STALKING OR TALKING?
AN ANALYSIS OF *STATE V. SHACKELFORD*, STALKING, AND THE FIRST AMENDMENT

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According to the U.S. Department of Justice, approximately 3.4 million adults[1] are stalked every year in the United States.[2] About half of these victims experience at least one "unwanted contact *per week.*"[3] Additionally, around one in four stalking victims report some form of cyberstalking, or stalking behaviors via the Internet or social media, with eighty-three percent reporting e-mail as a medium in which they've experienced stalking.[4] The effects of stalking are not to be understated, as victims report symptoms including, but not limited to, "stress-related health problems," difficulty falling or staying asleep, anxiety, decreased perceptions of safety at home, and "feelings of losing self, negative perceptions of self, and self-blame."[5] Though stalking seriously affects both men and women, about seventy-eight percent of stalking victims are women.[6] Mary,[7] whose story is highlighted in *State v. Shackelford*,[8] is one of those women.

Stories of stalking are not uncommon, and neither are challenges to state anti-stalking statutes. States have long faced constitutional challenges to their state stalking statutes, specifically on First Amendment grounds.[9] Stories like Mary's, and the N.C. Court of Appeal's decision in her case against her stalker, have illuminated what may be an express tension between protecting people's First Amendment freedom of speech

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[1] Persons aged 18 or older.

[2] KATRINA BAUM, SHANNAN CATALANO, MICHAEL RAND, & KRISTINA ROSE, STALKING VICTIMIZATION IN THE UNITED STATES 1 (Jan. 2009), https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf.

[3] *Id.* (emphasis added).

[4] *Id.*

[5] Melvin Huang, *Keeping Stalkers at Bay in Texas,* 15 TEX. J. C.L. & C.R. 53, 61 (2009).

[6] *Id.*

[7] The victim's actual name has been changed here and in court documents in order to protect her identity.

[8] 825 S.E. 2d 689 (N.C. Ct. App. 2019).

[9] *See infra* Section III.A.

and protecting victims of stalking. In *State v. Shackelford*,[10] Mary's stalker's convictions arising from his Internet posts about her were vacated because the court concluded his posts were First Amendment protected speech.[11]

If the court remains in the shadows when it comes to constitutional and technological advances (almost all state stalking statutes were drafted before the rise of social media), decisions such as *State v. Shackelford* could result in two different yet concerning realities. First, this may open the door for more behavior previously defined as stalking to be protected by the First Amendment and, thus, result in little to no protections for victims of stalking. Conversely, in a haste to fervently protect victims, courts may seriously step on the toes of the First Amendment such that more traditionally protected speech may be punishable under stalking statutes.

Shackelford shed light on the fact that North Carolina's stalking statute very well may be susceptible to one of those two concerning realities. This Note will articulate the possible reasons for concern with North Carolina's stalking statute and what the implications of the statute post-*Shackelford* could mean for the future of both stalking victims' rights and the First Amendment rights of North Carolinians. Ultimately, this Note will conclude that, to avoid running afoul of the First Amendment, North Carolina's stalking statute should be amended to be more narrow in scope. At the same time, North Carolina's civil remedies, such as no-contact orders, should be expanded in scope to ensure adequate protections for victims of stalking. This Note will reach this conclusion by starting with an in-depth analysis of *State v. Shackelford* in Section I, moving to a discussion of the First Amendment issues at play in Section II, examining the tensions between robust protections of the First Amendment and robust protections of victims in Section III, and finally articulating a recommendation for remedying the issue in Section IV.

[10] *Id.*
[11] *See id.* at 702.

I. *STATE V. SHACKELFORD* CASE ANALYSIS

A. Facts and Background

In October of 2018, *State v. Shackelford* came before the North Carolina Court of Appeals.[12] Defendant Brady Lorenzo Shackelford appealed his conviction of four counts of felony stalking on the grounds that the convictions were based "primarily upon the content of posts made by him on his Google Plus account" and thus were speech protected by the First Amendment.[13] The Court agreed, and Shackelford's convictions were vacated.[14]

Shackelford met the victim, referred to as "Mary," in April 2015 at a church in Charlotte where Mary was employed.[15] The two were seated at the same table and "briefly made small talk in a group setting."[16] The two did not communicate beyond this until a couple weeks later when Shackelford sent Mary an email, asking for help with a matter related to Shackelford's company.[17] Mary agreed to help, and the two set a time to meet.[18] Shackelford sent another email that same night, giving Mary more information about his company, and stated he would pay her "100K out of the convertible note proceeds AND take [her] out to dinner at any restaurant in Charlotte."[19] This email "set off a lot of red flags" for Mary and, thinking that his intentions were not professional, she promptly emailed Shackelford to cancel their meeting and informed her boss about their exchange.[20] In response, Shackelford sent Mary a five-page handwritten letter to her work address that included statements like Shackelford calling Mary his "soul mate," saying he was "highly attracted" to her and asking her to go on a date with him.[21] After Mary did not respond to this letter, Shackelford sent a second handwritten letter, this time to her home address.[22] In this letter, Shackelford first apologized for sending it to Mary's

[12] *Id.* at 691.
[13] *Id.*
[14] *Id.* at 702.
[15] *Id.*
[16] *Id.* at 691.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 691–92.
[22] *Id.*

home address even though she never gave him her address and concluded with instructing Mary to either go on a date with him or tell him to leave her alone.[23] Later, the reverend at the church where Mary worked and where Mary and Shackelford first met, contacted Shackelford to warn him that there could be legal ramifications if he did not stop contacting Mary.[24]

Following his conversation with the reverend, Shackelford did not send Mary any emails or letters.[25] However, in June 2015, Mary noticed that Shackelford had begun making social media posts about her on his Google Plus account.[26] The dates of the posts showed that they were made both before and after Shackelford's conversation with the reverend.[27] While these posts were not made directly to Mary, they mentioned her by name and were posted publicly, so that any user of Google Plus could read them.[28] Mary blocked Shackelford's account on Google Plus, but he continued to post about her using her initials and abbreviated versions of her name.[29]

In addition to using Mary's initials and abbreviated versions of her name, Shackelford frequently referred to her as "a woman at my church" in his online posts.[30] On June 19, Shackelford wrote that "a woman from [his] church" was driving him "bat crazy" and that she was "the first thing" he saw when he "w[o]ke up in the morning" and the last thing he saw when "lay[ing] down at night."[31] On June 28, Shackelford posted again about Mary saying that he was "feeling depressed" because he wants the woman from his church "really, really bad" but that she didn't want him.[32] On July 19, Shackelford wrote "there is only one woman that I want, and her initials are [Mary's initials]."[33] In this post, he continued to write, "[e]ven though we aren't dating yet, you might as well mark me down as being in a relationship because I am not interested in other women."[34]

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

On August 13, Shackelford sent a box of cupcakes to Mary's office.[35] This prompted Mary to file a police report that day because she "felt like she was being stalked."[36] Based on the police report, a warrant against Shackelford on a charge of misdemeanor stalking was issued by Detective Stephen Todd, and Shackelford was arrested the next day and subsequently released on bail.[37] On the same day of his arrest, and in the following days, Shackelford posted three more times about Mary on his Google Plus account.[38] On August 16, part of a lengthy post by Shackelford read:

> How do you know when something is not meant for you if you give up at the first sign of difficulty? Sometimes, God places difficulties in our lives because he wants us to be persistent . . . . If every guy let go of the girl who turned him down the first time, then there would be lots of marriages that never took place because he wasn't persistent.[39]

Later that same day, Shackelford posted again, this time speaking of courting "three Venus in Scorpios over the years" which lead to him doing research about "Scorpios and Venus in Scorpios."[40] Shackelford mentioned an article he came across during this research that he found particularly interesting, as it read, "[t]he author was talking about their obsessiveness and stated, 'Don't run away (you'll only be stalked).'"[41] In his post, Shackelford said he was drawn to this statement because he "saw [that] behavior in all three women" and that the "Scorpio Ascendant in [him] completely understood where they were coming from."[42]

On August 21, Mary filed a petition for a no-contact order against Shackelford, which prohibited him from contacting or "posting any information about [Mary] on social media."[43]

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[35] *Id.* at 693.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

Subsequently, Shackelford continued to post about Mary multiple times, often referring to her as his "future wife."[44] Shackelford also sent two emails to a close friend of Mary's explicitly referring to Mary and to the court orders Mary obtained against Shackelford.[45] In the first email, sent on November 24, Shackelford said to Mary's friend, "You were present in the courtroom when [Mary] obtained a protective order against me, so why would you even add me to your [Google Plus] circles if I am supposedly stalking [Mary]?"[46] Shackelford continued by saying that Mary had a "moral responsibility" to tell the truth about why she charged Shackelford and that Mary's friend should "encourage" Mary to "tell the truth" when they go to court.[47] In the second email, sent on December 18, Shackelford told Mary's friend about his plans to take a polygraph test on CNN "to prove that he had 'talked to God over 20 times and seen his face 5 times'" which, according to his plan, would ultimately culminate in Mary telling the judge that Shackelford was "a righteous man and was in no way a threat towards her."[48] Mary's friend forwarded both emails to Detective Todd.[49]

Based on Shackelford's Google Plus posts about Mary and the emails to Mary's friend, Detective Todd obtained an arrest warrant against Shackelford for felony stalking on December 24, 2015.[50] Shackelford was indicted for nine total counts of felony stalking in April 2016.[51] He moved to dismiss the charges on the ground that his social media posts that gave rise to these charges were protected speech under the First Amendment.[52] The trial court dismissed four of the stalking charges and referred to the language in the no-contact order prohibiting Shackelford from posting *about* Mary as possibly unconstitutional.[53] On August 18, 2017, Shackelford was convicted of each of the remaining four stalking charges.[54] Shackelford filed an appeal challenging all four convictions,

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[44] *Id.* at 693–94.
[45] *Id.* at 694.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See id.*
[52] *Id.*
[53] *Id.* at 694–95.
[54] *Id.* at 695.

stating that they should have been dismissed as unconstitutional under the First Amendment because the charges were "based—either in whole or in part—upon the content of his Google Plus posts" which were protected speech.[55] Shackelford further asserted that the North Carolina stalking statute was unconstitutional *as applied* to his specific case.[56]

B. Reasoning

There are two main types of constitutional challenges—facial and as-applied.[57] While facial challenges contest the constitutionality of a statute itself, as-applied challenges argue that the statute, as applied in a specific instance to a specific person, is unconstitutional.[58] Since this was an as-applied challenge, the court looked only to the specific facts surrounding Shackelford's particular circumstances in reaching their decision.[59]

In assessing the constitutionality of North Carolina's stalking statute[60] (hereinafter N.C. stalking statute) as applied to Shackelford, the court first assessed whether Shackelford's convictions triggered the First Amendment, and the court concluded they did.[61] The court next questioned whether the restriction on Shackelford's speech imposed by N.C.'s stalking statute unconstitutionally infringed on his First Amendment rights.[62] The State argued that Shackelford's social media posts should not be afforded any First Amendment protections because they were "integral to criminal conduct" and thus outside the protections of the First Amendment.[63] The court rejected this argument.[64] Ultimately, the court subjected N.C.'s stalking statute to strict scrutiny and determined that it failed that high bar.

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[55] *Id.*
[56] *Id.* (emphasis added).
[57] *See id.*
[58] *Id.*
[59] *See id.*
[60] N.C. GEN. STAT. § 14-277.3A (2019).
[61] *Shackelford*, 825 S.E.2d at 699.
[62] *Id.* See *infra* Section II for an in-depth discussion on the First Amendment, permissible and impermissible restrictions, and appropriate levels of scrutiny to apply to restrictions.
[63] *Shackelford*, 825 S.E.2d at 697.
[64] *Id.*

Typically, a content-based restriction—one that "cannot be justified without reference to the content of the regulated speech"[65]—is subject to strict scrutiny by courts, and thus is rarely found to be constitutional.[66] Here, in order to apply the N.C. stalking statute to Shackelford's Google Plus posts, the court was forced to look to the actual content of those posts, thus making the statute, as applied to Shackelford, a content-based restriction on his speech.[67] As a content-based restriction on speech, the application of the stalking statute was subject to strict scrutiny, and it could not withstand such a high level of scrutiny.[68] Thus, the court concluded that the application of N.C.'s stalking statute to Shackelford's social media posts constituted a violation of his First Amendment rights and vacated all four of Shackelford's felony stalking convictions.[69]

II. FIRST AMENDMENT IMPLICATIONS

A. First Amendment Primer

The Free Speech Clause of the First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . ."[70] The Supreme Court has expressed that "above all else, the First Amendment means that government has no power to restrict [speech or] expression because of its message, its ideas, its subject matter, or its content."[71] The First Amendment is incorporated against the states via the Fourteenth Amendment.[72]

The First Amendment's freedom of expression applies to speech and may also apply to conduct insofar as it is expressive.[73] Conduct comes into the purview of First Amendment protection when it "possesses sufficient communicative elements[.]"[74] Communication via posting on the Internet does not lose First Amendment protections simply because it involves the "act" of

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[65] *Id.* at 699.
[66] *See infra* notes 85–87 and accompanying text for more on strict scrutiny.
[67] *Shackelford*, 825 S.E.2d at 699.
[68] *Id.* at 699–702.
[69] *Id.* at 702.
[70] U.S. CONST. amend. I.
[71] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
[72] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
[73] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).
[74] *Id.*

posting online, nor does it receive lesser protections merely because the speech occurs online.[75] Regardless of subject matter, posting on the Internet "can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long protected by the First Amendment."[76] These protections extend "to all new media and forms of communication that progress might make available[.]"[77]

When analyzing a regulation under the First Amendment, it is important to first consider whether the regulation is content-based or content-neutral. A regulation is content-based if the law "applies to particular speech because of the topic discussed or the idea or message expressed."[78] However, regulations that appear content-neutral on their face may also be considered content-based restrictions if the law "cannot be justified without reference to the content of the regulated speech."[79] While regulations that are content-neutral are subject to a form of intermediate scrutiny,[80] content-based regulations receive more rigorous treatment.[81] Content-based regulations on speech, or "regulations which permit the [g]overnment to discriminate on the basis of the content of the message," require the government to look directly to the content of the speech in order to decide whether to regulate it.[82] This "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[83] The First

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[75] State v. Bishop, 787 S.E.2d 814, 818 (N.C. 2016).
[76] *Id.* at 817.
[77] *Id.* at 818.
[78] State v. Shackelford, 825 S.E.2d 689, 699 (N.C. Ct. App. 2019).
[79] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015).
[80] Intermediate scrutiny is a level of scrutiny that lies between strict scrutiny, which is incredibly hard to overcome, and rational basis review, which is much easier to overcome. *See, e.g.,* Johnson v. California, 545 U.S. 162 (2005); Craig v. Boren, 429 U.S. 190 (1976); United States v. Carolene Products Co., 304 U.S. 144 (1938). "[R]egulations that are unrelated to the content of speech" are typically subject to the intermediate level of scrutiny. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994). Regulations subject to intermediate scrutiny will typically be sustained if they "further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).
[81] *See Shackelford*, 825 at 697.
[82] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).
[83] *Id.* The concern over driving viewpoints from the marketplace is largely based on the "marketplace of ideas" theory of First Amendment jurisprudence, articulated by Justice Holmes. The marketplace of ideas is the idea that the First Amendment creates a universe where the best ideas prevail, where the weaker ideas naturally are

Amendment is intended to place "this sort of discrimination beyond the power of the government."[84] Thus, "[c]ontent-based regulations are presumptively invalid" and are subject to strict scrutiny.[85] In order to satisfy strict scrutiny, the restrictions must be narrowly tailored to serve a compelling government interest.[86] This is an extremely high standard and, as a general matter, most restrictions fail to satisfy strict scrutiny.[87]

However, there are some forms of speech that fall outside the scope of the First Amendment and are not afforded protection.[88] Some categories of speech not protected under the First Amendment include, but are not limited to, incitement of violence,[89] speech integral to criminal conduct,[90] "fighting words,"[91] and child pornography.[92] The Supreme Court has long held that "otherwise proscribable criminal conduct" does not receive First Amendment protections simply because the conduct "happens to involve the written or spoken word."[93] In other words, the constitutional freedom of speech does not extend immunity to "speech or writing used as an integral part of conduct in violation of a valid criminal statute."[94] For example, bans on child pornography will typically pass constitutional muster because the speech being regulated is "intrinsically related to the sexual abuse of children."[95] Content-based restrictions on speech are typically valid if the underlying speech itself falls into one of these categories of unprotected speech.[96]

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phased out or rejected. *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). Justice Holmes articulated this in his dissent to *Abrams* by saying "the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which [individual] wishes safely can be carried out. That at any rate is the theory of our constitution." *Id.* at 630.

[84] *Simon & Schuster, Inc.*, 502 U.S. at 116.

[85] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[86] *Shackelford*, 825 S.E.2d at 697.

[87] *See id.* at 700.

[88] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[89] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[90] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[91] *Chaplinsky*, 315 U.S. 568.

[92] *See* New York v. Ferber, 458 U.S. 747 (1982).

[93] State v. Bishop, 787 S.E.2d 814, 817 (N.C. 2016).

[94] *Ferber*, 458 U.S. at 761–62.

[95] *See id.* at 758–59.

[96] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

B. First Amendment Implications in State v. Shackelford

The First Amendment's protection of speech does not extend to "speech or writing used as an integral part of conduct in violation of a criminal statute."[97] In *Shackelford,* one of the State's main arguments was that Shackelford's social media posts were integral to criminal conduct because they amounted to a violation of North Carolina's stalking statute and, as a result, should not receive First Amendment protections.[98] Since his speech was outside of the First Amendment's protections, the State argued, even if the N.C. stalking statute as applied to Shackelford was a content-based restriction, the court *still* should not invalidate the statute since the underlying speech is unprotected.[99] The court rejected this argument, relying on precedent[100] to distinguish statutes that "incidentally punish speech that is integral to a criminal violation" from statutes where "the speech itself is the criminal violation."[101] Here, the court reasoned, Shackelford's social media posts were not integral to the violation of N.C.'s stalking statute, but rather Shackelford's posts themselves were the criminal violation.[102]

The court further determined that the stalking statute, as applied to Shackelford, constituted a content-based restriction on his speech.[103] The N.C. stalking statute prohibits communications or conduct that would "cause a reasonable person to . . . [s]uffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment."[104] Thus, communications or conduct that the recipient finds pleasing are not prohibited, while those that cause the recipient to suffer substantial emotional distress are prohibited. Therefore, determining whether or not Shackelford's posts were prohibited under this language of the statute could not be done without referring to the content of those posts. Thus, the

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[97] State v. Shackelford, 825 S.E.2d 689, 698 (N.C. Ct. App. 2019) (citing *Ferber*, 458 U.S. at 761–62).
[98] *Id.* at 697.
[99] *Id.*
[100] People v. Relerford, 104 N.E.3d 341 (Ill. 2017).
[101] *Shackelford*, 825 S.E.2d at 699.
[102] *See id.* at 698.
[103] *See id.*
[104] N.C. GEN. STAT. § 14-277.3A (2020).

court determined that, as applied to Shackelford, the stalking statute constituted a content-based restriction.[105]

Since the statute imposes a content-based protection on protected speech, the statute as applied to Shackelford must survive strict scrutiny in order to be constitutional. The North Carolina Supreme Court has explained that to survive strict scrutiny for this type of content-based restriction, the State "must show not only that a challenged content[-]based measure addresses the identified harm, but that the enactment provides the least restrictive means of doing so."[106] In *Shackelford,* the Court raised specific concerns that the application of the N.C. stalking statute to Shackelford's posts was not the least restrictive means to accomplish the State's asserted goal of "preventing the escalation of stalking into more dangerous behavior . . . ."[107] The court relied on the fact that Mary had already sought and received a no-contact order to show that there were less restrictive means (i.e. more strict enforcement of the terms of the no-contact order) by which the State could have achieved its asserted interest.[108] Therefore, the stalking statute as applied to Shackelford failed the strict scrutiny standard and was unconstitutional.[109]

C. First Amendment Implications Posed by North Carolina's Stalking Statute

While stalking is *conduct* that the N.C. stalking statute aims to punish, the language of the statute brings in expressive, communicative conduct as well.[110] Thus, the First Amendment may be implicated by the statute. North Carolina's stalking statute provides, in pertinent part, that:

> [a] defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a *course of conduct* directed at a specific

[105] *See Shackelford*, 825 S.E.2d at 699.
[106] *Id.* at 700.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 701.
[110] *See* N.C. GEN. STAT. § 14-277.3A (2020), *invalidated* by State v. Shackelford, 825 S.E.2d 689 (N.C. 2018).

> person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to . . . [s]uffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.[111]

The statute defines "course of conduct" as:

> [t]wo or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.[112]

As Judge Murphy's concurrence in *State v. Shackelford* suggests, the language "communicates to *or about* a person" in the statute's definition of course of conduct is a major point of concern under the First Amendment.[113] There is an important distinction between communications directed toward a specific person, like through telephone calls or mailings, and public postings that are not directed specifically to a person. Sending an unwilling recipient something in the mail, such as Shackelford sending cupcakes to Mary, is non-speech conduct and thus does not raise First Amendment concerns.[114] However, public postings on social media do not constitute "conduct" and thus may come into First Amendment territory.[115]

All four counts of stalking on which Shackelford was convicted were premised, either partially or wholly, on the online posts Shackelford made *about* Mary.[116] While these posts were undoubtedly about Mary, they were never sent directly to her or anyone else; rather they were posted publicly.[117] Due to the language of the N.C. stalking statute, Shackelford's posts, without more, were enough to support his stalking

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[111] *Id.* § 14-277.3A(c)(2) (emphasis added).
[112] *Id.* § 14-277.3A(b)(1).
[113] *See Shackelford*, 825 S.E.2d at 704 (Murphy, J., concurring) (emphasis added).
[114] *See id.* at 703.
[115] *See id.*
[116] *See id.* at 694 (majority opinion).
[117] *See id.; see also supra* text accompanying notes 25–34, 38–44.

convictions.[118] This means that Shackelford's speech online alone was being punished, not some other act.[119] This was the basis for the reason that the Court in *Shackelford* rejected the State's argument that Shackelford's posts should fall within the "speech integral to criminal conduct" exception to First Amendment protections.[120] Rather than the N.C. stalking statute incidentally punishing Shackelford's speech because it is integral to the criminal violation, the language of this statute actually makes the speech itself the criminal violation.[121]

The issues with the N.C. stalking statute in *Shackelford* are quite similar to those in Illinois' stalking statute, challenged in *People v. Relerford*,[122] and North Carolina's cyberbullying statute, challenged in *State v. Bishop*.[123] Both of these statutes were challenged as facially unconstitutional under the First Amendment, and the court in *Shackelford* relied heavily on both cases in order to come to their conclusion.[124]

Under the Illinois stalking statute[125] at issue in *Relerford,* "two or more nonconsensual communications to or about a person that the defendant knows or should know would cause a reasonable person to suffer emotional distress" are enough to constitute stalking.[126] Much like the pertinent portion of the N.C. stalking statute, the defendant in *Relerford* contested the aspect of Illinois' stalking statute that punishes communications "to or about" a person.[127] The *Relerford* court held that the contested stalking statute provision, as well as a similarly worded provision in Illinois' cyberstalking statute,[128] was facially unconstitutional under the First Amendment because they were both overbroad.[129] A statute may be unconstitutionally overbroad if a "substantial number of its applications are unconstitutional."[130]

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[118] *See Shackleford*, 825 S.E.2d at 698.
[119] *See id.*
[120] *See id.* at 699.
[121] *See id.*
[122] 104 N.E.3d 341 (Ill. 2017).
[123] 787 S.E.2d 814 (N.C. 2016).
[124] *See Shackelford*, 823 S.E.2d at 699–700.
[125] 720 ILL. COMP. STAT. 5/12-7.3(a)(1)-(2) (2020), *invalidated* by People v. Relerford, 104 N.E.3d 341 (2017).
[126] 104 N.E.3d at 349.
[127] *Id.*
[128] 720 ILL. COMP. STAT. 5/12-7.5(a)(1)-(2), *invalidated* by People v. Relerford, 56 N.E.3d 489, 497 (Ill. 2016).
[129] *Relerford*, 104 N.E.3d at 356.
[130] *Id.* at 353.

This was the case for Illinois' stalking statute since it "reaches a host of social interactions that a person would find distressing but are clearly understood to fall within the protections of the [F]irst [A]mendment."[131]

The defendant in *Bishop* challenged North Carolina's cyberbullying statute[132] which made it unlawful "for any person to use a computer or computer network to [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor [w]ith the intent to intimidate or torment a minor."[133] Much like the stalking statute at issue in *Shackelford,* North Carolina's cyberbullying statute was found to create a content-based restriction on speech protected by the First Amendment, and it failed strict scrutiny, again like *Shackelford,* because the statue was not the least restrictive means to accomplish the governmental interest of "protecting minors from [] potential harm."[134]

The similarities in statutory language as well as the courts' reasoning and decisions in *Shackelford*, *Relerford*, and *Bishop* are striking and highlight the potential troubles N.C.'s stalking statute may face. Perhaps the most prominent issue with N.C.'s stalking statute lies in the distinction between what Eugene Volokh calls "one-to-one speech vs. one-to-many speech."[135]

Volokh defines one-to-one speech as "speech said to a particular person in a context where the recipient appears not to want to hear it, whether because the recipient has expressly demanded that the speech stop or because the speaker intends to annoy or offend the recipient."[136] Examples of one-to-one speech would be sending letters and other mail to people, phone calls to a person, and communication of the like. Restrictions on this type of speech, such as in stalking and harassment laws, have traditionally been upheld against First Amendment

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[131] *Id.* at 353–54.
[132] N.C. GEN. STAT. § 14-458.1(a)(1)(d) (2020), *invalidated* by State v. Bishop, 787 S.E.2d 814, 815 (N.C. 2016).
[133] *Bishop*, 787 S.E.2d 814, 816 (N.C. 2016) (internal quotations omitted).
[134] *Id.* at 820.
[135] Eugene Volokh, *One-to-one Speech vs. One-to-many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. UNIV. L. REV. 731, 731 (2013).
[136] *Id.* at 742.

challenges.[137] One large reason for restrictions on one-to-one speech being upheld is the fact that since the speech is typically to one, or a limited number, of unwilling listeners, restricting that speech still leaves the speaker open to "communicate to other, potentially willing listeners."[138] This poses less of a threat to the marketplace of ideas.[139]

Conversely, one-to-many speech, like signs, words on clothing, picketing, flyers, etc., is generally protected under the First Amendment.[140] While some would-be viewers or listeners of this one-to-many speech may be unwilling or offended by the speech, "[s]o long as some of the viewers are likely to be open to the message, the message remains protected . . . ."[141] This is because if some listeners are open to the speech, then restricting it would restrict "constitutionally valuable communication to willing listeners . . . ."[142] Moreover, one-to-many speech that is critical of one person falls under this same umbrella of protection because, while the subject of criticism is likely to see and be offended by the message, other readers may find it to be valuable.[143] In all, restricting one-to-many communication restricts the availability of that communication to many willing listeners, which offends the First Amendment.[144]

Not only is N.C.'s stalking statute at controversy in *Shackelford* extremely akin to those statutes that were held unconstitutional in *Relerford* and *Bishop,* some of the language also falls within Volokh's conception of one-to-many speech. The language in N.C.'s stalking statute that punishes "communicat[ing] about a person"[145] is punishing one-to-many speech. Though the Internet posts in *Shackelford* were undoubtedly about a specific person (the victim), they were made publicly, to a large audience, some of whom may have been interested in reading them. In other words, as Volokh articulated, the fact that some of Shackelford's online acquaintances were likely willing readers of his posts (and thus listeners to his

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[137] *See id.*
[138] *Id.* at 743.
[139] Abrams v. U.S., 250 U.S. 616, 630 (1992) (Holmes, J., dissenting).
[140] *See* Volokh, *supra* note 135, at 743.
[141] *Id.*
[142] *Id.*
[143] *See id.*
[144] *See id.*
[145] N.C. GEN STAT. § 14-277.3A(b)(1) (2020).

speech), makes those posts more "constitutionally valuable communication."[146] Though in this specific instance it might be more difficult to view Shackelford's posts as valuable, it is easy to imagine a wealth of scenarios where public posts about a person that could offend N.C.'s stalking statute *would* be considered highly valuable, like criticizing a public figure, for example. With this in mind, and in the wake of the *Relerford* and *Bishop* decisions, it is likely that N.C.'s stalking statute, specifically the language "communicates to or about a person"[147] is at risk of being found facially unconstitutional under the First Amendment.

III. TENSIONS BETWEEN PROTECTING FIRST AMENDMENT RIGHTS AND PROTECTING VICTIMS

Anti-stalking statutes have largely been introduced by state legislatures attempting to address and remedy "some of the limitations found with civil protection orders and related statutes."[148] In response to the murder of Rebecca Schaffer[149] by a stalker in 1989, California was the first state to pass anti-stalking legislation, and all other states, plus the District of Columbia, quickly followed suit.[150] Following the passage of California's stalking statute in 1990, many "legal scholars, advocates, and legislators predicted a series of constitutional challenges" would soon unfold, and they were right.[151] Due to the "breadth of conduct potentially involved in stalking, anti-stalking statutes need to be relatively broad to be effective."[152]

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[146] Volokh, *supra* note 135, at 743; *see supra* notes 141–144 and accompanying text.
[147] N.C. GEN STAT. § 14-277.3A(b)(1).
[148] *Stalking: State and Federal Anti-stalking Laws,* LAW LIBR. – AM. L. & LEGAL INFO., https://law.jrank.org/pages/2143/Stalking-State-federal-anti-stalking-laws.html (last visited Aug. 21, 2020).
[149] Rebecca Schaeffer was a twenty-one year-old actress who was murdered in her home by a stalker, Robert John Bardo, in 1989. Bardo had stalked Rebecca Schaeffer for years, sending letters to her home and attempting to gain access to her sets, eventually culminating in him showing up at her home to kill her. Bardo was found guilty of first-degree murder in 1991 and is still serving his sentence of life without parole. Blake Bakkila, *How Rebecca Schaeffer's Horrific Murder Led to the Nation's First Anti-Stalking Law,* GOOD HOUSEKEEPING (Apr. 12, 2019), https://www.goodhousekeeping.com/life/a27116831/rebecca-schaeffer-murder/.
[150] *Stalking: State and Federal Anti-stalking Laws,* LAW LIBR. – AM. L. & LEGAL INFO., https://law.jrank.org/pages/2143/Stalking-State-federal-anti-stalking-laws.html (last visited Aug. 21, 2020).
[151] *Id.*
[152] *First Amendment and Other Legal Considerations,* 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY, A REPORT FROM THE

However, this breadth combined with the fact that stalking acts often include speech and/or expressive conduct means that these statutes must be carefully constructed, so as not to infringe on anyone's First Amendment rights.[153] This construction is easier said than done, and in the two decades since California passed the first anti-stalking statute, state stalking statutes have faced numerous constitutional challenges, many on First Amendment grounds.[154]

Since state stalking statutes were introduced due to the "inability of existing legal remedies to protect . . . victims from their stalkers,"[155] these challenges have made one thing clear—there may be an express tension between the First Amendment freedom of speech and protecting victims of stalking, such that robust protections of one may be at the cost of the other.

A. History of First Amendment Challenges to Stalking Statutes

State stalking statutes have been no stranger to constitutional challenges over the past two decades, with the two most common arguments against the statutes being that they are too vague or that they are overbroad because they "criminalize what is otherwise constitutionally protected expressive activity."[156]

1. Upheld as Constitutional

Though anti-stalking and similar statutes have been constitutionally challenged since their enactment, courts are not as quick to invalidate these regulations as it may appear. The following are a few cases in which anti-stalking statutes have been challenged under the First Amendment and survived those challenges. Though these decisions do not necessarily mean the regulations in question are safe from being rejected under a

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ATTORNEY GENERAL TO THE VICE PRESIDENT (Aug. 1999), https://webharvest.gov/peth04/20041022072652/http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm.

[153] *Id.*

[154] *See infra* Section III.A.

[155] Suzanne L. Karbarz, Note, *The First Amendment Implications of Anti-Stalking Statutes,* 21 J. LEGIS. 333, 335 (1995).

[156] *Id.* at 334.

constitutional challenge in the future, they may shed light on what is needed for a regulation to survive such challenges.

To start, a slew of constitutional challenges cropped up in 1995, likely as a result of the enactment of the first anti-stalking statutes. In large part, many of these general constitutional challenges resulted in the statutes being declared constitutional, "or that such a finding was supportable."[157]

In 2014, a Wisconsin Appellate Court affirmed the convictions of a defendant under the state stalking statute[158] in *State v. Maier.*[159] Defendant Maier's stalking charges were "based on two letters [he] sent to jurors who had found him guilty in a prior criminal proceeding in 2006."[160] Maier asserted that the statute under which he was convicted of stalking was unconstitutional because the letters he sent did not amount to a true threat.[161] Speech that is considered a true threat falls under the umbrella of speech that is not protected by the First Amendment.[162] However, Maier argued, since his speech *wasn't* a true threat, then it *was* protected by the First Amendment, and thus his convictions under the stalking statute were unconstitutional.[163] The court rejected this argument and stated that in order to prove the initial stalking charges, the State had to prove that Maier's "intentional course of conduct would have caused a reasonable person to suffer serious emotional distress or to fear bodily injury or death to herself" or another family member.[164] This, the court reasoned, "aptly describes a 'true threat' that does not enjoy constitutional protection."[165] Thus, in satisfying the language of the statute, Maier's speech amounted

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[157] George L. Blum, Annotation, *Validity of State Stalking Statutes,* 6 A.L.R. 7th; *see, e.g.*, Ratcliffe v. State, 660 So. 2d 1384 (Fla. 1995); Morrison v. State, 658 So. 2d 1038 (Fla. Dist. Ct. App. 1995); People v. Soto, 660 N.E.2d 990 (Ill. App. Ct. 1995).
[158] WIS. STAT. ANN. § 940.32(2)(a)-(c).
[159] No. 2013AP1391-CR, 2014 WL 1810151 at *1 (Wis. Ct. App. May 8, 2014).
[160] *Id.* at *1.
[161] *Id.* at *1, *4. "True threat" refers to a category of speech that is not protected by the First Amendment. A true threat is a "statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech." *Id.* at *4 (internal quotations omitted).
[162] *Id.* at *7.
[163] *Id.*
[164] *Id.* at *17.
[165] *Id.*

to a true threat that was not protected by the First Amendment.[166] Therefore, his First Amendment challenge failed.[167]

The reasoning in *Maier* could demonstrate a possible benefit of narrowing the language of N.C.'s stalking statute. If the statute were precise enough to only target unprotected speech, like true threats, it likely would survive First Amendment challenges, quite similar to Shackelford's.

Quite recently, in 2018, the First Circuit rejected a First Amendment challenge to a federal anti-stalking law in *United States v. Ackell.*[168] The defendant, Ackell, was convicted of stalking for inappropriate online and text communications with a younger female.[169] He argued that the federal anti-stalking statute violated his First Amendment freedom of speech because it targeted speech rather than conduct.[170] Ackell insisted that since the statute required him to use "the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce . . ." it was targeting his speech.[171] The court disagreed, and stated that although the statute "does name common means of communication . . . one could use to commit the offenses it defines, it does not necessarily follow that the statute targets speech."[172] The court also further reasoned that to the extent the statute might target speech, it is unprotected speech, such as true threats.[173]

A similar lesson as that learned from *Maier* can likely be learned from *Ackell* as well. Again, it appears that a narrow construction of N.C.'s stalking statute such that the only speech it targets is unprotected speech would be beneficial to survive First Amendment challenges.

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[166] *Id.*
[167] *Id.* at *8.
[168] 907 F.3d 67 (1st Cir. 2018).
[169] *Id.* at *70–71.
[170] *Id.* at *72.
[171] *Id.* (internal quotations omitted).
[172] *Id.*
[173] *Id.* at *75.

2. Declared Unconstitutional

Not every regulation challenged under the First Amendment has survived, however. The following cases are just a few in the line of those where a regulation has been declared, either facially or as-applied, unconstitutional under the First Amendment. These cases not only set the stage for the ultimate decision in *Shackelford but* serve as guidance to what may be the future for N.C.'s current stalking statute if not amended.

In a 1996 case, *Long v. Texas,*[174] the provision concerning stalking in Texas's state harassment statute was declared facially unconstitutional for vagueness.[175] Specifically, the defendant argued that the following section of the statute was too vague:

> A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he: [] on more than one occasion engages in conduct directed specifically toward the other person, including following that person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person . . .[176]

The court agreed that this was too vague, noting that this portion of the statute "covers *any* conduct in which a person could possibly engage."[177] It is possible that the drafters of this language considered future issues with this statute, as they included an affirmative defense for "constitutionally protected activity."[178] Presumably, this could be a solution to First Amendment challenges to the statute. However, the *Long* court tells us otherwise, and explains that "a general savings provision 'cannot substantially operate to save an otherwise invalid statute . . . .'"[179] Thus, the court declared the entire statute here unconstitutional.[180]

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[174] 931 S.W.2d 285 (Tex. App. 1996).
[175] *Id.* at *297.
[176] *Id.* at *288.
[177] *Id.* at *289.
[178] *Id.* at *298.
[179] *Id.* at *295.
[180] *Id.*

In the same vein, a year later, a landmark Supreme Court case *Reno v. ACLU*,[181] held the Communications Decency Act (CDA) unconstitutional under the First Amendment as a vague, content-based regulation that has an "obvious chilling effect on free speech."[182] The CDA was enacted by Congress in order to "prevent minors from gaining access to sexually explicit materials on the Internet."[183] The Act prohibited "any individual from knowingly transmitting 'obscene or indecent' messages to a recipient under the age of 18" as well as knowingly displaying "patently offensive materials in a manner available to those under 18."[184] The Court found issue specifically with the CDA's use of the terms "indecent" and "patently offensive" because it was open-ended and covered a large range of "material with serious educational or other value."[185] The court reasoned that unlike obscenity, for example, "indecency has *not* been defined to exclude works of serious literary, artistic, political, or scientific value."[186] Thus, the language of CDA was vague enough to punish speech that is not only protected by the First Amendment, but that could be quite valuable.[187]

Skipping ahead a few years to 2011, *United States v. Cassidy*[188] decided, much like *Shackelford*, that the federal stalking statute under which the defendant was convicted was unconstitutional under the First Amendment.[189] The defendant in this case violated the relevant statute[190] by "us[ing] an interactive computer service" to post messages which "caused substantial emotional distress to a person . . . ."[191] Much like N.C.'s stalking statute, the court took specific issue with the breadth of this language, noting that "the First Amendment protects speech even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes, or standards of good taste."[192] Moreover, the

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[181] 521 U.S. 844 (1997).
[182] *Id.* at 872.
[183] Sara L. Zeigler, *Communications Decency Act of 1996 (1996),* THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1070/communications-decency-act-of-1996.
[184] *Id.*
[185] Reno v. ACLU, 521 U.S. 844, 877 (1997).
[186] *Id.* at 862 (internal quotations omitted).
[187] *See id.*
[188] 814 F. Supp. 2d 574 (D. MD. 2011).
[189] *See id.*
[190] 18 U.S.C. § 2661A(2)(A).
[191] United States v. Cassidy, 814 F. Supp. 2d 574, 576 (D. Md. 2011).
[192] *Id.* at 581–82.

court noted that the "U.S. Supreme Court has consistently classified emotionally distressing or outrageous speech as protected" and that "[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt."[193] Ultimately, the court concluded that under the First Amendment, the statute was unconstitutional as applied to the defendant.[194]

Quite like the line of cases that withstood First Amendment challenges, these cases that failed to pass constitutional muster show a clear trend of courts preferring more narrow, specific language in stalking statutes. Thus, in attempting to remedy N.C.'s current stalking statute such that it is not declared unconstitutional, it will likely need to be narrowed. This, of course, begs the question of how to narrow the language of N.C.'s stalking statute, without also decreasing protections for stalking victims.

B. Robust First Amendment Protections and Robust Protections of Victims at the Cost of the Other?

Though the First Amendment supplies rights of the utmost importance, it is also imperative to remember in discussing these issues that "the right to be free from harassment" is also an important protection.[195] In the *Shackelford* opinion, Judge Davis notes that this case "aptly demonstrates [the] difficult issues [that] arise in attempting to balance, on the one hand, society's laudable desire to protect individuals from emotional injury resulting from unwanted and intrusive comments with, on the other hand, the free speech rights of persons seeking to express themselves on social media."[196] However, while there exists decades of case law establishing the importance and intricacies of protecting free speech,[197] there is a mass of information showing the importance of stalking statutes

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[193] *Id.* at 582 (citations omitted).
[194] *See id.*
[195] Blaine Tolison, *9 Investigates: Stalking Laws and the Challenges Victims Face Getting Protection,* WSOCTV.COM (Sept. 23, 2019, 5:36 PM), https://www.wsoctv.com/news/9-investigates-stalking-laws-and-the-challenges-victims-face-getting-protection/988330944/.
[196] State v. Shackelford, 825 S.E.2d 689, 702 (N.C. Ct. App., 2018).
[197] *See, e.g.,* NAACP v. Alabama, 357, U.S. 449 (1958); Taylor v. Mississippi, 319 U.S. 583 (1943); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., Concurring); United States v. Press Publishing Co., 219 U.S. 1 (1911).

in adequately protecting victims,[198] yet guidance on how to properly draft and enforce those statutes without offending the First Amendment is wanting. This gray area leads to many parts of stalking statutes being invalidated as unconstitutional, leaving victims with less protections and without alternate avenues for recourse.

Prior to the enactment of stalking statutes, the most common protections for people being stalked were injunctions or restraining orders.[199] However, as aforementioned,[200] this remedy proved to be ineffective in providing "any meaningful protection."[201] Injunctions and restraining orders can be difficult to obtain, since many states require a showing of physical abuse.[202] Since stalking often does not include physical abuse, this is yet another barrier to victims gaining protection absent a stalking statute. Moreover, the consequences for breaking these orders, which is often easily done, are typically minor and delayed.[203] A majority of states only punish a violation of a protective order with civil contempt, which then leads to victims of the violated order having to either "obtain an arrest warrant or petition the court to summon the violator to a contempt hearing."[204] Even more, the time delays that typically plague obtaining a contempt hearing or warrant means that victims were often left with no immediate protection. With the need for stalking statutes blatantly apparent in order to adequately protect victims of stalking, it is quite worrisome that these statutes are in danger of offending the First Amendment.

A recent Supreme Court case out of North Carolina, *Packingham v. North Carolina*,[205] provides an example, much like in *Shackelford*, of the tensions between protecting victims while also protecting the First Amendment. This decision also provides persuasive precedent that shows when the two rights—that of victims and that of freedom of expression—are at odds, the First Amendment usually wins.[206]

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[198] *See, e.g.,* Karbarz, *supra* note 155.
[199] *Id.* at 335.
[200] *See supra* note 155 and accompanying text.
[201] Karbarz, *supra* note 155, at 335.
[202] *See id.*
[203] *Id.*
[204] *Id.*
[205] 137 S. Ct. 1730 (2017).
[206] *See id.*

Packingham concerns Lester Gerard Packingham, who, at the age of 21, had sexual intercourse with a 13-year-old girl.[207] Packingham pleaded guilty to "taking indecent liberties with a child," and was required to register as a sex offender because the crime qualifies as "an offense against a minor."[208] As a registered sex offender, Packingham was barred under North Carolina statute, § 14-202.5[209] from "gaining access to commercial social networking sites."[210] A few years later Packingham posted on social media—a Facebook post regarding a dismissed speeding ticket—in violation of this statute.[211] A member of the Durham, NC police department discovered this post, and a grand jury indicted Packingham for his violation of §14-202.5.[212]

The Supreme Court held that NC statute §14-202.5, under which Packingham was indicted, was unconstitutional under the First Amendment.[213] The court conceded that the government had an important interest in "keeping convicted sex offenders away from vulnerable victims," but found that the statute enacted a prohibition "unprecedented in the scope of First Amendment speech [which] it burdens."[214] The Court went on to emphasize the importance of social media to the freedom of speech, by saying that:

> Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using these websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. *These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or*

[207] *Id.* at 1734.
[208] *Id.*
[209] N.C. GEN. STAT. § 14-202.5 (2020).
[210] *Packingham*, 137 S. Ct. at 1734.
[211] *Id.*
[212] *Id.*
[213] *See id.*
[214] *Id.* at 1737.

> *her voice heard*. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."[215]

This specific language from the Supreme Court regarding the important role social media plays in freedom of speech and expression is quite telling, not only of the express tensions that may arise in protecting victims while also protecting everyone's First Amendment rights, but of how these tensions will likely play out in the future as well, especially regarding N.C.'s current stalking statute. The language of the current stalking statute, as *Shackelford* highlights, can be so broadly applied as to prohibit speech on the Internet. With the strong precedent of the Supreme Court's decision in *Packingham* in mind, two things are clear: (1) when forced to decide between a protective statute and First Amendment rights, the Court heavily favors the First Amendment, and (2) it is imperative to the survival of N.C.'s stalking statute, as well as to strike a balance between protecting victims of stalking and protecting First Amendment rights, to amend the stalking statute.

IV. RECOMMENDATION

On a larger, more holistic scale, the tensions between freedom of speech and the state's desire to protect victims of stalking cannot truly be solved unless the law, and courts, catch up with modern technology. However, in the meantime, there are adjustments that the N.C. legislature can make in order to address the issue presented by *Shackelford.* These adjustments are twofold—first, N.C.'s stalking statute should be amended to be narrower and thus out of First Amendment concern. Second, civil remedies, such as restraining and no-contact orders, should both be broadened, and enforced more strictly.

A. Importance of Courts Catching up with Modern Technology

At the forefront of many challenges of stalking statutes under the First Amendment is the fact that many statutes, and First Amendment jurisprudence, leave courts and legislatures in

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[215] *Id.* (emphasis added).

murky waters when it comes to social media. It has been estimated that the law is "at least five years behind" developing technology.[216] For example, definitions of how the Internet works in case law as recent as 2007 are completely out of date now.[217] Sherry Honeycutt, who represents stalking victims and is the legal and policy director for the N.C. Coalition Against Domestic Violence, has commented on this issue, saying, "[w]hat [victims] find when they get in court in the criminal justice system is a system that's not really set up. We don't have laws that are really equipped to prosecute stalking cases on the basis of online social media speech . . . ."[218] This is because, Honeycutt notes, "[a] lot of our criminal jurisprudence grew at a time before we had social media."[219] This inability to keep up with technology inevitably leads to gaps in the law, which only stand to get wider.[220]

The answer to how to resolve the tensions between First Amendment protections and protections of victims in state stalking statutes is heavily nuanced and complicated, to say the least. However, the proper balance cannot be stricken unless the law, and those applying and enforcing the law, catch up with technological advances.

B. Amend North Carolina's Stalking Statute

The N.C. Court of Appeals decision in *Shackelford* leaves the door open for more constitutional challenges to N.C.'s stalking statute and the possibility that more victims will see their stalkers' convictions vacated. In order to best protect victims and allow N.C.'s stalking statute to stand on more solid First Amendment grounds, the statute should be amended. Though two former district court judges have voiced concern that amending the statute is inappropriate because the holding in

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[216] Julia Griffith, Blog, *A Losing Game: The Law Is Struggling to Keep up with Technology,* J. HIGH TECH. L. (April 12, 2019), https://sites.suffolk.edu/jhtl/2019/04/12/a-losing-game-the-law-is-struggling-to-keep-up-with-technology/.
[217] *Id.*
[218] Tolison, *supra* note 195.
[219] Jonathan Drew, *Court: Online Free Speech Rights Trump North Carolina Stalking Conviction,* NEWS 13 WLOS (Mar. 20, 2019), https://wlos.com/news/local/court-online-free-speech-rights-trump-north-carolina-stalking-conviction.
[220] *See* Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology,* MIT TECH. REV. (Apr. 15, 2014), https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/.

Shackelford is a narrow one,[221] cases and challenges like this one are extremely likely to keep occurring. In the *Shackelford* opinion, Judge Davis noted that courts "will no doubt continue to grapple with [this] issue[] going forward."[222] Thus, it is imperative that legislatures amend N.C.'s stalking statute.

Many advocates for victims of stalking, such as Sherry Honeycutt, also want to see N.C.'s stalking laws change because they are "outdated," and the current statute is not really "equipped to prosecute stalking cases on the basis of online social media speech . . . ."[223] UNC School of Government professor Shea Denning agrees, saying that in order "to prevent constitutional challenges, stalking laws need to be updated."[224]

As a result of *State v. Shackelford*, Rep. Lee Zachary proposed changes to the stalking statute in House Bill 558 that would change the stalking definition to someone who "observes, surveils, threatens, or communicates to . . . a person" and remove the "or about" language.[225] Removing this language would "remove public statements about a person from the statute's reach as well as the town-hall business-owner type of communication referenced in *Relerford.*"[226] Additionally, though it is important for courts and legislation to "keep up" with advances in technology, any amendment made to N.C.'s stalking statute likely should not expressly mention social media in order to stay on solid First Amendment grounds. In *Packingham v. North Carolina,* the N.C. Supreme Court noted that a "fundamental principle of the First Amendment" is that all people should "have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[227] The Court goes on to characterize social media as one of "the most important places . . . for [this] exchange of views."[228] This

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[221] Travis Fain, *Stalking Code Rewrite Delayed Over Domestic Violence Concerns,* WRAL, (Apr. 10, 2019, 2:05 PM), https://www.wral.com/stalking-code-rewrite-delayed-over-domestic-violence-concerns/18318102/.
[222] State v. Shackelford, 825 S.E.2d 689, 702 (N.C. Ct. App. 2018).
[223] Tolison, *supra* note 195.
[224] *Id.*
[225] Travis Fain, *Stalking Code Rewrite Delayed Over Domestic Violence Concerns,* WRAL, (Apr. 10, 2019, 2:05 PM), https://www.wral.com/stalking-code-rewrite-delayed-over-domestic-violence-concerns/18318102/.
[226] Shea Denning, *Court Vacates Stalking Convictions on First Amendment Grounds,* N.C. CRIM. LAW (Mar. 20, 2019, 8:00 PM), https://nccriminallaw.sog.unc.edu/court-vacates-stalking-convictions-on-first-amendment-grounds/.
[227] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[228] *Id.* at 1743.

leads to the notion that North Carolina courts will likely be very hesitant to uphold a statute which explicitly references and places any sort of restriction on the use of social media.

Narrowing the language of N.C.'s stalking statute in order to exclude speech or expression protected by the First Amendment has its merits. Namely, it will ensure that the statute is still relatively broad, but it removes language that may cause courts to invalidate the statute as a whole. In other words, though removing the language mentioned above will limit some behaviors that qualify as stalking, it is likely better than the entire statute being declared unconstitutional.

It is important to note, however, that there are concerns that come with making the above proposed amendment to N.C.'s stalking statute. Sherry Honeycutt mentions that "[a]nyone who's worked in victim advocacy in the last ten or fifteen years understands how devastating social media posts can be for a victim."[229] While removing the specific language from N.C.'s stalking statute that concerns communications about a person rather than directly to them may address the First Amendment concerns here, the amendment would effectively eliminate online posts from being considered stalking, which leaves something to be desired for protecting victims.

C. Increased Protections for Civil Protective Orders

Broadening, and increasing the focus on the availability and enforcement of civil protections for stalking can help bridge the gap left from removing the above language from N.C.'s stalking statute. Today, all jurisdictions offer protective orders for victims of stalking.[230] Though protective orders are "designed to prevent future violence rather than punish past conduct," most states make a violation of these orders a crime.[231] This provides a possible loophole for the First Amendment concerns of N.C.'s current stalking statute. Though removing the aforementioned language from the statute makes it more narrow in scope, victims of stalking will most likely still be able to obtain a protective order, since they require a lower burden of proof than in criminal

[229] Drew, *supra* note 219.
[230] Huang, *supra* note 5, at 68.
[231] *Id.* at 68.

proceedings.[232] If the offender then violates that protective order, the victim then has grounds to seek criminal punishment against their stalker. This is then an avenue for victims to see similar remedies offered from criminal cases against their stalkers, but based on the violation of a protective order, rather than a statute. If the criminal case is based upon a violation of a civil order rather than a statute, there is less of a chance for constitutional, specifically First Amendment, challenges.

Though this portion of my recommendation is logical, it is nothing but idealistic without proper enforcement of these protective orders. Without enforcement, protective orders are "like dollar bills that are not legal tender; they are merely pieces of paper."[233] Proper and strong enforcement of these protective orders is imperative because otherwise they offer, at best, "scant protection" and, at worst, may increase the "victim's danger by creating a false sense of security."[234] In fact, one study revealed that around fifty-eight percent of women reported experiencing a protective order violation.[235] Regardless of the reasons behind these violations, both officials and courts must be prepared not only to heavily enforce the weight behind the protective orders, but also enforce punishment of violations of the orders.

Oregon provides an example of what may be necessary regarding an increased focus on the enforcement of protective orders in order to best bridge the gap left from narrowing N.C.'s stalking statute. Oregon enacted a protective order specific to stalking in 1993, which was later amended in 2001 in order to include electronic communications.[236] Though meeting the grounds for stalking in Oregon is a bit harder (which is not recommended for North Carolina), those who do obtain stalking protective orders "receive intense enforcement from police officers, [as] the officers view a violation of a stalking protective order" as a high offense.[237]

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[232] *Id.* at 69.
[233] *Id.* at 70.
[234] Peter Finn & Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement,* NAT'L INSTITUTE OF JUST. 1, 49 (1990), https://www.ncjrs.gov/pdffiles1/Digitization/123263NCJRS.pdf.
[235] Huang, *supra* note 5, at 70.
[236] *Id.* at 76–77.
[237] *Id.* at 77.

V. CONCLUSION

Our rights to freedom of speech and expression, and to live freely from harassment are both important in living free and safe lives. However, what are we do to if those two rights conflict? This is the question posed to courts and legislators in light of First Amendment challenges to state anti-stalking statutes, like in *State v. Shackelford*. In light of the *Shackelford* decision, N.C.'s stalking statute may be at risk of being declared unconstitutional, and thus leave victims of stalking with little to no recourse. With this in mind, it is imperative that legislators work to carefully amend N.C.'s stalking statute such that it fully protects victims while not running afoul of the First Amendment. For the reasons articulated in this Note, the most effective remedy for this is twofold (1) amend N.C.'s anti-stalking statute to be more narrow, removing the language that is questionable under the First Amendment, and (2) expand civil remedies available to victims of stalking to fill the gap left from removing the language in the stalking statute. Careful attention to the new construction of N.C.'s stalking statute, as well as a strong focus on enforcing civil remedies for stalking will strengthen protections for stalking victims, as well as ensure robust protections of First Amendment rights in North Carolina.