

Comment

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Cyberstalking and Free Speech: Rethinking the *Rangel* Standard in the Age of the Internet

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INTRODUCTION

Each month, it seems, there are many new technological gadgets, hundreds of new smart phone applications, and Facebook changes that allow for increased information sharing and social contact. While such technological advances can make our lives easier, provide for greater creative expression, and encourage more expansive sharing of ideas and thoughts, such improvements may lead to negative consequences that must be addressed.

As with most modes of communication and expression, people have discovered numerous ways in which to abuse the advantages of the Internet. The recent and ongoing spate of cyberbullying cases is a prime example of this problem. In addition, cyberincitement of third parties to commit crimes against other persons allows individuals to reach a potentially much larger audience, over a longer period of time, than would be possible in a strictly offline environment. An example of cyberincitement is the “Nuremberg Files” website in which a pro-life activist publicized detailed personal information of many doctors who conducted abortions.¹ This information was placed next to graphic images of aborted fetuses.² These images combined with the text of the website presumably reached radical anti-abortion activists—when a doctor was injured or killed, the website’s operators either printed the doctor’s name in gray or struck a line through his or her name.³

¹ John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 443–44 (2002).

² *Id.* at 444.

³ *Id.*

Another form of disturbing behavior on the Internet is cyberstalking, which is the focus of this Comment. Generally, stalking is defined as a course of repetitious conduct directed toward a specific individual that would cause a reasonable person to feel fear.⁴ Cyberstalking involves “the use of the Internet, e-mail, or other electronic communications devices to stalk another person.”⁵ Several examples of cyberstalking include sending numerous harassing or threatening e-mails to another individual, creating a webpage devoted to threatening or harassing another individual, encouraging third parties online to stalk or cause harm to a specific person, and intimidating another person via an online chat system.⁶ Responses to a 2009 U.S. Department of Justice survey indicated that approximately one in four stalking victims who participated in the survey experienced some form of cyberstalking.⁷ As technology continues to progress, cyberstalking will become a more pervasive problem, which must be tackled sooner rather than later.

Like other forms of cyber-victimization, cyberstalking presents unique problems that make it difficult for existing laws and law enforcement to adequately respond to and prevent criminal activity that is conducted using the Internet and other technological media. For example, cyberstalkers can easily remain anonymous online, and they can also take on the identity of their victims or any other third parties as a means to increase fear in the victims.⁸ Furthermore, because of the virtual context of cyberstalking, victims may be completely unaware of the perpetrator’s physical location—thereby potentially causing more fear and uneasiness in the victim.⁹

In addition, along with the numerous law enforcement difficulties that cyberstalking has created, cyberstalking has altered the landscape of free speech litigation as it pertains to the crime. Courts and American society more generally have long regarded the First

⁴ *Stalking Facts*, NAT’L CENTER FOR VICTIMS OF CRIME, http://www.ncvc.org/src/main.aspx?dbID=DB_statistics195 (last visited Sept. 28, 2011).

⁵ U.S. DEP’T OF JUSTICE, 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY, *available at* <http://www.justice.gov/criminal/cybercrime/cyberstalking.htm>.

⁶ Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 129 (2007).

⁷ KATRINA BAUM ET AL., U.S. DEP’T OF JUSTICE, STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009), *available at* <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=45862>.

⁸ Goodno, *supra* note 6, at 130–32.

⁹ *Id.* at 129.

Amendment as one of the primary hallmarks of the Constitution.¹⁰ There are, however, several forms of expression that the First Amendment and its state constitutional counterparts do not protect because of their potential danger to society—such as threats, child pornography, and incitement to unlawful action.¹¹ This Comment explores how lawmakers can tailor laws or create new legislation to effectively respond to the dangers of cyberstalking while adhering to the American commitment to free speech; this Comment narrows its analysis of this issue to Oregon law specifically.

Part I of this Comment examines several free speech concerns as they pertain to stalking statutes, Oregon's stalking laws, and the leading Oregon Supreme Court case regarding stalking, *State v. Rangel*. Part II explores problems with the rule that *Rangel* set forth as it pertains to cyberstalking. Finally, this Comment proposes possible changes to the *Rangel* standard and Oregon legislation in order to resolve the issues with the most recent law while maintaining Oregon's adherence to freedom of expression.

I

FREE SPEECH IMPLICATIONS OF STALKING STATUTES AND THE OREGON STANDARD

One of the main criticisms of many stalking statutes is that they are unconstitutionally overbroad, sweeping in expression that is protected under the federal and state constitutions.¹² In order to avoid overbreadth challenges as they relate to expressive communications, many state statutes and court decisions require that the stalking defendant make a “credible threat” of violence against the victim.¹³ A “credible threat” is, generally, “‘a verbal or written threat’ coupled ‘with the apparent ability to carry out the threat’ so as to cause the victim fear.”¹⁴ There are, however, several problems with the credible threat requirement, especially as it pertains to cyberstalking.¹⁵

¹⁰ See Cronan, *supra* note 1, at 426.

¹¹ *Id.* at 427.

¹² Silvija A. Stikis, *Stopping Stalking*, 81 GEO. L. J. 2771, 2783–84 (1993).

¹³ Goodno, *supra* note 6, at 134–35.

¹⁴ *Id.* at 135–36 (emphasis omitted).

¹⁵ *Id.* at 136. The issues with the credible threat requirement will be explored further *infra* Part II.

A. Oregon Stalking Statutes

The three main Oregon Revised Statutes (ORS) dealing with stalking are ORS 30.866, 163.730, and 163.732. ORS 30.866 sets forth the elements of a civil stalking protective order,¹⁶ while ORS 163.732 provides the elements of the crime of stalking.¹⁷ ORS 163.730 supplies definitions for the criminal and civil statutes.¹⁸ ORS 30.866 and 163.732 are fairly similar, but the criminal statute has a higher mens rea requirement than the civil statute; knowledge is the culpability level in ORS 163.732,¹⁹ while ORS 30.866 requires a minimum mens rea level of recklessness.²⁰

Stalking is a Class A misdemeanor in Oregon and a Class C felony if the perpetrator has been convicted of stalking before or if the perpetrator has violated a stalking protective order.²¹ ORS 163.732 establishes three elements of criminal stalking: (1) “The person knowingly alarms or coerces another person or a member of that person’s immediate family or household by engaging in repeated and unwanted contact with the other person”; (2) It is objectively reasonable for an individual in the victim’s position to have been alarmed or coerced by the contact; and (3) “The repeated and unwanted contact causes the victim reasonable apprehension regarding” his or her personal safety or the personal safety of the victim’s immediate family or household member.²²

ORS 163.730 informs the meaning of ORS 163.732, defining the verb “alarm” as, “to cause apprehension or fear resulting from the perception of danger” and the verb “coerce” as, “to restrain, compel or dominate by force or threat.”²³

The concept most relevant to the free speech discussion is that of “contact.” “Contact” includes appearing in the physical or visual presence of the other person, following the other person, “sending or making written or electronic communications in any form to the other person,” speaking with the other individual by any means, and communicating with the other individual through a third party.²⁴ The

¹⁶ OR. REV. STAT. § 30.866 (2003).

¹⁷ *Id.* § 163.732. This Comment will focus on this criminal statute.

¹⁸ OR. REV. STAT. § 163.730 (2009).

¹⁹ *Id.* § 163.732(1)(a).

²⁰ OR. REV. STAT. § 30.866(1)(a) (2003).

²¹ OR. REV. STAT. § 163.732(2) (2009).

²² *Id.* § 163.732(1).

²³ *Id.* § 163.730.

²⁴ *Id.*

contact provision in ORS 163.730 was a central piece of the Oregon Supreme Court's constitutional analysis in *State v. Rangel*.²⁵

B. *State v. Rangel and the Court's "Expressive Contacts" Analysis*

Article 1, section 8 of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."²⁶ *Rangel* focused on whether or not ORS 163.732 was overbroad, which would violate article 1, section 8 by criminalizing protected speech.²⁷

In *Rangel*, the Oregon Supreme Court held that Oregon's criminal stalking statute, ORS 163.732, was not overbroad under the free speech provisions of the Oregon Constitution and the U.S. Constitution.²⁸ Eduardo Rangel was the defendant, and the State charged him with "stalking by 'unlawfully and knowingly alarm[ing] the victim] by coming to her place of employment and threatening her' on several occasions."²⁹ Because the charging document indicated that the defendant threatened the victim, the court concluded that there was a free speech issue under the state and federal constitutions.³⁰ Specifically, the court analyzed whether the communicative contact provisions listed in ORS 163.730(3) and employed in ORS 163.732 criminalized protected speech under article 1, section 8.³¹

1. *The Robertson Framework*

In analyzing the issue of whether or not ORS 163.732 was overbroad, the court applied the *Robertson* framework that the Oregon Supreme Court established in 1982 in *State v. Robertson*,³² which assessed the constitutionality of an Oregon coercion statute under article 1, section 8.³³ In *Robertson*, the court established a three-pronged test to determine whether laws involving expression are

²⁵ *State v. Rangel*, 328 Or. 294, 298–300, 977 P.2d 379, 381–83 (1999).

²⁶ OR. CONST. art. I, § 8.

²⁷ *Rangel*, 328 Or. at 296, 977 P.2d at 380.

²⁸ *Id.*

²⁹ *Id.* at 297, 977 P.2d at 381.

³⁰ *Id.*

³¹ *Id.* at 298–307, 977 P.2d at 382–87.

³² *Id.* at 298, 977 P.2d at 382.

³³ *State v. Robertson*, 293 Or. 402, 404, 649 P.2d 569, 577 (1982).

overbroad.³⁴ The first prong of the test provides that if a law is “directed to the substance of any ‘opinion’ or any ‘subject’ of communication,” then the law is unconstitutional unless it falls within a historical exception.³⁵

The second part of the *Robertson* framework defines what constitutes a “historical exception.”³⁶ The court defined “historical exception” as an unprotected category of speech “that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.”³⁷ The court listed several examples of historical exceptions, including solicitations of crimes, fraud and forgery and their modern variants, and several forms of theft.³⁸

If the law in question is directed to any subject of communication or the substance of an opinion but falls within a historical exception, a third analysis is required.³⁹ The third prong “is referred to as the ‘overbreadth and narrowing’ inquiry and is” used when either the law concerns speech but fits within a historical exception, or when the law involves both speech and the effects of speech.⁴⁰ Essentially, the “overbreadth and narrowing” inquiry asks whether the law, as written, encompasses constitutionally protected activity and expression.⁴¹ If the statute proscribes constitutionally permissible activity or expression, then the statute is overbroad and unconstitutional unless it can be saved by a “judicially imposed narrowing construction.”⁴² A narrowing construction may be able to remove the constitutionally allowable expression from the statute, thereby redirecting the focus of the statute to only proscribable expression and activity.⁴³ Oregon courts continue to use the *Robertson* framework to analyze the

³⁴ William R. Long, *Requiem for Robertson: The Life and Death of a Free-Speech Framework in Oregon*, 34 WILLAMETTE L. REV. 101, 109 (1998).

³⁵ *Robertson*, 293 Or. at 412, 649 P.2d at 576.

³⁶ Long, *supra* note 34.

³⁷ *Robertson*, 293 Or. at 412, 649 P.2d at 576.

³⁸ *Id.*

³⁹ Long, *supra* note 34.

⁴⁰ *Id.*

⁴¹ *Id.* at 109–10.

⁴² *Id.* at 110.

⁴³ *Id.*

constitutionality of laws involving expression and the effects of expression.⁴⁴

2. *Applying the Robertson Framework to Rangel*

The court in *Rangel* began its analysis of the constitutionality of ORS 163.732 by inquiring whether the statute was directed to the substance of opinions or to the subject of communications—the first prong of the *Robertson* test.⁴⁵ The court determined that the criminal stalking statute did not proscribe the subject of communications or the substance of opinions; rather, the court concluded that the statute aimed to proscribe the forbidden effects of expression, mainly “repeated and unwanted ‘contacts.’”⁴⁶ Therefore, article 1, section 8 did not prohibit the enactment of ORS 163.732 outright.⁴⁷ Because the statute did not directly concern speech or expression, the court did not examine the historical exceptions piece of the *Robertson* framework.⁴⁸

The court noted, however, that under *Robertson*, if a statute that is focused on forbidden effects, like ORS 167.732, proscribes written or verbal means used to produce those effects, the law must still “be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such ‘overbreadth.’”⁴⁹ Because the stalking statute criminalized the inducement of alarm or coercion through repeated and unwanted contacts, and because those contacts included speech or writing—“communicative” or “expressive contacts”—the court concluded that the statute restricted speech to a degree.⁵⁰ Thus, the court needed to analyze whether it could impose a narrowing construction to avoid an overbreadth problem.⁵¹

To assess whether a narrowing construction could have been applied to ORS 163.732, the court looked largely to a previous Oregon Supreme Court case, *State v. Moyle*, which dealt with the

⁴⁴ See, e.g., *State v. Moyer*, 348 Or. 220, 224, 230 P.3d 7, 10 (2010), *cert. denied*, 131 S. Ct. 326 (2010).

⁴⁵ *State v. Rangel*, 328 Or. 294, 298–99, 977 P.2d 379, 382 (1999).

⁴⁶ *Id.* at 299, 977 P.2d at 382.

⁴⁷ *Id.*

⁴⁸ See Long, *supra* note 34.

⁴⁹ *Rangel*, 328 Or. at 299, 977 P.2d at 382.

⁵⁰ *Id.* at 301, 977 P.2d at 383.

⁵¹ *Id.* at 302, 977 P.2d at 384.

Oregon harassment statute.⁵² The court interpreted the harassment statute in *Moyle* to be similar to the stalking statute at issue in *Rangel*; thus, the court concluded that the narrowing construction that the *Moyle* court used was applicable to *Rangel*.⁵³

The harassment statute in *Moyle* had a communicative expressions provision, which stated that a person commits harassment if he or she “[s]ubjects another to alarm by conveying a telephonic or written threat to inflict serious physical injury on that person . . . which threat reasonably would be expected to cause alarm.”⁵⁴ Even though the harassment statute did not explicitly require proof of a specific intent to effectuate the threat or of any present capacity to do so, the court held “that the elements of actual alarm and the reasonableness of the alarm under the circumstances had a similar purpose and effect.”⁵⁵ Such a conclusion is definitive of the credible threat requirement.⁵⁶ Therefore, the court’s eventual narrowing construction for the harassment statute required that individuals accused of harassment “ma[k]e a threat or its equivalent and . . . intend[] to cause the victim alarm.”⁵⁷

Because the harassment and criminal stalking statutes were similar, the *Rangel* court concluded that the text and legislative purpose of ORS 163.732 also required a credible threat.⁵⁸ Therefore because ORS 163.732 contained a communicative contacts provision, the court followed the *Moyle* analysis in concluding that although ORS 163.732 did not expressly require a credible threat, ORS 163.732(1)’s requirements of “actual alarm and the subjective and objective reasonableness of the alarm in the circumstances [had] the same purpose and effect.”⁵⁹

The *Rangel* court also determined that the elements of actual alarm and the objective and subjective reasonableness of the alarm “limit the reach of ORS 163.732(1) to a threat that is so unambiguous, unequivocal, and specific to the addressee that it convincingly expresses to the addressee the intention that it will be carried out” and

⁵² *Id.* at 302–06, 977 P.2d at 384–86.

⁵³ *Id.* at 305–06, 977 P.2d at 386.

⁵⁴ *Id.* at 298 n.5, 977 P.2d at 381 n.5.

⁵⁵ *Id.* at 305, 977 P.2d at 385–86.

⁵⁶ See Goodno, *supra* note 6, at 135–36.

⁵⁷ *Rangel*, 328 Or. at 297, 977 P.2d at 381.

⁵⁸ *Id.* at 305–06, 977 P.2d at 386.

⁵⁹ *Id.*

that the speaker has the “present ability to do so.”⁶⁰ In discussing how to further define the credible threat requirement under ORS 163.732, the court referred to the *Moyle* court’s definition of a credible (or “proscribable”) threat, which defined the term as, “a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts.”⁶¹ The court ultimately adopted the *Moyle* definition of a credible threat because the legislature intended that the term “alarm” be applied to the same form of communications as that to which it applied in the harassment statute.⁶² With the credible threat requirement, the court in *Rangel* successfully applied a narrowing construction to the criminal stalking statute, thereby avoiding an overbreadth issue under article 1, section 8.⁶³

II

PROBLEMS WITH THE *RANGEL* STANDARD AS IT PERTAINS TO CYBERSTALKING

In light of numerous and extensive technological advances since the court decided *Rangel* in 1999, the *Rangel* rule as it stands and ORS 163.732 do not adequately address the crime of cyberstalking for several reasons. First, there are multiple differences between offline stalking and cyberstalking that indicate that cyberstalking could potentially be more dangerous and cause more fear in victims than offline stalking.⁶⁴ Second, the credible threat requirement that *Rangel* established is problematic because it does not recognize that many perpetrators (online and offline) can knowingly cause fear in victims without expressly making an overt threat.⁶⁵ And third, there are issues with receipt of the threat, incitement of third parties, and the requirement that the stalker had the “present” or “apparent” ability to carry out the threat when the perpetrator communicates on the Internet or on another type of electronic device.⁶⁶

⁶⁰ *Id.* at 306, 977 P.2d at 386.

⁶¹ *Id.* at 303, 977 P.2d at 384.

⁶² *Id.* at 303, 977 P.2d at 384–85.

⁶³ *Id.* at 306, 977 P.2d at 386.

⁶⁴ Goodno, *supra* note 6, at 128–32.

⁶⁵ *See id.* at 135–36.

⁶⁶ *Id.* at 137–39.

Furthermore, *Rangel's* requirement that the threat instill in the victim “a fear of imminent and serious personal violence”⁶⁷ is troublesome because determining “imminence” in the Internet age is incredibly difficult, if not impossible.⁶⁸ For all of the foregoing reasons, Oregon’s stalking laws must be modified, or new laws must be passed, to effectively close technological loopholes that individuals have taken advantage of in frightening and harassing other people.

A. *Differences Between Cyberstalking and Offline Stalking*

While cyberstalking is similar to offline stalking in certain ways,⁶⁹ there are differences between the two forms of the crime that indicate that courts must modify their approach to cyberstalking cases.⁷⁰ Cyberstalking and offline stalking are similar in that they both consist of a desire to control the victim by repeated threatening or harassing behavior, which may lead to more destructive and alarming conduct.⁷¹ Cyberstalking is disparate from offline stalking, however, in five significant ways that make it easier for perpetrators to frighten their victims and evade law enforcement.⁷² The five ways in which cyberstalking differs from offline stalking include: (1) the ability to be completely anonymous on the Internet, (2) instantaneous communication, (3) physical location of the stalker, (4) the ability of cyberstalkers to assume the identity of the victim, and (5) incitement of third parties.⁷³

1. *Anonymity*

First, cyberstalking differs from offline stalking in that the cyberstalker can harass, threaten, and emotionally harm the victim without the victim ever knowing the identity of the perpetrator.⁷⁴ While anonymity can advance free speech and allow individuals to express themselves more openly, anonymity can also facilitate harmful language by enabling individuals to use more extremist

⁶⁷ Van Buskirk v. Ryan, 233 Or. App. 170, 177, 225 P.3d 118, 122, *review dismissed*, 348 Or. 218 (2010).

⁶⁸ Cronan, *supra* note 1, at 428.

⁶⁹ Goodno, *supra* note 6, at 128.

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 128–32.

⁷⁴ *Id.* at 130–31.

speech without having to deal with the consequences of attaching a name to their words.⁷⁵ As one scholar observed, “When people are less accountable for their conduct, they are more likely to engage in unsavory acts. When anonymous, people are often much nastier and more uncivil in their speech.”⁷⁶

In addition, anonymity creates a shield, or an opaque bubble, for cyberstalkers. When cyberstalkers can hide behind this cloak, not only can they avoid culpability, but they can also cause more fear in their victims.⁷⁷ When individuals have no conception of who is threatening them, it is difficult to evaluate the threat accurately, which may lead to more fear and uneasiness.⁷⁸ To elaborate, if a stalker verbally threatens to harm the victim in an offline setting, the victim can likely take certain measures to protect him or herself—such as avoiding the stalker and calling law enforcement with the necessary personal and descriptive information to locate and apprehend the perpetrator.⁷⁹ Online, however, victims of anonymous stalking have few means, if any, with which to counter the threat or determine its verity.⁸⁰

Furthermore, when the victim does not know the identity or physical features of the cyberstalker, law enforcement’s ability to investigate and locate the stalker is dramatically reduced.⁸¹ Another hurdle that the Internet presents in regards to anonymity is that cyberstalkers can delete electronic identifiers from their communications.⁸² In describing why a victim of offline and online stalking was unsuccessful in pressing cyberstalking charges against the suspect (even though she was successful in pressing offline stalking charges), an official from a North Carolina sheriff’s office stated, ““With this type of offense, you have to be able to prove who is sitting behind the computer that actually is setting up the account

⁷⁵ Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J. L. & SOC. PROBS. 65, 83–84 (2002).

⁷⁶ DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 140 (2007).

⁷⁷ Hammack, *supra* note 75, at 84; *see also* Goodno, *supra* note 6, at 130 (explaining how the anonymity of the Internet enables people to use more threatening and harassing language against other individuals online).

⁷⁸ Hammack, *supra* note 75, at 84.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ Goodno, *supra* note 6, at 131.

⁸² *Id.*

and doing this type of offense.”⁸³ The law enforcement officer further stated that even though the plaintiff could have potentially proven that the suspect owned the computer used to cyberstalk, mere ownership was insufficient for a cyberstalking conviction.⁸⁴

Moreover, cyberstalkers who threaten their victims anonymously can have an even stronger and more harmful psychological impact on their victims by taking advantage of individuals’ simple fear of the unknown.⁸⁵ Even though a stalker’s anonymity might not affect whether a threat is carried out, or whether harm will truly occur, the anonymity has a tremendous impact on the victim’s sense of danger.⁸⁶

2. *Instantaneous Communication*

Second, cyberstalking is different from offline stalking in that cyberstalkers can threaten and harass victims instantaneously and with more frequency than offline stalkers can.⁸⁷ In offline settings, the stalker must spend time repeatedly calling the victim or following the victim physically.⁸⁸ On the Internet, however, the stalker can instantly send harassing or intimidating messages to the victim with a simple click of a button and a few key strokes.⁸⁹ The cyberstalker can also easily set up his or her e-mail account to automatically send intimidating messages repeatedly—potentially thousands of times—to the victim.⁹⁰

Furthermore, the immediacy of Internet communications can amplify intimidating language because individuals have less time to reflect upon the effects of their words.⁹¹ Before the Internet became a pervasive element of social interaction, most individuals had a longer period of time between forming a thought or emotion and being able to express that thought or emotion to other people.⁹² In the age of the Internet, however, a “cooling off” period is nearly nonexistent; people can send frightening and harassing messages immediately without the

⁸³ *Rockingham Co. Woman Victimized by Facebook Imposter*, MYFOX8.COM (Feb. 24, 2011), <http://www.myfox8.com/news/wghp-story-terrorized-facebook-110224,0,2567589.story>.

⁸⁴ *Id.*

⁸⁵ Hammack, *supra* note 75, at 84.

⁸⁶ *Id.*

⁸⁷ Goodno, *supra* note 6, at 128–29.

⁸⁸ *Id.* at 129.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Hammack, *supra* note 75, at 83.

⁹² *Id.*

benefit of time allowing them to reflect upon the consequences of their language.⁹³ As a result, intimidating and threatening Internet speech can potentially cause more harmful effects on society and instill more fear in the receivers of the speech.⁹⁴

3. *Physical Location of the Stalker*

Third, the limitless reach of the Internet makes cyberstalking potentially more harmful than offline stalking in a few ways. In contrast to offline stalking, where stalkers are often confined to a limited physical area in which to instill fear in victims, cyberstalkers have the luxury of being able to terrify their victims from virtually anywhere in the world.⁹⁵ Moreover, the Internet is simply faster and likely cheaper than other forms of communication, such as regular mail and using the telephone.⁹⁶ This efficiency, combined with the omnipresence of the Internet, makes it incredibly easy for cyberstalkers to achieve their goal of exerting control over victims despite not always being physically close to their victims. The inability to determine the cyberstalker's whereabouts can cause the victim more fear in that he or she may be constantly fretting about whether the cyberstalker is next door, in a neighboring state, or perhaps in another country.⁹⁷ This is another example of how, in addition to anonymity, cyberstalkers can capitalize on individuals' fear of the unknown.

In addition to increasing fear in victims, cyberstalking presents complicated issues for law enforcement in that cyberstalking may involve multiple jurisdictions.⁹⁸ For example, when the cyberstalker and the victim are in two different states, prosecutors must determine which state's laws apply.⁹⁹ Conducting investigations in at least two different jurisdictions is thus naturally more time-consuming and complicated than it is in only one jurisdiction.¹⁰⁰ Such difficulties can cause delays in investigation and adjudication and may make it easier for cyberstalkers to elude law enforcement and to continue to terrify their victims.

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ Goodno, *supra* note 6, at 129.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 129–30.

⁹⁹ *Id.* at 129.

¹⁰⁰ *Id.* at 129–30.

4. *Cyberstalkers Can Assume the Identity of the Victim*

The fourth way in which cyberstalking is dissimilar from offline stalking is that cyberstalkers can take on the identity of the victim.¹⁰¹ This type of scheme can create an alarming situation quickly and without the victim being aware of the cyberstalker's actions. For example, the cyberstalker can send offensive and lewd messages in the victim's name or post similarly provocative comments on certain websites, allowing a wider audience to view the inflammatory speech.¹⁰² As a result, the victim may be banned from those websites and may be accused of inappropriate conduct; additionally, viewers of the posts and receivers of the messages may respond to the victim with similarly offensive language, threats, or perhaps even criminal activity.¹⁰³ Or, as was the case in *Osborne v. Fadden*, individuals can use someone's personal information to register the victim for services online—including pornography, expensive magazine subscriptions, and mortgage lending services, to name a few.¹⁰⁴

In a more frightening case out of California, a man took on his victim's identity and posted her phone number and address online in her name, along with a message fantasizing about being raped.¹⁰⁵ Several men went to her house, referring to the Internet solicitation that was posted in her name. Eventually authorities were able to locate and apprehend the suspect after the victim's father responded to the stalker's Internet posting, pretending to be someone who was interested in the rape fantasy.¹⁰⁶ The cyberstalker was eventually convicted of "three counts of solicitation for sexual assault and one count of stalking"; the judge sentenced the defendant to six years in prison, asserting that "'to give him anything less is insufficient to protect society.'"¹⁰⁷

¹⁰¹ *Id.* at 131.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Osborne v. Fadden*, 225 Or. App. 431, 435, 201 P.3d 278, 281–82, *review denied*, 346 Or. 213 (2009).

¹⁰⁵ Joanna Lee Mishler, *Cyberstalking: Can Communication via the Internet Constitute a Credible Threat and Should an Internet Service Provider Be Liable if It Does?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 115, 115–16 (2000).

¹⁰⁶ *Id.* at 116.

¹⁰⁷ *Id.*

5. *Incitement of Third Parties*

Finally, an important distinction between offline stalking and cyberstalking is that cyberstalkers can easily encourage other like-minded individuals to stalk in their place.¹⁰⁸ This scenario can arise when cyberstalkers post comments on discussion boards or send messages to other individuals inciting them to follow or harm a specific individual. By creating an outlet in which cyberstalkers can communicate with others who support the cyberstalkers' beliefs, thus causing them to think such beliefs are socially acceptable, the social aspect of discussion boards may even increase danger to many communities.¹⁰⁹ In addition to fostering a sense of belonging, such forums often provide information and resources necessary to carry out a harmful or violent act.¹¹⁰

For example, in one case, a cyberstalker posted a comment on the Internet about a woman, stating that “[she] was available for sex anytime of the day or night.”¹¹¹ The cyberstalker also posted the victim's personal information—including her home telephone number and address.¹¹² Numerous individuals called the victim in response to the posting, and she sought recourse by contacting state and local authorities in addition to the FBI.¹¹³ Unfortunately, authorities were unable to help her,¹¹⁴ which was likely due to the various difficulties involved in determining precisely who posted, viewed, and acted upon the Internet posting.¹¹⁵

Furthermore, a drawback of such websites—and Internet speech more generally—is that locating and objecting to alarming speech online is as difficult as the Internet's audience is expansive and scattered.¹¹⁶ As Scott Hammack observed in his article, “Justice Brandeis, in his dissent in *Whitney v. California*, noted that speech . . . should not be restricted as long as there is time to combat evil speech with more speech. He believed the power of reason would triumph during a public discussion.”¹¹⁷ The idea that public discussion “will

¹⁰⁸ Hammack, *supra* note 75, at 82.

¹⁰⁹ *Id.* at 82–83.

¹¹⁰ *Id.* at 83.

¹¹¹ Mishler, *supra* note 105, at 116–17.

¹¹² *Id.* at 116.

¹¹³ *Id.* at 117.

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ Hammack, *supra* note 75, at 81.

¹¹⁷ *Id.*

defeat evil counsels” is one of the primary reasons for protecting expression.¹¹⁸

Hammack went further to discuss how on the Internet, a public discussion is often impossible because of the difficulty in ensuring that the public can view and engage in both sides of a particular debate.¹¹⁹ In relation to the cyberstalking incitement example above, visitors of websites that encourage stalking and violence against specific people are unlikely to visit victim rights groups’ websites that refute the dangerous speech.¹²⁰ Similarly, peaceful individuals likely do not visit websites supporting stalking and violence against others; therefore, the two sides of the debate are not engaged in a discussion, which could ultimately lead to the triumph of reason and the discovery of a principled “truth.”

While anonymity, immediate communication, and large audiences are all features of cyberspace that contribute immensely to the free flow of ideas, such characteristics provide stalkers with endless, interrelated possibilities and loopholes. Stalkers can use these loopholes to frighten other individuals with more intensity and frequency than is the case with offline stalking. As such, Oregon courts and lawmakers should take the distinctions between cyberstalking and offline stalking into account when adjudicating cases or crafting policy.

B. The Credible Threat Requirement Is Unworkable in Cyberspace

In 2006 and 2007, Valerie Goodness, an Oregon resident, received over nineteen pages of alarming e-mails from her ex-husband of four years, Ricky Beckham.¹²¹ The messages consisted mostly of language such as, ““you fucking whore . . . I’m going to get you back, I’m getting my [s]on, you’ll never see him again, you[‘re] going to pay.””¹²² Perhaps the most frightening e-mail Beckham sent, however, stated, ““hope[fully] I CAN GET YOU WHERE NEED BE BEHIND BARS.””¹²³ During the parties’ marriage, Beckham repeatedly threatened and physically abused Goodness; at one point, Beckham threatened to kill Goodness, and he was arrested after

¹¹⁸ *Id.* at 82.

¹¹⁹ *Id.*

¹²⁰ *See id.* (discussing how visitors of an anti-Semitic website would be unlikely to visit a Jewish organization’s website objecting to the anti-Semitic speech).

¹²¹ *Goodness v. Beckham*, 224 Or. App. 565, 570, 198 P.3d 980, 983–84 (2008).

¹²² *Id.* at 569, 198 P.3d at 983.

¹²³ *Id.* at 570, 198 P.3d at 984.

punching her in the face and grabbing her by the throat.¹²⁴ While the parties were married, Beckham also had physical altercations with Goodness's older children, and he damaged property on multiple occasions in their home.¹²⁵

The last time Beckham abused Goodness was in 1998 or 1999, after which police had to remove Beckham from the couple's residence.¹²⁶ Despite this long history of violent and threatening behavior, the Oregon Court of Appeals reversed the lower court's decision granting Goodness a permanent stalking protective order, holding that Beckham's e-mails did not threaten imminent violence against Goodness and were thus insufficient to satisfy a stalking protective order under *Rangel*.¹²⁷ *Goodness v. Beckham* is a prime example of how the credible threat requirement can deny victims adequate relief and protection even when the victim's fear may be reasonable given the context of the case and other factors.

The *Rangel* requirements that the threat be "unequivocal" and conveyed specifically to the addressee¹²⁸ make the credible threat rule problematic—especially as it pertains to cyberstalking—for several reasons. First, the credible threat requirement creates a legal loophole for cyberstalkers in that they can—and often do—engage in conduct that does not explicitly threaten victims but that nonetheless causes them fear.¹²⁹ In a 1998 National Institute of Justice study, two scholars reported that "[l]ess than half of all stalking victims are directly threatened by their stalkers, although the victims, by definition, experience a high level of fear."¹³⁰ Instead of making direct threats, stalkers frequently follow a pattern of behavior that would cause a reasonable person fear despite the absence of an explicit threat.

The cyber context amplifies this issue, as various characteristics of the Internet allow stalkers to intimidate their victims with greater ease and frequency.¹³¹ For example,

¹²⁴ *Id.* at 567, 198 P.3d at 982.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 578, 198 P.3d at 988.

¹²⁸ *State v. Rangel*, 328 Or. 294, 306, 977 P.2d 379, 386 (1999).

¹²⁹ PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 14 (1998), available at <http://www.ncjrs.gov/pdffiles/169592.pdf>.

¹³⁰ *Id.* at 2.

¹³¹ See *supra* Part II.A.

Cyberstalkers . . . can easily use the Internet to send hundreds, even thousands, of frightening e-mail messages . . . in a matter of one hour, which over days and weeks can create havoc for a victim. If there is not one explicit threat in any of those thousands of e-mail messages, then the victim cannot establish the credible threat requirement.¹³²

Thus, in such a situation, the victim has no legal remedy, and the cyberstalker can continue this frightening behavior knowing that there is little chance that he or she will face serious legal consequences.

Second, a related problem with the credible threat requirement is that, by focusing on the alleged stalker's expressions and conduct, the psychological harm that the victim will likely experience goes unnoticed.¹³³ Moreover, the *Rangel* standard's emphasis on the stalker's behavior and potential of inflicting physical injury perpetuates the idea that harm from stalking occurs only when physical violence is involved or the threat is abhorrent.¹³⁴ This belief discounts the possibility that actions and speech that appear benign or innocuous may, in reality, be part of a larger pattern of dangerous and frightening behavior.¹³⁵

Third, the *Rangel* standard's requirement that the stalker convey a threat specifically to the addressee¹³⁶ is problematic, particularly in regards to cyberstalking, as the target of the threat may be completely unaware of the threat's existence and may never receive it—either directly or indirectly.¹³⁷ This issue is especially pertinent when cyberstalkers post alarming and frightening language online or use technology to incite other individuals to commit violence against a specific person. For example, in one tragic case out of California, the cyberstalker devoted an entire website to detailing his obsession with the victim, Amy Boyer, who was a classmate of his.¹³⁸ The perpetrator used the Internet to collect personal information about Boyer;¹³⁹ additionally, the cyberstalker posted information regarding Boyer's whereabouts, activities, and attire on any given day.¹⁴⁰ Not

¹³² Goodno, *supra* note 6, at 137.

¹³³ Joseph C. Merschman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 268–69 (2001).

¹³⁴ *See id.* at 269.

¹³⁵ *Id.*

¹³⁶ *State v. Rangel*, 328 Or. 294, 306, 977 P.2d 379, 386 (1999).

¹³⁷ *See Goodno, supra* note 6, at 138.

¹³⁸ *Id.*

¹³⁹ Mishler, *supra* note 105, at 129–30.

¹⁴⁰ Goodno, *supra* note 6, at 138.

only did the cyberstalker chronicle alarmingly specific details regarding Boyer's life on his website, but also, he expressed thoughts about physically harming and possibly killing her.¹⁴¹

In a horrific end to this course of behavior, the cyberstalker did in fact murder Boyer with a gun while she was at her dentist's office.¹⁴² Neither Boyer nor her family members and friends were aware of the cyberstalker's website that he had operated for approximately two years.¹⁴³ Even though this case did not go to trial, California prosecutors would likely have had difficulty proving that a credible threat existed because Boyer never received the threat—directly or indirectly.¹⁴⁴ Thus, *Rangel's* requirement that the threat be conveyed specifically to the addressee creates the potential for a troublesome dilemma, whereby the law might be unable to protect subjects of terrifying Internet speech until the stalker physically harms the victim.¹⁴⁵

Finally, *Rangel's* credible threat requirement is problematic because it does not address situations in which the stalker assumes the identity of the victim online. In such scenarios, a threat will likely not exist whatsoever in that the cyberstalker can post messages and detailed information online in the victim's name, inviting other individuals to physically harm the victim.¹⁴⁶ Therefore, the credible threat requirement in that context is essentially inapplicable to the analysis of whether or not a court should convict a defendant of criminal stalking.

C. Determining "Imminence" and "Present Ability" in Cyberspace Is Nearly Impossible

The *Rangel* requirements that a communication "instill[] in the addressee a fear of imminent and serious personal violence from the speaker" and that the stalker had the "present ability" to carry out the

¹⁴¹ Mishler, *supra* note 105, at 130.

¹⁴² *Id.* at 129.

¹⁴³ Goodno, *supra* note 6, at 138.

¹⁴⁴ *Id.*; see also Mishler, *supra* note 105, at 122, 129 (arguing that California's anti-stalking statute should not have included a credible threat requirement because the "requirement is rarely met" and because many online and offline stalkers do not directly threaten victims).

¹⁴⁵ See Mishler, *supra* note 105, at 122.

¹⁴⁶ Goodno, *supra* note 6, at 139.

threat¹⁴⁷ are problematic in regards to cyberstalking for several reasons.

First, language communicated in cyberspace is inevitably delayed, and the receiver or viewer of the speech does not “hear” the speech while it is being communicated.¹⁴⁸ In other words, ascertaining whether a threat is imminent and if the cyberstalker had the present ability to carry out the threat at the moment that he or she “speaks” is infeasible because the victim may not view the speech until hours, days, or weeks after the cyberstalker “spoke.”¹⁴⁹ Requiring that victims prove imminent physical harm and that the cyberstalker had the present ability to carry out the threat when victims may not have known of the threat’s existence is unfair and not in keeping with victims’ rights. Oregon courts have not recognized how this time delay issue affects stalking adjudication. *Goodness v. Beckham* demonstrated this problem. Rather than analyzing whether there was a threat of imminent violence when the petitioner viewed the e-mails, the court appeared to analyze whether there was an imminent threat at the time that the respondent-defendant sent the e-mails.¹⁵⁰

Second, the victim may be completely unable to ascertain the location from which the stalker is communicating the threat; the stalker could be communicating from across the street, in a nearby town, or perhaps another state or country. Again, requiring the victim to evaluate the imminence of a threat and the cyberstalker’s present ability to carry out the threat when the victim cannot ascertain the threat’s regional source imposes a burden of proof on victims that is unattainable and only adds to the hardship that victims of cyberstalking experience. The victim’s lack of information regarding the physical location of the stalker and the stalker’s ability to hide within the virtual world creates the frightening possibility that the stalker could, in reality, be physically close to the victim while the threat is being communicated from miles away. For example, the stalker could set up his or her e-mail account to automatically send alarming e-mails to the victim on a regular basis.¹⁵¹ This would allow the stalker to be in a location different from his or her computer but physically close to the victim without the victim’s knowledge—or

¹⁴⁷ *State v. Rangel*, 328 Or. 294, 303, 305–06, 977 P.2d 379, 384, 386 (1999).

¹⁴⁸ Cronan, *supra* note 1, at 428.

¹⁴⁹ *See id.*

¹⁵⁰ *Goodness v. Beckham*, 224 Or. App. 565, 578, 198 P.3d 980, 988 (2008).

¹⁵¹ Goodno, *supra* note 6, at 129.

perhaps even in direct conflict with the victim's beliefs about the cyberstalker's whereabouts.¹⁵²

Furthermore, in offline settings where the victim may be able to visually see the stalker based on proximity, the likelihood that the victim can accurately evaluate the risk of violence that the stalker poses is likely higher than in the cyberstalking context. Factors such as body language, tone of voice, and the extent of physical space between the two parties—just to name a few—aid in assessing how imminent violence may be and the probability that the stalker can carry out a verbal threat. The uncertainty as to the cyberstalker's location makes proving imminent fear of personal violence and present ability to carry out a threat extremely arduous for cyberstalking victims.

Third, the option to remain anonymous on the Internet also contributes to the complications of applying these requirements to cyberstalking cases. If the victim does not know who is threatening him or her and has no way of identifying the perpetrator, the victim will have a diminished ability to determine how imminent the risk of violence truly is and whether the cyberstalker has the present ability to carry out a threat.¹⁵³ To elaborate, without any identifying characteristics that may be associated with physical harm or danger—such as a history of violent behavior and carrying out threats—the victim will likely be unable to determine accurately how dangerous the stalker could be.¹⁵⁴ If the victim knows who the stalker is and can see the stalker, however, the victim will likely have a stronger ability to assess the immediate danger of the situation, the stalker's intentions, and the stalker's ability to carry out a threat.¹⁵⁵

The Internet is a very strong tool in the stalker's arsenal: anonymity, rapid communication, widespread access, and the ability to assume the identity of the victim and to incite third parties online all allow cyberstalkers to increase fear in victims with more efficacy, while escaping culpability. In addition, such aspects of the Internet, in conjunction with the fact that many stalkers do not explicitly threaten victims, severely impede victims' ability to satisfy the credible threat requirement essential to the *Rangel* standard.¹⁵⁶

¹⁵² *See id.*

¹⁵³ *See Hammack, supra* note 75, at 84.

¹⁵⁴ *See id.*

¹⁵⁵ *See Goodno, supra* note 6, at 138–39.

¹⁵⁶ *Id.* at 135–36.

Moreover, proving imminent personal violence and that the cyberstalker had the present ability to carry out the threat is practically impossible when the victim does not know the identity or location of the stalker.¹⁵⁷ The inevitable delay in receiving a threatening message or viewing a threatening web posting further complicates the imminence analysis and challenges the appropriateness of the requirement.¹⁵⁸ The *Rangel* decision as it stands does not adequately address this plethora of issues unique to cyberstalking, which leaves many victims with no protection. Therefore, lawmakers and the courts should reexamine the standard and revise it—or establish a new standard—so the law stays current with the times.

III

PROPOSED CHANGES TO THE *RANGEL* STANDARD TO ACCOUNT FOR CYBERSTALKING

Because cyberstalking is profoundly different from offline stalking, courts cannot rigidly apply the same test to both forms of the crime in a workable fashion. As such, a common-law test or a legislative enactment that takes into account the distinctions between offline and online stalking must be established. This Part addresses the advantages of creating a rule that focuses solely on cyberstalking, while ensuring that the rule does not infringe upon free speech rights. Oregon courts and lawmakers should consider the proposals below as cyberstalking becomes a more ubiquitous form of criminal activity.

A. Abandon or Reform the Imminence Requirement

Because there are many issues with evaluating imminence in cyberspace and because many threats made using electronic media *never* satisfy the imminence requirement, despite causing reasonable fear in victims, the new test should abandon the requirement or, at the very least, reinterpret it. Imminence should not be required in cyberstalking cases because of the inherent delay involved in cyber communications and because the unique aspects of the Internet simply disallow the possibility of evaluating imminence accurately, if it all. Because a cyberstalker can communicate with a victim anonymously and from anywhere in the world without the victim

¹⁵⁷ See *id.* at 138–39.

¹⁵⁸ Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 34–35 (2007).

being able to discover this critical information, the victim simply cannot evaluate how imminent the risk of personal violence truly is. The obstacle involved in assessing imminence online places a tremendous burden on victims—a burden that is very difficult to prove.¹⁵⁹

In addition, in the cyberstalking context, there is always the risk that the stalker could carry out the threat before the victim has a chance to view the threat.¹⁶⁰ This indicates a disconnect between the imminence requirement (and the *Rangel* standard more generally) and stalking that is committed online. Because the imminence requirement is unworkable in cyberspace, many victims cannot meet their burden of proving imminent fear despite that their fear may be reasonable. As a result of being unable to prove imminent fear, cyberstalking victims are often left with no legal recourse whatsoever, while cyberstalkers can continue their destructive behavior using the Internet loophole to escape liability. The requirement that cyberstalking victims prove that their fear was imminent should thus be eliminated.

If, however, courts retain the imminence requirement in the cyberstalking context, they must reinterpret the meaning of “imminence.” Specifically, the standard would have to address the inherent delay between the moment that the cyberstalker sends or posts the injurious message and the moment when the victim finally views the message.¹⁶¹ To meet such a standard, the victim would have to prove a reasonable fear of imminent personal violence *after* he or she viewed the frightening speech—rather than at the time when the alleged cyberstalker sent the message or made the web posting.¹⁶² This modification would help to close the gap between the cyberstalker’s initial threat and the victim’s viewing of the threat—thereby reducing the strenuous burden on victims to prove imminent fear at a time when they potentially did not even know that a threat existed. This reinterpretation, however, would likely not address how the difficulties in ascertaining imminence in cyberspace are

¹⁵⁹ See Cronan, *supra* note 1, at 428 (discussing how the imminence requirement in incitement cases “does not work with the vast majority of Internet communications”).

¹⁶⁰ See *id.* at 450 (discussing how the imminence requirement for incitement is rarely met in cyber incitement cases as “a time delay prevents words from being heard often until well after they are spoken”).

¹⁶¹ See *id.* at 456 (asserting that the imminence requirement in cases of cyber-incitement must be reinterpreted to recognize that “[t]he lawless action targeted by the Court occurs after the words are heard, not after they are spoken”).

¹⁶² See *id.*

exacerbated when individuals do not know the identity of the cyberstalker or the location from which the communication is being made.

B. Renounce the Credible Threat Requirement

Because the credible threat requirement often denies protection to cyberstalking victims even when their fear is reasonable, many scholars argue that cyberstalking laws should not require a credible threat.¹⁶³ Rather, the scholars argue that the laws should focus more on whether it is reasonable for the victim to feel fear for his or her safety based on the cyberstalker's behavior.¹⁶⁴ While the *Rangel* rule and ORS 163.732 do measure fear based on a reasonable person standard,¹⁶⁵ the credible threat requirement is highly burdensome on cyberstalking victims, is unworkable in most cases, and allows cyberstalkers to avoid liability. Therefore, the new standard should not require a credible threat but should focus on whether the victim's fear is reasonable, given the context.

At least ten states have enacted statutes specific to cyberstalking, or have amended state laws, to address the problems with the credible threat requirement.¹⁶⁶ For example, the Iowa legislature amended its stalking statute in 1994 to nullify the credible threat requirement for the crime of stalking.¹⁶⁷ The standard that the Iowa Legislature implemented sought to "criminalize[] a 'course of conduct' that may or may not include threats."¹⁶⁸ The legislature made a significant point of recognizing that victims of stalking can still experience reasonable fear even if expressive communications do not contain an overt threat, and even if the stalker does not have an apparent ability to carry out a threat.¹⁶⁹

Also, the State of Washington has two separate statutes for offline and online stalking—neither of which contain a credible threat requirement; rather, they both espouse a reasonable person

¹⁶³ See, e.g., Goodno, *supra* note 6, at 139–40; Merschman, *supra* note 133, at 267–68; Mishler, *supra* note 105, at 121–22.

¹⁶⁴ See, e.g., Goodno, *supra* note 6, at 140.

¹⁶⁵ OR. REV. STAT. § 163.732 (2003); *State v. Rangel*, 328 Or. 294, 300–01, 977 P.2d 379, 383 (1999).

¹⁶⁶ See Goodno, *supra* note 6, at 144–45.

¹⁶⁷ *State v. Limbrecht*, 600 N.W.2d 316, 319 (Iowa 1999).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

standard.¹⁷⁰ Also, Florida's anti-stalking law is similar to Washington's in that it does not contain a credible threat.¹⁷¹ In describing why the legislature amended its general stalking law (which includes offline and online stalking), a Florida district court stated that the "statute was 'designed to protect women from being harassed . . . by ensuring that victims did not have to be injured or threatened with death before stopping a stalker's harassment.'"¹⁷² These statutes tend to be more effective in ensuring that victims receive a legal remedy when their fear is reasonable and that cyberstalkers are held accountable.¹⁷³

C. Specifically Address the Distinctive Characteristics of the Internet

Third, the cyberstalking rule should specifically recognize the distinctive features of the Internet that make cyberstalking especially frightening. The State of Washington's cyberstalking statute is one of the most effective cyberstalking statutes in this regard, as it includes provisions regarding anonymity, repetitious communications, and third-party communications.¹⁷⁴ In addition, the statute states that "[e]lectronic communication" includes, but is not limited to, electronic mail, [I]nternet-based communications, pager service, and electronic text messaging.¹⁷⁵ This broader language combined with the provision that allows for third-party electronic communications¹⁷⁶ is preferable because it likely enables prosecutors to charge cyberstalkers who stalk by inciting third parties.¹⁷⁷

Furthermore, the Washington statute addresses the issues of delayed receipt of an intimidating communication and ambiguity as to the location of the offense by providing, "Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received."¹⁷⁸ Such a provision is

¹⁷⁰ WASH. REV. CODE ANN. § 9A.46.110 (West 2009) (offline stalking statute); WASH. REV. CODE ANN. § 9.61.260 (West 2010) (cyberstalking statute).

¹⁷¹ Goodno, *supra* note 6, at 145.

¹⁷² *Id.*

¹⁷³ *See id.* at 139–40.

¹⁷⁴ WASH. REV. CODE ANN. § 9.61.260. *See* Goodno, *supra* note 6, at 144, 146 (urging other states to follow Washington's example and discussing how Washington is one of three states that likely addresses all of the differences between offline and online stalking).

¹⁷⁵ *Id.* § 9.61.260(5).

¹⁷⁶ *Id.* § 9.61.260(1).

¹⁷⁷ *See* Goodno, *supra* note 6, at 146.

¹⁷⁸ WASH. REV. CODE ANN. § 9.61.260(4).

important because it recognizes the difficulty involved in requiring victims to prove reasonable fear at a time when they may not have known about the communication's existence. In addition, the provision allows for flexibility in regards to the jurisdiction in which prosecutors can charge suspects.

The State of Illinois also has a distinct cyberstalking statute that addresses the specific characteristics of the Internet and does not have a credible threat requirement.¹⁷⁹ The statute also has an explicit provision relating to incitement of third parties and webpages devoted to harming a certain individual.¹⁸⁰ The provision states, in part, that a person commits cyberstalking when he or she "creates and maintains [a] . . . webpage which is accessible to one or more third parties" in order to place the victim in fear, threaten the victim, or solicit third parties to stalk the victim."¹⁸¹ This provision of Illinois' statute is significant because it addresses, in detail, the various ways in which cyberstalkers can use websites to carry out their mission of controlling and harming victims.

The proposed cyberstalking law for Oregon should parallel much of Washington's cyberstalking statute and incorporate a section similar to the provision in Illinois' cyberstalking statute that prohibits the use of webpages to stalk individuals. Specifically, the statute should apply to anonymous and repetitious communications as well as to communications made to the target of the stalking and to third parties. In addition, there should be a provision explicitly stating that the offense of cyberstalking can be committed at either the place where the communication was made or the place where the communication was received. Furthermore, the definition of "electronic communications" should explicitly include communications made to third parties on websites and web postings. Specifically, Oregon's law should proscribe threats made on a webpage, language on a webpage that would place a reasonable person in the victim's situation in fear, and language inciting third-party visitors to the website to stalk the victim. Such a provision will ensure that Oregon law recognizes how websites centered around stalking individuals can be a form of cyberstalking, even if the target of the stalking never receives the communication.

¹⁷⁹ 720 ILL. COMP. STAT. 5/12-7.5 (2010), *amended by* 2010 Ill. Legis. Serv. 96-1551 (West).

¹⁸⁰ *Id.* at 5/12-7.5(a-5).

¹⁸¹ *Id.*

The proposed cyberstalking statute would likely improve victims' overall ability to obtain a stalking protective order when victims truly need that type of safety measure in place. By replacing the credible threat and imminence requirements with the reasonable person standard, the proposed statute would lower victims' overall burden from one that is nearly impossible to satisfy to a burden that would be more fair, yet still demanding. In addition, the statute would reduce the likelihood of cyberstalkers escaping culpability through the Internet loophole by providing the State of Oregon with better tools to charge and prosecute suspected cyberstalkers.

D. Constitutionality of the Proposed Standard

In order to ensure that the proposed rule does not violate the free speech provisions of the Oregon and federal constitutions, the rule should criminalize only conduct where the suspect "intentionally" or "willfully" intimidates, alarms, frightens, etc., another person.¹⁸² In addition, it is imperative that the proposed statute should address the "time, place, and manner" of electronic communications. Courts often use this doctrine to uphold statutes that restrict speech by addressing an unreasonable time, place, or manner of expressive conduct—this ensures that the government is not prohibiting speech based on a disapproval of the views expressed (the speech's "content"), which would be unconstitutional in most cases.¹⁸³

Oregon courts follow the time, place, and manner doctrine.¹⁸⁴ The Oregon version of the doctrine requires that laws that regulate expression based on the time, place, or manner of speech must contain language defining some adverse effect of the speech that the legislative body intends to prevent.¹⁸⁵ For example, in *City of Portland v. Ayers*, the Oregon Court of Appeals upheld a noise ordinance that banned the operation of any sound production device used: (1) "in such a manner as to cause a noise disturbance," (2) "between the hours of 10:00 p.m. and 7:00 a.m." and is "plainly audible" within a dwelling that is not the source of the sound, or (3)

¹⁸² See Goodno, *supra* note 6, at 155.

¹⁸³ Gene Barton, *Taking a Byte out of Crime: E-mail Harassment and the Inefficacy of Existing Law*, 70 WASH. L. REV. 465, 482 (1995).

¹⁸⁴ See generally Moser v. Frohnmayer, 112 Or. App. 226, 229–31, 829 P.2d 84, 85–86 (1992) (discussing how only content-neutral time, place, and manner regulations that focus on prohibited effects of speech are constitutionally sound), *aff'd*, 315 Or. 372, 845 P.2d 1284 (1993).

¹⁸⁵ *City of Portland v. Tidyman*, 306 Or. 174, 191, 759 P.2d 242, 251 (1988).

on public property and is “plainly audible” fifty feet or more from the device.¹⁸⁶

The court held, in part, that because the ordinance regulated the time, place, and manner of expression with the goal of curbing an “invasive effect” of expression—noise disturbance—and not the content of the expression, the ordinance did not violate article 1, section 8 of the Oregon Constitution.¹⁸⁷ In contrast, in *City of Portland v. Tidyman*, the Oregon Supreme Court held that a public nuisance ordinance regulating the locations of “adult businesses” violated article 1, section 8 because the ordinance did not adequately specify the adverse effects of the potentially obscene expression.¹⁸⁸ The City argued that adult bookstores contributed to “blight” and affected the “quality and stability” of neighborhoods, but the court asserted that the City’s findings were conclusory and vague—and thus, unpersuasive.¹⁸⁹ The court discussed how the ordinance did not adequately describe how the sale of “adult” materials led to a public “nuisance.”¹⁹⁰ Therefore, the court concluded, the ordinance would have the effect of banning certain materials because of their *content*—namely, their sexual nature.¹⁹¹ Thus, the ordinance violated article 1, section 8.¹⁹²

Also, legal scholars have assessed the constitutionality requirements of cyberstalking statutes by looking to court cases regarding telephonic harassment statutes because the two forms of criminal activity are similar.¹⁹³ For example, telephonic harassment statutes that ban anonymous, repeated, or late-night calls are all constitutional under the time, place, and manner doctrine as long as they satisfy other constitutional requirements.¹⁹⁴

¹⁸⁶ *City of Portland v. Ayers*, 93 Or. App. 731, 733, 764 P.2d 556, 558 (1988) (quoting PORTLAND, OR. CITY CODE § 14.24.160 (1993)), *review denied*, 308 Or. 79 (1989).

¹⁸⁷ *Id.* at 735–36, 741, 764 P.2d at 559, 562 (internal quotation marks omitted).

¹⁸⁸ *Tidyman*, 306 Or. at 185–86, 190–91, 759 P.2d at 247–48, 250–51. The Oregon Constitution does not ban obscenity outright—unlike the U.S. Constitution and other state constitutions. *State v. Henry*, 302 Or. 510, 514–15, 525, 732 P.2d 9, 11, 17 (1987). Therefore, if an Oregon legislative body seeks to regulate obscenity, it must do so by addressing secondary effects of obscene materials that fall within the list of exceptions in *State v. Henry*. *Tidyman*, 306 Or. at 179–80, 759 P.2d at 244.

¹⁸⁹ *Tidyman*, 306 Or. at 184–85, 759 P.2d at 247.

¹⁹⁰ *Id.* at 185, 759 P.2d at 247–48.

¹⁹¹ *Id.* at 185–86, 759 P.2d at 248.

¹⁹² *Id.*

¹⁹³ *E.g.*, Barton, *supra* note 183, at 481; Goodno, *supra* note 6, at 155.

¹⁹⁴ Barton, *supra* note 183, at 482.

To ensure constitutionality under article 1, section 8, the proposed cyberstalking law should be consistent with Oregon's time, place, and manner jurisprudence. Specifically, the law must explicitly describe the secondary effects of cyberstalking and how stalking conducted on the Internet can cause more fear in victims than offline stalking can.¹⁹⁵ The secondary effects that the proposed cyberstalking law should address should be repeated and unwanted contacts and the *fear* that those contacts produce. This provision would likely be consistent with the court's analysis in *Rangel*, in which the court stated that ORS 163.732 is aimed at curbing "forbidden effects"—"repeated and unwanted contacts."¹⁹⁶

Also, the proposed cyberstalking law should explicitly detail the "manner"¹⁹⁷ of expression that it seeks to proscribe in order to achieve the goal of thwarting repeated, unwanted contacts and reasonable fear. Meaning, for example, the law should include language banning, at the very least, "e-mail bombs" and anonymous messages based on the evidence that anonymity and e-mail bombs increase fear in stalking victims.¹⁹⁸

Finally, the proposed cyberstalking statute should contain a provision stating that it "does not include 'constitutionally protected activity,' including, but not limited to 'picketing and organized protests.'"¹⁹⁹ In sum, as long as the cyberstalking statute requires "intent" or "willingness" as its culpability level; focuses on the manner of electronic communications, including a detailed description of the adverse effects of stalking conducted on the Internet; and has a provision excluding constitutionally protected activity, the proposed rule should likely be constitutional.²⁰⁰

¹⁹⁵ See *Tidyman*, 306 Or. at 185–86, 759 P.2d 242, 247–48 (discussing how the ordinance at issue did not specifically address the adverse effects that the City wished to prevent, which contributed to the court's decision that the ordinance was unconstitutional).

¹⁹⁶ See *State v. Rangel*, 328 Or. 294, 299, 977 P.2d 379, 382 (1999) (discussing how the criminal stalking statute was directed to the "forbidden effects" of expression).

¹⁹⁷ The "time" and "place" pieces of the time, place, and manner doctrine are not relevant to this analysis.

¹⁹⁸ This type of language would be similar to the Washington cyberstalking statute. See WASH. REV. CODE ANN. § 9.61.260 (West 2010) (criminalizing repetitious anonymous messages).

¹⁹⁹ Goodno, *supra* note 6, at 155.

²⁰⁰ Barton, *supra* note 183, at 481–83; Goodno, *supra* note 6, at 155.

CONCLUSION

As cyberstalking becomes a more pervasive and harmful social issue, Oregon courts cannot simply apply the same test to offline and online stalking. Rather, courts and the legislature should recognize that cyberstalking and offline stalking are two different beasts—as such, these branches of government must evaluate the two forms of the crime through different lenses. Specifically, it is imperative that a new or modified rule addresses, at least, the five main characteristics of cyberspace that can increase fear in victims and that can potentially cause more danger to society.

In addition, Oregon courts should acknowledge that *Rangel's* credible threat requirement is often unworkable and impractical in cyberspace as issues such as anonymity, “e-mail bombs,” and the possibility that victims will be unable to determine the location from which the communications are made can all increase fear in victims even if there is no explicit threat in the contents of the communications. Furthermore, the same can be said with the imminence requirement—ascertaining and proving imminent fear is practically impossible in the age of the Internet.

Because of these problems, a new standard should apply only to cyberstalking and should not require imminent fear or a credible threat—rather, the analysis should emphasize whether a reasonable person would feel fear based on the cyberstalker’s behavior and the context of the situation. In addition, the standard must specifically address the distinguishing aspects of cyberspace—essentially, it must circumscribe the manner of electronic communications, which will ensure that Oregon courts treat cyberstalking cases differently from offline stalking cases. The rule must contain the requisite culpability level of intent or willfulness in order to be effective and constitutionally sound. Such a law would ensure that courts do not leave victims without protection when their fear may be reasonable, that cyberstalkers cannot hide from criminal liability, and that the government does not abridge individuals’ free speech rights in violation of the Oregon and federal constitutions. Therefore, Oregon courts and the legislature should consider the foregoing recommendations because they better serve to protect the public interest as technology continues to advance and individuals continue to abuse the numerous benefits that the Internet provides.

