain nothing more than the target’s name and a few pieces of contact information. But in certain contexts, that is more than enough to lead to incidents of harassment and true threats.

In January 2019, for example, several Covington Catholic High School students were ensnared in what was described as a “social media nightmare.”<sup>45</sup> These students—who were unfortunately wearing “Make America Great Again” hats—were caught in a short video that appeared to show them harassing and bullying a Native American man participating in D.C.’s Indigenous Peoples March.<sup>46</sup> It was later revealed, however, that this video was selectively edited and that the high school students were actually the ones being harassed.<sup>47</sup> “You all are a bunch of Donald Trump incest babies,” said one of the Native American protesters.<sup>48</sup> The protester then asked if there were any black students in the crowd, and when a black student stepped forward, the protestor called that student the “n-word.”<sup>49</sup>

After the full video of the encounter surfaced (about three days later), several media outlets were forced to issue retractions, corrections, and apologies.<sup>50</sup> Before the record was corrected, however, this

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43. 18 U.S.C. § 875(c) (2018).

44. MacAllister, *supra* note 11, at 2470. Additionally, this statute is more symbolic than enforceable, as many law enforcement officers are “simply unaware the statute exists.” *Id.* at 2472.

45. Valerie Richardson, *Covington Catholic Teens Sue Elizabeth Warren, Media Figures*, WASH. TIMES (Aug. 4, 2019), <https://www.washingtontimes.com/news/2019/aug/4/covington-catholic-teens-sue-elizabeth-warren-magg/> [<https://perma.cc/ZCA6-JYWZ>].

46. Sarah Mervosh, *Viral Video Shows Boys in ‘Make America Great Again’ Hats Surrounding Native Elder*, N.Y. TIMES (Jan. 19, 2019), <https://www.nytimes.com/2019/01/19/us/covington-catholic-high-school-nathan-phillips.html> [<https://perma.cc/2FDJ-XMKP>].

47. Michael E. Miller, *Viral Standoff Between a Tribal Elder and a High Schooler is More Complicated Than it First Seemed*, WASH. POST. (Jan. 22, 2019), [https://www.washingtonpost.com/local/social-issues/picture-of-the-conflict-on-the-mall-comes-into-clearer-focus/2019/01/20/c078f092-1ceb-11e9-9145-3f74070bbdb9\\_story.html](https://www.washingtonpost.com/local/social-issues/picture-of-the-conflict-on-the-mall-comes-into-clearer-focus/2019/01/20/c078f092-1ceb-11e9-9145-3f74070bbdb9_story.html) [<https://perma.cc/AJ59-YZHB>].

48. *Id.*

49. *Id.*

50. See, e.g., *id.*; Julie Irwin Zimmerman, *I Failed the Covington Catholic Test*, THE ATLANTIC (Jan. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/julie-irwin-zimmerman-i-failed-covington-catholic-test/580897/> [<https://perma.cc/EN3S-AXYK>].

video went viral, and these teens were doxed and subsequently threatened with violence as part of what has been described as “the most sensational Twitter attack in the history of the internet.”<sup>51</sup>

These teens should have the ability to hold their doxers accountable. These doxers went out of their way to gather a group of teenagers’ contact information and posted that information on the internet knowing full well that it would lead to harassment and potentially violence. And although doxing may be “therapeutic or cathartic” for these trolls, their activity is surely not protected by the First Amendment if it “cause[s] serious emotional stress” or “may lead to a violent confrontation.”<sup>52</sup> This sort of activity is not—or at least it should not be—protected by the First Amendment, as it leads to real-world harm and contributes little, if anything, to public discourse.<sup>53</sup>

## 2. *The Interstate Stalking Statute*

Section 2261A(2) of the Interstate Stalking Statute prohibits using any “interactive computer service” in a way that places a person in reasonable fear of death or serious bodily injury.<sup>54</sup> This law, like the Interstate Communications Statute, could cover some instances of doxing. But this law is rarely enforced and it serves only as a hollow protection from online harassment. “We’re in the business of worrying about murder and terrorism,” one federal officer said, “we don’t enforce cyberstalking laws.”<sup>55</sup> Over three million people are stalked over the internet each year; yet only three people are charged under § 2261A.<sup>56</sup> This lack of federal enforcement means that the States must step in if doxing is to be reduced. The statutes proposed in this article—if adopted and enforced by the States—would help “fill the gap,” so to speak.

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51. Deborah Yetter, *CovCath Dad Supports Kentucky Doxing Bill After ‘Sensational Twitter Attack’ on Son*, USA TODAY (Mar. 6, 2019), <https://www.msn.com/en-us/news/us/covcath-dad-supports-kentucky-doxing-bill-after-sensational-twitter-attack-on-son/ar-BBUt3nG> [<https://perma.cc/R9HP-Y94Y>].

52. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part and dissenting in part); see Calabro, *supra* note 12, at 75 (noting that doxing “often lead[s] to devastating consequences in real life”).

53. See *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

54. 18 U.S.C. §§ 2261A(2)(A)–(B) (2018).

55. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 85 (2014).

56. MacAllister, *supra* note 11, at 2474–75.

B. COUNTER-ARGUMENT: THE FIRST AMENDMENT ALLOWS  
RESTRICTIONS ON ONE-TO-ONE HARASSING SPEECH, BUT NOT ONE-  
TO-MANY HARASSING SPEECH

*Response:* This section is meant to rebut Eugene Volokh’s position in *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking.”*<sup>57</sup> There, Volokh argues the government can legitimately regulate harassing “one-to-one” speech (*i.e.*, speech made “to a particular person”), but that the First Amendment prevents the government from regulating harassing “one-to-many” speech (*i.e.*, speech “about a person”).<sup>58</sup> In Volokh’s view, for example, the State could legitimately punish someone for calling an ex-spouse at three o’clock in the morning and yelling derogatory words into the phone; but the State could *not* punish that person for publishing derogatory comments about an ex-spouse on their blog. When the State punishes one-to-one speech, Volokh argues, it only slightly interferes with public discourse, because a one-to-one statement is highly unlikely to persuade or inform the public at large.<sup>59</sup> But one-to-many speech, Volokh continues, should receive greater First Amendment protection because it has the capability to reach and inform many “potentially willing listeners.”<sup>60</sup>

I reject this rigid dichotomy. Speech should not receive full First Amendment protection just because it is communicated to more than one person. In fact, some speech is regulated precisely because of its capacity to incite mob violence.<sup>61</sup> Speech that encourages or facilitates harassment should not receive constitutional protection just because it is communicated to the masses—the opposite is often true. If certain speech has the potential to cause serious emotional (and perhaps physical) harm, yet adds little (if anything) to public discourse, the government can legitimately regulate that speech, regardless of the potential number of listeners.<sup>62</sup> As Justice Alito recently put it: Although “[i]t is true that a communication containing a threat may

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57. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”*, 107 Nw. L. REV. 731 (2013).

58. *Id.* at 738–39 (emphasis added).

59. *Id.* at 742–43.

60. *Id.* at 743.

61. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Feiner v. New York*, 340 U.S. 315 (1951); *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002).

62. See *United States v. Sutcliffe*, 505 F.3d 944, 960–61 (9th Cir. 2007) (holding that the First Amendment does not protect true threats posted online); *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 50 Cal. Rptr. 3d 27, 39 (Cal. Ct. App. 2006) (finding that a website maintained by an organization opposed to animal testing was not protected under the First Amendment because the site contained information about a biopharmaceutical company’s employees, including their home addresses).

include other statements that have value and are entitled to protection,” that coincidence “does not justify constitutional protection for the threat itself.”<sup>63</sup>

C. THE FIRST AMENDMENT OFTEN BARS CIVIL LIABILITY WHEN THE PLAINTIFF IS A PUBLIC FIGURE—DOES THAT MEAN PUBLIC FIGURES CANNOT SUE DOXERS?

*Response:* Perhaps in some circumstances. The statutes proposed in this article each contain an exception clause, which states that the statutes “do[] not apply in . . . circumstance[s] [that] would substantially chill protected First Amendment activity.” This acknowledges that there may be instances where the statutes must give way to overriding First Amendment values. Consider the following hypothetical post:

*Yesterday, Senator Mitch McConnell, yet again, prevented common-sense gun-control legislation from reaching the Senate floor. Voice your disagreement with Senator McConnell’s do-nothing attitude by sending your letters to his private home: [private address]. Or call him directly at [private phone number].*

Even if all the elements of the statutes were met in this case—*i.e.*, the person made this post with the intention that people would harass Senator McConnell, and Senator McConnell actually suffered severe emotional distress from harassment—the First Amendment would likely bar any criminal or civil action because of the need to publicly criticize governmental officials.<sup>64</sup> But in the vast majority of circumstances, the First Amendment will not be implicated.<sup>65</sup>

V. CONCLUSION

“Despite the incredible injuries malicious doxing causes, few legal remedies for subjects exist.”<sup>66</sup> This article proposes two anti-doxing statutes that would provide doxing victims with legal recourse. The First Amendment demands that these statutes have stringent requirements, and they will not apply in most cases of online harass-

63. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part and dissenting in part).

64. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (noting that the ability to criticize the government is “the central meaning of the First Amendment”); *see also* Alexander J. Lindvall, *Frankly, My Dear, I Don’t Give a \*Darn\*—An Argument Against Censoring Broadcast Media*, 7 *ARIZ. ST. SPORTS & ENT. L.J.* 153, 160–61 (2017).

65. *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985) (holding that the First Amendment is not implicated in private tort suits on matters of private concern).

66. MacAllister, *supra* note 11, at 2466.

ment. But as Tanya Gersh's case illustrates, serious physical and emotional harms can stem from seemingly innocuous postings of personal information in certain contexts. If these proposed statutes are adopted (and enforced), victims like Tanya Gersh will have the ability to hold their harassers accountable.

