

**CYBERSTALKING: HOLDING PERPETRATORS ACCOUNTABLE  
AND PROVIDING RELIEF FOR VICTIMS**

Kara Powell\*

Cite as: Kara Powell, *Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims*, 25 RICH. J.L. & TECH., no. 3, 2019.

---

\* J.D. Candidate, 2020, University of Richmond School of Law. B.A., 2017, North Carolina State University. The author would like to acknowledge Professor Margaret E. Ivey of the University of Richmond School of Law for her thoughtful comments and guidance. Additionally, the author would like to thank the editors and staff of the Richmond Journal of Law and Technology for their efforts in editing this article.

## I. INTRODUCTION

[1] After deciding to end the relationship, Tina carefully broke all ties with her ex-boyfriend.<sup>1</sup> Then, the first blog post went live.<sup>2</sup> The post was in Tina's name, discussing her background as a business school graduate who worked in commodities at a bank and then transferred to real estate.<sup>3</sup> The post took a dark turn as it went on to describe Tina as an escort and provided her phone number and address.<sup>4</sup> As more blog posts went live, more people began harassing Tina by looking for an escort.<sup>5</sup> Despite such harassment, Tina was looking for a new job.<sup>6</sup> She received a few offers, then radio silence.<sup>7</sup> She knew the employers were googling her, and she knew exactly what they were finding.<sup>8</sup> Tina's story reveals how cyberstalking can affect one's personal life, mental health, job prospects, and financial situation.

[2] Cyberstalking involves the use of technology to make an individual fearful or concerned about his or her safety.<sup>9</sup> Cyberstalkers generally employ the Internet through e-mails, blogs, instant messages, video

---

<sup>1</sup> See Sara Stewart, *How Cyberstalking Can Ruin Women's Lives*, N.Y. POST (Apr. 18, 2018, 7:25 PM), <https://nypost.com/2018/04/18/how-cyberstalking-nearly-ruined-this-womans-life/> [<https://perma.cc/PB39-6JKJ>] ("In 2012, Tina finally broke up with her boyfriend . . .").

<sup>2</sup> See *id.* (stating that Tina's ex-boyfriend created a blog in her name).

<sup>3</sup> See *id.*

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

<sup>5</sup> See *id.* ("He was encouraging people to harass me, to contact me, to hire me as an escort.").

<sup>6</sup> See Stewart, *supra* note 1 (Tina, who was looking for a job in finance at the time . . .").

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See Sameer Hinduja, *Cyberstalking*, CYBERBULLYING RES. CTR. (Mar. 21, 2018), <https://cyberbullying.org/cyberstalking> [<https://perma.cc/4JZB-J36V>].

messages, chat rooms, social networks, or other websites, which intimidate, harass, and create fear in victims.<sup>10</sup> Cyberstalking is harassing in nature and may include revealing private information; sending threatening messages through text messages or social media; calling or messaging repeatedly and constantly; posting derogatory posts on social media; and sending unwanted and inappropriate photographs or videos.<sup>11</sup> There are infinite methods and forms of communication and surveillance a cyberstalker can use. Also, there is no typical or average method used in the context of cyberstalking. This is one reason why it is so challenging to hold perpetrators accountable. Statutes and civil remedies must be very broad to cover all the ways in which a cyberstalker can act.

[3] Furthermore, cyberstalkers can easily pursue victims because the Internet provides a platform for instant harassment and ubiquitous dissemination, allowing an infinite number of people to view content.<sup>12</sup> Posts can be stored forever, which magnifies the effect of cyberstalking on victims.<sup>13</sup> The Internet also provides anonymity.<sup>14</sup> The ability to remain anonymous gives the perpetrator an advantage because the victim may not

---

<sup>10</sup> See Cassie Cox, Comment, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws*, 54 JURIMETRICS J. 277, 279 (2014) (citing Bradford W. Reynolds et al., *Stalking in the Twilight Zone: Extent of Cyberstalking Victimization and Offending Among College Students*, 33 DEVIANT BEHAV. 1, 1 (2012)).

<sup>11</sup> See U.S. DEP'T OF JUSTICE, REP. TO CONGRESS: STALKING AND DOMESTIC VIOLENCE 1 (2001) [hereinafter STALKING AND DOMESTIC VIOLENCE REPORT]; A. Meena Seralathan, Note, *Making the Time Fit the Crime: Clearly Defining Online Harassment Crimes and Providing Incentives for Investigating Online Threats in the Digital Age*, 42 BROOKLYN J. INT'L L. 425, 433 (2016).

<sup>12</sup> See Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 128–32 (2007).

<sup>13</sup> See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 4 (2014).

<sup>14</sup> See Goodno, *supra* note 12, at 130–31.

know who is behind the cyberstalking.<sup>15</sup> This is a problem because if law enforcement cannot identify a perpetrator, then they cannot charge a crime.<sup>16</sup> Even if the victim does know who the perpetrator is, the victim still lives in fear of whether the cyberstalker is in the next cubicle, the next house, the next state, or another country.<sup>17</sup> Additionally, perpetrators can also use the Internet to induce third parties to harass a victim. For example, Tina's ex-boyfriend used the Internet to encourage numerous people to contact Tina looking for an escort.<sup>18</sup> Her ex-boyfriend began the cyberstalking, but it was third parties who amplified the harassment Tina endured.<sup>19</sup>

[4] Modern technology provides cyberstalkers with innovative methods to surveil, harass, and stalk their victims.<sup>20</sup> Such tools are widely available and relatively inexpensive.<sup>21</sup> For example, cameras invisible to the naked eye can be installed in common household items, such as air filters, smoke detectors, and clocks.<sup>22</sup> Spyware can be installed on a cell phone, tablet, or computer, allowing a perpetrator to see everything on the victim's screen,

---

<sup>15</sup> See ALLISON M. SMITH, CONG. RESEARCH SERV., RL34651, PROTECTION OF CHILDREN ONLINE: FEDERAL AND STATE LAWS ADDRESSING CYBERSTALKING, CYBERHARASSMENT, AND CYBERBULLYING 5 (2009).

<sup>16</sup> See Goodno, *supra* note 12, at 129–31.

<sup>17</sup> See SMITH, *supra* note 15, at 5.

<sup>18</sup> See Stewart, *supra* note 1.

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

<sup>20</sup> See NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 790 (West Academic Publishing ed., 4th ed. 2013); Guilherme Roschke, *Interpartner Surveillance: Recent Developments in the Legal Response to Electronic Privacy Invasions*, ABA, [https://www.americanbar.org/content/dam/aba/publishing/cdv\\_newsletter/surveillance.athcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/cdv_newsletter/surveillance.athcheckdam.pdf) [<https://perma.cc/U2DG-5BJV>].

<sup>21</sup> See LEMON, *supra* note 20, at 790.

<sup>22</sup> See *id.* at 791.

including e-mails, text messages, and passwords.<sup>23</sup> Keystroke recording software gives a perpetrator the ability to see every keystroke on a computer, such as entire passwords, bank account information, and websites visited.<sup>24</sup> Some software can even send numerous text messages at specific time intervals so the cyberstalker does not need to be physically present at a phone or computer.<sup>25</sup>

[5] Such technology is dangerous to the victim because the perpetrator can very easily surveil and harass the victim with this sophisticated technology. The victim's personal autonomy and privacy is diminished.<sup>26</sup> For instance, if a victim is attempting to reach out to resources and receive help, his or her ability to do so is hampered because the cyberstalker will discover the victim's actions through cameras, spyware, keystroke recording technology, and other such devices. The perpetrator may respond by lashing out, therefore making the situation more dangerous for the victim.

[6] According to a Pew Research Study conducted in 2014, forty percent of Internet users had experienced online harassment.<sup>27</sup> About thirty-three percent felt their reputation had been damaged by the experience.<sup>28</sup>

---

<sup>23</sup> See *id.* at 791–92.

<sup>24</sup> See *id.* at 792.

<sup>25</sup> See STALKING AND DOMESTIC VIOLENCE REPORT, *supra* note 11, at 2.

<sup>26</sup> See Claire Kelleher-Smith, *Surveillance As Control: Legally Recognized Harms of Intimate Partner Spying* (2011) (on file with the author), in NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 935 (West Academic Publishing ed., 4th ed. 2013).

<sup>27</sup> See Maeve Duggan, *Online Harassment*, PEW RES. CTR. 12 (Oct. 22, 2014), <http://www.pewinternet.org/2014/10/22/online-harassment/> [<https://perma.cc/BJ92-FENL>]. “Cyberharassment” and “cyberstalking” can be considered synonyms, but generally cyberstalking involves repeated incidents of cyberharassment against a specific individual. See Sarah Jameson, Comment, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMM'LAW CONSPECTUS 231, 236 (2008).

<sup>28</sup> See *id.* at 7.

Additionally, social media was the most common way in which victims experience online harassment.<sup>29</sup>

[7] Generally, holding wrong-doers accountable and providing relief for victims is offered through both criminal statutes and civil remedies. The Federal Interstate Stalking Punishment and Prevention Act<sup>30</sup> (section 2261A(2)) and the Interstate Communications Act<sup>31</sup> (section 875(c)) are the two federal criminal statutes that address cyberstalking. Intentional infliction of emotional distress (IIED) and defamation are the two main civil remedies available to victims. However, these civil remedies are rarely used because they are ineffective at providing relief for the majority of cyberstalking victims.<sup>32</sup>

[8] In response to both the ineffective federal criminal cyberstalking statutes and civil claims to hold perpetrators accountable and provide relief to cyberstalking victims, this comment proposes that a private right of action should be added to section 2261A(2).

[9] Part II explores the effects of cyberstalking on victims and the relationship between cyberstalking, intimate partner violence, and off-line stalking.<sup>33</sup> Part III reviews the two primary federal criminal cyberstalking statutes and discusses the ineffectiveness of these statutes to hold the majority of cyberstalking perpetrators accountable. Part IV analyzes the civil claims applicable in the context of cyberstalking and argues their overall scarcity and ineffectiveness in cyberstalking cases. Part V proposes

---

<sup>29</sup> *See id.* at 23.

<sup>30</sup> *See* 18 U.S.C. § 2261A(2) (2018).

<sup>31</sup> *See* 18 U.S.C. § 875(c) (2012).

<sup>32</sup> *See* discussion *infra* Part IV.

<sup>33</sup> “Off-line stalking” refers to stalking that occurs in the physical world, and not through the Internet or other technology. *See generally* Cristina Cavezza & Troy E. McEwan, *Cyberstalking Versus Off-line Stalking in a Forensic Sample*, 20 *PSYCHOL., CRIME & L.* 955 (2014) (providing the general concept of off-line stalking).

Congress add a private right of action to section 2261A(2) to more effectively hold cyberstalking perpetrators accountable and provide relief for victims.

## II. EFFECTS OF CYBERSTALKING ON VICTIMS, AND THE RELATIONSHIP BETWEEN CYBERSTALKING, INTIMATE PARTNER VIOLENCE, AND OFF-LINE STALKING

[10] Victims of cyberstalking can be affected emotionally, mentally, physically, and financially. Since cyberstalking can take so many different forms, the effects vary greatly among victims. Additionally, every individual victim is affected differently by a particular situation.

[11] There are many overlapping characteristics between tactics employed by cyberstalkers and tactics employed by domestic violence and intimate partner violence perpetrators. Cyberstalkers use intimidation, coercion, threats, and emotional abuse, all of which are part of the domestic and sexual violence power and control wheel.<sup>34</sup> Perpetrators also regularly utilize isolation as a control tactic because victims may become so emotionally distressed and fearful that they begin to hide in their homes and distance themselves from friends, family, and the outside world.<sup>35</sup> Victims also may experience disturbed sleep, anxiety, panic attacks, depression, hypervigilance, post-traumatic stress disorder, embarrassment, frustration, and guilt.<sup>36</sup>

[12] Additionally, sometimes cyberstalking and off-line stalking can overlap or transform from one type to the other. Both cyberstalkers and off-line stalkers are generally “motivated by a desire to exert control over their

---

<sup>34</sup> See *Power and Control Wheel*, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, <http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf> [<https://perma.cc/6ALW-E43R>].

<sup>35</sup> See CITRON, *supra* note 13, at 6.

<sup>36</sup> See *Impact of Stalking on Victims*, STALKING RISK PROFILE (2011), <https://www.stalkingriskprofile.com/victim-support/impact-of-stalking-on-victims> [<https://perma.cc/KST9-HGLG>].

victims.”<sup>37</sup> An off-line stalker may also employ cyberstalking in order to more thoroughly surveil and harass the victim. Often times, cyberstalking has even resulted in off-line stalking or sexual violence.<sup>38</sup> In 2014, a National Network to End Domestic Violence survey found that seventy-nine percent of victims reported their domestic violence abusers monitored their social media accounts, and seventy-four percent of victims reported their abusers monitored their text messages.<sup>39</sup> As a possible solution to this substantial problem of cyberstalking, criminal law has the potential to play an important role in cyberstalking cases.<sup>40</sup>

### III. FEDERAL CRIMINAL CYBERSTALKING STATUTES

[13] Both section 2261A(2) and section 875(c) are federal criminal statutes used to prosecute cyberstalking cases.<sup>41</sup> Section 2261A(2) criminalizes a broader range of cyberstalking behaviors and activities, while section 875(c) only addresses cyberstalking with an intent to kidnap or

---

<sup>37</sup> See STALKING AND DOMESTIC VIOLENCE REPORT, *supra* note 11, at 2. See generally *Power and Control Wheel*, *supra* note 34 (describing the cycle of control exerted by stalking perpetrators on their victims).

<sup>38</sup> See CITRON, *supra* note 13, at 5.

<sup>39</sup> See *A Glimpse from the Field: How Abusers Are Misusing Technology*, NAT’L NETWORK TO END DOMESTIC VIOLENCE 2 (2014), [https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV\\_Glimpse+From+the+Field+-+2014.pdf](https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV_Glimpse+From+the+Field+-+2014.pdf) [<https://perma.cc/9UNQ-K2TN>].

<sup>40</sup> See CITRON, *supra* note 13, at 123.

<sup>41</sup> See Executive Office of United States Attorneys, *Cyber Misbehavior*, 64 DEP’T. OF JUSTICE J. OF FED. L. & PRAC. 1, 7–8 (May 2016), <https://www.justice.gov/usao/file/851856/download> [<https://perma.cc/FG6A-2Z54>]. The “Federal Telephone Harassment Act,” 47 U.S.C. § 223, is not within the scope of this paper because it does not cover “interactive computer service,” 47 U.S.C. § 223(h)(B), and thus does not include communications through the Internet. Therefore, the statute is not helpful to cyberstalking victims because the communications and surveillance take place through the Internet.

injure an individual. Both statutes, however, are ultimately ineffective at combatting a broad range of cyberstalking cases.

#### A. Section 2261A(2)

[14] Section 2261A(2) was originally passed as part of the Violence Against Women Act in 1994.<sup>42</sup> It was amended in 2006 to include cyberstalking<sup>43</sup> and again in 2013 to broaden the scope of cyberstalking.<sup>44</sup> The 2013 amendment expanded coverage under the statute to include cyberstalkers who were located in the same state as victims.<sup>45</sup> As a result, the amendment increased the number of perpetrators who could be charged and found guilty under the statute.

[15] The statute makes it a crime for one “with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, . . .” to use an “interactive computer service or electronic communication service or electronic communication[s] system of interstate commerce . . . to engage in a course of conduct that” either “places [a] person in reasonable fear of the death of, or serious bodily injury . . .” or “causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress . . . .”<sup>46</sup>

---

<sup>42</sup> See *United States v. Cassidy*, 814 F. Supp. 2d 574, 580 (D. Md. 2011); see also Hanni Fakhoury, *With VAWA, A Major Step Forward in Combating Violence, but Constitutional Concerns Remain*, ELECTRONIC FRONTIER FOUND. (Mar. 14, 2013), <https://www.eff.org/deeplinks/2013/03/vawa-well-intentioned-still-unconstitutional> [<https://perma.cc/S8U8-LHPK>].

<sup>43</sup> See *Cassidy*, 814 F. Supp. 2d at 580–81 (explaining the changes made to § 2261A in the 2006 amendment).

<sup>44</sup> See Fakhoury, *supra* note 42.

<sup>45</sup> See *id.*

<sup>46</sup> 18 U.S.C. § 2261A(2) (2018).

[16] For a purely online cyberstalking case with no physical injury to the victim, a defendant may receive up to five years imprisonment and possibly a fine.<sup>47</sup> However, if the cyberstalking transforms into off-line physical harm, a defendant can receive up to ten years if a victim suffers serious bodily injury.<sup>48</sup>

[17] Notably, there is “no private right of action for a violation of [section 2261A(2)]” either explicitly within the statutory text, or implicitly under common law.<sup>49</sup> Even though only one United States Court of Appeals has spoken on the issue,<sup>50</sup> no court has said that there is an implied private right of action under section 2661A(2). The 11th Circuit, while holding section 2261A(2) does not provide a private right of action, focused on whether Congress intended to create, expressly or by implication, a private right of action.<sup>51</sup> The court looked at both the statutory text and legislative history.<sup>52</sup> The court reasoned the legislative history in fact indicated Congress did not intend for a private right of action and instead only intended the statute “to aid law enforcement in their criminal investigations and prosecutions.”<sup>53</sup> Thus, for a defendant to be liable under the statute, he or she would have to be criminally convicted in a case brought by the government. A victim cannot bring his or her own private action against a defendant. This is significant because it limits the amount of cyberstalkers who can held liable

---

<sup>47</sup> See 18 U.S.C. § 2261(b)(5).

<sup>48</sup> See 18 U.S.C. § 2261(b)(3).

<sup>49</sup> Gjergjani v. Ware, No. 4:14-CV-00448-ALM, 2016 U.S. Dist. LEXIS 116461, at \*20 (E.D. Tex. Aug. 8, 2016); see Rock v. BAE Sys., 556 F. App'x 869, 871 (11th Cir. 2014); Fox v. Tippetts, No. 2:09 CV 00485, 2009 U.S. Dist. LEXIS 104895, at \*10 (W.D. La. Nov. 10, 2009); Kruska v. Perverted Justice Found. Inc., No. CV 08-0054-PHX-SMM, 2009 U.S. Dist. LEXIS 14139, at \*10 (D. Ariz. Feb. 5, 2009).

<sup>50</sup> See Rock, 556 F. App'x at 871.

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

<sup>52</sup> See *id.*

<sup>53</sup> *Id.*

under the statute. Furthermore, another problem with the statute is the mens rea requirement and how courts have interpreted it.

### 1. The Mens Rea of Section 2261A

[18] The mens rea under section 2261A(2) is explicitly stated in the statute as “intent.” For a cyberstalker to be guilty under section 2261A(2), the perpetrator must: (1) have used the Internet or computer in some form; (2) have *intended* to kill, injure, harass, intimidate, or place under surveillance with *intent* to kill, injure, harass, or intimidate another person; and (3) have, by the course of conduct, either placed the victim in reasonable fear of death or serious bodily injury; or caused, attempted to cause, or would be reasonably expected to cause substantial emotional distress to the victim.<sup>54</sup>

[19] Courts have interpreted the mens rea requirement to mean the defendant must have the specific intent *to carry out the act(s)* listed in section 2261A(2),<sup>55</sup> meaning the defendant must have *actually* intended to kill, injure, harass, or intimidate. For example, if the victim’s response to cyberstalking is severe emotional distress, the defendant will not be found guilty unless he actually *intended* to cause death, injury, harassment, or intimidation.<sup>56</sup> Proving intent is challenging in cyberstalking cases because “when the perpetrator hides behind the cybermedium and the personal relationship is removed, it can be difficult to show specific intent against the victim.”<sup>57</sup> Therefore, the mens rea requirement under section 2261A(2) poses a problem by not holding enough cyberstalking perpetrators accountable.<sup>58</sup>

---

<sup>54</sup> See 18 U.S.C. § 2261A(2) (2018).

<sup>55</sup> See Cox, *supra* note 10, at 286–87.

<sup>56</sup> See *id.* at 287.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.*

[20] The mens rea requirement of section 2261A(2) also fails to take into account the unique characteristics and triggers of a relationship involving domestic violence or intimate partner violence. It focuses on a singular act rather than considering the cycle of violence, power, and control.<sup>59</sup> For example, when trying to prove the requisite intent, a reasonable juror may assume the defendant just wanted speak with the victim or was frustrated with the victim, and thus had a reasonable justification to call and text multiple times. As such, the mens rea requirement creates a standard that is perhaps harder to prove to a reasonable juror without considering the subjective perspective of the victim. Therefore, it allows defendants to escape criminal liability if it does not appear to the outside world that the defendant *intended* to cause the harm.

[21] For example, in *United States v. Infante*, the court held the “intent-to-harass” element of section 2261A(2) required the defendant to act with the “*purpose to harass*.”<sup>60</sup> The defendant and victim met during a college class.<sup>61</sup> The entire class took a three week trip abroad, in which the defendant and the victim talked on a few occasions, but the victim ultimately told the defendant she was not romantically interested in him.<sup>62</sup> After the victim was back in New York, the defendant, who lived in Arizona, continuously contacted the victim through phone calls, text messages, and e-mails.<sup>63</sup> The defendant even sent the victim flowers and small gifts.<sup>64</sup> He eventually flew unannounced from Arizona to New York and stalked the victim from a constant distance of ten to fifteen feet, but

---

<sup>59</sup> See LEMON, *supra* note 20, at 790.

<sup>60</sup> *United States v. Infante*, 782 F. Supp. 2d 815, 820 (D. Ariz. 2010) (emphasis added).

<sup>61</sup> See *id.* at 816.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.* at 816–17.

<sup>64</sup> See *id.* at 817.

never confronted her.<sup>65</sup> Even though the victim suffered substantial emotional distress as a result of the defendant's actions, the court dismissed the section 2261A(2) charge against the defendant on the ground that he did not act with "the *intent* and *purpose* to harass."<sup>66</sup> The court explained the defendant did not engage in "calculated behavior," but merely traveled to New York "in the misguided hope to renew their relationship."<sup>67</sup> The court did not find evidence that the defendant made or took any threatening actions toward the victim.<sup>68</sup>

[22] *Infante* demonstrates how difficult it is to prove intent. The defendant harassed the victim using many different forms of communication.<sup>69</sup> These actions alone could negatively affect a victim's emotional and mental state. Even when the defendant flew across the country to stalk the victim off-line, it was still not enough in the court's opinion to constitute intent under section 2261A(2).<sup>70</sup> Thus, the high standard under section 2261A(2) is difficult for the government to meet in most cyberstalking cases and consequently not enough perpetrators are held criminally liable under the statute.

[23] However, when the cyberstalking is severe and persistent enough, defendants can indeed be held criminally liable under the statute. The perpetrator's actions need to be appalling enough to meet the reasonable person standard. Contrary to the result in *Infante*, the defendant in *United States v. Sayer* was charged and pled guilty under section 2261A(2).<sup>71</sup> The

---

<sup>65</sup> See *Infante*, 782 F. Supp. 2d at 817.

<sup>66</sup> *Id.* at 823 (emphasis added).

<sup>67</sup> *Id.* at 821.

<sup>68</sup> See *id.* at 823.

<sup>69</sup> See *id.* at 816.

<sup>70</sup> See *Infante*, 782 F. Supp. 2d at 823.

<sup>71</sup> See *United States v. Sayer*, 748 F.3d 425, 427 (1st Cir. 2014).

defendant and the victim dated for about two years until the victim ended the relationship.<sup>72</sup> After the relationship ended, the defendant stalked and harassed the victim for over four years.<sup>73</sup> The off-line stalking caused the victim to become constantly fearful, forcing her to give up activities she enjoyed and change her routine to avoid the defendant.<sup>74</sup> The victim successfully received a protective order in state court.<sup>75</sup> The stalking then transformed into cyberstalking when the defendant used the Internet to “induce anonymous third parties to harass” the victim.<sup>76</sup>

[24] Several strangers came to the victim’s house seeking “sexual entertainment” after they saw an advertisement on Craigslist, which stated that the victim would perform sexual acts, contained a photograph of the victim in lingerie, and listed the victim’s address.<sup>77</sup> These unwelcomed visits by strangers continued for eight months until the victim changed her name and moved into her aunt’s house in a different state.<sup>78</sup> She subsequently began a new career and felt safe for a few months until an unknown man showed up at her house and told the victim he saw videos of her on a pornography website.<sup>79</sup> The victim later searched the Internet and found videos of herself engaging in consensual sexual acts with her ex-boyfriend, the defendant.<sup>80</sup> The websites also included her address at her

---

<sup>72</sup> *See id.* at 428.

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

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

<sup>75</sup> *See id.*

<sup>76</sup> *Sayer*, 748 F.3d at 428.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

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

aunt's house.<sup>81</sup> One website even encouraged viewers to write to the victim to tell her their thoughts on the video.<sup>82</sup> After a fraudulent account appeared in her name on Facebook, she contacted the police.<sup>83</sup> An investigation into the defendant began, while the victim discovered more social media accounts in her name.<sup>84</sup> The victim's aunt was fearful of strangers showing up at her house, so the victim moved back to her home state.<sup>85</sup>

[25] The harassment from the defendant did not end after the victim moved again because strangers continued to show up at her house looking for sexual acts.<sup>86</sup> The defendant was charged under section 2261A(2), in which he pled guilty and received the statutory maximum sentence of five years.<sup>87</sup> He appealed on constitutional grounds, but the court rejected his arguments and affirmed the trial court's judgment and sentence.<sup>88</sup>

[26] *Sayer* demonstrates how a persistent perpetrator can be held criminally liable under section 2261A(2). It was likely significant that the defendant did not cease his campaign of harassment even after the victim changed her name and moved twice. All of the defendant's actions, considered together, demonstrated the required intent despite the challenging objective standard.<sup>89</sup> The defendant pled guilty, which means the court did not offer insight or precedent regarding the relevant factors

---

<sup>81</sup> *See Sayer*, 748 F.3d at 428.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 429.

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

<sup>86</sup> *See Sayer*, 748 F.3d at 429.

<sup>87</sup> *See id.* at 427.

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

<sup>89</sup> *See id.* at 432.

and considerations under the objective standard for intent. Hence, in cases where the perpetrator is not as persistent, and the danger is not as severe, it is less clear whether the required intent element is sufficiently satisfied.

[27] Overall, section 2261A(2) has the ability to hold cyberstalkers criminally liable. However, the intent element is a high standard to meet in the cyberstalking context, and consequently, not enough cyberstalkers are held accountable. Since there is no private right of action under the statute, it is largely ineffective in the majority of cyberstalking cases.

### **B. Section 875(c)**

[28] Section 875(c) is another federal criminal statute used to prosecute cyberstalking cases. Yet, section 875(c) is a very narrow statute in the context of cyberstalking. The statute, which provides punishment of up to five years imprisonment, only covers communications through the Internet that “contain[] any threat to *kidnap* any person or any threat to *injure* the person of another.”<sup>90</sup> Thus, for a cyberstalker to be guilty under section 875(c), he or she must have made a threat *specifically* to kidnap or injure an individual.

[29] There are many forms of cyberstalking that do not specifically involve a threat to kidnap or injure—or even a threat at all.<sup>91</sup> For example, constant and repetitive phone calls, harassing text messages, fraudulent online accounts, and sending intimate private photographs would not be covered under section 875(c). The possible methods and forms of cyberstalking are so broad that there is no standard or typical course of action perpetrators employ. Therefore, section 875(c) is very narrow in the context of cyberstalking and does not cover many instances of

---

<sup>90</sup> 18 U.S.C. § 875(c) (2012) (emphasis added).

<sup>91</sup> See STALKING AND DOMESTIC VIOLENCE REPORT, *supra* note 11, at 1; see also Seralathan, *supra* note 11, at 4.

cyberstalking. Additionally, there is no private right of action under section 875(c).<sup>92</sup>

### 1. The Mens Rea of Section 875(c)

[30] There is not an explicit mens rea requirement included in the text of the statute.<sup>93</sup> However, when a statute does not include a specific mens rea, this does not mean that a mens rea is not required at all.<sup>94</sup> “When interpreting federal criminal statutes that are silent on the required mental state, [the Court] read[s] into the statute ‘only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”<sup>95</sup> In interpreting the mens rea and actus reus in section 875(c), the Sixth Circuit and Eighth Circuit have directly spoken to the issue. The Sixth Circuit has specifically stated:

to constitute "a communication containing a threat" under [18 U.S.C.] § 875(c), a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being

---

<sup>92</sup> See *Clements v. Chapman*, 189 F. App'x 688, 690 (10th Cir. 2006); see also *Alexander v. Hendrix*, No. RDB-14-2666, 2015 U.S. Dist. LEXIS 69451, at \*9 (D. Md. May 29, 2015); *Fox v. Tippetts*, No. 2:09 CV 00485, 2009 U.S. Dist. LEXIS 104895, at \*8–9 (W.D. La. Nov. 10, 2009); *Clements v. Miller*, No. 04-cv-02455-REB-BNB, 2005 U.S. Dist. LEXIS 36812, at \*9 (D. Colo. Aug. 29, 2005).

<sup>93</sup> See *United States v. Houston*, 683 F. App'x 434, 437 (6th Cir. 2017) (“The plain text of § 875(c) offers no guidance on the question of the mental state that must be proven in order to secure a conviction.”).

<sup>94</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[A] defendant must be ‘blameworthy in mind’ before he can be found guilty, a concept courts have expressed over time . . . .”); see also *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

<sup>95</sup> *Elonis*, 135 S. Ct. at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

communicated to effect some change or achieve some goal through intimidation (the actus reus).<sup>96</sup>

While the Eighth Circuit has not spoken to whether the “reasonable person” standard is objective or subjective,<sup>97</sup> the Sixth Circuit has specifically said that “the mens rea element of a [section] 875(c) violation must be determined objectively.”<sup>98</sup>

[31] As is the case with the mens rea requirement of 2261(A)(2), the objective standard for the mens rea requirement of 875(c) “fails to take into account the particular experiences of a domestic violence victim.”<sup>99</sup> For example, while a text message or phone call may not seem threatening to a “reasonable person” under an objective standard, “a victim of domestic violence may find it a credible threat that deeply disturbs her peace of mind.”<sup>100</sup> For example, the Sixth Circuit used an objective standard under section 875(c) in *United States v. Landham*.<sup>101</sup> The defendant and victim had a long history involving domestic violence perpetrated by the defendant.<sup>102</sup> During a phone call, the defendant told the victim “Are you

---

<sup>96</sup> *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (interpreting in a way to “achieve the intent of Congress”); *see also* *United States v. Nicklas*, 713 F.3d 435, 439–40 (8th Cir. 2013) (quoting *Alkhabaz*, 104 F.3d at 1495); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) (quoting *Alkhabaz*, 104 F.3d at 1495); *United States v. Tanner*, 26 F. App'x 469, 471 (6th Cir. 2001) (quoting *Alkhabaz*, 104 F.3d at 1495).

<sup>97</sup> *See Nicklas*, 713 F.3d at 438–39 (noting that the court has not yet addressed whether section 875(c) “requires the government to prove the defendant’s subjective intentions.”).

<sup>98</sup> *Alkhabaz*, 104 F.3d at 1496 (citing *United States v. DeAndino*, 958 F.2d 146, 149–50 (6th Cir. 1992)).

<sup>99</sup> *See* Aily Shimizu, *Recent Development, Domestic Violence in the Digital Age: Towards the Creation of a Comprehensive Cyberstalking Statute*, 28 BERKELEY J. GENDER L. & JUST. 116, 124 (2013).

<sup>100</sup> *Id.*

<sup>101</sup> *See United States v. Landham*, 251 F.3d 1072, 1081 (6th Cir. 2001).

<sup>102</sup> *See id.* at 1076–77.

an idiot? I've done more to you with a Parker 51 than what happened to your father with a goddamn Taurus five-shot," and also threatened to kidnap the victim's children.<sup>103</sup> Though this was arguably a threat to both injure the victim, and kidnap the child, the Sixth Circuit ultimately held the district court erred in failing to dismiss the defendant's charge under section 875(c), and thus reversed defendant's conviction.<sup>104</sup> While the statements the defendant made to the victim may not constitute threats to a reasonable person under an objective standard, they may in fact be taken seriously and cause fear in the victim, due to the history and complexities of the previous intimate partner violence.<sup>105</sup>

[32] The context of a particular relationship; a possible history of domestic violence and intimate partner violence; and the cycle of power, violence, and control are important considerations that are left out of the evaluation when the court utilizes a reasonable person standard.<sup>106</sup> As a whole, section 875(c) is largely ineffective in the cyberstalking context. It is such a narrow statute, and the objective standard does not effectively take the victim into account in the situations the statute does cover. Therefore, the statute is ineffective at holding the majority of cyberstalkers criminally liable, and there is no private right of action under the statute for victims to bring their own civil claim.

[33] While criminal statutes "can serve as a deterrent to [cyberstalkers] and aid victims who cannot afford to bring a private suit . . . victims of online crimes are often left with inadequate protection from their harassers."<sup>107</sup> Based on the shortcomings of the federal criminal statutes in providing adequate solutions for victims, civil remedies may provide

---

<sup>103</sup> *Id.* at 1082.

<sup>104</sup> *See id.* at 1076, 1082–83.

<sup>105</sup> *See id.* at 1087.

<sup>106</sup> *See* LEMON, *supra* note 20.

<sup>107</sup> Colleen M. Koch, Comment, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233, 259 (2017) (footnotes omitted).

beneficial options.<sup>108</sup> “[T]hough criminal enforcement can stop undesirable behavior, it leaves victims without monetary compensation for the harms they have suffered.”<sup>109</sup> A private right of action can remedy those pitfalls of the criminal cyberstalking statutes.<sup>110</sup>

#### IV. CIVIL CLAIMS FOR CYBERSTALKING VICTIMS

[34] In general, domestic violence victims rarely use civil claims.<sup>111</sup> However, in 2016, a victim of domestic violence prevailed on civil claims in Ohio.<sup>112</sup> She had been brutally attacked by her ex-husband, which resulted in a swollen eye, a broken cheekbone, and cuts and bruises. She sued for assault, battery, false arrest or imprisonment, and IIED.<sup>113</sup> Ultimately, she received a compensatory damages award of about one and a half million dollars, and a punitive damages award of twenty million dollars.<sup>114</sup> Her total damage award was decreased to about three and a half million dollars, due to an Ohio statute that capped non-economic damages—such as pain and suffering, and punitive damages.<sup>115</sup> Despite

---

<sup>108</sup> *See id.* at 261.

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

<sup>110</sup> *See id.*

<sup>111</sup> *See* Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 945 (2004); *see also* CITRON, *supra* note 13, at 122 (explaining the costs associated with bringing a civil suit and why victims may choose not to bring one).

<sup>112</sup> *See* Lindsey Bever, *Domestic Violence Survivor Stunned by \$21 Million Award in Lawsuit Against Her Ex-Husband*, WASH. POST (June 15, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/06/15/domestic-violence-survivor-stunned-by-21-million-award-in-lawsuit-against-her-ex-husband/?noredirect=on&utm\\_term=.8be7cc6b843b](https://www.washingtonpost.com/news/morning-mix/wp/2016/06/15/domestic-violence-survivor-stunned-by-21-million-award-in-lawsuit-against-her-ex-husband/?noredirect=on&utm_term=.8be7cc6b843b) [<https://perma.cc/ZCW3-A5T9>].

<sup>113</sup> *See id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

how successful this domestic violence victim was with her lawsuit, this “case [was] believed to be one of the first in Ohio in which a domestic violence victim has brought a civil lawsuit against an abusive spouse—and won.”<sup>116</sup>

[35] There is a scarcity of civil cases involving domestic violence.<sup>117</sup> This is likely because of financial obstacles, such as hiring an attorney, and emotional obstacles, like spending time in the same courtroom as the perpetrator.<sup>118</sup> Moreover, there are even fewer civil cases involving cyberstalking because of the limited applicable civil claims; assault, battery, and false arrest or imprisonment cannot be used in cyberstalking cases, unlike in domestic violence or off-line stalking cases. Additionally, without physical injuries in cyberstalking cases, it is more difficult to prove that the perpetrator’s actions caused the damage. Even though mental and emotional harm are just as valid as physical harm, such damages are more challenging to visually perceive—and hence prove in court—than physical injuries.

[36] Though cyberstalking victims do not often bring civil claims, IIED and defamation claims are still occasionally used.<sup>119</sup> Nevertheless, both IIED and defamation claims pose challenges to victims seeking relief and are largely ineffective at holding the majority of cyberstalkers accountable.

### A. IIED

[37] An individual is liable under an IIED claim if he or she “by extreme and outrageous conduct intentionally or recklessly causes severe emotional

---

<sup>116</sup> *Id.*

<sup>117</sup> *See* Buel, *supra* note 108, at 945.

<sup>118</sup> *See id.* at 949–55.

<sup>119</sup> *See, e.g.,* Sous v. Timpone, No. 15-7972(KM) (MAH), 2016 U.S. Dist. LEXIS 60768, at \*23–24 (D.N.J. May 9, 2016) (dismissing on subject-matter jurisdiction grounds); Doe v. Egea, No. 15-20219-CIV-ALTONAGA/O’Sullivan, 2015 U.S. Dist. LEXIS 82632, at \*2 (S.D. Fla. June 25, 2015) (dismissing on subject-matter jurisdiction grounds).

distress to another.”<sup>120</sup> Generally, it is insufficient that a defendant has acted with a tortious intent, or even an intent to inflict emotional distress.<sup>121</sup> Liability is ordinarily found when the conduct is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>122</sup> A pattern of behavior can cause an individual’s conduct to be more extreme compared to one instance of such behavior.<sup>123</sup> The test is whether a reasonable community member’s resentment of the conduct would lead the community member to exclaim, “Outrageous!”<sup>124</sup> Mere indignities, threats, annoyances, insults, or other trivialities do not constitute liability under an IIED claim.<sup>125</sup>

[38] For example, in *Gjergjani v. Ware*, the defendant, who was a stranger to the victim, created a “virtually identical” Instagram profile to the one the victim used for her business.<sup>126</sup> The defendant posted false and defamatory statements, including accusations that the victim caused a former co-worker’s death, was unfaithful to her husband, promiscuous, and an unfit mother.<sup>127</sup> The defendant also created various other Internet accounts and e-mail addresses, “directed toward defaming [the victim].”<sup>128</sup>

---

<sup>120</sup> RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965).

<sup>121</sup> *See id.* cmt. d.

<sup>122</sup> *Id.*

<sup>123</sup> *See Feltmeier v. Feltmeier*, 798 N.E.2d 75, 83 (Ill. 2003).

<sup>124</sup> RESTATEMENT (SECOND) OF TORTS: OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS § 46 cmt. d (AM. LAW INST. 1977).

<sup>125</sup> *See id.*

<sup>126</sup> *Gjergjani v. Ware*, No. 4:14-CV-00448-ALM, 2016 U.S. Dist. LEXIS 116461, at \*2, (E.D. Tex. Aug. 8, 2016).

<sup>127</sup> *See id.*

<sup>128</sup> *Id.*

The victim argued she was constantly spending time trying to monitor the situation by deleting the defendant's posts and comments, and reporting them to the social media providers.<sup>129</sup> She even hired a company to attempt to mitigate the harm that the defendant's online statements caused to her reputation.<sup>130</sup> The victim sued the defendant for cyberstalking under section 2261A(2), IIED, and defamation.<sup>131</sup> In regard to the section 2261A(2) claim, the court held there was no private right of action under this statute, and thus the plaintiff could not maintain the claim.<sup>132</sup> For the IIED claim, the court explained that "[IIED] is intended as a *gap-filler* tort[,] which has no application when the conduct at issue invades some other legally-protected interest[s]."<sup>133</sup> "Thus, '[w]here the gravamen of a plaintiff's complaint is really another tort, [IIED] should not be available.'"<sup>134</sup> The court subsequently dismissed the plaintiff's IIED claim.<sup>135</sup>

[39] Similarly, in *Fridovich v. Fridovich*, the court held a successful defamation claim "will preclude a cause of action for [IIED] if the sole basis for the [IIED]" claim includes the same facts that support the defamation claim.<sup>136</sup> Consequently, for an IIED claim to succeed, along with a successful defamation claim, the plaintiff must plead each claim based on

---

<sup>129</sup> *See id.* at \*5.

<sup>130</sup> *See id.* at \*5–6.

<sup>131</sup> *See Ware*, 2016 U.S. Dist. LEXIS 116461, at \*9, \*18–20; *see also* discussion *infra* Section IV.B (discussing the defamation claim).

<sup>132</sup> *See Ware*, 2016 U.S. Dist. LEXIS 116461, at \*20; *see also* discussion *supra* Section III.A.

<sup>133</sup> *Ware*, 2016 U.S. Dist. LEXIS 116461, at \*19. (emphasis added) (citation omitted).

<sup>134</sup> *Id.* (citing *Hoffmann–La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004)).

<sup>135</sup> *See id.* at \*19.

<sup>136</sup> *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992).

separate facts that support each respective claim.<sup>137</sup> Essentially, if a plaintiff has facts to support a defamation claim, the plaintiff cannot use these same facts for an IIED claim.<sup>138</sup>

[40] Such a “gap-filler” rule is ineffective at providing relief for cyberstalking victims since a case can only be built on a finite number of facts. Indeed, plaintiffs should not be able to prevail and recover damages under *both* IIED and defamation claims based on the same facts, due to policy concerns.<sup>139</sup> However, plaintiffs *should* be able to plead both claims based on the same facts. If a plaintiff merely pleads two claims, this does not mean the plaintiff will prevail on both. If a defendant’s actions fall within the defamation definition as well as the IIED definition, the plaintiff is forced to choose one claim to plead, which would most likely be the defamation claim due to the gap-filler rule.<sup>140</sup> Allowing plaintiffs to plead both claims would increase their opportunity to prevail on at least one of the claims. The current restrictive requirement decreases a cyberstalking victim’s options and hinders the possibilities of prevailing and obtaining relief in his or her case.

[41] Even when the gap-filler requirement does not bar the plaintiff from bringing an IIED claim, the elements under IIED are still challenging for a cyberstalking victim to satisfy. For example, in *Lancaster v. Alphabet Inc.*, the plaintiff argued the defendants engaged in a “campaign of harassment” that included theft of the victim’s identity, hundreds of phone calls per day, false infringement claims, and disruptions of the victim’s computer and

---

<sup>137</sup> *See id.*

<sup>138</sup> *See Kamau v. Slate*, No. 4:11cv522-RH/CAS, 2012 U.S. Dist. LEXIS 158213, at \*32 (N.D. Fla. Oct. 1, 2012).

<sup>139</sup> *See generally* RESTATEMENT (SECOND) OF TORTS: GENERAL PRINCIPLE § 901 (AM. LAW INST. 1977) (listing the purposes of awarding tort damages).

<sup>140</sup> *See Kamau*, 2012 U.S. Dist. LEXIS 158213, at \*32.

Internet connection.<sup>141</sup> Despite the defendants' numerous harassing actions, the court granted the defendants' motion to dismiss on the grounds that the plaintiff did not offer sufficient "facts to support a finding that [d]efendants' conduct was 'extreme and outrageous[,] or that [d]efendants intended, or possessed a reckless disregard for, [p]laintiff's extreme emotional distress."<sup>142</sup>

[42] Therefore, even when a cyberstalking victim brings claims that the defendant's conduct was outrageous, "atrocious[,] and utterly intolerable[,]"<sup>143</sup> the legal standard alone makes it very challenging for plaintiffs to meet all the elements of IIED in order to prevail. Overall, an IIED claim is ineffective at holding cyberstalkers accountable and providing relief for victims.

## B. Defamation

[43] Although largely inapplicable to the majority of cyberstalking cases, defamation is another civil remedy available to cyberstalking victims. A defendant is liable for defamation if the plaintiff can show there was:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher;
- and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>144</sup>

---

<sup>141</sup> Lancaster v. Alphabet Inc., No. 15-cv-05299-HSG, 2016 U.S. Dist. LEXIS 88908, at \*13 (N.D. Cal. July 8, 2016).

<sup>142</sup> *Id.* at \*14.

<sup>143</sup> RESTATEMENT (SECOND) OF TORTS § 46(1) cmt. d. (AM. LAW INST. 1965).

<sup>144</sup> RESTATEMENT (SECOND) OF TORTS: ELEMENTS STATED § 558 (AM. LAW INST. 1977).

Generally, it is unnecessary for plaintiffs to prove that actual reputational harm occurred. Rather, whether a statement was defamatory “depends on its general tendency to have such an effect.”<sup>145</sup>

[44] For instance, in *Gjergjani v. Ware*, the court awarded the plaintiff damages for the defamation claim.<sup>146</sup> The court held the defendant liable for defamation *per se* for each of the statements she made regarding the plaintiff.<sup>147</sup> These statements included: “[t]his tramp got a man killed”; “[s]he's a skank ... [s]he got a man killed”; “THIS HARLOT HAS HAD MEN KILLED” “[Plaintiff is a] home-wrecker”; “[Plaintiff] is a freak, and is willing to do a lot sexually”; and “[t]his girl gets around[] [a] lot.”<sup>148</sup> The court actually presumed damages based on the *per se* defamation.<sup>149</sup>

[45] Although the defamation claim was successful in *Gjergjani v. Ware*,<sup>150</sup> this will not be the case in every instance of cyberstalking. The defamation claim in this case was likely strengthened because the online social media accounts did not involve the victim's personal accounts, but rather her business accounts.<sup>151</sup> Thus, there was an implication of financial loss in this case since a business was involved. There is a causal relationship between damage to a business' reputation and an impact on a business' income. With a personal social media account on the other hand, there is less of an implication of financial loss, which poses a challenge when

---

<sup>145</sup> Koch, *supra* note 104, at 263 (quoting RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (AM. LAW INST. 1977)).

<sup>146</sup> See *Gjergjani v. Ware*, No. 4:14-CV-00448-ALM, 2016 U.S. Dist. LEXIS 116461, at \*28 (E.D. Tex. Aug. 8, 2016); see discussion *supra* Section III.A (discussing the facts of the case and the holdings of the other claims).

<sup>147</sup> See *Ware*, 2016 U.S. Dist. LEXIS 116461, at \*10–11.

<sup>148</sup> *Id.* (emphasis in original) (citations omitted).

<sup>149</sup> See *id.* at \*10.

<sup>150</sup> See *id.* at \*28.

<sup>151</sup> *Cf. id.* at \*2 (stating that Plaintiff uses her profile to market and publicize her blog).

proving that a damaged reputation led to a financial loss, or the calculated amount of the loss.

[46] Additionally, not every cyberstalking case even involves defamation. There are numerous instances of cyberstalking in which the perpetrator does not make a false or defamatory statement. For instance, calling hundreds of times a day, sending hundreds of text messages a day, and posting hundreds of pictures on someone's personal Facebook or Instagram account does not always involve false or defamatory statements, or even statements at all. Moreover, if the perpetrator does make a derogatory or harmful statement about the plaintiff and it is accurate, then there is no defamation.<sup>152</sup> Thus, defamation only applies to a small portion of cyberstalking cases and is ineffective at combatting cyberstalking in every instance.<sup>153</sup>

[47] Furthermore, other than a handful of cases where the claims were dismissed because of administrative, jurisdiction, or venue reasons, there appears to be no other case law in which a cyberstalking victim has brought a defamation claim.<sup>154</sup> This is likely because most cyberstalking cases do not involve defamation. Therefore, a defamation claim as a whole is largely ineffective for cyberstalking victims because it does not cover a broad array of cyberstalking cases, and the only case law on point demonstrates its overall ineffectiveness.

[48] Both IIED and defamation claims are largely ineffective for the majority of cyberstalking cases. Since victims cannot reliably turn to these civil claims for effective relief, and the federal criminal cyberstalking

---

<sup>152</sup> See *Air Wis. Airlines Corp. v. Hooper*, 571 U.S. 237, 248 (2014) (citation omitted).

<sup>153</sup> Cf. Koch, *supra* note 104, at 264 (explaining that victims of cyberstalking must show that the fake profile gave false information that was harmful to the victim's reputation and that others viewed that profile).

<sup>154</sup> See, e.g., *Kruska v. Perverted Justice Found. Inc.*, No. CV 08-0054-PHX-SMM, 2009 U.S. Dist. LEXIS 14139, at \*7 (D. Ariz. Feb. 5, 2009) (dismissing the defamation claim without prejudice).

statutes also pose significant challenges to cyberstalking victims, there needs to be a more effective private right of action for cyberstalking victims.

## V. PROPOSED RECOMMENDATION

### A. Private Right of Action Added to Section 2261A(2)

[49] To increase the remedies available to victims and to hold more cyberstalkers accountable, a private right of action should be added to section 2261A(2). The private right of action should be added to section 2261A(2), and not section 875(c), because section 2261A(2)'s scope is broader and will cover a diverse array of cyberstalking situations, unlike section 875(c) which is more narrowly written. The proposed statutory language is as follows:

Whoever is a victim, target, or receiver of any threatening, intimidating, or harassing communications, forms of surveillance, or other courses of conduct by means of any interactive computer service or electronic communication service or electronic communications system of interstate commerce, or any other facility or form of interstate or foreign commerce, and who

- (A) is placed in reasonable fear of death or serious bodily injury because of a perpetrator's actions; or
- (B) is caused substantial emotional distress because of a perpetrator's actions may maintain a civil action against the perpetrator to obtain compensatory or punitive damages and injunctive relief or other equitable relief.<sup>155</sup>

---

<sup>155</sup> Compare 18 U.S.C. § 875(c) (2012) (Interstate communications), with 18 U.S.C. § 2261(a)(2) (Supp. V 2017) (Interstate domestic violence).

[50] The statute's possible relief would include an injunction or damages, or both. There are many costs associated with cyberstalking, including mental health costs, "attorney fees, damage to property, child care costs, moving expenses, [and] changing phone numbers."<sup>156</sup> When determining whether a victim was placed in reasonable fear of death or serious bodily injury, or caused substantial emotional distress, the standard should be subjective, from the victim's perspective. Such a standard will properly take into account any unique circumstances involving the relationship between the victim and the cyberstalker, particularly in the context of domestic violence or intimate partner violence.<sup>157</sup>

[51] The proposed statute should survive any constitutional challenges because Congress has the power to regulate channels of interstate commerce under the Commerce Clause of the United States Constitution.<sup>158</sup> Congress' power "over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce."<sup>159</sup> The Internet constitutes an instrumentality of the channels of interstate commerce, which therefore gives Congress the authority to enact the proposed legislation.<sup>160</sup>

[52] Moreover, the statutory proposal empowers victims by increasing the amount of available options.<sup>161</sup> Adding merely one additional civil remedy for cyberstalking victims provides empowerment by increasing the

---

<sup>156</sup> Matt Nobles et al., *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, 31 JUST. Q. 986, 1006 (2013).

<sup>157</sup> See Shimizu, *supra* note 96, at 124.

<sup>158</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>159</sup> See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964).

<sup>160</sup> See SMITH, *supra* note 15, at 2.

<sup>161</sup> Cf. Bever, *supra* note 109 (explaining the purpose of the domestic violence victim's lawsuit was to help her "feel empowered" and to give more power to other domestic violence victims).

choices victims can make.<sup>162</sup> This is significant because empowering victims is one of the most fundamental concepts of the anti-domestic violence and anti-intimate partner violence movement.<sup>163</sup>

[53] Significantly, the fact that individuals are already attempting to bring a private right of action under section 2261A(2) shows a substantial need for the proposed statute.<sup>164</sup> If victims are left without relief after considering or exhausting criminal statutes and civil remedies, the proposed statute will provide another potential remedy.

### **B. Possible Challenges to the Proposed Statute**

[54] There are a few possible challenges to the proposed statute. First, there are potential financial obstacles. There may not always be economic damages with cyberstalking, which means victims may not be able to receive any compensatory damages. Even when there are economic damages, it may be challenging to prove such damages in court. Again, because there are so many different forms of cyberstalking, courts may have difficulty understanding the exact financial harm in specific cases.

[55] Furthermore, even though the proposed statute explicitly states that victims may receive punitive damages, such damages are more difficult to

---

<sup>162</sup> See Lauren Bennett Cattaneo & Lisa A. Goodman, *What Is Empowerment Anyway? A Model for Domestic Violence Practice, Research, and Evaluation*, 5 AM. PSYCHOL. ASS'N 84, 85 (2015).

<sup>163</sup> See *id.* at 84. See generally LISA A. GOODMAN & DEBORAH EPSTEIN, *A Critical Analysis of System Responses: The Importance of Voice, Community, and Economic Empowerment*, in LISTENING TO BATTERED WOMEN 89–109 (Am. Psychol. Ass'n 2008) (discussing a conceptual framework criticizing the “one-size-fits-all” responses that marginalizes women’s situations in criminal justice, mental health, and advocacy).

<sup>164</sup> See *Gjergjani v. Ware*, No. 4:14-CV-00448-ALM, 2016 U.S. Dist. LEXIS 116461, at \*6–7 (E.D. Tex. Aug. 8, 2016); *Fox v. Tippetts*, No. 2:09 CV 00485, 2009 U.S. Dist. LEXIS 104895, at \*2, 7 (W.D. La. Nov. 10, 2009); *Kruska v. Perverted Justice Found. Inc.*, No. CV 08-0054-PHX-SMM, 2009 U.S. Dist. LEXIS 14139, at \*2 (D. Ariz. Feb. 5, 2009).

receive due to the higher standard. Punitive damages are only awarded where conduct is “outrageous,” because a defendant has an “evil motive” or “reckless indifference to the rights of others.”<sup>165</sup> Also, cyberstalking victims may only be able to receive an injunction with the proposed statute. Additionally, perpetrators may not have sufficient financial resources for victims to collect after obtaining a judgment in court.<sup>166</sup> Accordingly, it may not be worth a victim’s time, mental effort, and financial resources to bring a civil cause of action.

[56] An additional financial obstacle is that a victim must hire an attorney for a civil cause of action, unlike in a criminal proceeding.<sup>167</sup> Even if the victim can afford to bring a private right of action, the perpetrator may not have many assets.<sup>168</sup> It may not be worth the victim’s time and money if the suit will not result in a damage award.<sup>169</sup>

[57] Furthermore, there will still be challenges with proof, similar to the challenges posed in the criminal context.<sup>170</sup> However, unlike in the criminal proceeding, there is not a mens rea requirement in the civil context. The proposed statute does not include a required “intent” and is purposely focused on the victim. This will alleviate some of the problems posed with the current version of section 2261A(2). Harmful Internet behavior, in general, in criminal or civil actions, “ha[s] several unique factors that make [it] more difficult to detect . . . identify who is to blame, and follow through

---

<sup>165</sup> RESTATEMENT (SECOND) OF TORTS: PUNITIVE DAMAGES § 908(2) (AM. LAW INST. 1979).

<sup>166</sup> See Juan M. Acevedo García, *Intentional Infliction of Emotional Distress Torts as the Best Legal Option for Victims: When Cyberbullying Conduct Falls Through the Cracks of the U.S. Criminal Law System*, 85 REVISTA JURÍDICA UPR 127, 165 (2016).

<sup>167</sup> See CITRON, *supra* note 13, at 122.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.* (noting that not all victims feel this way because some will want the perpetrator to endure litigation even though monetary compensation is an unlikely result).

<sup>170</sup> See discussion *supra* Section III.A.1.

with a cause of action.”<sup>171</sup> For example, cyberstalkers can disguise their identities, hide from anywhere in the world, and erase evidence.<sup>172</sup>

[58] Notwithstanding any possible challenges to the proposed statutory recommendation of adding a private right of action to section 2261A(2), overall, the statute will likely increase options for victims of cyberstalking, empower more victims, and hold more cyberstalkers accountable for their actions.

## VI. CONCLUSION

[59] Cyberstalking affects victims financially, mentally, emotionally, and sometimes even physically.<sup>173</sup> Since cyberstalking is a more recent phenomenon, changing as technology advances, the criminal statutes and available civil claims have yet to catch up. As technological innovations continue in the future, the law must keep up with these changes in order to hold perpetrators accountable and to provide victims relief.

---

<sup>171</sup> Koch, *supra* note 104, at 266–67.

<sup>172</sup> *See id.*

<sup>173</sup> *See* discussion *supra* Part II.