OVERBROAD INJUNCTIONS AGAINST SPEECH (ESPECIALLY IN LIBEL AND HARASSMENT CASES)

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INTRODUCTION

Donna is publicly criticizing Paul. So Paul sues her, and gets an injunction such as this: "[Defendant] is permanently enjoined from publishing . . . any statements whatsoever with regard to the plaintiff."[1]

It's hard to reconcile such an injunction (whether entered in a libel case or as a "personal protective order") with First Amendment precedents. The injunction isn't limited to speech within a First Amendment exception, such as libel or true threats.[2] It is far from "narrowly tailored," which is often set forth as a requirement for the rare content–based anti–speech injunctions that are indeed permitted.[3] Yet I have found over 200 such injunctions (almost all in the last ten years)—some as broad as that one, and others narrower but still overbroad—entered either in libel cases or in cases involving petitions to stop harassment or cyberstalking.[4] And these 200 are likely just the tip of the iceberg, since such injunctions rarely

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1. Saadian v. Avenger213, No. BC 502285 (Cal. Super. Ct. L.A. Cty. July 28, 2014); *see also* Appendix (collecting many more such cases).

2. For more on injunctions that are indeed limited to libel (or to some related constitutionally valid tort causes of action), see Eugene Volokh, *Anti–Libel Injunctions*, 168 U. PA. L. REV. 73 (2019).

3. *See* Same Condition, LLC v. Codal, Inc., No. 1–20–1187, 2021 WL 2525659, at ¶ 36 (Ill. App. Ct. June 21, 2021); Coleman v. Razete, 137 N.E.3d 639, 647 (Ohio Ct. App. 2019); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 347 (Cal. 2007); Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993).

4. "Harassment" here refers to criminal harassment or harassment that might be targeted by harassment prevention orders, not hostile environment workplace harassment, *see* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992), or quid pro quo workplace harassment.

None of the injunctions I discuss in this Article are stipulated injunctions, or otherwise agreed to as a matter of contract. They therefore can't be justified as involving voluntary waivers of First Amendment rights, as in *Perricone v. Perricone*, 972 A.2d 666, 681–83 (Conn. 2009).

lead to appeals, and thus are rarely made visible in searchable Internet databases.

Some injunctions have restricted speech criticizing exes and other family members.[5] Others have restricted criticisms of businesses or professionals (lawyers, doctors, real estate agents, financial advisers) with whom speakers say they had a bad experience. Still others have restricted criticism of police officers, judges, and other government officials.

Some have banned all speech about the plaintiff, or all online speech about the plaintiff. Others have been narrower—for instance, banning all "derogatory" speech or all posting of photographs of the plaintiff—but were still not limited to speech that First Amendment law recognizes to be restrictable (such as libel or true threats or unwanted speech said to the plaintiff).[6]

Many of these injunctions have focused on online speech. But the Court has made clear that online speech, and in particular speech on social media, is fully protected by the First Amendment, as much as is speech in newspapers or books or leaflets.[7]

Unsurprisingly, most such injunctions involve either a defendant who was not represented by a lawyer, or a default judgment against a defendant who did not appear, so the First Amendment arguments against the injunctions were likely not effectively presented to the judge. Part I lays out the evidence on the injunctions that I've found.

When these injunctions do go up on appeal, they almost always get reversed, because they violate the First Amendment.[8] Part II discusses the precedents on this, both from the U.S. Supreme Court and from state and federal appellate courts. I hope this Part (and

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5. *See* Appendix. From what I've seen, such orders don't exhibit any particular gender pattern; men sometimes get them against ex-wives and ex-girlfriends, women sometimes get them against ex-husbands and ex-boyfriends, and some stem from same-sex relationships.

6. *See, e.g.*, *infra* notes 215–217.

7. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 877–79 (1997); Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

8. *See infra* Part C.

the Article more broadly) will be especially useful to judges, lawyers, and even pro se litigants dealing with such cases, as well as to legal academics. I discuss state and federal appellate precedents there in more detail than is common for a law review article, so that it will be more useful for practical litigation.

But some courts have upheld such injunctions, based on two related theories. First, some courts have concluded that the First Amendment doesn't protect harassment, and that otherwise protected speech becomes unprotected harassment when it is said (especially when it is said often) with an intent to offend, embarrass, or harass.[9] Second, some courts have concluded that the First Amendment doesn't protect such speech when it is on a matter of merely "private concern."[10] I think these theories are inconsistent with First Amendment precedents, and Part III will discuss that.

Finally, Part IV will speculate why courts are doing this, and how it bears on broader debates about how the "cheap speech" created by the Internet has affected public discussion; how some judges might perceive their role in pragmatically resolving disputes; and how judges deal with litigants whom they see as irrational, and therefore as uncontrollable using normal tools such as civil damages liability.

Our legal system offers many remedies, however imperfect, for damaging speech about a person. One is the libel lawsuit, which may allow even a narrowly tailored injunction forbidding the defendant from repeating specific statements that have been found to libelous at trial.[11] Another, in some states, is criminal libel law.[12] A third, in other states and under federal law, is criminal harassment law or cyberstalking law, though that may raise its own First

9. *See infra* Part F.

10. *See infra* Part E.

11. *See* Volokh, *Anti–Libel Injunctions*, *supra* note 2.

12. *See* Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2313–17 (2021); Eugene Volokh, *Criminal Libel: Survival and Revival* (in progress).

Amendment problems.[13] And if Donna is writing derogatory things *to* Paul, rather than just *about* him, he may able to get a restraining order to make that stop.[14]

But the injunctions I describe in this Article are not a permissible remedy: they restrict constitutionally protected opinions and constitutionally protected true statements of fact. Sometimes, they interfere with speech about government officials and other important figures.[15] Sometimes, they interfere with speech on matters of public concern, such as business treatment of consumers or alleged criminal conduct.[16] And even when they deal with what appear to be private disputes, they interfere with speech on what I call "daily life matters," which is likewise constitutionally protected.[17]

Of course, persistent criticism, which may often be unfair and insulting, may understandably distress its targets. But, as the Supreme Court and lower courts have made clear, such speech cannot be suppressed even by damages awards, and certainly not by injunctions.

I. WHAT SOME TRIAL COURTS ARE DOING

Let me begin by laying out the injunctions that some trial courts have been issuing. I start with the broadest and continue to ones that are narrower but still not narrow enough.

A. *"Stop talking about plaintiff" injunctions*

Some injunctions in libel cases categorically ban defendant from speaking about plaintiff (or at least from doing so online or on some

13. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731 (2013).

14. *See, e.g.*, Chan v. Ellis, 770 S.E.2d 851, 853–84 (Ga. 2015); cases cited *infra* note 157.

15. *See infra* Part A.

16. *See infra* Part I.

17. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1092–94 (2000).

particular site), for instance, "Defendant Leo Joseph is hereby permanently restrained from publishing future communications to any third-parties concerning or regarding the Plaintiffs in either their professional, personal or political lives."[18] I collect many such cases in the Appendix; they include injunctions entered restricting speech about the Prime Minister of Haiti (the one I just quoted), a controversial billionaire Chinese businessman,[19] local professionals,[20] businesspeople,[21] and more.

Similar injunctions are sometimes entered in claims brought under statutes that authorize injunctions against "harassment" or "stalking" (sometimes called "harassment prevention orders" or "personal protection orders").[22] Those statutes are usually used to require the defendant to stay away from the plaintiff, or to stop talking *to* the plaintiff rather than *about* the plaintiff.[23] And the statutes generally call on courts to focus on whether the defendant has annoyed, harassed, or substantially distressed the plaintiff, not on whether the defendant has published defamatory statements.[24] But

18. Baker v. Haiti–Observateur Group, No. 1:12-cv-23300-UU, at 3 (S.D. Fla. Feb. 6, 2013), *vacated sub nom.* Baker v. Joseph, 938 F. Supp. 2d 1265 (S.D. Fla. Apr. 9, 2013).

19. Jia v. Gu, No. 17-2-27517-4 KNT, at ¶ C (Wash. Super. Ct. King Cty. Nov. 9, 2017). The plaintiff founded startup electric car manufacturer Faraday Future, and later turned out to have been on his way to filing for bankruptcy to deal with $3.6 billion in debt. Sean O'Kane, *Faraday Future Founder Files for Chapter 11 Bankruptcy*, THE VERGE (Oct. 14, 2019, 1:44 PM), https://www.theverge.com/2019/10/14/20913519/faraday-future-jia-yueting-china-chapter-11-bankruptcy-leeco [https://perma.cc/REZ8-TLAR].

20. Saadian v. Avenger213, No. BC 502285 (Cal. Super. Ct. L.A. Cty. July 28, 2014) (lawyer); Streeter v. Visor, No. CV2014093311, 2014 WL 8106739, at *1–2 (Ariz. Super. Ct. Maricopa Cty. Aug. 1, 2014) (doctor and his assistant), *rev'd*, No. 1 CA–CV 14–0595, 2015 WL 7736866 (Ariz. Ct. App. Dec. 1, 2015).

21. Wendle Motors, Inc. v. Honkala, No. CV–06–0334–FVS, 2006 WL 3842146, at *1 (E.D. Wash. Dec. 29, 2006).

22. *See, e.g.*, CAL. CIV. PROC. CODE § 527.6 (West 2022); FLA. STAT. ANN. § 784.048 (West 2021); MICH. COMP. LAWS ANN. § 600.2950a (West 2018).

23. *See, e.g.*, *id.*

24. *Id.*

the laws are increasingly used to order a defendant to stop speaking about the plaintiff, based on speech that is likely annoying, distressing, or harassing precisely because it "damages [the plaintiff's] reputation."[25]

Here are a few examples; because such orders may be less familiar than libel cases, I offer a few more details on each:

- *The state senator:* Florida state senator Lauren Book got an injunction "prohibit[ing]" a persistent critic, Derek Logue, "from posting *anything* related to [Senator Book], even statements that would unquestionably constitute pure political speech."[26] Logue is an advocate for the rights of released sex offenders (and himself a released

25. *See, e.g.*, Order & Findings of Fact & Conclusions of Law, Moriwaki v. Rynearson, No. 12–17, at Conclusions of Law ¶ 5 (Wash. Mun. Ct. Bainbridge Island July 17, 2017) [https://perma.cc/VJ9K-AYDW] (justifying a "stalking protection order" against a critic of a local community activist in part on the grounds that the activist "has experienced extreme stress, anxiety, and fear that [the critic] will damage his reputation," and in part on the grounds that the critic would "continue to stalk" the activist, which in context referred to continued criticism, not physical following), *rev'd*, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018), *reconsideration denied*, 2018 WL 733810 (Wash. Super. Ct. Kitsap Cty. Feb. 5, 2018); E.D.H. v. T.J., 559 S.W.3d 60, 63, 65 (Mo. Ct. App. 2018) (discussing and reversing anti–harassment order that barred a woman "from 'post[ing], plac[ing] or includ[ing] any derogatory, demeaning, disparaging, degrading, and/or belitt[l]ing, comments, remarks, pictures or similar 'postings' about [her ex-boyfriend] . . . that would reveal [the ex–boyfriend's] identity' through [the woman's] social media pages or the pages of others," and noting that the ex–boyfriend's testimony at the harassment order hearing focused on the statements allegedly "defam[ing] his character"); Dahdah v. Zabaneh, No. 14-15-00889-CV, 2017 WL 61836, at *1 (Tex. App. Jan. 5, 2017) (discussing trial court order banning "harassing" defendants and "besmirching their reputations").

26. Logue v. Book, 297 So. 3d 605, 620 (Fla. Ct. App. 2020) (en banc) (interpreting effect of trial court order, which had banned all "direct or indirect contact" by Logue with Book, including through "use of social media"); *id.* at 612 (interpreting the phrase "indirect contact" as covering online posts "that are not sent directly to an individual" but nonetheless, for instance, "sufficiently describ[e] the person in such a way as to make their specific identification possible" and are therefore "designed so as to be reasonably likely to come to the attention of the targeted person, even if indirectly").

sex offender); Book is a prominent backer of sex offender registration laws.[27] The injunction was based on Logue's having protested against a march that Book had organized, having asked an aggressive question at a screening of a documentary in which both Book and Logue were featured, and having set up a web site that sharply criticized Book (and posted a picture of her home, together with its address and purchase price, drawn from public records).[28]

- *The judge:* Michigan state trial judge Cheryl Matthews got an injunction apparently barring Richard Heit from making any online statements about her.[29] Heit, whose fiancée had earlier lost a case before Judge Matthews, had harshly criticized the judge online, saying things like, "They are all liars," "We will take [Judge] Matthews [Petitioner] out. She has had it in for you from the start. She is only one step over a traffic cop. She will be in jail," "We will get this to appeals and take them all down," "A farce! A mockery! A FUCKING JOKE! Dishonest Judge," and "DO NOT VOTE FOR JUDGE CHERYL MATTHEWS."[30]

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27. *Id.* at 607; *see also Legislative Advocacy*, LAUREN'S KIDS, https://laurenskids.org/advocacy/legislation/ [https://perma.cc/TDU4-TAR8].

28. *Id.* at 608–09; see also FLORIDIANS FOR FREEDOM: RON AND LAUREN BOOK EXPOSED!, http://ronandlaurenbook.blogspot.com/ [https://perma.cc/E4BA-NZGZ]; Francisco Alvarado, *State Sen. Lauren Book Seeks Restraining Order to Silence Protestor*, FLA. BULLDOG (Aug. 15, 2017), https://www.floridabulldog.org/2017/08/state-sen-lauren-book-seeks-restraining-order-to-silence-protester/ [https://perma.cc/E74E-CT22].

29. The order barred defendant from "posting a message through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411s," which on its face forbids all posts by defendant about anyone or anything; but in context, it likely refers to posts about plaintiff. Matthews v. Heit, No. 14–817732–PH (Mich. Cir. Ct. Oakland Cty. Mar. 11, 2014); Petition for Personal Protection Order, *id.* (Mar. 10, 2014).

30. Attachment to Petition for Personal Protection Order, *id.* at ¶¶ 5-6 (Mar. 10, 2014).

- *The forensics expert and former state board member:* Stacy David Bernstein was a prominent forensic psychology expert, a sometime instructor for the FBI, and a gubernatorially appointed member of the Connecticut Board of Firearms Permit Examiners.[31] Bernstein got an order forbidding Robert Serafinowicz from posting "any information, whether adverse or otherwise, pertaining to [Bernstein] on any website for any purpose."[32] Serafinowicz had earlier criticized Bernstein online, and pointed to a past abuse prevention order entered against Bernstein, a past judgment apparently entered against Bernstein for unpaid debts, and a possible arrest of Bernstein 30 years before.[33] Serafinowicz had also sent letters to various government agencies that had dealings with Bernstein.[34]
- *The planning board member:* Planning board member Colleen Stansfield got an order forbidding Ronald Van Liew from, among other things, mentioning Stansfield's "name in any 'email, blog, [T]witter or any document.'"[35] Van Liew had earlier run for town council member against Stansfield, and had called Stansfield "a liar and corrupt"; he had also had some personal run–

31. Serafinowicz v. Bernstein, No. CV154034547S, 2015 WL 3875108, at *2, *4 (Conn. Super. Ct. May 28, 2015), *aff'd sub nom.* Stacy B. v. Robert S., 140 A.3d 1004, 1007 (Conn. App. Ct. 2016).

32. *Serafinowicz*, 2015 WL 3875108, at *6.

33. *Id.* at *2–4.

34. *Id.*

35. Eugene Volokh, *Critic May Not Mention Planning Board Member's "Name in Any 'Email, Blog, [T]witter or Any Document'"*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/01/critic-may-not-mention-planning-board-members-name-in-any-email-blog-twitter-or-any-document [https://perma.cc/PK6W-5L3M]. This temporary restraining order was reversed by another judge at the hearing for the permanent order ten days later, and the Massachusetts Supreme Judicial Court eventually held that Stansfield's restraining order petition might have constituted malicious prosecution on her part. Van Liew v. Stansfield, 2014 Mass. App. Div. 69 (Mar. 28, 2014), *aff'd*, 47 N.E.3d 411 (Mass. 2016).

ins with her, though the injunction wasn't limited to personal communications.[36]

- *The commission member (and her brother the mayor):* Norma Kleem, a town commission member and the sister of mayor Cyrus Kleem got an order barring Johanna Hamrick—who runs a local blog and had been candidate for town mayor and city council president—from "posting any information/comments/threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family,"[37] which would have barred comments about the mayor as well.
- *The police officer:* Police officer Philip Lanoue got a court order barring Patrick Neptune from, among other things, "posting anything on the Internet regarding the officer."[38] Neptune had earlier criticized Lanoue on the site copblock.org[39] based on what Neptune thought was

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36. Both of the run-ins stemmed from Stansfield approaching Van Liew. First, Stansfield "challenged various positions taken by Van Liew" at a "public 'meet and greet' event at the town library in connection with [Van Liew's town selectman] candidacy . . . . At the close of the event, Stansfield approached Van Liew and asked whether he was going to take part in upcoming debates. According to Stansfield, Van Liew responded loudly, '[O]f course . . . and I know what you do . . . . [Y]ou sent an anonymous letter to my wife and I'm coming after you.'" *Van Liew*, 47 N.E.3d at 413–14 (Mass. 2016). Second, "during their first interaction in a two–hour telephone call initiated by Stansfield (that took place at some point prior to 2009) Van Liew screamed at her and called her 'terrible names.'" *Id.* at 414.

37. Order of Protection at 3, Kleem v. Hamrick, No. cv–11–761954 (Ohio Ct. Com. Pl. Cuyahoga Cty. Aug. 15, 2011), available at http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf [https://perma.cc/7GLK-JASW]. A week later, the court changed its mind. *See* Journal Entry, *Kleem*, No. cv–11–761954, available at http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf [https://perma.cc/7GLK-JASW].

38. Neptune v. Lanoue, 178 So. 3d 520, 521 (Fla. Dist. Ct. App. 2015).

39. Kelly W. Patterson, *Florida Cop Tells His Mommy on Seat Belt Scofflaw Who Criticized Him on CopBlock*, COPBLOCK (Jan. 15, 2016), http://www.copblock.org/150994/florida-cop-tells-mommy-seat-belt-scofflaw/ [https://perma.cc/KY8B-BQBW].

an improper traffic stop; sent public officials several letters criticizing Lanoue; and sent three letters to Lanoue's home address.[40]

- *The anti–vaccination activist:* Kimberly McCauley got a court order providing that fellow anti–vaccination activist Matthew Phillips "[n]ot post photographs, videos, or information about [McCauley] to any internet site."[41] Phillips had argued that McCauley had sold out to pro–vaccination forces, and included photographs of McCauley's daughter (which McCauley had earlier posted herself), apparently to suggest that McCauley was endangering her own daughter by vaccinating her;[42] but the injunction covered any information about McCauley, not just material on her daughter.
- *The fake immigration lawyer:* Nelly Gabueva got a restraining order requiring lawyer Andrei Romanenko to "take down all harassment material on website related to Nelly A. Gabueva."[43] The "harassment material," according to the petition for the restraining order, consisted of Romanenko's allegations that Gabueva was practicing immigration law without a license.[44] Several months later, the California Bar seized Gabueva's practice on the grounds that she "led clients to believe that

40. *See Neptune*, 178 So. 3d at 521; *see also* Gaddis v. Lannom, No. 5–20–0327, 2021 Ill. App. Unpub. LEXIS 1222, at *2, *4 n.1 (2021) (mentioning an order banning a citizen from "posting anything on social media concerning" a police officer, and noting that it was unconstitutional).

41. McCauley v. Phillips, No. 2016–70000487 (Cal. Super. Ct. Sacramento Cty. Sept. 8, 2016), *appeal dismissed on procedural grounds*, No. C083588, 2018 WL 3031765 (Cal. Ct. App. June 19, 2018); Request for Civil Harassment Restraining Orders, *id.* (June 16, 2016).

42. Request for Civil Harassment Restraining Orders, *id.* (June 16, 2016).

43. Civil Harassment Restraining Order, Gabueva v. Romanenko, No. CCH–19–581819, at 2 ¶ 6.a.4 (Cal. Super. Ct. S.F. Cty. July 26, 2019).

44. Request for Civil Harassment Restraining Orders, *id.* (July 2, 2019).

she was an attorney and qualified to practice immigration law," even though she had "never been admitted to the State Bar of California";[45] and a federal criminal complaint was filed against her on similar grounds, though that case was later dismissed.[46]

- *The copyright owner:* Poet Linda Ellis got a court order requiring Matthew Chan to remove "all posts relating to Ms. Ellis" from a site that he ran.[47] There were about 2000 posts on the site mentioning Ellis; the posts generally criticized her practice of demanding thousands of dollars from people who had posted copies of one of Ellis's poems.[48]
- *The ex–girlfriend and successful video game developer:* Prominent video game developer Zoë Quinn got a court order forbidding her ex–boyfriend Eron Gjoni from "post[ing] any further information about [Quinn] or her personal life on line or . . . encourag[ing] 'hate mobs.'"[49] Gjoni had created a Web page describing his romantic relationship with Quinn, and claiming that she had emotionally mistreated him.[50] This led to a torrent of

45. *State Bar Seizes the Practice of a San Francisco Nonattorney Who Victimized Russian and Mongolian Immigrants*, STATE BAR OF CAL. (May 4, 2020), http://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-seizes-the-practice-of-a-san-francisco-nonattorney-who-victimized-russian-and-mongolian-immigrants [https://perma.cc/36VW-5XD5].

46. Nate Gartrell, *Bay Area Woman Accused of Posing as Attorney to 'Victimize' Immigrants Charged with a Federal Crime*, SAN JOSE MERCURY NEWS (July 21, 2020, 1:48 PM), https://www.mercurynews.com/2020/07/21/bay-area-woman-accused-of-posing-as-attorney-to-victimize-immigrants-charged-with-a-federal-crime/ [https://perma.cc/BM73-EMLA]; Criminal Complaint, United States v. Gabueva, No. 3:20–mj–70917 MAG (N.D. Cal. July 8, 2020).

47. Chan v. Ellis, 770 S.E.2d 851, 853 (Ga. 2015) (reversing that order).

48. *Id.* at 852.

49. Van Valkerburg v. Gjoni, No. 1407RO1169, at 1 ¶ 14 (Mass. Boston Mun. Ct. Sept. 16, 2014).

50. S*ee id.* at 4.

online criticism of Quinn by others, including some threats of violence (though never by Gjoni himself), partly because Gjoni's post was interpreted as suggesting that some of the favorable reviews of Quinn's games were written by reviewers who were themselves romantically involved with Quinn. That in turn led to an ongoing debate between Quinn's supporters and opponents, labeled the Gamergate controversy.[51]

- *The condominium association*: The Hamptons Metrowest Condominium Association got an order barring resident Howard Fox from "post[ing] anything related to The Hamptons [condo complex],"[52] and requiring him to "take down all such information" from his existing blogs.[53] Fox had "utilized the internet to voice his displeasure over the quality of life at the Hamptons."[54]
- *The businessman with an arrest record:* Christopher Fuller got a court order "prohibit[ing] [Frank] Craft from posting anything about Fuller on the internet" for five years.[55] Fuller had been arrested for caller ID spoofing

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51. For accounts of this from different perspectives, see Zachary Jason, *Game of Fear*, BOSTON MAG. (Apr. 28, 2015, 5:45 AM), http://www.bostonmagazine.com/news/article/2015/04/28/gamergate/ [https://perma.cc/N7GS-3MBR]; Cathy Young, *Gamergate: Part I: Sex, Lies, and Gender Games*, REASON (Oct 12, 2014, 10:00 AM), http://reason.com/archives/2014/10/12/gamergate-part-i-sex-lies-and-gender-gam [https://perma.cc/3EL5-HN4A]; Cathy Young, *Gamergate: Part 2: Videogames Meet Feminism*, REASON (Oct. 22, 2014, 8:30 AM), http://reason.com/archives/2014/10/22/gamergate-part-2-videogames-meet-feminis [https://perma.cc/R3SQ-XR2P].

52. Transcript of Proceedings, Hamptons at Metrowest Condo Ass'n v. Fox, No. 2015–CA–007283–O, at 88 (Fla. Cir. Ct. Orange Cty. Apr. 28, 2016); *see also* TM v. MZ, 926 N.W.2d 900 (Mich. Ct. App. 2018); Appellant's Supplemental Brief, TM v. MZ, 926 N.W.2d 900 (Mich. Ct. App. 2018) (No. 329190), 2017 WL 6519842 (stating that the case involved a dispute between local elected officials).

53. Fox v. Hamptons at Metrowest Condo. Ass'n, Inc., 223 So. 3d 453, 455–56 (Fla. Dist. Ct. App. 2017).

54. *Id.* at 456 n.1.

55. Initial Brief of Appellant, Craft v. Fuller, No. 2D19–2891, 2019 WL 5778472, at *7 (Fla. Ct. App. Oct. 11, 2019).

several times; Craft, his former business associate, then posted a dozen tweets with the hashtag ("#spoofing-schmuck") but without using Fuller's name.[56] Fuller claimed the posts would be understood to be about him, and sought a restraining order—which a judge granted.[57]

- *The political consultant*: A court issued an order forbidding Jason Miller's ex–girlfriend Arlene Delgado, with whom he had a child, from "engag[ing] in any social media . . . which comments . . . on [Miller's] emotional or mental health or personal behavior."[58] Miller was an adviser to the 2016 and 2020 Trump campaigns, and was slated to be President Trump's White House Communications Director but withdrew when his affair with Delgado (a political commentator and also a former Trump campaign advisor) came to light.[59]

All these, then, were broad injunctions that categorically banned all speech (or at least all online speech or all social media speech) by one person about another. I'll explain in Part II why they are unconstitutionally overbroad, but for now I want to establish that such injunctions are indeed being issued.

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56. Craft v. Fuller, 298 So. 3d 99, 101–02 (Fla Ct. App. 2020).

57. Initial Brief of Appellant, Craft v. Fuller, No. 2D19-2891, 2019 WL 5778472 (Fla. Ct. App. Oct. 11, 2019). The order was reversed by *Craft v. Fuller*, 298 So. 3d 99 (Fla. Ct. App. 2020).

58. Delgado v. Miller, 314 So. 3d 515, 518 (Fla. Ct. App. 2020) (reversing the order). The order also imposed a reciprocal obligation on Miller with respect to Delgado.

59. *See* Murray Waas, *Trump Aide Concealed Work for PR Firm and Misled Court to Dodge Child Support*, THE GUARDIAN (Mar. 25, 2021, 5:47 PM), https://www.theguardian.com/us-news/2021/mar/25/jason-miller-trump-aide-teneo-secret-deal-pr-firm [https://perma.cc/78QF-PCLA].

B. Injunctions that are narrower but still too broad

Some injunctions are narrower, but still restrict protected speech because they aren't limited to speech that falls within recognized First Amendment exceptions (such as libel or true threats).[60]

1. Negative/derogatory/disparaging speech

Some injunctions ban "negative," "critical," "derogatory," "degrading," "demean[ing]," "offensive," or "disparag[ing]" material, without limiting that to defamation.[61] Yet such negative but not defamatory material is fully protected by the First Amendment, as cases such as *Hustler Magazine, Inc. v. Falwell*[62] and *Snyder v. Phelps*[63] make clear.[64]

2. Speech interfering with business relationships

One injunction banned a disgruntled ex–tenant from "directly or indirectly interfering . . . via any . . . material posted . . . in any me-

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60. *See, e.g.*, *infra* notes 215–217.

61. *See infra* **Error! Reference source not found.**.

62. 485 U.S. 46 (1988).

63. 562 U.S. 443 (2011).

64. *See, e.g.*, Shak v. Shak, 144 N.E.3d 274, 277 (Mass. 2020) ("Nondisparagement orders are, by definition, a prior restraint on speech."); Healey v. Healey, 529 S.W.3d 124, 129 (Tex. App. 2017) ("Expressions of opinion may be derogatory and disparaging but nevertheless be constitutionally protected."); Wolfe Financial Inc. v. Rodgers, No. 1:17cv896, 2018 WL 1870464, at *17 (M.D.N.C. Apr. 17, 2018) (rejecting a proposed injunction on the grounds that it "would subject [defendant] to imprisonment and fines . . . for truthful, non–defamatory statements that a judge later deems 'derogatory'"); Shoemaker v. Gianopoulos, No. H038576, 2014 WL 320061, at *9 (Cal. Ct. App. Jan. 29, 2014) ("[P]osting disparaging comments about people on internet sites is constitutionally protected activity."); Pickrell v. Verio Pac., Inc., No. B144327, 2002 WL 220650, at *6 (Cal. Ct. App. Feb. 11, 2002) (invalidating injunction against "disparaging statements," on the grounds that "[v]igorous criticism, even if amounting to a 'disparaging statement,' is at the heart of constitutionally protected freedom of speech"); Same Condition, LLC v. Codal, Inc., 2021 IL App (1st) 201187, ¶ 36 (Ill. App. Ct. June 21, 2021) ("[A] court may not enjoin a party from criticizing others 'even though they find that criticism distressing.'" (internal punctuation omitted)); Flood v. Wilk, 125 N.E.3d 1114, 1129 (Ill. App. Ct. 2019).

dia with [the ex–landlord's] advantageous or contractual and business relationships."[65] This provision deliberately went beyond defamation; indeed, a separate provision of the injunction already banned speech "calculated to defame."[66] Other courts have issued similar injunctions.[67] Several more injunctions have barred disgruntled ex–clients from posting reviews of particular businesses or professionals, again without any limitation to false and defamatory factual claims.[68]

Yet speech that interferes with business relationships, for instance by urging someone not to deal with a company, is generally fully protected unless it's defamatory. The tort of intentional interference with business relations is subject to the same First Amendment constraints as is the tort of defamation,[69] which would include the requirement that liability only be imposed on a finding that the speaker's statements included factual falsehoods.

65. Chevaldina v. R.K./FL Management, Inc., 133 So. 3d 1086, 1090–91 (Fla. Ct. App. 2014) (holding this injunction was unconstitutional).

66. *Id.* at 1091.

67. Hutul v. Maher, No. 1:12–cv–01811, 2012 WL 13075673, at *8 (N.D. Ill. Dec. 10, 2012); DeJager v. Burgess, No. 112CV219299, at 3 ¶ 6 (Cal. Super. Ct. Santa Clara Cty. Aug. 1, 2012); Comp. Sci. Rsch. Ed. & Apps. v. Prasad, No. 2013 CA 582, at 5 (Fla. Cir. Ct. Leon Cty. May 5, 2017); Peretti v. Ellis, No. CV 60CV–18–2524 (Ark. Dist. Ct. Pulaski Cty. Sept. 11, 2018); Izzet Gunbil, L.L.C. v. Estrada, No. 46D01–1908–CT–001985, 2019 WL 11278771, at *3 (Ind. Super. Ct. Laporte Cty. Dec. 16, 2019).

68. Etehad Law v. Anner, No. BC625332 (Cal. Super. Ct. L.A. Cty. Jan. 31, 2017) (barring "posting . . . any future reviews . . . regarding any and all [past] interaction" between her and her ex–lawyer); *see also* Swinyard v. Johnson, No. 190906886 (Utah Dist. Ct. Salt Lake Cty. Jan. 15, 2020) ("Defendant shall immediately remove any reviews he has posted online about Plaintiffs [a divorce lawyer and his firm] and Defendant is further restrained from posting reviews of Plaintiffs in the future."); William Noble Rare Jewels, L.P. v. Doe, No. DC–14–14740 (Tex. Dist. Ct. Dallas Cty. Jan. 15, 2005) (likewise, as to jeweler).

69. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Moore v. Hoff, 821 N.W.2d 591 (Minn. Ct. App. 2012); Beverly Hills Foodland, Inc. v. United Food & Com. Workers Union Local 655, 39 F.3d 191, 196 (8th Cir. 1994); A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1295 (Ohio 1995); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990); Fendler v. Phx. Newspapers, 636 P.2d 1257, 1262–63 (Ariz. Ct. App. 1981); Blatty v. N.Y. Times Co., 728

Other injunctions have barred a defendant from contacting a plaintiff's clients or prospective clients. The injunctions applied to all statements, whether false and defamatory, true, or expressions of opinion.[70] These too are unconstitutional: An injunction "which prohibits [Defendant] generally 'from contacting past or present clients of [Plaintiff]'" is overbroad to the extent that it "is not supported by the district court's findings of fact or conclusions of law regarding defamation."[71]

A similar injunction barred a defendant from contacting a plaintiff's employer or prospective employers.[72] Indeed, a Tennessee statute requires courts in all divorce cases to issue orders "restraining both parties . . . from making disparaging remarks about the other . . . to either party's employer."[73] But that too is unconstitutional, for the reasons given above.

P.2d 1177, 1182, 1184 (Cal. 1986); Thompson v. Armstrong, 134 A.3d 305, 310 (D.C. 2016); Farah v. Esquire Magazine, 736 F.3d 528, 540 (D.C. Cir. 2013); Dairy Stores, Inc. v. Sentinel Pub. Co., 465 A.2d 953, 961 (N.J. Super. Ct. 1983); Evans v. Dolfecino, 986 S.W.2d 69, 79 (Tex. App. 1999); Jefferson Cty. School Dist. No. R–1 v. Moody's Investor's Services, Inc., 175 F.3d 848, 856–58 (10th Cir. 1999); Lakeshore Community Hosp., Inc. v. Perry, 538 N.W.2d 24, 28 (Mich. Ct. App. 1995); Ward v. Triple Canopy, Inc., No. 8:17–cv–802–T–24 MAP, 2017 WL 3149431, at *5 (M.D. Fla. July 25, 2017) ("Ward's request that Triple Canopy be 'enjoined from taking any further action which harms or attempts to harm the career' of Ward is overbroad because it would prohibit more speech than just that found to be defamatory, and Ward needs to narrow this request.").

70. *See, e.g.*, Fortas v. Gervais Group, L.L.C., No. 20CV3585 (Ga. Super. Ct. DeKalb Cty. Apr. 2, 2020) (barring "harassing Plaintiff by contacting . . . Plaintiff's clients[] or Plaintiff's potential clients"); Emergency Motion for Contempt, *id.* (Ga. Super. Ct. DeKalb Cty. May 21, 2020); Adili v. Yarnell, No. 2017–CP–08–552, at 2 ¶ B (S.C. Ct. Com. Pl. 9th Jud. Cir. Feb. 27, 2017); Group for Horizon Ent., Inc. v. Branham, No. 2016–60729, at 1 ¶ 3 (Tex. Dist. Ct. Harris Cty. Sept. 9, 2016).

71. Ferguson v. Waid, 798 F. App'x 986, 989 (9th Cir. 2020).

72. Hagele v. Burch, No. 07 CVS 19854, at 4 (N.C. Super. Ct. Wake Cty. Aug. 15, 2013).

73. TENN. CODE ANN. § 36–4–106(d)(1)(C).

3. Specific accusations of misconduct (but with no finding of libel)

Still other injunctions forbid a speaker from making specific allegations of misconduct against a plaintiff—but without any finding that the allegations are libelous, or even that they are false:

- In *Stark v. Stark*,[74] for instance, Memphis Police Department Sergeant Joe Stark got a court order requiring his ex–wife, Pamela Stark, to take down a Facebook post that criticized him (she had accused him of abusing her) and of the Police Department (which she had accused of not suitably investigating her claims of abuse).[75]
- Another order restrained a newspaper, the *Daily Iberian*, "from publishing or posting on its website any article or story in which plaintiff David W. Groner is accused of dishonesty, fraud or deceit in connection with a Louisiana Supreme Court decision or similar matter."[76] The Louisiana Supreme Court had indeed disciplined Groner, a lawyer, after he entered into a consent agreement admitting, among other things, that he had knowingly engaged in "misrepresentation" to a client.[77]
- A plaintiff got a pretrial injunction against defendant's "[c]ontacting or communicating with people or entities in Idaho or on the internet concerning the criminal history of

74. Stark v. Stark, No. W2019–00650–COA–R3–CV, 2020 WL 507644 (Tenn. Ct. App. Jan. 31, 2020).

75. *Id.* at *2.

76. Groner v. Wick Commc'ns Co., No. 00126863 (La. Dist. Ct. Iberia Parish Aug. 25, 2015); *see also* Eugene Volokh, *Judge to Newspaper: Don't Publish Any Article in Which a Lawyer 'Is Accused of Dishonesty, Fraud or Deceit' in Connection with His Discipline by the State Supreme Court*, REASON (Sept. 1, 2015, 9:22 AM), https://reason.com/volokh/2015/09/01/judge-to-newspaper-dont-publis/ [https://perma.cc/T58C-YUM3].

77. *In re* Groner, 984 So.2d 707 (La. 2008) (mem.); *see also* Joint Memorandum in Support of Consent Discipline, at 3, available at https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/08/GronerMemoRedacted.pdf [https://perma.cc/TB8M-8GAQ].

the Plaintiff(s)" or "any allegations of wrongdoing by Plaintiffs."[78]

- Another speaker was barred from "characteriz[ing] Plaintiffs as unfit in their business and profession, cast[ing] serious doubt upon their honesty and integrity, and stat[ing] that Plaintiffs have committed or are currently committing a crime or other defamatory allegation."[79] This was not limited to false and defamatory future allegations; it applied even if defendants learned things that did cast serious doubt on plaintiffs' honesty and integrity.[80]
- Another speaker was barred from making statements "suggesting that Plaintiff was not deployed overseas, was not in combat, was not injured while serving in the United States Military, and/or did not earn the medals he claims to have earned," though the court expressly held that the evidence does "not confirm, one way, or another, without further investigation," the accuracy or inaccuracy of those statements.[81]
- A parent whose child's body had been prepared at a funeral home, and who was upset that a convicted sex offender was working there, was "restrained from speaking, delivering, publishing, emailing or disseminating information in any manner regarding [the employee's] sex offender status, his address and employment status to anyone anywhere."[82]

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78. Parker v. Casady, No. CV–16–4844 (Idaho Dist. Ct. Bonneville Cty. Jan. 18, 2017). *But see* DiTanna v. Edwards, 323 So. 3d 194, 203 (Fla. Dist. Ct. App. June 30, 2021) (striking down, on First Amendment grounds, an injunction that barred the defendant from contacting "anyone connected with Petitioner's employment or school to inquire about Petitioner").

79. Adili v. Yarnell, No. 2017–CP–08–552, at 2 ¶ A (S.C. Ct. Com. Pl. 9th Jud. Cir. Feb. 27, 2017).

80. *Id.*

81. Davis v. Leung, No. 15–1610–CC4, at 2, 3 (Tex. Cty. Ct. Williamson Cty. May 18, 2017).

82. Redmond v. Heller, No. 347505, 2020 WL 2781719, at *3 (Mich. Ct. App. May 28, 2020) (reversing this order on First Amendment grounds).

- Some speakers have been enjoined from accusing plaintiffs of crimes, even without a finding that such accusations are false.[83]
- Some speakers have been enjoined from expressing pejorative opinions about plaintiffs, including ones that would be seen under libel law as pure opinions and therefore as constitutionally protected (e.g., that a plaintiff is a "bully" or "unprofessional").[84]

To be sure, I don't know whether any of these factual allegations were true. But the point is that the judges in these cases made no factual findings on the matter—they restrained the speech *regardless* of whether it was true.

4. Accusations of misconduct sent to government authorities

Some courts have barred defendants from submitting complaints about plaintiffs to the police or to government agencies.[85] Indeed, a

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83. *See, e.g.*, Pearson v. Pearson, No. 417–00143–2017 (Tex. Dist. Ct. Collin Cty. Jan. 24, 2017) (barring "reporting any alleged act regarding the treatment of children of which he does not have direct personal knowledge in any public forum in reference to" Plaintiff); Bey v. Rasawehr, 161 N.E.3d 529, 533 (Ohio 2020) (reversing order that had barred "posting about the deaths of Petitioners' husbands in any manner that expresses, implies, or suggests that the Petitioners are culpable in those deaths").

84. Murphy v. Gump, No. 2016–CC–002126–O (Fla. Cty. Ct. Orange Cty. July 18, 2016); *see also* DCS Real Estate Investments, LLC v. Juravin, No. 2017–CA–0667 (Fla. 5th Cir. Ct. Feb. 28, 2018) (injunction against using the term "[b]ullying" "to describe the plaintiffs' businesses or relationships").

85. *See, e.g.*, *In re* Marriage of Meredith, 201 P.3d 1056, 1062 (Wash. Ct. App. 2009) (reversing such an order); Ruffino v. Lokosky, No. CV 2015–009252, 2017 WL 10487365, at *1 (Ariz. Super. Ct. Maricopa Cty. Apr. 4, 2017), *rev'd sub nom.*, Lokosky v. Gass, No. 1 CA–SA 18–0101, 2018 WL 3150499, ¶12 (Ariz. Ct. App. 2018) (likewise); Portofino Towers Condo. Ass'n, Inc. v. Wohlfeld, No. 2018–041933–CA–01 (08), at 2 ¶ 4 (Fla. 11th Cir. Ct. Feb. 11, 2019) (requiring court approval for reports to government agencies), *modified*, *id.* at ¶ 4.a (Feb. 28, 2019) (removing the preapproval provision); Hagele v. Burch, No. 07 CVS 19854, at 4 (N.C. Super. Ct. Wake Cty. Aug. 15, 2013) (barring Defendant from communicating with National Institutes of Health or National Institute of Environmental Health Sciences about plaintiff doctor).

Tennessee statute, noted above, requires courts in all divorce cases to issue orders "restraining both parties . . . from making disparaging remarks about the other . . . or to either party's employer."[86] When one spouse works for the police department, these orders forbid the other spouse from filing a complaint with the police, or with higher–ups in local government.[87]

5. Information about the underlying lawsuit

Some cases have barred the parties from speaking about the court order itself, or about filings in the case.[88] These courts did not purport to seal the court records (a process that generally requires a powerful showing of a need for confidentiality that overcomes the common–law and constitutional rights of access to court records[89]). Rather, they left the records unsealed but forbade the party from speaking about the case, including about features of the case that would not generally be seen as confidential.

6. Pictures of the plaintiff

Some other injunctions ban posts that include pictures of the plaintiff: Businessman John Textor, for instance, got a court order barring his billionaire business rival Alki David from "posting any tweets" or "any images . . . directed at John Textor without a legitimate purpose."[90] Community activist Clarence Moriwaki got an order barring a political critic, Richard Rynearson, from "us[ing] the

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86. TENN. CODE ANN. § 36–4–106(d)(3).

87. *See* Stark v. Stark, No. W2019–00650–COA–R3–CV, 2020 WL 507644, at *1 (Tenn. Ct. App. Jan. 31, 2020).

88. Absolute Pediatric Servs., Inc. v. Humphrey, No. 04CV–18–2961, at 4 ¶ D (Ark. Cir. Ct. Benton Cty. Nov. 9, 2018) ("All parties are enjoined from disseminating this order to the public . . . ."); Group for Horizon Ent., Inc. v. Branham, No. 2016–60729, at 2 ¶ 7 (Tex. Dist. Ct. Harris Cty. Sept. 9, 2016) (forbidding "[p]ubliciz[ing] this law suit, its exhibits, or this Temporary Restraining Order to Plaintiffs' family, friends, or to their clients and business colleagues").

89. *See, e.g.*, Bernstein v. Bernstein Litowitz Berger & Grossmann, 814 F.3d 132 (2d Cir. 2016).

90. David v. Textor, 189 So. 3d 871, 874 (Fla. Dist. Ct. App. 2016).

photograph of [Moriwaki] to create memes, posters, or other online uses."[91] I cite several more such cases in the Appendix.

Yet the First Amendment includes the right to illustrate one's criticisms or comments about people using their photographs. Newspapers and TV stations routinely exercise that right, and other speakers are entitled to do the same.[92]

7. Other speech

- *Use of names in title or domain name:* The *Moriwaki v. Rynearson* injunction barred Rynearson from posting sites or pages "that use the name or personal identifying information of [Moriwaki] in the title or domain name," even when the pages made clear that they were criticizing Moriwaki rather than being authored or endorsed by him.[93]
- *Accusations of figurative lynching:* In *Brummer v. Wey*,[94] the plaintiff—a prominent law professor who had been unsuccessfully nominated by President Obama to be on the Commodities Futures Trading Commission—got an injunction restricting an online tabloid from displaying any pictures of lynchings associated with his name.[95] The tabloid had ac-

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91. Order for Protection, Moriwaki v. Rynearson, No. 12–17, at 2 (Wash. Mun. Ct. Bainbridge Island July 17, 2017), *rev'd*, Moriwaki v. Rynearson, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018); *see also* Appendix (citing more such cases). The *Moriwaki* injunction covered even pages that made clear that they weren't put up by Plaintiff, such as Defendant's page that he renamed "Not Clarence Moriwaki" precisely to alleviate any possible confusion.

92. *See* Kelley v. Post Publ'g Co., 98 N.E.2d 286 (Mass. 1951); Bremmer v. J.–Trib. Publ'g Co., 76 N.W.2d 762 (Iowa 1956); Howell v. N.Y. Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993); Bement v. N.Y.P. Holdings, Inc., 760 N.Y.S.2d 133 (N.Y. App. Div. 2003); Four Navy Seals v. Associated Press, 413 F. Supp. 2d 1136 (S.D. Cal. 2005).

93. Order for Protection, Moriwaki v. Rynearson, No. 12–17, at 2 (Wash. Mun. Ct. Bainbridge Island July 17, 2017), *rev'd*, Moriwaki v. Rynearson, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018).

94. 166 A.D.3d 475, 476–77 (2018) (reversing this order).

95. *Id.* at 477.

cused Professor Brummer (who was himself black) of having perpetrated a figurative "lynching" of two black stockbrokers by being on an arbitration panel that permanently banned them from their profession.[96] The images were accusations that Brummer was the lyncher, not threats that Brummer would himself be lynched, but the order nonetheless banned such images.[97]

- *Public records:* In *Catlett v. Teel*,[98] the plaintiff got an injunction barring her ex–boyfriend from posting public records that he had obtained about her, including ones that had mentioned her past arrests for harassment and domestic assault.[99]

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All the injunctions in this subpart (B) are thus narrower than the categorical "stop talking about plaintiff" injunctions in Part A. But they still enjoin speech that falls outside any existing First Amendment exceptions.

II. WHY SUCH BROAD INJUNCTIONS ARE UNCONSTITUTIONAL

A. Supreme Court precedent generally

All these injunctions violate the First Amendment, which generally protects the right to criticize people, including private figures. False, defamatory statements of fact about people can lead to liability, and might even be enjoinable.[100] But that can't justify bans

96. *Id.* at 476.
97. *See id.* at 478.
98. 477 P.3d 50 (Wash. Ct. App. 2020) (reversing this order).
99. *Id.*; *see also* Wells v. Fischbach, No. A21–0108, 2021 WL 3716677, at *4 (Minn. Ct. App. Aug. 23, 2021) (affirming denial of harassment restraining order that was based on publishing information about a person's past convictions, because "speech that communicates readily available public information is protected speech").
100. *See* Volokh, *Anti–Libel Injunctions*, *supra* note 11, at 90.

(broad or narrow) on future speech about a person that would cover protected opinion and protected factually accurate allegations, and not just false factual assertions.

Courts must "look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[101] A statute banning someone from saying anything online about a particular person would be unconstitutional; same with the injunction.

Indeed, the Supreme Court struck down such an injunction in *Organization for a Better Austin v. Keefe*.[102] In *Keefe*, local civil rights activists decided that Keefe's real estate sales practices were improper,[103] so they began distributing leaflets in Keefe's home town, including to people going to and from Keefe's church.[104] Some of the leaflets even included Keefe's home phone number, and urged readers to call Keefe and express their disapproval.[105] The leafletters would do this every few weeks, and threatened to continue until Keefe stopped doing what the leafletters condemned.[106]

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101. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971). This logic applies to content–neutral injunctions as well as content–based ones; to the extent some such injunctions have been upheld, for instance in cases such as *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), they have been upheld under a test similar to (though "somewhat more stringent" than) the one for content–neutral statutes. *See id.* at 765.

102. 402 U.S. 415 (1971).

103. *See id.* at 416–17; *see also* Keefe v. Org. for a Better Austin, 253 N.E.2d 76, 77 (Ill. App. Ct. 1969), *rev'd*, 402 U.S. 415 (1971). ("The Austin area is undergoing racial change, and the [activist group], an integrated community organization, has been working to keep white residents in the community. In its efforts to stabilize the community and to deal rationally with integration, the OBA is attempting to stop 'panic peddling' by those brokers who exploit residents of racially changing areas by fomenting panic among them.") The Organization for a Better Austin believed Keefe was one such "panic peddl[er]." *Id.*

104. *Keefe*, 402 U.S. at 417.

105. *Id.*

106. *Id.*

The Illinois courts enjoined the leafletting, but the Supreme Court reversed on First Amendment grounds.[107] The Court concluded that even the "inten[t] to exercise a coercive impact . . . does not remove [the speech] from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper."[108] And the Court held that "[d]esignating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of [such] informational literature," when the plaintiff "is not attempting to stop the flow of information into his own household, but to the public."[109]

Of course, no one wants to be the target of persistent criticism, especially criticism that one sees as unfair or disproportionate. Even if the criticism doesn't include actionable falsehoods, it can still lead to rejection by prospective employers, customers, social acquaintances, or romantic partners. Indeed, it can be distressing just to know that there is such harsh criticism out there, even if one is confident that almost all readers would recognize that the criticism is unfounded. But courts cannot suppress harsh opinions about people, just as they cannot suppress even foolish or evil opinions about other matters.

To be sure, the Supreme Court has been open to some restrictions on sending unwanted speech *to* people. In *Rowan v. U.S. Post Office Department*,[110] for instance, the Court upheld a law that let householders demand that particular senders stop sending them mail, and made it a crime to violate such a demand.[111] "[N]o one," the Court held, "has a right to press even 'good' ideas on an unwilling

107. *See id*. at 417–20.
108. *Id*. at 419.
109. *Id*. at 419–20.
110. 397 U.S. 728 (1970).
111. *Id*. at 737.

recipient."[112] Likewise, the Court has seemed open to the constitutionality of properly crafted telephone harassment laws.[113] This principle could also apply to unwanted email, unwanted comments on others' Facebook pages, or perhaps even unwanted "tagging" that one knows generally yields automatic notification to the target (as @ mentioning does on Twitter).[114] But when it comes to speech *about* people, which may reach willing listeners (even if it's about an unwilling subject), *Keefe* makes clear that this speech is generally constitutionally protected.[115]

B. Protection for photographs and other information about people

Restrictions on all speech about a person are thus unconstitutional; but so are narrower restrictions, so long as they focus on speech that falls outside a First Amendment exception. Take, for instance, *NAACP v. Claiborne Hardware Co.*, in which the organizers of a boycott of white–owned stores demanded that black customers

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112. *Id.* at 738.

113. FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (lead opin.); Frisby v. Schultz, 487 U.S. 474, 484 (1988). Note that unwanted speech to government officials may often be constitutionally protected. *See, e.g.*, State v. Fratzke, 446 N.W.2d 781, 782, 785 (Iowa 1989); State v. Drahota, 788 N.W.2d 796, 798, 804 (Neb. 2010); Commonwealth v. Bigelow, 59 N.E.3d 1105, 1108, 1112 (Mass. 2016); United States v. Popa, 187 F.3d 672, 673 (D.C. Cir. 1999). *But see* United States v. Waggy, 936 F.3d 1014, 1015 (9th Cir. 2019).

114. *See, e.g.*, Polinsky v. Bolton, No. A16–1544, 2017 WL 2224391, at *4 (Minn. Ct. App. May 22, 2017); Nancy Leong & Joanne Morando, *Communication in Cyberspace*, 94 N.C. L. REV. 105, 120, 123–24 (2015) ("[B]y tagging the target of a message, the speaker has taken affirmative steps to ensure that the target receives the message.").

115. Several opinions have expressly recognized this distinction, using this very language. David v. Textor, 189 So. 3d 871, 874 (Fla. Dist. Ct. App. 2016) (expressly recognizing this distinction); Krapacs v. Bacchus, 301 So. 3d 976, 980 (Fla. Dist. Ct. App. 2020) (likewise); McCurdy v. Maine, No. 2:19–CV–00511–LEW, 2020 WL 1286206, at *8 (D. Me. Mar. 18, 2020); *see also* State v. Shackelford, 825 S.E.2d 689, 703 & n.7 (N.C. Ct. App. 2019) (Murphy, J., concurring); State v. Kimball, 8 Wash. App. 2d 1021, 2019 WL 1488879, at *4 (2019); *see also* A.S.R. v. A.K.A., 84 N.E.3d 1276, 1285 (Mass. App. Ct. 2017) (distinguishing speech to the plaintiff from "political speech directed to the public at large," though it's not clear what result the court would have reached as to speech that was directed to the public at large but was nonpolitical).

stop shopping at those stores.[116] The organizers stationed "store watchers" outside the stores to take down the names of black shoppers who were not complying with the boycott.[117] Those names were then read aloud at meetings at a local black church, and printed and distributed to other black residents.[118] Some of the noncomplying shoppers were physically attacked for refusing to go along with the boycott.[119]

But the Court held that the First Amendment protected publishing the fact that the noncomplying shoppers were not complying with the boycott, despite the backdrop of violence and the attempt to use social ostracism to pressure black shoppers to forgo their legal rights to shop at white–owned stores.[120] Though "[p]etitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism," the Court held, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[121] Both financial liability for such speech and an injunction against such speech was unconstitutional, the Court concluded.[122]

Likewise, *Florida Star v. B.J.F.*[123] makes clear that there is a First Amendment right to publish the lawfully obtained fact that a particular named person had been the victim of a crime (there, rape).[124] And publishing people's photographs, so long as it isn't done for purposes of advertising or merchandising, is constitutionally protected as well.[125]

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116. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 887 (1982).
117. *Id.* at 897.
118. *Id.* at 903–04.
119. *Id.* at 894.
120. *Id.* at 888.
121. *Id.* at 909–10.
122. *Id.* at 924 & n.67.
123. Fla. Star v. B.J.F., 491 U.S. 524 (1989).
124. *Id.* at 526, 541.
125. *See, e.g.*, Pott v. Lazarin, 260 Cal. Rptr. 3d 631, 638–39 (Ct. App. 2020); Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995); Foster v. Svenson, 7 N.Y.S.3d 96, 100 (N.Y. App. Div. 2015); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183–84 (9th Cir. 2001).

Of course, repeated criticism, even if it consists of opinions and accurate factual statements (and is thus not limited to actionable, enjoinable libel) is undoubtedly disquieting:

1. It can damage reputation, often using claims that a judge may view as unfair, even though not libelous. That is especially so if the criticism becomes prominent in Google searches for one's name, and defines one to strangers or casual acquaintances.
2. Such criticism can be perceived as intruding on privacy, by making its targets feel that they have become the object of others' condemnation, or even just curiosity or amusement. The law does not generally treat that as actionable invasion of privacy (outside the narrow zone of the disclosure of private facts), but I suspect many people perceive it as an intrusion, and some judges may agree.

(If the criticism gets more of a direct readership, for instance if it gets redistributed via Twitter or Facebook, it can lead to threats against the person being criticized, or even physical attacks;[126] but I leave that matter for another article, and focus here on perceived harm to reputation and privacy.)

Yet equally clearly, our legal system takes the view that such effects on reputation and privacy cannot themselves justify restricting speech. *Near v. Minnesota*,[127] one of the two earliest cases in which the Court struck down government action on free speech or free press grounds, involved a newspaper's repeated, unfair, anti–

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126. Christina Capecchi & Katie Rogers, *Killer of Cecil the Lion Finds out That He Is a Target Now, of Internet Vigilantism*, N.Y. TIMES (July 29, 2015), https://www.nytimes.com/2015/07/30/us/cecil-the-lion-walter-palmer.html [https://perma.cc/CW32-25XU]. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. at 933 (holding that speech identifying people who aren't complying with a boycott was constitutionally protected, even when there was evidence that some people criminally attacked those people as a result of the speech).

127. 283 U.S. 697 (1931).

Semitic criticisms of various people.[128] *Organization for a Better Austin v. Keefe* (noted in the previous section) and *NAACP v. Claiborne Hardware Co.* similarly involved speech that was personalized, offensive to its subjects, and indeed potentially coercive.[129] But the cases held that such speech could not be broadly restricted up front—only damages liability and perhaps prosecutions for specific constitutionally unprotected libelous statements would be allowed.[130]

C. *State and federal appellate precedents*

Unsurprisingly, when the injunctions that I describe are appealed, they are generally struck down. We see that with regard to unduly broad injunctions issued in libel cases, such as:

1. In *Puruczky v. Corsi*,[131] the Ohio Court of Appeals held that an order that "Corsi cannot contact anyone *about or in relation to Puruczky*" was an unconstitutional prior restraint,[132] because "the trial court did not make a specific

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128. *Id.* at 703–04, 722–23.

129. NAACP v. Claiborne Hardware Co., 458 U.S. at 909–10. *Claiborne Hardware* did stress that the speech there was aimed at promoting equal rights, and was thus "designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. But the Court had long made clear that the First Amendment rules are the same for pro–civil–rights speech and for other speech. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 444 (1963) ("That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner."). And courts have naturally relied on *Claiborne Hardware* far outside the context of pro–civil–rights speech. *See, e.g.*, Bey v. Rasawehr, 161 N.E.3d 529, 544 (Ohio 2020).

130. *See Near*, 283 U.S. at 736.

131. 110 N.E.3d 73 (Ohio Ct. App. 2018).

132. *Id.* at 81.

finding that speech which had already taken place constituted libel or defamation and cannot assume that future speech will fall into such a category."[133]

2. In *Ellerbee v. Mills*,[134] the Georgia Supreme Court "reverse[d] the injunction" that barred the defendant from making 27 specific statements about the plaintiff, "because the jury did not find all of those statements defamatory in its verdict and because the order sweeps more broadly than necessary."[135]
3. In *McCarthy v. Fuller*,[136] the Seventh Circuit reversed an injunction on the grounds that it "forb[ade] statements not yet determined to be defamatory," and thus "could restrict lawful expression"; for example, the injunction "order[ed] Hartman to take down his website, which would prevent him from posting any nondefamatory messages on his blog; it would thus enjoin lawful speech."[137]
4. In *Ferguson v. Waid*,[138] the Ninth Circuit reversed an injunction barring Ferguson—who had been found to have libeled Waid—"from contacting past or present clients of Brian J. Waid, either in person, via telephone, or by electronic communications."[139] (The lawsuit was brought by Waid, who didn't want to be spoken about, not by clients of his saying that they didn't want to be

133. *Id.* at 82.
134. 422 S.E.2d 539 (Ga. 1992).
135. *Id.* at 540–41.
136. 810 F.3d 456 (7th Cir. 2015).
137. *Id.* at 462.
138. 798 F. App'x 986 (9th Cir. 2020).
139. *Id.* at 989.

spoken to.) The injunction, the court held, was "overbroad," because it wasn't limited to "statements found to be defamatory."[140]

5. Appellate opinions in California, Illinois, Minnesota, Nebraska, Nevada, and (in a nonprecedential decision) Tennessee have likewise struck down, on overbreadth grounds, injunctions in libel cases that weren't limited to banning repetition of the specific statements found to be libelous.[141]

And courts have held the same with regard to broad injunctions entered in harassment or cyberstalking cases—unsurprising, because the First Amendment protects speech about people regardless of the state law cause of action that purports to restrict the speech:[142]

1. In *Evans v. Evans*,[143] the California Court of Appeal struck down a preliminary injunction prohibiting an ex–wife from posting "false and defamatory statements"

140. *Id.*

141. *See* Wallace v. Cass, No. G036490, 2008 WL 626475, at *8–*9 (Cal. Ct. App. 2008) ("[Defendant] may be enjoined from posting signs repeating the kinds of statements about the Plaintiffs that have already been adjudicated as defamatory, but paragraph 4(a) sweeps up any nondefamatory statements she makes about them as well and is too broad."); *see also* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 352 (Cal. 2007) (setting aside a provision of an injunction that banned defendant from "initiating contact with individuals known to Defendant to be employees of Plaintiff"); Same Condition, LLC v. Codal, Inc., No. 1–20–1187, 2021 WL 2525659, ¶49 (Ill. App. Ct. June 21, 2021); Griffis v. Luban, No. CX–01–1350, 2002 WL 338139, at *6 (Minn. Ct. App. Mar. 5, 2002); Gillespie v. Council, No. 67421, 2016 WL 5616589, at *5 (Nev. Ct. App. Sept. 27, 2016); Nolan v. Campbell, 690 N.W.2d 638, 652–53 (Neb. 2004); *see also* Kauffman v. Forsythe, No. E2019–02196–COA–R3–CV, 2021 WL 2102910, at *6 (Tenn. Ct. App. May 25, 2021).

142. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (constitutional protection does not turn on "'mere labels' of state law"); *see supra* cases cited in note 69 (concluding that interference with business relations claims are subject to the same First Amendment constraints as libel claims); *see also* Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905–06 (Utah 1992) (same as to the intentional infliction of emotional distress); Nelson v. Pagan, 377 S.W.3d 824, 837 (Tex. App. 2012) (same).

143. 76 Cal. Rptr. 3d 859 (Ct. App. 2008).

and "confidential personal information" about her ex–husband online.[144] The injunction, the court noted, was not limited to statements that had been found to be constitutionally unprotected.[145]

2. In *David v. Textor*, the Florida Court of Appeal struck down an injunction barring "text messages, emails, . . . tweets[, or] . . . any images or other forms of communication directed at John Textor without a legitimate purpose."[146] This injunction, the court held, was a forbidden "prior restraint" because it prevented "not only communications *to* Textor, but also communications *about* Textor."[147] Several other Florida appellate decisions have taken the same view.[148]

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144. *Id.* at 869.

145. *Id.* at 863; *see also* Altinawi v. Salman, No. B284071, 2018 WL 5920276, at *6 (Cal. Ct. App. Nov. 13, 2018) (finding that "the restraining order," which "required Salman to remove *all* comments about Altinawi and Altinawi's job from social media and blogs, and barred Salman from future posting of similar material," was "clearly overbroad, as it encompassed speech the court itself recognized as constitutionally protected (such as reviews of the nightclub and Altinawi's behavior as an employee there)"); Molinaro v. Molinaro, 245 Cal. Rptr. 3d 402, 408 (Ct. App. 2019) ("[T]he part of the order prohibiting Michael from posting 'anything about the case on Facebook' is overbroad and impermissibly infringes upon his constitutionally protected right of free speech.").

146. 189 So. 3d 871, 874 (Fla. Ct. App. 2016).

147. *Id.* at 876 (emphasis in original).

148. *See, e.g.*, DiTanna v. Edwards, 323 So. 3d 194 (Fla. Dist. Ct. App. 2021); Krapacs v. Bacchus, 301 So. 3d 976 (Fla. Dist. Ct. App. 2020); Logue v. Book, 297 So. 3d 605 (Fla. Dist. Ct. App. 2020) (en banc); Fox v. Hamptons at Metrowest Condominium Ass'n, Inc., 223 So.3d 453, 457 n.3 (Fla. Dist. Ct. App. 2017); O'Neill v. Goodwin, 195 So.3d 411, 414 (Fla. Dist. Ct. App. 2016). All these injunctions barred defendants from posting anything about plaintiffs on the Internet. *See also* Chevaldina v. R.K./FL Mgmt., Inc., 133 So. 3d 1086, 1091 (Fla. Dist. Ct. App. 2014) (striking down an injunction that barred "directly or indirectly interfering in person, orally, in written form or via any blogs or other material posted on the internet or in any media with Plaintiffs' advantageous or contractual and business relationships" or "directly or indirectly publishing any blogs or any other written or spoken matter calculated to defame, tortuously interfere with, invade the privacy of, or otherwise cause harm to Plaintiffs").

3. In *Flood v. Wilk*, the Appellate Court of Illinois struck down as unconstitutional an order prohibiting the respondent from "communicating in any form any writing naming or regarding [petitioner], his family or any employee, staff or member of [the petitioner's congregation]."[149]
4. In *TM v. MZ*,[150] the Michigan Court of Appeals reversed a protective order aimed at forbidding the defendant from reposting "highly inflammatory and negative . . . comments" about petitioner and her family online, including allegations that she was involved in a kidnapping.[151] The order, the court held, was an unconstitutional prior restraint, even if the defendant's words "amounted to harassment or obnoxiousness."[152]
5. In *In re Marriage of Suggs*,[153] the Washington Supreme Court set aside a civil harassment restraining order that barred "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties . . . for the purpose of annoying, harassing, vexing, or otherwise harming" her ex–husband, who was a police officer, "and for no lawful purpose."[154] The order, the court held, was an "unconstitutional prior restraint," in part because it "chill[ed] all of [the ex–wife's] speech about [the ex–husband], including that which would be constitutionally protected, because it is unclear what she can and cannot say."[155]

149. 125 N.E.3d 1114, 1116 (Ill. App. Ct. 2019).

150. 926 N.W.2d 900 (Mich. Ct. App. 2018).

151. *Id.* at 904.

152. *Id.* at 910; *see also* Redmond v. Heller, 957 N.W.2d 357, 376 (Mich. Ct. App. May 28, 2020) (striking down injunction on First Amendment grounds because it "potentially covers much more than the specific four statements found to be defamatory").

153. 93 P.3d 161 (Wash. 2004).

154. Id. at 162; *see also* In re Marriage of Meredith, 201 P.3d 1056, 1062 (Wash. Ct. App. 2009); Catlett v. Teel, 477 P.3d 50 (Wash. Ct. App. 2020).

155. *In re Marriage of Suggs*, 93 P.3d at 166.

The upshot of these cases is consistent and simple: Injunctions against speech about a person are unconstitutional if they bar speech about people (and not just to them) and go beyond constitutionally unprotected categories of speech (such as defamation or true threats).

III. THE DOCTRINAL DEFENSES OF THE BROAD INJUNCTIONS

I suspect the legal framework in Part II will not be controversial among First Amendment lawyers and academics.[156] And, as Part C notes, most appellate courts that have considered the issue have rejected these sorts of orders. But some courts have nonetheless upheld them; let me turn here to discussing the doctrinal reasons they have given.

A. Content neutrality

Some courts have reasoned that stop – speaking – about–plaintiff injunctions are content–neutral, and therefore subject to much less demanding First Amendment scrutiny than content–based restrictions would be:

> [The order] is limited to social and electronic network remarks "regarding Plaintiff." As written, therefore, the proscription is not concerned with the *content* of Appellant's speech but with, instead, the *target* of his speech, namely, Plaintiff, whom the court has already deemed the victim of his abusive conduct.[157]

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156. *See, e.g.*, David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 52–53 (2013) (concluding that stop–speaking–about–plaintiff injunctions "are plainly overbroad and therefore unconstitutional"); Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 822–24 (2013).

157. Commonwealth v. Lambert, 147 A.3d 1221, 1229 (Pa. Super. Ct. 2016); *see also* S.B. v. S.S., 243 A.3d 90, 106 (Pa. 2020). Some injunctions, for instance ones banning coming near plaintiff or speaking to plaintiff, may indeed be content–neutral. *See, e.g.*, PLT v. JBP, No. 346948, 2019 WL 7206134, at *5 (Mich. Ct. App. Dec. 26, 2019); Scott v. Steiner, No. B258400, 2015 WL 9311734, at *6 (Cal. Ct. App. Dec. 22, 2015); Arnold v.

But that is mistaken, for reasons the Ohio Supreme Court recognized in *Bey v. Rasawehr*:

> [T]he "target" of such speech necessarily concerns the subject matter of the speech. [An injunction against such speech about a person] "cannot be justified without reference to the content of the prohibited communication." It requires an examination of its content, i.e, the person(s) being discussed, to determine whether a violation has occurred and is concerned with undesirable effects that arise from "the direct impact of speech on its audience or listeners' reactions to speech." We therefore cannot accept appellees' attempt to characterize the order banning all posted speech about them as merely a content–neutral regulation.[158]

The injunctions we're discussing "on [their] face" draw distinctions based on the "communicative content" of what a speaker conveys.[159] They define the forbidden speech based on "the topic discussed" (the plaintiffs).[160] They were "adopted by the government because of disagreement with the message [the speech] conveys," a

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Toole, No. D067317, 2015 WL 6746572, at *3 (Cal. Ct. App. Nov. 5, 2015); Rew v. Bergstrom, 845 N.W.2d 764, 777 (Minn. 2014); R.D. v. P.M., 135 Cal. Rptr. 3d 791, 799 (Ct. App. 2011); State v. Noah, 9 P.3d 858, 867 (Wash. Ct. App. 2000). This Article, though, focuses on injunctions against speech about the plaintiff.

158. Bey v. Rasawehr, 161 N.E.3d 529, 539 (Ohio 2020) (partly cleaned up). *See also* Same Condition, LLC v. Codal, Inc., 2021 IL App (1st) 201187, ¶ 34 (2021) (holding that order banning defendants "from making any additional posts online regarding Codal" is content–based, because it "clearly intended to regulate the content of [defendants'] speech, namely any online speech involving Codal," and "in order to determine whether [defendants] violated the court's order, one would have to examine the content of their online posting"); Lo v. Chan, 2015 WL 9589351 (Cal. Ct. App. Dec. 30, 2015) (holding that order "prohibiting appellants from approaching, yelling out, or calling out to parishioners concerning respondent or other church officials from the Cerritos College parking lot on any day church services are held is, on its face, an impermissible content–based prior restraint of speech"); Sarver v. Chartier, 813 F.3d 891, 903 (9th Cir. 2016) (recognizing that a state right of publicity law, which bars commercial uses of a plaintiff's name, likeness, or other attributes of identity, is content–based).

159. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

160. *Id.*

"separate and additional" basis for finding the restriction to be content–based.[161] Determining whether the defendant is violating the order requires "'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred,"[162] and in particular whether the defendant's new speech contains a reference to plaintiffs.

Nor does it matter that the speech may be covered by a stalking or harassment statute that applies generally to "a pattern of conduct."[163] Speech does not lose its First Amendment protection simply because it's restricted as part of a broader conduct restriction, at least when the conduct restriction applies to the speech precisely because of what it communicates.

The leading case on such conduct restrictions—ones that include speech because of what it says—is *Holder v. Humanitarian Law Project*,[164] where a federal statute forbade providing "material support" to foreign terrorist organizations.[165] The statute restricted providing money, goods, or soldiers to such organizations, but also swept in speech such as training the organizations in international law or advising them on petitioning the United Nations.[166] The government sought to categorize the speech restriction as merely incidental, because it was part of a restriction on a broad course of conduct.[167] But the Court disagreed: "The law here may be described as directed at conduct, . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a

161. *Id.* (citation omitted).
162. McCullen v. Coakley, 573 U.S. 464, 479 (2014) (citation omitted).
163. *See, e.g.*, FLA. STAT. §§ 784.048–.0485.
164. 561 U.S. 1 (2010).
165. *Id.* at 28.
166. *Id.* at 27.
167. *Id.* at 27–28.

message."[168] The law therefore had to be treated as a speech restriction, not merely a conduct restriction.[169]

The same was true in *Cohen v. California*,[170] the main precedent on which *Humanitarian Law Project* relied on this point. "*Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace."[171] "But when Cohen was convicted for wearing a jacket bearing an epithet," "we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message."[172]

Likewise, even if a defendant's speech that violates a stop – talking – about–plaintiff injunction also violates a stalking or harassment statute, it does so because of what the speech communicated. The injunction must therefore be treated as a content–based speech restriction.

B. *"Speech integral to criminal conduct"*

Some litigants have argued that broad "anti–harassment" injunctions are constitutional under the First Amendment exception for "speech integral to criminal conduct": The enjoined speech, the theory goes, is integral to criminal harassment or stalking.[173]

The speech integral to criminal conduct exception generally applies to speech that's closely connected to a nonspeech crime (or a crime involving unprotected speech, such as child pornography).

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168. *Id.* at 28.

169. The Court ultimately upheld this "content–based regulation of speech," but only because it was "carefully drawn to cover only a narrow category of speech" that implicated "the Government's interest in combating terrorism[, which] is an urgent objective of the highest order." *Id.* at 26–28.

170. 403 U.S. 15 (1971).

171. *Holder*, 561 U.S. at 28.

172. *Id.* For many more examples, *see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation–Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

173. Merit Brief of Appellees, Bey v. Rasawehr, No. 2019–0295, at 7–14 (Ohio Aug. 20, 2019).

Speech that threatens illegal conduct might qualify.[174] So might speech that solicits illegal conduct.[175] An injunction against such threats or solicitation might thus fit within the exception—but an injunction against all speech about a person is not thus limited.

Some courts have upheld *criminal prosecutions* under a federal stalking statute that criminalizes (among other things) repeated speech that "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress" and is said "with the intent to . . . harass,"[176] reasoning that this speech is integral to the criminal conduct that the statute itself bans.[177]

One such case, *Petrovic*, involved speech that genuinely was integral to a *separate* crime (extortion). Petrovic threatened to publish nude photos of M.B. and other personal information about her if she ended their relationship; when she did end it, he mailed postcards to her family and workplace, as well as local businesses, with a link to a website where he posted the photos and information.[178] A jury found Petrovic guilty of extortion (in violation of 18 U.S.C. § 875(d)), as well as violating the interstate stalking statute (18 U.S.C. § 2261A(2)(A)).[179] The Eighth Circuit held that "[t]he communications for which Petrovic was convicted under § 2261A(2)(A) were integral to this criminal conduct as they constituted the *means of carrying out his extortionate threats*."[180]

Another case, *Osinger*, did appear to involve speech that was punished without a connection to a separate crime; the court concluded that the speech there—posting revenge porn of an ex–girlfriend—

174. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1003–07 (2016).

175. *Id.* at 989–97.

176. 18 U.S.C. § 2261A(2)(B).

177. United States v. Petrovic, 701 F.3d 849 (8th Cir. 2012); United States v. Osinger, 753 F.3d 939 (9th Cir. 2014); United States v. Gonzalez, 905 F.3d 165 (3d Cir. 2018).

178. *See* 701 F.3d at 852–53.

179. *See id.* at 854.

180. *Id.* at 855 (emphasis added).

was integral to his criminal conduct "in intentionally harassing, intimidating or causing substantial emotional distress to V.B."[181] One more case, *Gonzalez*, followed the same approach.[182] But I think that *Osinger* and *Gonzalez* are unsound applications of the "speech integral to criminal conduct" doctrine, even in the context of criminal cyberstalking prosecutions.[183] Perhaps the results in some such cases might be defended on some other theory, for instance that revenge porn (*Osinger*) is a constitutionally unprotected invasion of privacy,[184] or that the speech in *Gonzalez* was libelous and thus constitutionally unprotected.[185] The "speech integral to criminal conduct" rationale, though, cannot itself justify criminal harassment statutes; and several state appellate decisions agree.

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181. 753 F.3d at 947. Two of the cases *Osinger* cited to support its holding, *Petrovic* and *United States v. Meredith*, 685 F.3d 814 (9th Cir. 2012), involved speech integral to the commission of a separate crime (extortion in *Petrovic*, fraud in *Meredith*). One other case, *United States v. Shrader*, did not address the "speech integral to criminal conduct" exception, but dealt only with a vagueness challenge. 675 F.3d 300, 311 (4th Cir. 2012).

I think Judge Watford had the better approach to *Osinger*; he concurred because he saw the speech as continuing a course of harassment that began with Osinger physically stalking his victim, 753 F.3d at 952 (Watford, J., concurring), and he noted that "[c]ases in which the defendant's harassing 'course of conduct' consists entirely of speech that would otherwise be entitled to First Amendment protection" raise "a question whose resolution we wisely leave for another day." *Id.* at 954.

182. In *Gonzalez*, the Third Circuit made a similar mistake to that in *Osinger*, applying the "integral to criminal conduct" exception to speech that was not connected to a separate crime. 905 F.3d 165, 193 (3d Cir. 2018). *See also* Commonwealth v. Johnson, 21 N.E.3d 937 (Mass. 2014); United States v. Sergentakis, 2015 WL 3763988, at *4–*7 (S.D.N.Y. 2015).

183. For much more on my disagreement with those cases, see Volokh, *The "Speech Integral to Criminal Conduct" Exception*, at 1036–43; what follows in the text is a quick summary of my argument, coupled with material from cases decided after that article was written.

184. *See, e.g.*, Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, *supra* note 12, at 2303; Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 100 UCLA L. REV. 1366, 1378 (2016); State v. VanBuren, 214 A.3d 791 (Vt. 2019); *cf.* Borzych v. Hart, No. 2019CV008976 (Wisc. Cir. Ct. Milwaukee Cty. Dec. 5, 2019) (docket entry, available on Westlaw Dockets) (harassment order enjoining the posting or emailing of "any explicit images of the petitioner").

185. 905 F.3d at 192–93.

Thus, in *People v. Relerford*,[186] the Illinois Supreme Court held that an Illinois stalking law could not be justified under the "speech integral to criminal conduct" exception, because it was not limited to speech "'proximate[ly] link[ed]'" to "some other criminal act."[187] Instead, the court concluded, "[i]n light of the fact that a course of conduct [under the Illinois law] can be premised exclusively on two communications to or about a person," the stalking law "is a direct limitation on speech that does not require any relationship—integral or otherwise—to unlawful conduct."[188]

Under the Illinois law, "the speech [was] the criminal act," and the speech integral to criminal conduct exception therefore did not apply.[189] As an Illinois appellate case later held, "without this link between the unprotected speech and a separate crime, the exception would swallow the first amendment whole: it would give the legislature free rein to criminalize protected speech, then permit the courts to find that speech unprotected simply because the legislature criminalized it."[190]

Similarly, in *Matter of Welfare of A.J.B.*,[191] the Minnesota Supreme Court rejected the government's argument that a stalking by mail statute was valid under the "speech integral to criminal conduct" exception.[192] The court held the argument was "circular," since "the speech covered by the statute is integral to criminal conduct because the statute itself makes the conduct illegal."[193] Thus, the statute was unconstitutional, because it was not limited to speech aimed "to induce or commence a separate crime."[194]

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186. 104 N.E.3d 341 (Ill. 2017).

187. *Id.* at 352.

188. *Id.*

189. *Id.*

190. Flood v. Wilk, 125 N.E.3d 1114, 1128 (Ill. App. Ct. 2019).

191. 929 N.W.2d 840 (Minn. 2019).

192. *Id.* at 859.

193. *Id.*

194. *Id.* at 852. *See also* Burroughs v. Corey, 92 F. Supp. 3d 1201, 1209 n.16 (M.D. Fla. 2015) ("Burroughs asserts that an argument for the 'speech integral to criminal conduct'

In *State v. Doyal*,[195] the Texas Court of Criminal Appeals (Texas' highest court for criminal cases) likewise wrote:

> The State also contends that any speech that is implicated by the statute is unprotected because it constitutes "speech integral to criminal conduct." But the cases that involve this form of unprotected speech involve speech that furthers *some other activity* that is a crime.[196]

And in *State v. Shackelford*, the North Carolina Court of Appeals held that a stalking statute was unconstitutional as applied to the defendant's social media posts because,

> Defendant's indictments were premised . . . upon social media posts . . . that he wrote *about* Mary but did not send directly *to* her (or, for that matter, to anyone else). . . . [H]is speech itself was the crime.
>
> For this reason, the First Amendment is directly implicated by Defendant's prosecution . . . . We therefore reject the State's argument that Defendant's posts fall within the "speech integral to criminal conduct" exception. . . . ("[The statute] does not incidentally punish speech that is integral to a criminal violation; the speech itself is the criminal violation.")[197]

Legislatures are free to punish nonspeech conduct, as well as narrow categories of constitutionally unprotected speech, such as true threats. But they cannot label speech that mentally distresses people "stalking" and then punish all such speech.[198]

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exception is circular with respect to this statute because the speech is only integral to criminal conduct because this statute criminalizes the conduct. Burroughs is right that speech cannot be unprotected only because it is criminal in the challenged statute. However, speech is unprotected where it is integral to criminal *conduct* forbidden under another statute, such as where the speech constitutes the crime of extortion."), *aff'd*, 647 F. App'x 967 (11th Cir. 2016).

195. 589 S.W.3d 136 (Tex. Crim. App. 2019).

196. *Id*. at 143 (emphasis added).

197. 825 S.E.2d 689, 698–99 (N.C. Ct. App. 2019).

198. *Mashaud v. Boone*, 256 A.3d 235 (D.C. Aug. 12, 2021), *review en banc granted*, noted the tension between *A.J.B.* and some of the federal stalking cases, such as *Osinger*, but

But in any event, for our purposes we need not resolve whether the *Osinger* view or the *Relerford* view is right as to criminal punishments for *specific past speech* designed to cause substantial emotional distress. None of those cases offers support to categorical injunctions against *all future speech* about the plaintiff; to quote the Ohio Supreme Court in *Bey v. Rasawehr*,

> Even if past speech that an offender [engaged in] . . . could be considered speech that was integral to the criminal conduct of menacing by stalking, we do not believe that this principle may be applied categorically to future speech—that is by its nature uncertain and unknowable—directed to others.
>
> Because of the uncertainty inherent in evaluating future speech that has yet to be expressed, the record here cannot justify a content–based prior restraint on speech when there has been no valid judicial determination that such speech will be integral to criminal conduct, defamatory, or otherwise subject to lawful regulation based on its content.[199]

C. "Harassment is not protected speech"

A few courts have upheld broad injunctions on the grounds that "harassment is not protected speech." This has been especially common in California, under the theory that "speech that consti-

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didn't resolve it. *See id.* at 240–42. A dissenting judge would have followed the *A.J.B.* approach. *Id.* at 246 (Beckwith, J., dissenting).

199. 161 N.E.3d 529, 542 (Ohio 2020); *see also* Buchanan v. Crisler, 922 N.W.2d 886, 901–02 (Mich. Ct. App. 2018) (explaining that "to enjoin an individual from posting a message in violation of MCL 750.411s," a criminal harassment statute, "there must first be a finding that a prior posting violates that statute," and "the trial court should then consider the nature of the postings that will be restricted to ensure that constitutionally protected speech will not be inhibited by enjoining an individual's online postings").

tutes 'harassment' within the meaning of section 527.6 [of the California Code of Civil Procedure] is not constitutionally protected, and the victim of the harassment may obtain injunctive relief."[200]

Like many broad assertions, this one originated in a case where it made sense—that case involved "[v]iolence and threats of violence,"[201] and such conduct and speech is indeed constitutionally unprotected.[202] Some other courts have likewise asserted that "free speech does not include the right to cause substantial emotional distress by harassment or intimidation," specifically in the context of unprotected true threats or unwanted speech to a person.[203]

But the application of the assertion grew, as these things do. By its terms, § 527.6 allows injunctions not just based on "violence" or "a credible threat of violence," but also

- "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person,"
- "that serves no legitimate purpose,"
- "which would cause a reasonable person to suffer substantial emotional distress," and
- which "actually cause[s] substantial emotional distress to the petitioner."[204]

And later cases have read this provision to cover nonthreatening speech about a person, for instance,

200. Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 129 Cal. App. 4th 1228, 1250 (Ct. App. 2005); *see also* Guiffrida v. Glick, 2017 WL 2439511, at *2 (Mont. 2017).

201. *Huntingdon*, 129 Cal. App. at 1250.

202. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003).

203. *See* Purifoy v. Mafa, 556 S.W.3d 170, 190, 192 (Tenn. Ct. App. 2017) (citation omitted); State v. Cooney, 894 P.2d 303, 307 (Mont. 1995); State v. Goldberg, No. M2017–02215–CCA–R3–CD, 2019 WL 1304109 (Tenn. Ct. Crim. App. Mar. 20, 2019); Erickson v. Earley, 878 N.W.2d 631, 635 (S.D. 2016); Bd. of Dirs. for Glastonbury Landowners Ass'n, Inc. v. O'Connell, 396 Mont. 548 (2019); *see also* State v. Nye, 943 P.2d 96, 101 (Mont. 1997) (making such a statement as to speech posted on others' property without their permission).

204. CAL. CODE CIV. PROC. § 527.6.

- a woman's emails to the Marine Corps making various complaints about her neighbor, a marine;[205]
- a man's complaints to the police department about the alleged behavior of his neighbor, a police officer;[206]
- a man's "statement on his blog suggesting [another man] committed sexual assault";[207]
- a man's posting any "photographs, videos, or information about [a friend whom he had earlier pursued romantically] to any internet site";[208]
- a man's engaging in "social media harassment with family names" of a fellow church member's family—which apparently seemed to refer to any social media commentary (or at least critical commentary) about the family.[209]

But, in the words of then–Judge Alito, "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[210] The Ninth Circuit, the New Jersey Supreme Court, and the Michigan and Washington Courts of Appeals have adopted the

205. Parnell v. Shih, No. D074805, 2020 WL 1451931, at *5 (Cal. Ct. App. Mar. 25, 2020).

206. Hunley v. Hardin, No. B210918, 2010 WL 297759, at *4 (Cal. Ct. App. Jan. 27, 2010) (upholding the injunction based in part on findings that defendant had "made false complaints designed to damage [plaintiff's] professional career," but the injunction barred all future complaints, absent court permission, and not just false complaints).

207. Altinawi v. Salman, No. B284071, 2018 WL 5920276, at *6 n.8 (Cal. Ct. App. Nov. 13, 2018) (describing trial court's conclusion, but not reaching its validity on appeal because defendant had not appealed it).

208. Phillips v. Campbell, 206 Cal. Rptr. 3d 492, 500 (Ct. App. 2016).

209. Burrett v. Rogers, No. G047412, 2014 WL 411240, at *2 (Cal. Ct. App. Feb. 4, 2014).

210. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001); *see also* DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008).

same view, quoting Justice Alito's statement.[211] None of the Supreme Court's lists of First Amendment exceptions have included a harassment exception.[212] Indeed, as one California decision noted, harassment under California law is not protected speech "only because the definition of harassment *carves out* constitutionally protected activity":[213]

> Thus, even if the defendant's conduct meets the statutory definition of harassment in every other way—i.e., it evidences a continuity of purpose, it is directed at a specific person, it causes the plaintiff to suffer substantial emotional distress, and it would cause a reasonable person to suffer substantial emotional distress—we still must determine whether it is constitutionally protected.[214]

As I noted above, some alleged harassment might indeed be constitutionally unprotected: for instance, true threats of criminal conduct, which are criminalized as "harassment" in many states.[215] Likewise, traditional "telephone harassment" and its modern analogs—again, unwanted speech said *to* a person, rather than publicly accessible speech *about* a person[216]—are likely constitutionally unprotected under the principle that "no one has a right to press even

211. Catlett v. Teel, 477 P.3d 50, 59 (Wash. Ct. App. 2020); TM v. MZ, 926 N.W.2d 900, 909 (Mich. Ct. App. 2018); State v. Burkert, 174 A.3d 987, 1000 (N.J. 2017); Rodriguez v. Maricopa Cty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010); *see also* Falossi v. Koenig, No. E048400, 2010 WL 4380112, at *13 (Cal. Ct. App. Nov. 5, 2010).

212. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality op.); United States v. Stevens, 559 U.S. 460, 462 (2010); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

213. Falossi v. Koenig, No. E048400, 2010 WL 4380112, at *13 (Cal. Ct. App. Nov. 5, 2010).

214. *Id.*

215. *See, e.g.*, IDAHO CODE ANN. § 18–7902(c); NEV. REV. STAT. ANN. § 200.571(1)(a)(1)–(3). *State v. D.R.C.*, 467 P.3d 994 (Wash. Ct. App. 2020), is thus correct when it says, "When it comes to the crime of harassment, speech is not protected if it constitutes a true threat, as opposed to mere bluster or hyperbole." *Id.* at 998.

216. *See supra* note 114 and accompanying text for some discussion of borderline cases, such as "@" references on Twitter.

'good' ideas on an unwilling recipient."[217] (That latter line is from a case that upheld a ban on unwanted mailings to a person's home.) But all the injunctions we are discussing here go far beyond that.

D. *Restrictions based on past speech or conduct*

Most injunctions against speech follow some past improper speech by the defendant—for instance, some past libels. The logic seems to be that such defendants have proved themselves to be irrational or malicious, and the only way to prevent similar misbehavior is through a categorical ban. At least one appellate case, *Best v. Marino*,[218] makes that explicit:

> The state has broad power to limit a person's liberty interests based on that person's prior [criminal] conduct . . . . The rationale underlying such statutes [which mandate imprisonment, loss of the right to vote, loss of the right to keep and bear arms, or registration of sex offenders] is that the public interest is served by limiting a convicted felon's ability to engage in certain activity—even though that limitation burdens the exercise of the person's inherent rights. [Footnote: Although Respondent was not convicted of "stalking," we conclude that the district court's finding [of stalking in a civil case] is analogous to a conviction for the purposes of this opinion.]
>
> Orders of protection are essentially justified by the same rationale. The purpose of an order of protection is to prevent future harm to a protected party by a restrained party. To achieve this result, it is constitutionally permissible to limit a restrained party's ability to engage in certain activity—including the exercise of his or her right to free speech.

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217. Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 730 (1970); *see* McCurdy v. Maine, No. 2:19–cv–00511, 2020 WL 1286206, at *8 (D. Me. Mar. 18, 2020) (approving of state court's view that "harassment is not protected under the First Amendment" on the grounds that the state court order was limited to unwanted speech to a person), *recommended decision affirmed*, *id.* (May 19, 2020).

218. 404 P.3d 450 (N.M. Ct. App. 2017).

> The Order of Protection limited Respondent's right to speak and publish freely only inasmuch as it restrained her from (1) directly contacting Petitioner, and (2) causing Petitioner to suffer severe emotional distress [even in the absence of direct contact]. Placing such limitations on Respondent—as the restrained party under the Order of Protection—is not an unconstitutional limitation on her First Amendment rights.[219]

This, though, is inconsistent with the Supreme Court's First Amendment precedents. Indeed, *Near v. Minnesota* struck down a statute that allowed a court to enjoin future distribution of "a malicious, scandalous and defamatory newspaper," so long as the court found that the defendant had regularly published such a newspaper in the past.[220] Near's past misconduct couldn't justify such an injunction, the Court held, even though the state had alleged that Near had published nine "malicious, scandalous and defamatory" editions.[221]

Likewise, *Packingham v. North Carolina* made clear that, whatever rights convicted sex offenders may lose, once they are released from prison and probation, they retain full First Amendment rights.[222] (Repeated frivolous litigation can indeed lead to limits on future lawsuits,[223] but the filing of a lawsuit invokes the legal system in a way that imposes legal burdens on the court system and the defendant.[224] A vexatious litigant designation only keeps the court system from being used to inflict such burdens, and doesn't limit the litigant's out – of–court speech.)

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219. *Id.* at 458–59.

220. 283 U.S. 697, 701 (1931).

221. *Id.* at 703.

222. 137 S. Ct. 1730 (2017).

223. *See, e.g.*, CAL. CODE CIV. PROC. §§ 391.1, 391.3, 391.7; TEX. CIV. PRAC. & REMEDIES CODE §§ 11.001–.101.

224. *See, e.g.*, Tokerud v. Capitolbank Sacramento, 38 Cal. App. 4th 775, 779 (1995) (upholding vexatious litigant finding based on plaintiff's "repeatedly fil[ing] baseless actions" because such actions are "a burden on the target of the litigation and the judicial system").

Again, the Ohio Supreme Court's analysis in *Bey v. Rasawehr* is correct:

> Because of the uncertainty inherent in evaluating *future* speech that has yet to be expressed, the record here cannot justify a content–based prior restraint on speech when there has been no valid judicial determination that such speech will be integral to criminal conduct, defamatory, or otherwise subject to lawful regulation based on its content.
>
> When it comes to speech, the application of a criminal law should generally occur after the contested speech takes place, not before it is even uttered. As observed by the United States Supreme Court in *Carroll v. President & Commissioners of Princess Anne*,
>
> "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement."[225]

To be sure, a criminal conviction does reduce the defendants' free speech rights while they are imprisoned, and while they are out on probation. In particular, restrictions on probationers' speech about a crime victim have sometimes been upheld, on the theory that they "encourag[e] the defendant's acceptance of responsibility for the crime and protect[] the victim, as a member of the public, from further harm, whether emotional, physical, or financial."[226]

But those are restrictions that follow a criminal trial, which offers many important procedural protections:

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225. 161 N.E.3d 529, 542 (Ohio 2020).

226. *See, e.g.*, Commonwealth v. Pereira, 99 N.E.3d 835, 842 & n.10 (Mass. App. Ct. 2018).

1. Defendants can't be sentenced to prison or even to probation unless they can either afford a lawyer or are offered a court–appointed defense lawyer.[227]
2. A criminal sentence can only be imposed based on proof of guilt beyond a reasonable doubt.[228]
3. For all crimes where the maximum sentence is over six months (whether or not a sentence that long is imposed), the defendant is entitled to a trial by jury.[229]
4. In nearly all jurisdictions, the criminal proceeding cannot be authorized unless the prosecutor concludes that a prosecution is merited.[230]

A civil restraining order, based on a judge's finding of "stalking" or libel, lacks all these protections.[231] Most significantly, such orders are often entered when the defendant lacks a lawyer, and there is therefore no "meaningful adversarial testing" of the defendant's contentions.[232] Whatever merit speech–restrictive probation conditions might have, they can't justify similar conditions in civil cases. And the cases discussed in Part C reaffirm that: Courts have indeed generally stressed that even a finding at trial that certain speech is libelous only justifies restrictions against repeating that particular speech.

E. *Private concern*

Some intermediate appellate courts have upheld injunctions on the grounds that they were focused on speech on matters of purely

227. Alabama v. Shelton, 535 U.S. 654, 667, 674 (2002).

228. *In re* Winship, 397 U.S. 358 (1970).

229. Lewis v. United States, 518 U.S. 322 (1996).

230. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 529 & nn.71–72 (1994) (discussing this general rule and some rare exceptions).

231. In some cases, an overbroad injunction may be issued following a jury finding of guilt, so protection 3 in the above list would be present; but the others would still be absent.

232. *Shelton*, 535 U.S. at 667 (cleaned up).

"private concern," and that such speech is less constitutionally protected than speech on matters of public concern.[233] I think this is generally a mistake.

To begin with, let's distinguish two possible senses of "private" when it comes to speech, especially speech that is said to be harassment:[234]

1. Speech that is seen as *intruding on the subject's privacy*.
2. Speech that is seen as being about *matters that aren't of public importance*, and are therefore seen as less constitutionally valuable.

The "private concern" argument in favor of such injunctions emerged as to matters that intruded on the subject's privacy. The earliest such cases involved unwanted speech sent to an unwilling listener, for instance by email, phone, or mail.[235] Such speech may indeed be more regulable, because it is likely only to offend, and not to persuade or enlighten.[236] But beyond being less valuable, the speech is also generally seen as an intrusion on the listeners' rights

233. *See* Buchanan v. Crisler, 922 N.W.2d 886, 901–02 (Mich. Ct. App. 2018); Neptune v. Lanoue, 178 So. 3d 520, 523 (Fla. Ct. App. 2015); Guiffrida v. Glick, 403 P.3d 1245 (Mont. 2017).

234. There are other possible senses, but these are the ones I want to focus on here.

235. The origin of the California "private concern" orders (and the earliest such case I found in any state) is *Brekke v. Wills*, 23 Cal. Rptr. 3d 609, 616–17 (Ct. App. 2005), which involved a letter addressed by a 16–year–old boy to his 15–year–old girlfriend's mother; while defendant delivered it to his girlfriend, he "intended that plaintiff would read and be annoyed by [it]." *Id.* at 618. *See also* State v. Nguyen, 450 P.3d 630, 640 (Wash. Ct. App. 2019) (upholding stalking conviction based in part on the theory that the statute targets speech on matters of purely private concern; the speech in that case consisted of threats and statements made directly to the victim); Wagner v. State, 539 S.W.3d 298, 310–11 (Tex. Crim. App. 2018) (likewise); Edwards v. Rose, No. C086490, 2019 WL 4051878, at *3 (Cal. Ct. App. Aug. 28, 2019) (citing *Brekke v. Wills* as to private matters, but using it to uphold injunction limited to speech to plaintiff); Scott v. Steiner, No. B258400, 2015 WL 9311734 (Cal. Ct. App. Dec. 22, 2015) (likewise); Moore v. Fox, No. B233657, 2013 WL 953995, at *15 (Cal. Ct. App. Mar. 13, 2013) (likewise); Mitchell v. Mitchell, No. A131632, 2012 WL 2510051 (Cal. Ct. App. June 28, 2012) (likewise).

236. *See* Volokh, *One–to–One Speech vs. One–to–Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, *supra* note 13, at 743.

"to be let alone" in their own homes or at least their own communications devices and accounts.[237]

Following those cases, the California Court of Appeal upheld an injunction against distributing information improperly downloaded from petitioner's cell phone, and that case (*Evilsizor*) has often been cited since.[238] Such publication of illegally intercepted material is one area where the Supreme Court has indeed looked to whether the material is on matters of public concern (see the discussion of *Bartnicki v. Vopper* below). And such publication implicates the subject's right of privacy in personal communications.

The "private concern" rationale has also been applied to broader restrictions on information that might loosely be seen as covered by the disclosure of private facts tort—embarrassing information (such as the details of a divorce[239]) or information about a person's location or contact information (such as home addresses[240] and personal phone numbers[241]). I discuss elsewhere injunctions that genuinely do focus on such highly personal information.[242]

237. *See, e.g.*, Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 736 (1970).

238. *In re* Marriage of Evilsizor & Sweeney, 189 Cal. Rptr. 3d 1, 11 (Ct. App. 2015); *see also* Littleton v. Grover, 2019 WL 1150759, at *2 (Wash. Ct. App. Mar. 12, 2019) (involving communication of private emails); *In re* Marriage of Nadkarni, 93 Cal. Rptr. 3d 723, 734 (Ct. App. 2009) (involving similar facts to *Evilsizor*, but without a First Amendment defense).

239. Wedding v. Harmon, 492 S.W.3d 150, 153, 155 (Ky. Ct. App. 2016) (concerning "private email communications between themselves" and "comments regarding the interaction of the parties, the communication between the parties, the details of the parties' divorce, or any arrangements to be made through the parties"); *see also* Lewis v. Rehkow, No. 1 CA–CV 19–0075 FC, 2020 WL 950215, *2 (Ariz. Ct. App. Feb. 27, 2020) (discussing, without a First Amendment analysis, a December 2006 order barring parties from publicly discussing their divorce case).

240. Santsche v. Hopkins, No. A154559, 2019 WL 1353295, at *6 (Cal. Ct. App. Mar. 26, 2019).

241. Westbrooke Condo. Ass'n v. Pittel, No. A14–0198, 2015 WL 133874, at *2 (Minn. Ct. App. Jan. 12, 2015); Polinsky v. Bolton, No. A16–1544, 2017 WL 2224391, at *2 (Minn. Ct. App. May 22, 2017) (concerning "addresses, telephone numbers, photographs or any other form of information by which a reader may contact, identify or locate").

242. *See* Eugene Volokh, *Injunctions Against Disclosure of Private Facts* (in progress).

But since *Evilsizor*, the "private concern" rationale has also been applied to cases where the speech isn't generally seen as an invasion of privacy, except in the loosest sense that all unwanted speech about someone might be seen as qualifying. Some injunctions, for instance, forbid

- any references to plaintiff "under an identity or auspices other than [defendant's] true name,"[243]
- speech accusing plaintiffs of committing crimes,[244]
- any "disparaging comments" about plaintiffs,[245] and
- all speech on social media about plaintiffs.[246]

The rationale there, it seems to me, is simply that speech on matters of private concern is not valuable enough to be protected.[247] And I think this rationale is mistaken.

To begin with, speech on matters far removed from politics, religion, science, art, or other big topics remains covered by the First Amendment:

> *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the

243. *Polinsky*, 2017 WL 2224391, at *2.

244. *Westbrooke Condo. Ass'n*, 2015 WL 133874, at *2–*3 (upholding a broad order in part because it was based on defendant's having posted claims "that the [plaintiff] condominium association was run by criminals and was engaged in criminal activity"); Guiffrida v. Glick, 2017 MT 136N, 388 Mont. 556, ¶¶ 2, 6 (2017) (likewise, as to claims that "accused [plaintiff] of murder").

245. *Westbrooke Condo. Ass'n*, 2015 WL 133874, at *1.

246. Narian v. Sanducci, No. B286152, 2018 WL 5919462, at *1 (Cal. Ct. App. Nov. 13, 2018); SLA v. SZ, No. 349341, 2020 WL 3022755, at *7–*8 (Mich. Ct. App. June 4, 2020) (describing order as banning all "posting [of] a message through the use of any medium of communication, including the internet or a computer or any electronic medium, pursuant to MCL 750.411s," but presumably implicitly limited to posting material about the plaintiffs).

247. *See, e.g.*, Buchanan v. Crisler, 922 N.W.2d 886, 901 (Mich. Ct. App. 2018); Parisi v. Mazzaferro, 210 Cal. Rptr. 3d 574, 583 (Ct. App. 2016), *disapproved of on other grounds by* Conservatorship of O.B., 470 P.3d 41 (Cal. 2020).

> protection of free speech as fully as do Keats' poems or Donne's sermons.'"[248]

And that is particularly true of speech about people who are important to our private lives. When we talk to our friends about our lives, we also talk about those with whom we have shared those lives. Telling a woman, for instance, that she can't mention her ex–boyfriend (or even just that she can't criticize him) on her Facebook page keeps her from explaining her own life story to her friends. Why is she single again? Why is she upset? Why is she hesitant about future relationships?

People often can't answer such questions honestly, and in a way that their friends recognize as honest, without talking about their exes. Compare, for instance, *Bonome v. Kaysen*,[249] where a woman's published book that discussed the sexual details of a past relationship was seen as being enough on a matter of public concern to defeat a disclosure of private facts lawsuit.[250] Explaining how one feels, and who made one feel that way, is an important facet of self–expression, whether in a memoir or on a blog post:

> [I]f [a writer] wishes to tell what she described as "the ongoing story of my life" by announcing to the world that "this is what I did," or "this is what happened to me," it should be her right to do so. It is disturbing and constitutionally suspect to give anyone, including the government or her ex–boyfriend empowered by the government, censorship power over [such speech].[251]

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248. United States v. Stevens, 559 U.S. 460, 479 (2010) (citations omitted).

249. No. 032767, 2004 WL 1194731 (Mass. Super. Ct. 2004).

250. The lover's name wasn't mentioned in the book, but he plausibly alleged that he could be easily identified by those who knew the couple. *Id.* at *2; *see also* Anonsen v. Donahue, 857 S.W.2d 700 (Tex. Ct. App. 1993); Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980).

251. Sonja R. West, *The Story of Us: Resolving the Face–Off Between Autobiographical Speech and Information Privacy*, 67 WASH. & LEE L. REV. 589, 594 (2010); *see also* Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 907–11 (2006).

To be sure, the Supreme Court has at times upheld certain kinds of restrictions on the grounds that they were limited to speech on matters of private concern. But the Court's reasoning in those cases was deliberately narrow.

1. In *Connick v. Myers*,[252] the Court first expressly set forth the public concern/private concern distinction, in limiting First Amendment claims brought by government employees who had been fired for their speech.[253] But the Court stressed that this stemmed from the government's role as employer, which was deciding only whether to continue employing an employee.[254] Because "government offices could not function if every employment decision became a constitutional matter," "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[255]

Indeed, the Court in *Connick* stressed that speech on matters of private concern remained protected against the government as sovereign:

> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" We in no sense suggest that speech on private matters falls into one of the narrow and well–defined classes of expression which carries so little social value, such as obscenity,

252. 461 U.S. 138 (1983).
253. *Id.* at 143.
254. *Id.*
255. *Id.* at 143, 147.

> that the State can prohibit and punish such expression by all persons in its jurisdiction.[256]

Connick thus concludes that speech on matters of private concern *is* protected against injunctions, criminal punishment, and the like (though not against firing from a government job, the matter in *Connick* itself).

2. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[257] the Court held that false and defamatory statements of fact on matters of private concern could lead to presumed and punitive damages in libel cases, even without the showing of "actual malice" generally required for statements on matters of public concern.[258] As in *Connick*, the Court recognized that "such speech is not totally unprotected

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256. *Id.* at 147 (citation omitted). *See also* Garcia v. State Univ. of N.Y. Health Scis. Ctr., 280 F.3d 98, 106 (2d Cir. 2001) ("[T]he public concern doctrine does not apply to student speech in the university setting."); Yano v. City Colls. of Chi., No. 08 CV 4492, 2013 WL 3791616, at *8 (N.D. Ill. July 19, 2013) (same), *aff'd sub nom*. Yano v. El–Maazawi, 651 F. App'x 543 (7th Cir. 2016); Deegan v. Moore, No. 7:16–CV–00260, 2017 WL 1194718, at *5 (W.D. Va. Mar. 30, 2017) (same); Guse v. Univ. of S.D., No. 08–4119, 2011 WL 1256727, at *16 (D.S.D. Mar. 30, 2011) (same); Qvyjt v. Lin, 932 F. Supp. 1100, 1108–09 (N.D. Ill. 1996) (same); Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 766 (9th Cir. 2006) (likewise for high school student speech); Jamshidnejad v. Cent. Curry Sch. Dist., 108 P.3d 671, 674–75 (Or. Ct. App. 2005) (likewise for junior high school student speech); Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009) (likewise for prisoner speech); Startzell v. City of Phila., No. CIV.A.05–05287, 2007 WL 172400, at *5 n.6 (E.D. Pa. Jan. 18, 2007) (likewise for speech on government property), *aff'd*, 533 F.3d 183 (3d Cir. 2008); Van Dyke v. Barnes, No. 13–CV–5971, 2015 WL 148977, at *5–*6 (N.D. Ill. Jan. 12, 2015) (likewise when government is accused of retaliating against foster parents); Eichenlaub v. Twp. of Ind., 385 F.3d 274, 284 (3d Cir. 2004) (likewise when government is accused of retaliating against speakers in zoning disputes); Nolan v. Vill. of Dolton, No. 10 CV 7357, 2011 WL 1548343, at *2 (N.D. Ill. Apr. 21, 2011) (likewise when government is accused of filing retaliatory criminal charges). The one case I have found that applies *Connick* to government action in programs outside government employment, *Landstrom v. Illinois Dep't of Child. & Fam. Servs.*, 892 F.2d 670, 679 (7th Cir. 1990), appears to have been abrogated by *Bridges*. *See Van Dyke*, 2015 WL 148977, *5–*6; *Nolan*, 2011 WL 1548343, at *2.

257. 472 U.S. 749 (1985).

258. *Id.* at 759–60 (lead opin.).

by the First Amendment," though it concluded that "its protections are less stringent."[259]

But *Dun & Bradstreet* was dealing solely with liability for false and defamatory statements of fact—statements that the Court had already held lack "constitutional value" (whether they are "intentional lie[s]" or "careless error[s]").[260] The question was just how much protection such valueless statements should get to prevent an undue chilling effect on true statements.[261] The Court's holding thus doesn't justify outright prohibitions on true statements (or opinions) on matters of private concern—categories of speech that the Court has never labeled as having "no constitutional value."

3. In *Bartnicki v. Vopper*,[262] the Court held that third parties that receive copies of illegally intercepted cell phone calls may publish them, without fear of liability, if the calls contain "truthful information of public concern."[263] But the Court said that it "need not decide whether" liability could be imposed for "disclosures of trade secrets or domestic gossip or other information of purely private concern" that stem from illegally intercepted calls.[264]

4. In *Snyder v. Phelps*, the Court held that expressions of opinion on matters of public concern generally cannot lead to liability for intentional infliction of emotional distress, and concluded that the question "turns largely on whether that speech is of public or private concern."[265] "[W]here matters of purely private significance are at issue," the Court concluded, "First Amendment protections are often less rigorous."[266] This suggests that the emotional distress tort might be applicable to "intentionally or recklessly engaged in

259. *Id.* at 760.
260. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).
261. *Dun & Bradstreet*, 472 U.S. at 760.
262. 532 U.S. 514 (2001).
263. *Id.* at 534.
264. *Id.* at 533.
265. 562 U.S. 443, 451 (2011).
266. *Id.* at 452.

extreme and outrageous conduct [consisting of speech on matters of private concern] that caused the plaintiff to suffer severe emotional distress."[267]

But even if speech on matters of private concern is treated as a somewhat less protected category of speech—perhaps like commercial speech is a somewhat less protected category[268]—that can only justify certain kinds of restrictions, not categorical bans. Commercial speech, for instance, can be specially restricted when it's misleading, or when it proposes illegal transactions.[269] But it doesn't follow that a defendant can be entirely banned from engaging in commercial speech about some particular subject.

Likewise for bans on a defendant talking about a plaintiff. Such bans involve the government acting as sovereign, threatening jail time (for contempt of court) when someone says certain things. They are not limited to speech found to have "no constitutional value," such as true threats or false and defamatory statements of fact. They are not limited to constrained areas such as illegally intercepted conversations, or speech that a jury has found to be "outrageous" (a deliberately narrow zone[270]). So long as speech on matters of private concern is somewhat protected—and the Court has assured us that it is—it cannot be restricted through such categorical injunctions.[271]

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267. *Id.* at 451.

268. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

269. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

270. *See Snyder*, 562 U.S. at 458; Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 57 (1988); Zuger v. State, 673 N.W.2d 615, 622 (N.D. 2004).

271. *Parnell v. Shih*, No. D074805, 2020 WL 1451931 (Cal. Ct. App. Mar. 25, 2020), upheld an order barring a woman from future communications about her neighbor to the Marine Corps, the neighbor's employer. The court concluded that such speech was on a matter of private concern, lacked a "legitimate purpose," and could thus be banned. *Id.* at *3–*4. I think this was mistaken, but at least the order was narrow, and indeed the Court of Appeal narrowed the order from its original version (which had banned all communications to the Marine Corps by the defendant, not limited to communications about plaintiff).

Likewise, *Parisi v. Mazzaferro*, 210 Cal. Rptr. 3d 574 (Ct. App. 2016), *disapproved of as to other matters by Conservatorship of O.B.*, 470 P.3d 41 (Cal. 2020), concluded that speech

Moreover, some injunctions against speech about a person haven't been facially limited to speech on particular topics of private concern, or even to speech on matters of private concern generally (a test that would in any event likely be unconstitutionally vague in an injunction). For instance, they have applied to future speech

- accusing the plaintiff of criminal misconduct, which "generally [is] speech on a matter of public concern";[272]
- accusing government authorities of not properly investigating the plaintiff's alleged misconduct, which definitely would be speech on matters of public concern;[273]
- discussing a broad social problem and giving the plaintiff's alleged behavior as an example, which likewise would be speech on matters of public concern;[274]
- accusing a businessperson or a professional of providing poor service, which may likewise be speech on matters of public concern;[275]

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on matters of private concern could sometimes be enjoined, but held that an injunction against such speech had to be suitably narrow: The injunction could not ban all speech about plaintiff that "could be interpreted as a pattern of conduct with the intent to harass," but had to be limited to restricting the "repetition" of "specific defamatory statements made by [defendant] in his prior correspondence"—*i.e.*, speech that already fit within the defamation exception to the First Amendment. *Id.* at 586. And the *Parisi* court also invalidated a provision of the injunction that required prior court approval before defendant could write anything about one of the plaintiffs "to any government agency"; the defendant, the court ruled, "may not be constitutionally restrained from true petitioning activity to government officials." *Id.*

272. Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284, 1292 (9th Cir. 2014); *see also* Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290, 1298 (11th Cir. 2008); Boule v. Hutton, 328 F.3d 84, 91 (2d Cir. 2003).

273. For examples of such speech that was indeed enjoined, see Bey v. Rasawehr, 161 N.E.3d 529 (Ohio 2020); Stark v. Stark, No. W201900650COAR3CV, 2020 WL 507644, at *1 (Tenn. Ct. App. Jan. 31, 2020).

274. *See* Florida Star v. B.J.F., 491 U.S. 524, 536–37 (1989) (holding that an article about a violent crime is speech on a matter of public concern, and this includes the name of the specific person—there, the victim—mentioned in the article).

275. Gardner v. Martino, 563 F.3d 981, 989 (9th Cir. 2009); Manufactured Home Cmtys., Inc. v. County of San Diego, 544 F.3d 959, 965 (9th Cir. 2008).

- discussing the court order itself, and the process that led to the court order,[276] which definitely would be speech on matters of public concern as well.

For all the reasons given above, I think the Ohio Supreme Court was right in expressly rejecting a "private concern" defense of an injunction:

> [O]ur role here is not to pass judgment on the . . . First Amendment value of Rasawehr's allegations. To the extent his statements involve matters of both private and public concern, we cannot discount the First Amendment protection afforded to that expression. We most assuredly have no license to recognize some new category of unprotected speech based on its supposed value. Rejecting such a "free–floating test for First Amendment coverage," the United States Supreme Court declared in *Stevens* that the First Amendment's guarantee of free speech "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." "Our decisions * * * cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[277]

Likewise, the Vermont Supreme Court rejected the view that otherwise protected speech could be punished as "abusive . . . language" when it was on a matter of private concern:

> The U.S. Supreme Court has consistently interpreted the First Amendment to shield a broad and expansive array of speech. Of bedrock importance is the principle that the First Amendment's protections extend beyond expressions "touching upon a matter of public concern." *Connick*, 461 U.S. at 147 ("The First Amendment does not protect speech and assembly only to the extent it can be characterized as political . . . . We in no sense suggest that speech on private matters . . . carries so little social value . . . that the State can prohibit and punish such expression . . . ." . . .

276. *See supra* Part B.5.
277. Bey v. Rasawehr, 161 N.E.3d 529, 545–46 (Ohio 2020).

> Equally fundamental is the principle that "the Constitution protects expression . . . without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 444–45 (1963).[278]

Similarly, in the words of the Third Circuit,

> [Many] cases point to the principle that outside the employment context the First Amendment forbids retaliation for speech even about private matters. . . . [W]hile speech on topics of public concern may stand on the "highest rung" on the ladder of the First Amendment, private speech (unless obscene or fighting words or the like) is still protected on the First Amendment ladder. The rationale for a public/private concern distinction that applies to public employees simply does not apply to citizens outside the employment context. By the same token, the decisions of the Supreme Court and of our court have not established a public concern threshold to the protection of citizen private speech. We decline to fashion one now.[279]

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278. State v. Tracy, 130 A.3d 196, 201 (Vt. 2015). The D.C. Court of Appeals has likewise vacated a speech–restrictive injunction on the grounds that "a communication does not lose First Amendment protection merely because it discusses matters of private rather than public concern." Mashaud v. Boone, 256 A.3d 235 (D.C. Aug. 12, 2021), *review en banc granted*. But it left open the possibility that an injunction might be justified if it was focused on information of a "very personal nature." *Id.*

279. Eichenlaub v. Twp. of Ind., 385 F.3d 274, 284 (3d Cir. 2004) (paragraph break omitted) (dealing with government retaliation against citizen speech on matters of private concern); *see also* McCraw v. City of Okla. City, 973 F.3d 1057 (10th Cir. 2020) (holding that even casual conversations with friends are protected by the First Amendment, even when they are not on matters of public concern: "while speech on topics of public concern may stand on the 'highest rung' on the ladder of the First Amendment, private speech (unless obscene or fighting words or the like) is still protected on the First Amendment ladder" (quoting *Eichenlaub*, 385 F.3d at 284)); Trusz v. UBS Realty Invs., LLC, 123 A.3d 1212, 1219 (Conn. 2015) (explaining that "workplace speech on private matters is protected by the first amendment to the same extent that it is protected elsewhere insofar that it cannot be punished or prohibited by the government acting in its role as a *lawmaker*," even though government employee speech on such matters can be restricted "in [the government's] role as an employer"); Falossi v. Koenig, No. E048400, 2010 WL 4380112, at *13 (Cal. Ct. App. Nov. 5, 2010) ("Falossi argues that Koenig's

Those cases, it seems to me, are correct in concluding that speech is protected even when it is on matters of "private concern"; and the lower court cases authorizing broad injunctions on a "private concern" theory are mistaken.

F. *Bad intentions*

Some courts have defended the broad injunctions on the grounds that the defendant's speech was ill–motivated. In *Bey v. Rasawehr*, for instance, the Ohio appellate court upheld an injunction, reasoning that Rasawehr's speech was "for an illegitimate reason born out of a vendetta seeking to cause mental distress."[280] (The Ohio Supreme Court later reversed the injunction, without discussing Rasawehr's intentions.) Some other courts have taken a similar view to that of the Ohio appellate court,[281] and some of the statutes that authorize anti–harassment orders specifically turn on whether the defendant's past speech lacked a "legitimate purpose" or was intended to "harass," "annoy," "inflict mental distress," and the like.[282] This justification for anti–speech injunctions is mistaken, though, for several related reasons:

1. The broad injunctions discussed in this Article are not limited to speech said with a particular motive. The judges might have felt

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photography was not protected because it did not relate to any matter of public concern. Recently, however, the United States Supreme Court reminded us that 'serious value' is not 'a general precondition to protecting . . . speech.'") (citing *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010)).

280. Bey v. Rasawehr, 2019–Ohio–57, 2019 WL 182418, at *8 ¶ 42 (Ohio Ct. App. 2019), *rev'd in part*, 161 N.E.3d 529 (Ohio 2020).

281. *See also Mashaud*, 256 A.3d at 238 (vacating a similar injunction that a trial court had justified on the grounds that the speaker "acted with a 'vindictive motive'").

282. IND. CODE ANN. § 35–45–2–2 (West, Westlaw through 2020 Reg. Sess.); IOWA CODE ANN. § 708.7 (West, Westlaw through 2020 Reg. Sess.); N.J. STAT. ANN. § 2C:33–4 (West, Westlaw through L.2020, c. 109 & J.R. No. 2.); OR. REV. STAT. ANN. § 166.065 (West, Westlaw through 2020 Reg. Sess.); 18 PA. STAT. & CONSOL. STAT. ANN. § 2709 (West, Westlaw through 2020 Reg. Sess.); MD. CRIM LAW CODE ANN. § 3–803 (West, Westlaw through 2020 Reg. Sess.); WASH REV. CODE ANN. § 9.61.260 (West, Westlaw through 2020 Reg. Sess.); WIS. STATE. ANN. § 813.125 (West, Westlaw through 2019 Act 186).

that they could predict the defendants' future motives based on the defendants' past speech, but people's intentions change.

Say, for instance, that someone has been sharply criticizing his former lawyer; a judge concludes that the criticism was intended to harass, and therefore forbids all future speech by the defendant about the lawyer (or even just all "derogatory" speech). The defendant might well want to criticize the injunction, out of a genuine desire to inform the public about what he sees as an injustice. In the process of doing this, he would need to mention the lawyer in describing how the injunction came about. But the injunction would restrict even such mentions.

2. The motives in these cases can be difficult to disentangle. Someone who feels mistreated by a professional or a business might be motivated both by hostility and a desire to warn others. Even complaints about exes might stem both from a desire for revenge and a desire to explain oneself to friends and acquaintances, or to warn them about what one sees as the ex's dangerous proclivities.

3. Partly because of this difficulty, judges' inferences about a speaker's intentions are likely to stem from the judges' reactions to the speaker's viewpoint or identity. Is the defendant a woman who is just trying to ruin a man who left her? Or is she someone who sincerely wants to warn her friends—including other women who might date him in the future—about what she sees as the man's deceitfulness, abusiveness, or psychological cruelty? Or could she have both motives, and if so, what should be the legal consequence of that?

Is the defendant seeking revenge on a company that fired him, or is he genuinely trying to blow the whistle on its alleged misconduct? Is the defendant just trying to subtly extort a settlement from a business (assume there is no concrete proof of extortion, but just a pattern of criticism that could be used for that purpose), or is he honestly trying to alert other consumers?

It's human nature to assume the best intentions of people whose views, experiences, or identities are like yours, and the worst of

people who are different from you. That danger is especially exacerbated if the decision is made by a single judge rather than by a jury that contains a mix of people, who would have to justify their views to each other. And the danger is further exacerbated when the case involves a default judgment (as many of the libel injunctions do[283]), an unrepresented litigant (as many of the libel injunction and harassment cases do[284]), and a busy judge who is trying to get through case after case.

4. Perhaps because of all this, "under well–accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection."[285] At one point, American criminal libel law did forbid reputation–damaging speech (whether true, false, or opinion) if it lacked "good motives" or "justifiable ends."[286] But the Court has expressly rejected that as to speech on matters of public concern;[287] again, recall that the broad injunctions discussed in this Article generally forbid all future speech about plaintiff, whether or not the speech is on matters of public concern or of private concern. And other courts have recognized the same principle as to speech on matters of private concern as well.[288]

Indeed, in *Near v. Minnesota*, the Court made clear that a speaker's past libelous speech cannot justify broad restrictions on nonlibelous speech in the future, even when the injunction is limited to speech said without "good motives."[289] *Hustler Magazine, Inc. v. Falwell*

283. *See, e.g.*, Baker v. Kuritzky, 95 F. Supp. 3d 52, 59 (D. Mass. 2015).

284. *See, e.g.*, Capital Resorts Group, Inc. v. Emmons, No. 3:15–CV–368–PLR–HBG, at 6 ¶ 2 (E.D. Tenn. Mar. 4, 2016).

285. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J., joined by Alito, J.) (alteration and internal quotation marks omitted); *id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.) (taking the same view); *see* Volokh, *Freedom of Speech and Bad Purposes*, *supra* note 184.

286. Volokh, *Freedom of Speech and Bad Purposes*, *supra* note 184, at 1390. Speech on matters of public concern was evaluated under the same test. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 265 (1952).

287. Garrison v. Louisiana, 379 U.S. 64 (1964).

288. State v. Turner, 864 N.W.2d 204, 209 (Minn. Ct. App. 2015).

289. 283 U.S. 697, 713 (1931).

similarly upheld Hustler's right to criticize Jerry Falwell in a harsh, vulgar, and deeply emotionally distressing way,[290] even though the attack there stemmed from Larry Flynt's personal hostility towards Falwell.[291]

Likewise, in *Tory v. Cochran*,[292] the Court considered a case challenging the constitutionality of an injunction barring a disgruntled litigant from picketing outside his former lawyer's office "holding up signs containing various insults and obscenities" (apparently as a means of pressuring the lawyer to pay the litigant money).[293] The Court ultimately vacated the injunction on narrow grounds: The lawyer (the famous Johnny Cochran) had died while the case was pending, so "the grounds for the injunction [were] much diminished, if they have not disappeared altogether."[294] But the Court agreed to hear the case despite the defendant's likely bad intentions or his "vendetta" against the lawyer; it vacated the injunction rather than just dismissing the case as improvidently granted; and it never suggested that Tory's bad intentions would strip the speech of First Amendment protection.

G. *Too much?*

Some of the injunctions might be motivated by the sense that the speaker's speech is just too frequent. Saying something once or a few times is fine, but more than that is too distressing for the victim, and no longer valuable to public debate—after someone repeats his criticisms too often, "enough is enough," and "at some point . . . it . . . becomes a personal vendetta to just upset the subject."[295]

290. 485 U.S. 46, 57 (1988).

291. *See* RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 59–60 (1988).

292. 544 U.S. 734 (2005).

293. *Id.* at 735.

294. *Id.* at 738.

295. Oral Arg., Keyes v. Biro, No. B271768, at 4:00, 9:45 (Cal. Ct. App. Oct. 24, 2017) (Rothschild, J.). The court ultimately held that the injunction should be read narrowly, as limited to unwanted speech to the plaintiff—a doctor who the defendant thought committed malpractice—and not public speech about the plaintiff.

Libel law doesn't focus on the frequency of libelous statements, but harassment statutes often require "repeated" communications; the term "harassment" itself often connotes excessive repetition. And unwanted speech to an unwilling listener may indeed sharply decline in value when it's repeated, especially after the listener has demanded that it stop: Presumably the listener has heard and rejected the message, and repeating it is unlikely to persuade or enlighten.

Yet speech to the public can't lose its constitutional protection simply because of its frequency. Repetition is often needed to reach new listeners, to get the attention of listeners who might have ignored the statements before, or to offer new information even to listeners who have heard the past criticism.

This is why political and ideological advertisers don't assume that one ad run once is enough (whether that ad praises a candidate or a cause, or criticizes the other side). It's also why labor picketers and leafletters generally show up repeatedly, though this costs a great deal in time and effort. Newspapers sometimes satisfy themselves with one story about a person, but newspapers have to worry about turning off some paying readers who might be annoyed by what they see as repetition (even when the repetition successfully reaches other readers). Even so, newspapers may engage in a drumbeat of criticism, if they think it's warranted.

Unsurprisingly, the Supreme Court has often protected campaigns of criticism and not just individual statements. The leaflets criticizing Keefe were distributed on four days over the span of six weeks.[296] In *NAACP v. Claiborne Hardware Co.*, the names of black residents who chose not to go along with the boycott were apparently read in church and distributed on leaflets, so long as they

296. Keefe v. Org. for a Better Austin, 253 N.E.2d 76, 78 (Ill. App. Ct. 1969).

were not complying.[297] The speech in many picketing cases criticizing particular businesses has also been repeated.[298] Yet the Court has never suggested that such repetition would make the speech less protected.

IV. WHY THOSE COURTS ARE DOING IT

The principles I mentioned above—that a court may not enjoin speech that falls outside the First Amendment exceptions—are well–established; why then do at least some trial court judges depart from them?

A. *Speech by private individuals as less respectable than speech by media outlets*

As Part A made clear, even repeated vilification in newspapers or by organizations cannot be enjoined. Very few, if any, courts today would be inclined to enjoin alleged harassment or stalking—in the form of publications, whether in print or online—by a newspaper or by a familiar–looking, traditionally organized advocacy group. Yet for some reason some judges are willing to enjoin such speech by individuals. Why?

I suspect this willingness to restrain private speakers flows from two related reasons. First, precisely because newspapers cost money to publish, and try to make money from subscribers or advertisers, they tend to be accountable to their readers and tend to publish what their readers want, in the style the readers want. That a newspaper is printing something itself tends to indicate the likely value of the speech. Even a judge who found the speech loathsome or pointless might have thought twice about substituting his own

297. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982).

298. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 493 (2014) (anti–abortion counselors speaking outside one clinic "once a week"); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 571 (1988) (leafletting going on "for about three weeks").

views for those of editors and readers.[299] Likewise, if an established political advocacy group thought some speech worth saying, judges may have seen that as evidence that the speech had value to public debate.

Second, newspaper speech can have many motives, but the most plausible ones tend to be public–regarding. Perhaps the publisher, editor, reporter, or columnist has a political agenda. Perhaps they are just pandering to readers' tastes, but even that means that they want to entertain or inform readers about something that many readers care about. It's possible that newspaper writers are just trying to wreak private vengeance, or are irrationally obsessed—but that seems unlikely, especially since such motivations (at least if transparent enough) are likely to lead to market pushback from readers.

And the same is likely true for speech by advocacy groups, even relatively little–known ones such as the Organization for a Better Austin: Whatever a judge might think of their ideology, it seems likely that the speech was indeed motivated by ideology. Even a judge who suspects that base motives are at play (for example, that a rich publisher is trying to get revenge against a politician or business leader who had frustrated the publisher's business plans)

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299. Occasional cases did conclude that speech in newspapers wasn't "newsworthy" and thus could lead to liability for disclosure of private facts. *See, e.g.*, Briscoe v. Reader's Digest, 483 P.2d 34 (Cal. 1971), *overruled by* Gates v. Discovery Commc'ns Inc., 101 P.3d 552 (Cal. 2004); Diaz v. Oakland Trib., Inc., 188 Cal. Rptr. 762 (Ct. App. 1983). But I don't know of any recent incidents of an outright injunction against a newspaper's publishing anything further about a person; and I know of only one recent case that issued a narrower but still overbroad injunction against a newspaper on libel or harassment grounds: *Groner v. Wick Communications, Inc.*, No. 00126863 (La. Dist. Ct. Aug. 25, 2015), discussed at notes 76–77 and accompanying text. A few rare recent injunctions against newspapers have stemmed from other theories. *See, e.g.*, *In re* Emma F., 107 A.3d 947, 952 (Conn. 2015) (discussing a trial court injunction against publishing a court document that should have been filed under seal but wasn't, and declining to review the injunction because it had been vacated by the court nine days later); Las Vegas Rev.–J. v. Eighth Jud. Dist. Ct., 412 P.3d 23 (Nev. 2018) (reversing a trial court injunction against publishing autopsy photos).

might be reluctant to enjoin such mainstream speech based on speculation about motive.

But once individuals can easily speak, without having to persuade any intermediary about the worth of their speech, judges are likely to see much more speech by libel defendants that seems pointless and ill–motivated. Motive turns out to be critical under many harassment or stalking statutes, which condemn speech that is said with "the intent to annoy" or with "no legitimate purpose."[300] (I have argued that such motive is generally irrelevant to the value of the speech, and should thus not be used to justify restricting speech that has presumptively valuable content;[301] but the statutes are premised on a different view.) Indeed, some courts have taken the view that government employee speech motivated by purely personal motives is to be treated as on a matter of "private concern," even when its content would suggest that it's on a matter of public concern.[302]

Of course, the speakers in all these cases would likely take a different view of the value of their speech, and of their own motives. I suspect that most think they really do have valuable things to say, and that their motives are to inform the public.

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300. IND. CODE ANN. § 35–45–2–2 (West, Westlaw through 2020 Reg. Sess.); IOWA CODE ANN. § 708.7 (West, Westlaw through 2020 Reg. Sess.); N.J. STAT. ANN. § 2C:33–4 (West, Westlaw through L.2020, c. 109 & J.R. No. 2.); OR. REV. STAT. ANN. § 166.065 (West, Westlaw through 2020 Reg. Sess.); 18 PA. STAT. & CONSOL. STAT. ANN. § 2709 (West, Westlaw through 2020 Reg. Sess.); MD. CRIM LAW CODE ANN. § 3–803 (West, Westlaw through 2020 Reg. Sess.); TEX. PENAL CODE ANN. § 42.07 (West, Westlaw through 2019 Reg. Sess.); WASH REV. CODE ANN. § 9.61.260 (West, Westlaw through 2020 Reg. Sess.); WIS. STATE. ANN. § 813.125 (West, Westlaw through 2019 Act 186).

301. *See* Volokh, *Freedom of Speech and Bad Purposes*, *supra* note 184; Volokh, *One–to–One Speech vs. One–to–Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, *supra* note 13, at 737–94.

302. *See, e.g.*, Workman v. Jordan, 32 F.3d 475, 482–83 (10th Cir. 1994); Foley v. Univ. of Hous. Sys., 355 F.3d 333, 341 (5th Cir. 2003); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990).

If I'm right, then judges just aren't trusting individual speakers in the newly democratized mass communications system to define what is worth talking about, and to talk about it without being second–guessed about their motivations. Media organizations and political organizations are given latitude to say even things that judges may view as unfair or cruel.[303] But private speakers are often not given such latitude—and the judges think that an injunction, with its accompanying threat of criminal contempt punishment if it is violated, is the necessary means for stopping such speech.

As I mentioned, I think that such a view is wrong, and that speech that's outside the traditional First Amendment exceptions (speech that isn't, for instance, libel or true threats) should remain free even if judges think it's worthless or ill – intentioned. But I think these injunctions come about because judges see that everyone can speak the way that established media and political organizations have long spoken—and judges often don't like it.

B. *Speech by private individuals, without the money and power of media outlets*

Private individuals are also less likely to fight back in court than are media outlets. They are less likely to appear to defend themselves; many of the injunctions I mention here followed default judgments.[304] They are less likely to know the First Amendment arguments to make when they do appear. They are less likely to appeal an injunction.

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303. For a similar argument about why courts are more likely to find actionable invasion of privacy in speech of non–mainstream–media sources, see Jeffrey Toobin, *Gawker's Demise and the Trump–Era Threat to the First Amendment*, NEW YORKER (Dec. 19, 2016), https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment [https://perma.cc/G9ZT-T7V8] ("This kind of deference to journalistic judgment about what constitutes 'truthful information of public concern' may be a vestige of a more orderly period in journalistic history. The implicit trust in the news media reflected in these rulings may not extend today to the operators of Web sites, a change that could also have ramifications for traditional news organizations.").

304. *See* Appendix.

Media outlets may also fight back in the media. A judge, especially an elected state court judge, might be especially reluctant to issue an injunction that will likely be covered in the press, and criticized by the press—both by the newspaper that's being enjoined, and by other media outlets that will likely take the newspaper's side. A judge may be less reluctant to issue an injunction against private citizens, who will at most rant about it on their Facebook pages.

C. *Judges as flexible problem–solvers*

I also suspect that many of the trial judges who entered these injunctions operated with a particular attitude: Our job is to solve problems stemming from human relationships—deal with petty personal hostility that can damage people's lives and cause potentially violent friction—and the injunction is a useful, flexible tool for such problem–solving.[305]

First Amendment doctrine sometimes views injunctions against speech as comparable to statutory speech restrictions—to repeat Justice Black's formulation, "we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[306] Other times, the doctrine views injunctions against speech as "prior restraints" that are even more constitutionally troublesome than statutory speech restrictions, in part because of the discretion they vest in a judge.[307]

But the problem–solving attitude takes a different view, though usually just implicitly: An injunction, the theory goes, is a sensible approach because it can be well tailored to the particular problems

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305. In a related context, *cf.* Mandeep Talwar, *Improving the Enforcement of Restraining Orders After* Castle Rock v. Gonzales, 45 FAM. CT. REV. 322, 330–31 (2007) (praising judges who "act as problem–solving, proactive participants in combating domestic violence").

306. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971).

307. *See, e.g.*, Madsen v. Women's Health Center, Inc., 512 U.S. 753, 793 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

of the relationship. Of course a statute banning anyone from mentioning anyone else online would be unconstitutional. Of course a statute banning anyone from disparaging anyone else would be unconstitutional. Even a narrower statute, such as a ban on disparaging one's ex–spouse on social media, would be unconstitutional. An injunction, though, can both focus on speech about a particular person and take into account the likely harm of the speech, the likely value of the speech, and the likely availability of narrower speech restrictions.

For instance, say a judge is facing a defendant who seems bent on disparaging a family member or an ex–lover or a former business partner.

1. The judge may look at the past statements, conclude that they are likely false and defamatory, and therefore conclude that future criticisms by this defendant of this plaintiff are likely to be harmful (because they will likely be libelous, perhaps as demonstrated by a finding that some past statements were libelous) and valueless (because they will likely be false).
2. The judge may observe that the statements are about purely personal grievances, and therefore conclude that even future statements that wouldn't be false (they might be true, or opinions) are likewise likely to be of modest First Amendment value (because they will almost certainly be speech on matters of purely private concern).
3. The judge may conclude that the defendant is obsessed, so restrictions on repeating only particular statements found to be defamatory would lead the defendant to just make up more falsehoods.[308]

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308. Thomas v. Wray, No. CV19WD05, at 1–2 (Ark. Cir. Ct. Benton Cty. May 24, 2018); Appellee's Brief, Stutz Artiano Shinoff & Holtz, APC v. Larkins, No. D057190, 2011 WL 863341, at *6 (Cal. Ct. App. Jan. 25, 2011) (quoting trial transcript):

4. Or the judge may conclude that the defendant is irrational, so restrictions on all false and defamatory statements would be futile, because the defendant will sincerely (but unreasonably) believe that those statements aren't false.

Justice Stevens expressed some similar thoughts, though as to much narrower injunctions. In *Madsen v. Women's Health Center, Inc.*, Justice Stevens voted to uphold an injunction setting up bubble zones outside abortion clinics, but with language that would have applied even more broadly:

> Unlike the Court, . . . I believe that injunctive relief should be judged by a more lenient standard than legislation. . . .
>
> [L]egislation is imposed on an entire community, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity. Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional. . . .

In formulating this injunction, it was the court's intention to eliminate reference to accusations of illegal, unethical, incompetent or intimidating conduct on the part of Plaintiff from any website maintained by Defendant.

We've been back in court several times on the language that still appears on the website. And, unfortunately, I feel like I'm chasing something that I can't get my hands around, because every time I rule that Defendant shouldn't use one phraseology, she simply switches to another in an . . . apparent attempt to circumvent the Court's order. . . .

So what I intend to do is modify the injunction to prevent any mention of Stutz, Artiano, Shinoff on Defendant's websites.

And *I'm doing that not in an attempt to foreclose or eliminate the Defendant's right to free speech, but because it is crystal clear to me at this point that she is unable or unwilling to modify her website in any good–faith attempt to remove reference to that law firm*. . . . [W]hat I'm trying to do is to make a bright–line rule that there's no way anybody can misinterpret. . . .

> In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions.
>
> On the other hand, even when an injunction impinges on constitutional rights, more than "a simple proscription against the precise conduct previously pursued" may be required; the remedy must include appropriate restraints on "future activities both to avoid a recurrence of the violation and to eliminate its consequences." Moreover, "[t]he judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." As such, repeated violations may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature.
>
> In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts.[309]

Of course, Justice Stevens was talking about narrow injunctions on speech in a particular place, aimed at causing harms unrelated to the content of speech (such as blocked abortion clinic entrances). There is a large gap between these narrow injunctions and categorical "stop talking about the plaintiff" restrictions. Still, there is a logical link: Justice Stevens is arguing that,

1. Injunctions should be viewed *more favorably* than normal criminal or civil prohibitions, rather than as presumptively less defensible prior restraints.
2. Judicial discretion should likewise be viewed positively, as a tool for better tailoring, rather than negatively, because of the fear of excessive discretion.

309. *Madsen*, 512 U.S. at 778–79 (Stevens, J., concurring in part and dissenting in part).

3. As a result, even if a categorical prohibition (for instance, no protesting within 36 feet of an abortion clinic) is invalid,[310] an injunction entered against a particular set of defendants is proper.

Justice Stevens's view, it seems to me, was rightly rejected by all the other Justices in *Madsen*.[311] But I think it nonetheless appeals to many trial court judges, and may explain why they issue orders that would be clearly unconstitutional under the orthodox view—"we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[312]

D. Getting "all the craziness . . . to stop totally"

Finally, one aspect of an injunction's flexibility is that it can take account of the judge's evaluation of the qualities of the particular speaker. One particularly vivid illustration came in a case where a judge ordered a woman "to cease posting any information about your parents on social media referencing indirectly or directly reference either one of them,"[313] and added, "Court informs the respondent that all the craziness described in these petitions needs to stop totally."[314]

That sentiment, I think, implicitly lurks in some (though by no means all) of the cases I describe. The speakers there seem to come across as weird, perhaps even mentally unbalanced. They seem obsessed with their subjects' supposed misdeeds, far beyond what most of us would see as proportionate. Some might label them "cyberstalkers," reflecting the excessive attention we associate with stalkers.

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310. *Id.* at 778.

311. *Id.* at 766 (majority opin.); *id.* at 794 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part).

312. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971).

313. Raatz v. Raatz, Nos. 2019CV000123 & 2019CV000124 (Wis. Cir. Ct. Portage Cty. May 21, 2019) (docket entry, available in Westlaw Dockets).

314. *Id.*

Judges may easily get a sense that the speakers' criticisms are unfounded—or even if well–founded, are repeated at unreasonable length or with unreasonable enmity. And judges may get a sense that a narrow injunction (e.g., "you may not say recklessly or knowingly false and defamatory things about the plaintiff" or "you may not repeat [certain specified charges] about the plaintiff") just won't do any good: The obsessed, irrational speaker might claim that her allegations are actually true, or might subtly change the allegations and then claim that they are different. The only way to make "all the craziness" stop, the judge might be thinking, is just to categorically tell her to stop saying *anything* about the plaintiffs, leaving no room to wiggle out.[315]

Such a prohibition can't be implemented using a general statute. "No person shall engage in crazy, excessive, irrational speech about others" is too vague to be constitutional (even apart from its overbreadth)—it doesn't adequately notify speakers about what they can't say. But judges may think they know crazy when they see it,[316] and should be allowed to enjoin it. In a sense, this may be connected to the rules related to "vexatious litigants": When a plaintiff has filed many lawsuits that appear frivolous, seemingly driven by "obsess[ion]" more than by rational evaluation of the merits of a case, courts will often limit the plaintiff's ability to file future lawsuits.[317]

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315. *See, e.g.*, Stutz Artiano Shinoff & Holtz v. Larkins, No. D057190, 2011 WL 3425629, at *3–*4, *9 (Cal. Ct. App. Aug. 5, 2011) (describing but ultimately reversing a broad injunction banning the defendant from speaking about the plaintiff, which the court entered following the defendant's refusal to comply with an earlier, narrower stipulated injunction).

316. "I know crazy when I see it / I see that look in your eyes again / I know crazy when I see it / Your disguise is way too thin / I've seen it all before / And I know what's in store / And I'm not playing your crazy game no more." ANDREW THOMAS WALTON, *I Know Crazy When I See It*, *on* the aptly titled LOVE AND LITIGATION (2015). Also, "crazy has places to hide in / that are deeper than any goodbye." LEONARD COHEN, *Crazy to Love You*, *on* OLD IDEAS (2012).

317. *See, e.g.*, Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1295 & n.15, 1299 (11th Cir. 2002); Lichtman v. Zelenkofske Axelrod & Co., No. 978 EDA 2013, 2014 WL 10896825,

Yet while this is an understandable human reaction, the First Amendment cannot allow it when it comes to speech rather than to litigation. We can't be stripped of our constitutional rights to speak simply because a judge unilaterally concludes that we're irrational or obsessed. Whatever the rule might be for filing lawsuits, an act that triggers expensive legal obligations on the part of defendants, such a prohibition can't apply to ordinary speech, press, petitioning, or assembly.

Many political or religious zealots throughout the history of First Amendment law may have come across as obsessed or irrational or lacking a sense of proportion. Indeed, the willingness to fight a case up to the Supreme Court, often at considerable personal cost and peril, may itself be evidence of such obsession, especially to those of us who sharply disagree with the speaker's views. The defendant in *Cantwell v. Connecticut*, for instance, went to a mostly Catholic part of town to urge passersby to listen to a record that stridently attacked Catholicism.[318] Besides being unusually rude, even by the standards of those who dislike Catholics, this had to have been a dangerous thing to do.

The near–funeral picketers from Westboro Baptist Church, of *Snyder v. Phelps* infamy, seem not just offensive and bigoted but unhinged.[319] The 1965 *Henry v. Collins*[320] case, a follow–up to *New York Times Co. v. Sullivan*,[321] protected the rights of someone who tried to get wire services to publish his conspiracy theories about "a diabolical plot" against him.[322] The 2005 *Tory v. Cochran* case protected the

at *2 (Pa. Super. Ct. July 14, 2014) (quoting trial court as concluding that "it is highly unlikely that any sanction [short of an order banning future filings] would be either collectable or meaningful, give[n] Ms. Lichtman's insatiable desire to pursue wasteful, vexatious, baseless, and harassing litigation").

318. 310 U.S. 296, 301 (1940).

319. 562 U.S. 443 (2011).

320. 380 U.S. 356 (1965).

321. 376 U.S. 254 (1964).

322. *Collins*, 380 U.S. at 356; for the factual details, see Henry v. Pearson, 158 So. 2d 695, 696 (Miss. 1963).

rights of a disgruntled litigant who came across as obsessed, an extortionist, or both.[323]

Understandably, in all these cases the Supreme Court has declined to give trial judges the power to decide who is too irrational to speak. And that is especially so because it's human nature for people to view people who are far on their own side of various topics as impassioned and dedicated, but comparable people far on the other side as crazy or obsessed, especially if they are going after targets who seem like pillars of the community (judges, police officers, elected or appointed government officials, and the like).[324]

Indeed, remedies law sometimes allows injunctions that go further than the initial violation, and even that forbid behavior that, absent the initial misdeed, would not be tortious.[325] But First Amendment law does not allow such preventative measures that ban otherwise protected speech[326] (as opposed to narrow content–neutral time, place, and manner restrictions).[327]

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323. 544 U.S. 734 (2005).

324. *See supra* the first several cases discussed in Part A.

325. *See, e.g.*, People v. Conrad, 64 Cal. Rptr. 2d 248, 250 (Ct. App. 1997).

326. *See, e.g.*, McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339 (Cal. 2007); Gillespie v. Council, No. 67421, 2016 WL 5616589 (Nev. Ct. App. Sep. 27, 2016); Tory v. Cochran, 544 U.S. 734 (2005).

327. For an example of a permissible prophylactic content–neutral injunction, see, e.g., Schenck v. Pro–Choice Network of W. N.Y., 519 U.S. 357, 381–82 (1997):

> Based on defendants' past conduct, the District Court was entitled to conclude that some of the defendants who were allowed within 5 to 10 feet of clinic entrances would not merely engage in stationary, nonobstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars. And because defendants' harassment of police hampered the ability of the police to respond quickly to a problem, a prophylactic measure was even more appropriate.

Yet note the narrowness of the injunction: The defendants could continue to say anything they wanted; they only had to do this from 15 feet away from driveways and parking lot entrances.

CONCLUSION

I hope this Article has done two things.

First, I hope it has given practical users of the legal system—judges, lawyers, and unrepresented litigants—a guide to dealing with these broad injunctions against speech under existing First Amendment rules. I think those rules, as set forth by the U.S. Supreme Court and many of the appellate courts I quote, are generally wise, and generally forbid such injunctions. As I noted in the Introduction, libel can be restricted. Unwanted speech to a person can be restricted. A few other categories of speech, such as true threats of illegal conduct, can be restricted. But offensive speech about a person—distressing and disturbing as it may be—generally cannot be restricted.

Second, I hope it has given more theoretical readers, whether academics or others who might want to reform the law, a perspective on something that has been happening in trial courts. It has been happening almost entirely without public notice. It has often been happening in cases where the defendants were unrepresented, or had outright defaulted. It has been happening largely contrary to binding precedent—but precedent that defendants often lack the knowledge or legal assistance to cite.

And it has, I think, reflected a set of powerful impulses on judges' parts to try to protect people against what they understandably perceived as serious harms. Perhaps those judges' efforts just cannot be reconciled with our constitutional rules; indeed, I think they can't be. But scholars can benefit, I think, from considering this more, and considering what it says about the virtues and limitations of our legal system.

APPENDIX

Speech restricted	Type[328]	Relationship[329]	Representation[330]	Name	Citation
"Any allegations of wrongdoing"	L			Parker v. Casady	No. CV-16-4844, at 1 (Idaho Dist. Ct. Bonneville Cnty. Jan. 18, 2017)
"Badmouthing, disparaging or ... denigrating"	F			Mackney v. Mackney	No. CL 2008-013103, at 5 ¶ 16 (Va. Cir. Ct. Fairfax Cnty. July 26, 2010)
"Contacting past or present clients of [P]"	LH		A	Ferguson v. Waid	No. C17-1685RSM, at 1-2 ¶ 3 (W.D. Wash. Nov. 19, 2018), *rev'd in relevant part*, 798 F. App'x 986 (9th Cir. 2020)
"Contact[ing] anyone about plaintiff"	H	Roommates	P	Y.P. v. K.V.	No. 2010-RO-0041, at 1 ¶ 14 (Mass. Dist. Ct. Somerville Feb. 20, 2020), *aff'd*, 99 Mass. App. Ct. 1130 (First Amendment arguments held to have been waived), *appeal denied*, 173 N.E.3d 1099 (Mass. 2021)

328 L (libel), H (harassment), H+ (harassment where the speech was treated as harassing in part because it damaged reputation), I (interference with business relations), P (Privacy), F (family law cases, involving divorce or child custody), ? (some uncertainty).

329 "%" indicates that the parties had been romantically involved, or at least that one had been romantically interested in the other. "Lawyer" indicates that the lawsuit appeared to be a lawyer suing an ex-client or ex-adversary. Some of the entries in the column refer to the nature of the allegations and not just the relationship of the parties.

330 A (adversarial lawsuit where both parties were present and defendant was represented by counsel), D (default judgment), E (ex parte), or P (defendant was pro se). Blanks, in this column and in others, indicate that the situation was unclear.

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representa-tion**[330]	**Name**	**Citation**
"Disparaging comments" to P's business contacts or potential business contacts	LI		P	Filsoof v. Cole	No. 1:21-cv-01791-NRB, at 1-2 (S.D.N.Y. Apr. 6, 2021)
"Derogatory"	H	%	P	Holton v. Holton	No. 2019-DR-963, at 5 ¶ 6 (Fla. Cir. Ct. Duval Cnty. July 31, 2019), *rev'd*, No. 1D19-2849, 297 So.3d 707 (Fla. Ct. App. 2020)
"Derogatory"	LF	%	D	Wang v. Lee	No. BC573818, at Att. 7a (Ohio Ct. Com. Pl. Franklin Cnty. July 15, 2016)
"Derogatory, disparaging, negative, unfavorable, uncomplimentary, ... or critical"	L		D	Selakovic v. Greenway Nutrients	No. 2014-CA-002578XXXXMB, at 2 (Fla. Cir. Ct. Palm Beach Cnty. Aug. 14, 2020)
"Disparag-[ing]"	L		P	Sulla v. Horowitz	No. 12-1-0417, at 2 ¶ 3 a.-b. (Haw. Cir. Ct. 3d Cir. June 17, 2013), *aff'd*, 366 P.3d 1086 (Haw. Ct. App. 2016)
"Disparaging comments on ... website relating to [P's] employment"	L			Barette v. Houston Forensic Science Center, Inc.	No. 2018-81317, at 1 ¶ 1 (Tex. Dist. Ct. Harris Cnty. Dec. 6, 2018), *vacated*, No. 01-19-00129-CV, 2019 WL 5792194 (Tex. App.—Houston [1st Dist.] Nov. 7, 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Disparaging"	H+	%	A	Gary M. v. Crystal S.	No. BD555480, at *7 (Cal. Super. Ct. L.A. Cnty. Feb. 25, 2020), *aff'd on procedural grounds*, No. B301773, 2020 WL 5050650, *7 (Cal. Ct. App. Aug. 27, 2020)
"Disparaging"	L		D	Madwire Media, LLC v. Niemann	No. 2014CV030182, at 2 ¶ E.1 (Colo. Dist. Ct. Larimer Cnty. May 6, 2014)
"Disparaging"	H+	Lawyer		Furman v. Horton	No. 502019DR003547XXXXSB, at 2 ¶ E (Fla. Cir. Ct. Palm Beach Cnty. July 28, 2020)
"Disparaging"	L		P	Oxendine v. Ramirez	No. 502017CA011274XXXXMB, at 1 (Fla. Cir. Ct. Palm Beach Cnty. Nov. 9, 2017)
"Disparaging"	L		A	Turofsky v. Bliok	No. 12319/13, at 2 (N.Y. Sup. Ct. Nassau Cnty. Apr. 8, 2015)
"Disparaging"	L		A	CK Creations v. Pease	No. 2019-CI-13562, at 3 ¶ e (Tex. Dist. Ct. Bexar Cnty. Aug. 12, 2019)
"Disparaging"	L		D	Pearson Roofing v. Kot	No. 2012-50879-367, at 5 (Tex. Dist. Ct. Denton Cnty. Dec. 18, 2012)
"Disparaging"	L	%	A	Davis v. Leung	No. 15-1610-CC4, at 3 (Tex. Cnty. Ct. Williamson Cnty. May 18, 2017)
"Disparaging"	L	Ex-employee	A	TitleMax of S.C., Inc. v. Crowley	No. 4:20-cv-02938-JD-TER, at 3 (D.S.C. Apr. 28, 2021), *dismissed*, No. 4:20-cv-2938-JD, 2021 BL 485577 (D.S.C. Dec. 21, 2021)

Speech restricted	Type[328]	Rela-tion-ship[329]	Repre-senta-tion[330]	Name	Citation
"Disparaging" / discouraging future custom-ers	LH	Ex-cus-tomer	P	Izzet Gun-bil, L.L.C. v. Estrada	No. 46D01-1908-CT-001985, 2019 WL 11278771, *3 (Ind. Super. Ct. Laporte Cnty. Dec. 16, 2019),
"Disparaging" + all contact with investors	L		D	Sedona Oil & Gas Corp. v. Lowder	No. DC-14-12548, at 2 (Tex. Dist. Ct. Dallas Cnty. June 23, 2015)
"Harmful, ma-licious and disparaging"	LI		P	Transporta-tion Firm, LLC v. Eno-ble, Inc.	No. 16-cv-2186-SHL-dkv, at 6 (Tenn. Cir. Ct. Mem-phis Cnty. June 3, 2016), available at 2016 WL 8738240
"Malicious"	L		D	Guo v. Li	No. PWG-18-259, 2019 WL 2288348, at *4 ¶ 3 (D. Md. May 29, 2019), *vacated*, 2020 WL 2563184 (D. Md. May 29, 2019)
"Negative or derogatory"	L		D	Empire Dev. Corp. v. Camp-bell	No. LC105389, at 2 ¶ 7 (Cal. Super. Ct. L.A. Cnty. Jan. 19, 2018)
"Negative"	L	Doctor v. ex-pa-tient	D	Arzate v. Moham-med	No. CV2013-016874, at ¶¶ 7–9 (Ariz. Super. Ct. Mari-copa Cnty. Jan. 14, 2015)
"Negative"	L	Lawyer	D	Berd v. Brutus Ca-ligula	No. CV2012-094656, at ¶¶ 5–6 (Ariz. Super. Ct. Mari-copa Cnty. Feb. 1, 2013)
"Negative"	L		D	Flippa Pty LTD v. Qui-nones	No. CV2012-095192, at ¶¶ 4--5 (Ariz. Super. Ct. Mari-copa Cnty. Apr. 8, 2013)

Speech restricted	Type[328]	Relationship[329]	Representation[330]	Name	Citation
"Negative"	L		D	Katz v. Digirolamo	No. CV2013-003905, at ¶¶ 7–8 (Ariz. Super. Ct. Maricopa Cnty. June 11, 2014)
"Negative"	L	Lawyer	D	Mehta v. Oslova	No. CV2011-054721, at ¶¶ 4–5 (Ariz. Super. Ct. Maricopa Cnty. Dec. 20, 2012)
"Negative"	L	Alleged patron v. prostitute over allegations of sexual assault	D	Meisenbach v. Castillo	No. CV2014-001528, at 8 ¶ 12 (Ariz. Super. Ct. Maricopa Cnty. Mar. 1, 2016)
"Negative"	L		D	Precise Auto Care, LLC v. Pabrezis	No. CV2013-003594, at 4 ¶ 8 (Ariz. Super. Ct. Maricopa Cnty. Mar. 3, 2014)
"Negative"	L		D	Profinity LLC v. Shipley	No. CV2012-013904, at ¶¶ 6–7 (Ariz. Super. Ct. Maricopa Cnty. Feb. 14, 2014)
"Negative"	L		D	Ramsthel v. Penny	No. CV2014-093104, at 2 ¶ 1, 22 ¶ 7 (Ariz. Super. Ct. Maricopa Cnty. Sept. 24, 2014)
Online	L		D	Ruffino v. Lokosky	No. CV2015-009252, 2017 WL 10487368, at ¶¶ 11–13 (Ariz. Super. Ct. Maricopa Cnty. June 29, 2016), *default judgment set aside, setting aside aff'd*, 425 P.3d 1108 (Ariz. Ct. App. 2018)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representa-tion**[330]	**Name**	**Citation**
"Negative"	LI		D	Walter Arnstein, Inc. v. Transpacific Software PVT Ltd.	No. 11-CV-5079, at 1–2 ¶ 1 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 26, 2016)
"Negative"	L		P	McLean v. Walters	No. CJ-2014-3185, at 2 (Okla. Dist. Ct. Oklahoma Cnty. Sept. 28, 2014)
"Negative, critical, derogatory, disparaging, or discrediting"	L		D	Shannon v. Ghosh	No. 15:cv-13010-PBS, 8:18-CV-00259, at 2 ¶ b (Mass. Super. Ct. Greenbelt Cnty. Aug. 10, 2015)
"Offensive"	L		D	Enovative Techs., LLC v. Leor	86 F. Supp.3d 445, 446 (D. Md. 2015)
"Personal," including from public records	H		P	In re Guardianship of Janzen	No. 33272-1-III (Wash. Super. Ct. Spokane Cnty. 2008), *aff'd in part, rev'd in relevant part*, No. 33272-1-III, 190 Wash. App. 1041 (2015)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representa-tion**[330]	**Name**	**Citation**
"Posting anything on any social media forums regarding the Petitioner, his parenting ..., or any other negative comments about the Petitioner"	H	%	P	Henkel v. Henkel	No. 2020CV000049, at Lexis docket (Wisc. Cir. Ct. Jefferson Cnty. Feb. 10, 2020)
"Social media harassment with family names"	H			Burrett v. Rogers	No. 30-2012-0058389 (Cal. Super. Ct. Orange Cnty. Sept. 7, 2012), *aff'd*, No. G047412, 2014 WL 411240 (Cal. Ct. App. Feb. 4, 2014)
Accessing any social media site	H	%		Jacobson v. Webb	No. 48-2014-DR-015747-O (Fla. Cir. Ct. Orange Cnty. Nov. 2014), *rev'd*, No. 5D14-4426, 175 So. 3d 938 (Fla. Ct. App. 2015)
Accurate allegations of fraud	L	Newspaper D		Groner v. Wick Communications Co.	No. 00126863, at 1 (La. Dist. Ct. Iberia Parish Aug. 25, 2015)
Accurate allegations of sex offender status	LH			Redmond v. Heller	No. 2017-000364-NO (Mich. Cir. Ct. Kalamazoo Cnty. Aug. 29, 2017), *rev'd*, No. 347505, 2020 WL 2781719 (Mich. Ct. App. May 28, 2020)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Accusations of misconduct that hadn't been found defamatory	L		A	McCarthy v. Fuller	No. 1:08-cv-00994-WTL-DM (S.D. Ind. Mar. 19, 2014), *rev'd in relevant part*, 810 F.3d 456 (7th Cir. 2015)
Accusations of mistreatment of children based on hearsay + contacting P's patients	L	Family		Pearson v. Pearson	No. 417-00143-2017, at 1 (Tex. Dist. Ct. Collin Cnty. Jan. 24, 2017)
All	H	Doctor v. ex-patient	P	Streeter v. Visor	No. CV2014093311, at 2 ¶ 11 (Ariz. Super. Ct. Maricopa Cnty. Dec. 1, 2015), *rev'd*, 2015 WL 7736866 (Ariz. Ct. App. Dec. 1, 2015)
All	H	%		Bredfeldt v. Greene	No. C20131650, at 4–5 (Ariz. Super. Ct. Pima Cnty. May 20, 2013), *aff'd on procedural grounds*, No. 2 CA-CV 2016-0198, 2017 WL 6422341 (Ariz. Ct. App. Dec. 18, 2017)
All	I+	Doctor v. ex-patient	D	Peretti v. Ellis	No. CV 60CV-18-2524, at 1-2 (Ark. Cir. Ct. Pulaski Cnty. Sept. 11, 2018)
All	L	Lawyer	D	Naso v. Silva	No. 30-2013-00679547-CU-DF-CJC, at 2 (Cal. Super. Ct. Orange Cnty. July 27, 2015)

Speech restricted	Type[328]	Rela-tion-ship[329]	Repre-senta-tion[330]	Name	Citation
All	H	Minister P	P	Flood v. Wilk	No. 2017 OP 020404 (Ill. Cir. Ct. Cook Cnty. Oct. 3, 2017), *rev'd*, 125 N.E.3d 1114 (Ill. App. Ct. 2019)
All	H			Bryant v. Hutchison	No. 19-OP-180 & -181 (Ill. Cir. Ct. Saline Cnty. Nov. 18, 2019), *rev'd*, No. 5-19-0508, 2020 WL 7694319 (Ill. App. Ct. Dec. 28, 2020)
All	H	Lawyer	E	Buchanan v. Crisler	No. 337720 (Mich. Dist. Ct. Ingham Cnty. Nov. 9, 2016), *rev'd*, 922 N.W.2d 886 (Mich. Ct. App. 2018)
All	F	Reli-gious leader P %	P	Jones v. Jones	No. 27-FA-08-5921, at 3 ¶ 5 (Minn. Dist. Ct. Hennepin Cnty. May 11, 2015)
All	LI		E	Puruczky v. Corsi	No. 2017 P 000046 (Ohio Ct. Com. Pl. Geauga Cnty. Feb. 15, 2017), *rev'd*, 110 N.E.3d 73 (Ohio Ct. App. 2018)
All	H			Ackerman v. Adams	No. 14ST08-0272, at 2 (Ohio Ct. Com. Pl. Knox Cnty. Nov. 2, 2015)
All	H	Family		Rasawehr v. Ra-sawehr	No. 17-CV-014, at 4 ¶ 9 (Ohio Ct. Com. Pl. Mercer Cnty. Jan. 18, 2018), *rev'd sub nom.* Bey v. Rasawehr, 161 N.E.3d 529 (Ohio 2020)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
All	L	Political dispute; one plaintiff was Prime Minister of Haiti	D	Baker v. Haiti-Observateur Group, Inc.	No. 1:12-cv-23300-JJO, at 3 ¶ 6 (S.D. Fla. Feb. 6, 2013), *vacated*, 938 F. Supp. 2d 1265 (S.D. Fla. Apr. 9, 2013)
All	L		A	Powers v. Connerth	No. No. CC-17-CV-902, at 3 ¶ 1 (Tenn. Cir. Ct. Montgomery Cnty. Feb. 14, 2019)
All	L			Lowry v. Fiorani	No. 2007-12907, at 1 (Va. Cir. Ct. Fairfax Cnty. Nov. 16, 2007)
All	H			Harper v. Fleck	No. 16S-35, at 3 (Va. Cir. Ct. Monongalia Cnty. May 5, 2016)
All	H	Doctor v. ex-patient	A	Petitioner v. Brandon	No. 2010CV014072, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. Sept. 8, 2010)
All	LI	Lawyer		Baldinger v. Ferri	No. 3:10-cv-03122-PGS-DEA, at 2 ¶ 2 A., ¶ 3 A. (D.N.J. July 10, 2012)
All	L	Lawyer		Littman v. Mann	No. 13-00498 CA 23, at 2 ¶ 1 (Fla. Cir. Ct. Miami Dade Cnty. Jan. 24, 2013)
All	H?			Ulmer v. Scoville	No. 602785, at 1 (La. Dist. Ct. East Baton Rouge Parish Aug. 31, 2012)

Speech restricted	**Type[328]**	**Rela-tion-ship[329]**	**Repre-senta-tion[330]**	**Name**	**Citation**
All	L	Reli-gious leader P		West v. Watson	No. DV-10-317A, at 4 ¶ 7 (Mo. Cir. Ct. Flathead Cnty. Aug. 10, 2010)
All	L			Regional Water-proofing, Inc. v. Hickman	No. 19 CVS 13073, at 2 ¶ 2 (N.C. Super. Ct. Wake Cnty. Oct. 25, 2019)
All	FH	%	D	Draghici v. Johnson	No. D-14-506304-D, at 3 (Nev. Dist. Ct. Clark Cnty. Aug. 10, 2015)
All	L	Lawyer	A	Stutz Ar-tiano Shi-noff & Holtz v. Larkins	No. 37-2007-00076218-CU-DF-CTL, at 2 (Cal. Super. Ct. San Diego Cnty. Dec. 11, 2009), *rev'd*, No. D057190, 2011 WL 3425629, *3–*4, *9 (Cal. Ct. App. Aug. 5,
All	H			Schliepp v. Raabe	No. 2020CV001844 (Wisc. Cir. Ct. Milwaukee Cnty. Mar. 18, 2020)
All "sharing of her opinion on this matter"	L			Howell-Wright v. Hoover	No. CJ-20-141, at 1 (Okla. Dist. Ct. Cherokee Cnty. Nov. 12, 2020)
All contact with business associates	L		P	Coppinger v. Ramsey	No. CC-12-00349-E, at 25 c (Tex. Dist. Ct. Dallas Cnty. Cnty. Feb. 22, 2013)
All public comments	L	Neigh-bors	A	Kauffman v. Forsythe	No. E2019-02196-COA-R3-CV (Tenn. Cir. Ct. Rhea Cnty. Dec. 6, 2019), *rev'd*, No. 2019-CV-49 (Tenn. Ct. App. May 25, 2021)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Anonymous e-mails about P, speech about order	L		A	Absolute Pediatric Servs., Inc. v. Humphrey	No. 04CV-18-2961, at 3 ¶ 2(a) (Ark. Cir. Ct. Benton Cnty. Nov. 1, 2019)
Anonymous references + photos	H			Polinsky v. Bolton	No. 27-CV-15-15467 (Minn. Dist. Ct. Hennepin Cnty. Sept. 2015), *aff'd*, No. A16-1544, 2017 WL 2224391 (Minn. Ct. App. May 22, 2017)
Anonymous references + photos	H	Lawyer	A	Fredin v. Middlecamp	No. 62-HR-CV-19-621 (Minn. Dist. Ct. Ramsey Cnt. Mar. 9, 2020), *aff'd*, No. A20-0539, 2021 WL 417017 (Minn. Ct. App. Feb. 8, 2021)
Any accusations of dishonesty, unfitness in business, or crime	L			Adili v. Yarnell	No. 2017-CP-08-552, at 2 ¶ B (S.C. Ct. Com. Pl. 9th Jud. Cir. Feb. 27, 2017)
Calling P "bully" or "unprofessional"	LP			Murphy v. Gump	No. 2016-CC-002126-O, at 2 (Fla. Cnty. Ct. Orange Cnty. July 18, 2016)
Complaining to government agencies about doctor	L		A	Hagele v. Burch	No. 07 CVS 1985 (N.C. Super. Ct. Wake Cnty. Aug. 15, 2013)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Complaining to government agencies about P without court permission	H	Condo. ass'n P	A	Portofino Towers Condo Ass'n, Inc. v. Wohlfeld	No. 2018-041933-CA-01 (08) (Fla. Cir. Ct. Miami-Dade Cnty. Feb. 11, 2019), modified (Feb. 28, 2019)
Complaining to immigration enforcement about P	F	%		Meredith v. Meredith	No. 063024566 (Wash. Super. Ct. Pierce Cnty. Nov. 9, 2007), *rev'd*, 201 P.3d 1056 (Wash. Ct. App. 2009)
Complaining to police department about police officer P without court permission	H	Police officer P		Hunley v. Hardin	No. GS011027 (Cal. Super. Ct. L.A. Cnty. Aug. 20, 2008), *aff'd*, No. B210918, 2010 WL 297759 (Cal. Ct. App. Jan. 27, 2010)
Complaining to government agencies	H	Family	P	Parisi v. Mazzaferro	No. SCV 257142 (Cal. Super. Ct. Sonoma Cnty. 2015), *rev'd in part*, 210 Cal. Rptr. 3d 574 (Ct. App. 2016)
"[D]iscussing Petitioner or this case with anyone familiar with Petitioner"	H	Family		Sophia M. v. James M.	No. O14503/17 (N.Y. Fam. Ct. N.Y. Cnty. Feb. 27, 2020), *rev'd*, No. 2020-03046 (N.Y. App. Div. June 22, 2021)
Interference with business	LIP		A	R.K./FL Mgmt., Inc. v. Chevaldina	No. 2011-017842-CA-01, 2012 WL 12887238 (Fla. Cir. Ct. Miami-Dade Cnty. Nov. 26, 2012), *rev'd*, 133 So. 3d 1086 (Fla. Ct. App. 2014)

Speech restricted	Type[328]	Relationship[329]	Representation[330]	Name	Citation
Online, but only on Complaints-Board.com	L			Stockton v. Smith	No. 12C162, at 2 ¶ 2 (Colo. Dist. Ct. Douglas Cnty. Oct. 14, 2014)
Online	L		D	ALS Guardian Angel Found. v. Nicoletti	No. CV2016-004857, at 4 ¶¶ 8–10 (Ariz. Super. Ct. Maricopa Cnty. Jan. 11, 2017)
Online	H	Lawyer %		Castillo v. Ormandy	No. 5483462, at 2 (Ariz. Super. Ct. Maricopa Cnty. Oct. 17, 2019)
Online	L	Alleged patron v. prostitute over allegations of sexual assault	D	Meisenbach v. Riva	No. CV2014-000834, at 13 ¶ 9 (Ariz. Super. Ct. Maricopa Cnty. Apr. 30, 2014)
Online	LH			Thomas v. Wray	No. CV19WD05, at 2 (Ark. Cir. Ct. Benton Cnty. May 24, 2018)
Online	H	%		Hanlon v. Toro	No. D18-01483, at 4 ¶ 23 (Cal. Super. Ct. Contra Costa Cnty. Aug. 22, 2018)
Online	H		D	Batsalkin v. Hedden	No. 18VERO01811, at 2 ¶ 6.a.4 (Cal. Super. Ct. L.A. Cnty. Nov. 9, 2018)
Online	L	Doctor v. ex-patient	A	Bradley v. Stefani	No. YC070821, 2019 WL 4899177, * 2 (Cal. Super. Ct. L.A. Cnty. Sep. 11, 2019)

Speech restricted	**Type**[328]	**Rela-tion-ship**[329]	**Repre-senta-tion**[330]	**Name**	**Citation**
Online	H	%	P	Erikson v. Caleb	No. 18STR001127, at 4 ¶ 23 (Cal. Super. Ct. L.A. Cnty. Mar. 9, 2018)
Online	L	Lawyer	D	Etehad Law v. Anner	No. BC625332, at 3 (Att.) (Cal. Super. Ct. L.A. Cnty. Jan. 31, 2017)
Online	H	Lawyer	A	Mercado v. Castanedo	No. BS118244, at 3 ¶ 5 (Cal. Super. Ct. L.A. Cnty. Feb. 4, 2009)
Online	H	Friends	A	Narain v. Sanducci	No. 17TRRO00279 (Cal. Super. Ct. L.A. Cnty. Sept. 26, 2017), *aff'd*, No. B286152, 2018 WL 5919462 (Cal. Ct. App. Nov. 13, 2018)
Online	H	Friend of ex-husband	P	Appel v. Zona	No. 1802924, at 3 ¶ 11 (Cal. Super. Ct. Riverside Cnty. July 25, 2018)
Online	H			Liebich v. Phillips	No. 2016-70000487, at 1 (Cal. Super. Ct. Sacra-mento Cnty. Sept. 8, 2016)
Online	H	Political activist P	A	McCauley v. Phillips	No. 2016-70000487, at 1 (Cal. Super. Ct. Sacra-mento Cnty. Sept. 8, 2016), *appeal dismissed on proce-dural grounds*, No. C083588, 2018 WL 3031765 (Cal. Ct. App. June 19, 2018
Online	L		D	SNA Transp., Inc. v. Co-lumbus Freight, Inc.	No. CIVDS 1620113, at 2 ¶ 3 (Cal. Super. Ct. San Ber-nardino Cnty. Sep. 22, 2017)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H		A	Wannebo v. Ewing	No. 37-2016-00026279-CU-HR-CTL, at 6 ¶ 6.a.4 (Att.) (Cal. Super. Ct. San Diego Cnty. Oct. 25, 2016)
Online	H+			Leka v. Pochari	No. 20CH009145, at 2 ¶ 5.a.4 (Cal. Super. Ct. Santa Clara Cnty. Jan. 16, 2020)
Online	H	State official P	A	Serafinowicz v. Bernstein	No. CV154034547S, 2015 WL 3875108, *6 (Conn. Dist. Ct. Waterbury Jud. Dist. May 28, 2015), *aff'd sub nom.* Stacy B. v. Robert S., 140 A.3d 1004 (Conn. App. Ct. 2016
Online	H	Revenge porn %		Faustina v. Hulick	No. 2012 CPO 000388, at 2 (D.C. Super. Ct. Mar. 9, 2012)
Online	H	State senator P		Book v. Logue	No. DVCE-17-5746 (Fla. Dist. Ct. Broward Cnty. Mar. 9, 2018), *rev'd*, 297 So. 3d 605 (Fla. Ct. App. 2020) (en banc)
Online	H	Police officer P	P	Lanoue v. Neptune	No. DVCE 14-4939 (Fla. Cir. Ct. Broward Cnty. Aug. 22, 2014), *rev'd*, 178 So. 3d 520 (Fla. Ct. App. 2015)
Online	L		D	Flushcash, Inc. v. Bladis	No. 3D12-1287, at 2 ¶ 6 (Fla. Cir. Ct. Miami Dade Cnty. Apr. 17, 2012), *appeal dismissed*, 92 So.3d 834 (Fla. Ct. App. July 24, 2012)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	Political consultant P	A	Delgado v. Miller	No. 17-16674 (Fla. Cir. Ct. Miami-Dade Cnty. Feb. 27, 2020), *rev'd*, 2020 WL 7050217 (Fla. Ct. App. Dec. 2, 2020)
Online	H	Condo. ass'n P	P	Hamptons at Metrowest Condo. Ass'n v. Fox	No. 2015-CA-007283-O (Fla. Cir. Ct. Orange Cnty. Apr. 18, 2016), *rev'd*, 223 So. 3d 453 (Fla. Ct. App. 2017)
Online	H	Lawyer		Mazariego v. Seoane	No. 2020DR004974DRAXES, at 3 ¶ 2.g (Fla. Cir. Ct. Pasco Cnty. Oct. 15, 2020)
Online	H	Friends and business partners	A	Craft v. Fuller	No. 2019DR005604XXFDFD (Fla. Cir. Ct. Pinellas Cnty. June 28, 2019), *rev'd*, 298 So. 3d 99 (Fla. Ct. App. 2020)
Online	L	Lawyer		Schaefer v. Gerrish	No. 12-CA-4135-16-W, at 3 (Fla. Cir. Ct. Seminole Cnty. Nov. 12, 2019)
Online	H	Dissatisfied customer D	A	Siegal v. Barnett	No. 16 OP 20356 (Ill. Cir. Ct. Cook Cnty. Sept. 21, 2016), *aff'd*, No. 1-16-3073, 2018 WL 3746460 (Ill. App. Ct. Aug. 3, 2018)
Online	H		A	Quinn v. Gjoni	No. 1407RO1169, at 1 ¶ 14 (Mass. Muni. Ct. Boston Sept. 16, 2014)
Online	L			Muzani v. Trankle	No. 02-C-13-182491, at 1 (Md. Cir. Ct. Anne Arundel Cnty. Nov. 15, 2013)

Speech restricted	**Type**[328]	**Rela-tion-ship**[329]	**Repre-senta-tion**[330]	**Name**	**Citation**
Online	H	Neigh-bors	Origi-nally ex parte then pro se.	Zlatkin v. Roggow	No. 19-010012-PH (Mich. Dist. Ct. Gladwin Cnty. 2018), *aff'd sub nom.* SLA v. SZ, No. 349341, 2020 WL 3022755 (Mich. Ct. App. June 4, 2020)
Online	H	Judge P	E	Matthews v. Heit	No. 14-817732-PH, at 1 ¶ 5 (Mich. Cir. Ct. Oakland Cnty. Mar. 11, 2014)
Online	LI		D	Thermolife Int'l, LLC v. Connors	No. C-266-15, at 3 ¶ 3 (N.J. Super. Ct. Bergen Cnty. Apr. 11, 2016)
Online	H+		A	Siegle v. Martin	No. BUR-L-2674-18, at 2 (N.J. Super. Ct. Burlington Cnty. Jan. 23, 2019)
Online	H	%		Davino v. Hochman	No. FV-14-000536-16, at 4 (N.J. Super. Ct. Morris Cnty. Feb. 3, 2016)
Online	L	Revenge porn %		Nahra v. Maliska	No. CV-15-852649, at 2 ¶ 5(iv) (Ohio Ct. Com. Pl. Cuyahoga Cnty. June 2, 2016)
Online	H	Local of-ficial P	E	Kleem v. Hamrick	No. CV 11 761954, at 3 (Ohio Ct. Com. Pl. Cuya-hoga Cnty. Aug. 15, 2011), *vacated*, Aug. 22, 2011
Online	H	Public speaker P %	A	Coleman v. Razete	No. SK1701382 (Ohio Ct. Com. Pl. Hamilton Cnty. Jan. 25, 2018), *rev'd*, 137 N.E.3d 639 (Ohio Ct. App. 2019)

Speech restricted	Type[328]	Relation-ship[329]	Representa-tion[330]	Name	Citation
Online	L		D	Clearpath Lending v. JTRepper	No. A1500104, at 3 (Ohio Ct. Com. Pl. Hamilton Cnty. Sept. 28, 2015)
Online	L		D	Indivijual Custom Eyewear v Jodie J	No. A1407004, at 3 (Ohio Ct. Com. Pl. Hamilton Cnty. July 9, 2015)
Online	L		A	Smith v. Jennings	No. CJ-2019-5832, at 1 ¶ 2 (Okla. Dist. Ct. Oklahoma Cnty. Aug. 19, 2020)
Online	F	%	A	Seachrist v. Seachrist	No. CI-15-06447, at 1 (Pa. Ct. Com. Pl. Lancaster Cnty. Oct. 15, 2015)
Online	H+	%	A	Davis v. Ellis	No. DC-19-14291, at 4 ¶ d. (Tex. Dist. Ct. Dallas Cnty. Sept. 12, 2019)
Online	L			Fischer v. Owens	No. 13-2-00996-3, at 2 (Wash. Super. Ct. Clark Cnty. June 24, 2014)
Online	L	Prominent businessman P	A	Jia v. Gu	No. 17-2-27517-4 KNT, at 4–5 ¶ C (Wash. Super. Ct. Washington Cnty. Nov. 9, 2017)
Online	H	%	P	Pawlowicz v. Galkin	No. BQ040101, at 3 ¶ 8 & 10 (Cal. Super. Ct. L.A. Cnty. Nov. 25, 2013)
Online	HLI	Lawyer	D	PrismXKB, Inc. v. Benaissa	No. 17PSR000329, at 44198 (Cal. Super. Ct. L.A. Cnty. Aug. 15, 2017)
Online	L	Lawyer		Saadian v. Avenger213	No. BC 502285, at 1 (Cal. Super. Ct. L.A. Cnty. July 28, 2014)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	FH+	%	A	People v. Velyvis	No. CR211376A, 2020 WL 4698811, *1 (Cal. Super. Ct. Marin Cnty. July 27, 2020)
Online	L		D	Rainek v. Honsinger	No. 2014CV30018, at 2 (Colo. Dist. Ct. Conejos Cnty. Oct. 2, 2015)
Online	L	Doctor v. ex-patient	D	Noble v. Matevosyan	No. 17CV8129-3, at 10 (Ga. Super. Ct. DeKalb Cnty. Jan. 4, 2019)
Online	L	Doctor v. ex-patient		Blom v. Callan	No. CV-OC-2011-16232, at 2 ¶ 3 (Idaho Dist. Ct. Ada Cnty. Apr. 9, 2012)
Online	H		A	Siegal v. Barnett	No. 163073-U, at ¶ 11 (Ill. Cir. Ct. Cook Cnty. Aug. 3, 2018), *aff'd*, 2018 IL App (1st) 163073-U, ¶ 11
Online	H			Oprisiu v. Leblanc	No. [unclear], at 1 ¶ 5 (Mich. Cir. Ct. Grand Traverse Cnty. Mar. 7, 2012)
Online	L	Lawyer	D	Revision Legal, PLLC v. Oskouie	No. 17-32312-CZ, at ¶ 7.d (Mich. Cir. Ct. Grand Traverse Cnty. Mar. 2018)
Online	H			Brilar, LLC v. DeAngelis	No. 19-173448-C2, at 1 (Mich. Cir. Ct. Oakland Cnty. June 5, 2019)
Online	L	Lawyer		Robiner v. Cooper	No. 13-133770-C2, at 1 (Mich. Cir. Ct. Oakland Cnty. Feb. 27, 2014)
Online	H		D	Rucki v. Evavold	No. DV-10-317A, at 1 ¶ 1. (Minn. Dist. Ct. Dakota Cnty. Mar. 1, 2018)

Speech restricted	Type[328]	Relation-ship[329]	Representation[330]	Name	Citation
Online	H	%		Baker v. Krecl	No. CV-515-2018-378, at 2 ¶ 5 (Mont. Dist. Ct. Lewis & Clark Cnty. May 2, 2008)
Online	L			Yanik v. Simple	No. 16 CV 11482, at 2 ¶ 7 (N.C. Super. Ct. Wake Cnty. Dec. 2, 2019)
Online	F	%	P	Fantozzi v. Bigler	No. FD-16-1725-05, at 2 ¶ 6 (N.J. Super. Ct. Passaic Cnty. July 25, 2008)
Online	H		P	Woodward v. Price & Adrian v. Price	No. D-1329-CV-2020-00854, -00855, at ¶ 7.B(3) (N.M. Dist. Ct. Sandoval Cnty. July 9, 2020)
Online	H			Heim v. Clark	No. 2018CV002381, at Westlaw docket (Wisc. Cir. Ct. Dane Cnty. Sept. 12, 2018)
Online	H	Lawyer		Peterson v. Tease	No. 2012CV000569, at Westlaw docket (Wisc. Cir. Ct. Manitowoc Cnty. Oct. 1, 2012)
Online	H			Elias v. Aguilar	No. 2018CV005181, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. July 2, 2018)
Online	H			Lyons v. Simonis	No. 2019CV002587, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. Apr. 12, 2019)
Online	H	Family		Raatz v. Raatz	No. 2019CV000123, at Westlaw docket (Wisc. Cir. Ct. Portage Cnty. May 21, 2019)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Online	L	Lawyer	A	Picazio v. Holmseth	No. DVCE11005919, at 2 (Fla. Cir. Ct. Broward Cnty. Sept. 19, 2011)
Online	H	Ex-client	D	Mazor v. Leys	No. 20STCV47187 (Cal. Super. Ct. L.A. Cnty. Aug. 24, 2021)
Online	L	Lawyer	P	Bacchus v. Krapacs	No. 4D19-641, at 4 ¶ 6 (Fla. Cir. Ct. Broward Cnty. Aug. 12, 2020), rev'd, 301 So.3d 976, 980 (Fla. Ct. App. 2020)
Online "dis-paraging"	L		D	Nationwide Biweekly Admin., Inc. v. John Doe et al.	No. 2014-CV-0061, at 3 ¶ 2 b.-c. (Ohio Ct. Com. Pl. Greene Cnty. Apr. 10, 2014)
Online	H	%	A	B.M. v. M.M.	No. 14P001222 (Cal. Super. Ct. Orange Cnty. Jul 30, 2017), *aff'd on procedural grounds*, No. G05508, 2019 WL 4594776 (Cal. Ct. App. Sept. 23, 2019)
Online	H		D	Childers v. Renoir	No. CIVDS1937150 (Cal. Super. Ct. San Bernardino Cnty. Dec. 20, 2019)
Online	L		A	Same Condition, LLC v. Codal, Inc.	No. 19-L-5407, at ¶ 6 (Ill. Cir. Ct. Cook Cnty. Oct. 2, 2020), *rev'd*, 2021 IL App (1st) 201187

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	Husband v. wife's ex-lover	A	Boone v. Mashaud	No. CPO-739-14, at 2 (D.C. Super. Ct. July 11, 2014), *vacated*, No. 16-FM-383, 256 A.3d 235 (D.C. Ct. App. 2021), *rehearing en banc granted* (Dec. 30, 2021)
Online (social media)	H		A	O'Neill v. Goodwin	No. 4D152055, at App. 413 (Fla. Cir. Ct. Broward Cnty. June 29, 2016), *rev'd*, 195 So. 3d 411, 413 (Fla. Ct. App. 2016)
Online + "offensive posts"	H	Revenge porn %		Fahrenback v. Jensen	No. 13-DR-010094, at 3 ¶ 6 (Fla. Cir. Ct. Hillsborough Cnty. July 16, 2013)
Online + "submitting ... to any news outlets"	L			Net Element Inc. v. Zell	No. 2014-015763-CA-01, at 4 ¶ 2 (Fla. Cir. Ct. Miami-Dade Cnty. Oct. 22, 2014)
Online + photos	H+	Family court evaluator v. ex-adversary		Kiffmeyer v. Boyer	No. CV2017-090072, at 2 (Ariz. Super. Ct. Maricopa Cnty. Jan. 31, 2017)
Online + photos	H			Watson v. Gugerty	No. J-802-CV-20170995, at 2 (Ariz. Super. Ct. Mohave Cnty. June 3, 2013)
Online + photos	H	Revenge porn		Derrig v. Alexander	No. DV20191766, at 2 (Ariz. Super. Ct. Pima Cnty. Sept. 9, 2019)
Online + photos	H	%	P	Gomez v. Carrasco	No. 18CEFL05380, at LEXIS docket (Cal. Super. Ct. Fresno Cnty. Jan. 31, 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online + photos	H	%		Montanari v. Barren	No. SS 024853, at ¶ 6.a.4 (Cal. Super. Ct. L.A. Cnty. Sept. 11, 2014)
Online + photos	H	%		Weber v. Bland	No. 13D002025, at 4 ¶ 21 (Cal. Super. Ct. Orange Cnty. Mar. 7, 2013)
Online + photos	H	%		Czodor v. Luo	No. 18V002374, at 8 (Att.), item 23 (Cal. Super. Ct. Orange Cnty. Oct. 19, 2018)
Online + photos	H	%		Cardoza v. Ortiz	No. FAMSS 1707719, at 7 (Cal. Super. Ct. San Bernardino Cnty. Sept. 28, 2017)
Online + photos	H			Geldart v. Christner	No. 2014-33246-FMCI, at 2 ¶ 2.d (Fla. Cir. Ct. Volusia Cnty. Dec. 10, 2015)
Online + photos	H+	%		Benenson v. Hightower	No. 2017-3442, at 1 (La. Dist. Ct. New Orleans Parish Sept. 11, 2017)
Online + photos	LH	Lawyer	D	Hutul v. Maher	No. 1:12-cv-01811, 2012 WL 13075673, at *9 ¶ 6 (N.D. Ill. Dec. 10, 2012)
Online + photos	H	%	A	Strickler v. Cappetto	No. 2018CV000107, at Westlaw docket (Wisc. Cir. Ct. Marathon Cnty. Feb. 23, 2018)
Online + photos	H	Prominent businessman P	A	David v. Textor	No. 14-267DV (Fla. Cir. Ct. Martin Cnty. Oct. 17, 2014), *rev'd*, 189 So. 3d 871 (2016)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online + tagged photos	H+	%	A	Dennis v. Napoli	No. 4885340, at 13 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 12, 2015), *aff'd*, 49 N.Y.S.3d 652 (App. Div. 2017)
Online comments that "impair Plaintiff's ... Reputation and ability to find work"	H+I		A	Svancara v. Castillo	No. 201419907-7, at 2 ¶ 3.a.iii (Tex. Dist. Ct. Harris Cnty. Apr. 10, 2014)
Online materials that "disparage" or "vilify"	L	School P	A	Hargrave Military Academy v. Guyles	No. 7:06-cv-00283-JCT-mfu, at 2 (W.D. Va. May 8, 2006)
Online on D's site	H+	Former federal nominee P	A	Brummer v. Wey	No. 153583/2015, at 3 (N.Y. Sup. Ct. N.Y. Cnty. June 5, 2017), *rev'd*, 166 A.D.3d 475 (2018)
Online reviews + social media	H			Pereira v. Dormena	No. 2025RO 0081, at 1 ¶ 6 (Mass. Super. Ct. Barnstable Cnty. Feb. 12, 2020)
Online speech causing emotional distress	H+			Best v. Marino	No. [unknown] (N.M. Dist. Ct. Doña Ana Cnty. Oct. 26, 2012), *aff'd*, 404 P.3d 450 (N.M. Ct. App. 2017)

Speech restricted	**Type[328]**	**Relationship[329]**	**Representation[330]**	**Name**	**Citation**
Online statements “that express[] or impl[y] that [D] is the natural, biological or adopted daughter of [P’s relative]”	L		D	Armesto v. Rosolino	No. 70424-9-I, at 5 (Wash. Super. Ct. King Cnty. July 7, 2014), *vacated*, 2014 WL 3360238
Photos	HL	“Online mugshot extortion[]”		Gugerty v. Watson	No. C20172678, at 2 ¶ 6 (Ariz. Super. Ct. Pima Cnty. June 8, 2017)
Photos	H			Petitioner v. Terpstra	No. 2020CV005018 (Wis. Cir. Ct. Milwaukee Cnty. Sept. 8, 2020)
Photos	H			Marais v. Bravo	No. 17CHRO0186, at 3 ¶ 11 (Cal. Super. Ct. L.A. Cnty. July 17, 2017)
Photos	F	%	P	Marquez v. Flores	No. FAMSS1909109, at LEXIS docket (Cal. Super. Ct. San Bernardino Cnty. Nov. 12, 2019)
Photos	F	%	P	Rashid v. Sarwat	No. HHDFA155040511S, 2016 WL 3391543, at *3 under “personal property” (Conn. Dist. Ct. Hartford Jud. Dist. June 1, 2016)
Photos	P	Revenge porn %		Sotiropoulos v. Blue Star Media	No. 2013CV225702, at 2 (Ga. Super. Ct. Fulton Cnty. May 8, 2013)

Speech restricted	Type[328]	Relation-ship[329]	Representation[330]	Name	Citation
Photos	H			Coby v. Jones	No. 2018CV004811, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. June 20, 2018)
Photos	H		A	Petitioner v. Scmidt	No. 2019CV004213, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. June 13, 2019)
Photos + "derogatory"	H+	Religious leader P %		Bond v. Thomas	No. 155440/2017, at 1 (N.Y. Sup. Ct. N.Y. Cnty. July 28, 2017), *cf.* 2018 WL 1226050 (N.Y. Sup. Mar. 8, 2018) (related case)
Photos + e-mails about P	H		A	Littleton v. Grover	No. 51217-3-II, at *9-10 (Wash. Super. Ct. Pierce Cnty. Mar. 12, 2019), *rev'd in part*, 2019 WL 1150759 (Wash. Ct. App.)
Photos + name in title of pages	H	Civic activist P	A	Moriwaki v. Rynearson	No. 12-17, at 2 (Wash. Mun. Ct. Kitsap Cnty. July 17, 2017), *rev'd*, No. 17-2-01463-1, 2018 WL 733810 (Wash. Super. Ct. Feb. 5, 2018)
Public records related to P's arrest	H	%	A	Catlett v. Teel	No. 19-2-00086-9 (Wash. Super. Ct. Island Cnty. Mar. 26, 2019), *rev'd*, 477 P.3d 50 (Wash. Ct. App. 2020)

Speech restricted	**Type[328]**	**Relationship[329]**	**Representation[330]**	**Name**	**Citation**
Removal of web site	L	Judge P, lawsuit over campaign video	A	Concerned Citizens for Judicial Fairness, Inc. v. Yacucci	No. 562014CA001711 (Fla. Cir. Ct. St. Lucie Cnty. Aug. 8, 2014), *rev'd*, 162 So. 3d 68 (Fla. Ct. App. 2014)
Remove accurate allegations from site	H	Lawyer	A	Gabueva v. Romanenko	No. CCH-19-581819, at 2 ¶ 6.a.4 (Cal. Super. Ct. S.F. Cnty. July 26, 2019)
Remove all posts about P	H		P	Ellis v. Chan	No. SU13DM409 (Ga. Super. Ct. Muscogee Cnty. Mar. 6, 2013), *rev'd*, 770 S.E.2d 851 (Ga. 2015)
Remove allegation of domestic abuse from Facebook	F	Police officer P %	A	Stark v. Stark	No. CT-002958-18 (Tenn. Cir. Ct. Shelby Cnty. Feb. 7, 2019), *aff'd on procedural grounds*, No. W201900650COAR3CV, 2020 WL 507644 (Tenn. Ct. App. Jan. 31, 2020)
Remove allegations of crime	H+	Local official P		McGuire v. Zoran	No. T15-1798PH (Mich. Cir. Ct. St. Clair Cnty. July 28, 2015), *rev'd sub nom.* T.M. v. M.Z., 926 N.W.2d 900 (Mich. Ct. App. 2018)
Referring to P's customers in discussing P, using terms "mafia" & "bullying" about P	L		A	DCS Real Estate Investments, LLC v. Juravin	No. 2017-CA-0667, at 4 ¶ 10 (Fla. Cir. Ct. Lake Cnty. Feb. 28, 2018), *aff'd*, No. 5D21-451, 2021 WL 4438553, 325 So 3d 1289 (Fla. Ct. App. Sept. 28, 2021)

Speech restricted	Type[328]	Rela-tion-ship[329]	Repre-senta-tion[330]	Name	Citation
Shutdown of site	L	Local official P	A	Fremgen v. Fullofbologna.com	No. 2006CV000372, at 2 ¶ 1 (Wisc. Cir. Ct. Winnebago Cnty. Mar. 30, 2006)
Social media	H	Former schoolmates	A	Altinawi v. Salman	No. YS029942 (Cal. Super. Ct. L.A. Cnty. June 15, 2017), *rev'd*, No. B284071, 2018 WL 5920276 (Cal. Ct. App. Nov. 13, 2018)
Social media	H	%		Curcio v. Pels	No. 18STRO07928 (Cal. Super. Ct. L.A. Cnty. Nov. 26, 2018), *rev'd*, 47 Cal. App. 5th 1 (2020)
Social media	H		A	Mullins v. Prater	No. 2012-cv-336 (Ohio Ct. Com. Pl. Auglaize Cnty. Jan. 4, 2013), *rev'd*, No. 2-13-04, 2013 WL 5230272 (Ohio Ct. App. Sept. 16, 2013)
Social media	H	%		Shirk v. Lambert	No. CP-14-MD-0008149-2015 (Pa. Ct. Com. Pl. Centre Cnty. Oct. 26, 2015), *aff'd*, 147 A.3d 1221 (Pa. Super. Ct. 2016)
Social media	H	%	P	A.P. v. A.S.	No. 51C01-2004-PO-67 & -68 (Ind. Cir. Ct. Martin Cnty. May 14, 2020), *aff'd*, No. 20A-PO-1486, 2021 WL 631648 (Ind. Ct. App. Feb. 18, 2021)
Social media	H	%		Matter of Bundza	No. [unknown] (N.H. Cir. Ct. Feb. 14, 2018), *rev'd on other grounds*, No. 2018-0173, 2019 WL 1787457 (N.H. Apr. 24, 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Social media	H	%		Bannerton v. Bannerton	No. 2020-007820-PP, at 2 ¶ 6.1 (Mich. Cir. Ct. Macomb Cnty. Nov. 2, 2020)
Social media	H			Perkins v. McAfee	No. 2020CV002121, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. Mar. 23, 2020)
Social media	H		E	Lannom v. Gaddis	No. 2018OP108 (Ill. Cir. Ct. Williamson Cnty. Mar. 28, 2018), *rev'd*, 2021 IL App (5th) 200327-U
Social media	H	%	P	Roberts v. Garrett	No. FAMVS1803240, at LEXIS docket (Cal. Super. Ct. San Bernardino Cnty. Oct. 23, 2018)
Social media speech about divorce	H/F	%	P	Molinaro v. Molinaro	No. BD643016 (Cal. Super. Ct. L.A. Cnty. Feb. 15, 2017), *rev'd*, 245 Cal. Rptr. 3d 402 (Ct. App. 2019)
Speech about order to Ps' "family, friends, or to their clients and business associates"	LP			Group for Horizon Entm't, Inc. v. Branham	No. 2016-60729, at 2 ¶ 6 (Tex. Dist. Ct. Harris Cnty. Sept. 9, 2016)
Speech near church and to church members	H	Minister P		Lo v. Chan	No. VS023928 (Cal. Super Ct. L.A. Cnty. Feb. 5, 2015), *rev'd*, 2015 WL 9589351 (Cal. Ct. App. Dec. 30)

Speech restricted	**Type[328]**	**Relationship[329]**	**Representation[330]**	**Name**	**Citation**
Speech that causes "reputational damage"	L		D	Meathe v. Wezensky	No. CACE14-012425, at 2 (Fla. Cir. Ct. Broward Cnty. Apr. 23, 2015)
Speech to people connected with P's "employment or school to inquire about" plaintiff	H	%	A	DiTanna v. Edwards	No. 50-2020-DR-004435-XXXX-SB (Fla. Cir. Ct. Palm Beach Cnty. June 22, 2020), *rev'd*, 323 So. 3d 194 (Fla. Ct. App. 2021)
Statements that "tend to expose [P] to public contempt, ridicule, aversion or disgrace," with no limitation to false statements	L		D	Torati v. Simpson	No. 502696/2012, at 2 ¶ 5 (N.Y. Sup. Ct. Kings Cnty. Dec. 2, 2013)