U.S. v. Yung: Third Circuit Rejects Overbreadth Challenge to Federal Cyberstalking Statute

I. OVERVIEW

Applying to law school is difficult. For many prospective first year students, securing an alumni interview is a welcome sign that they are serious contenders for a coveted position in an incoming class. However, as challenging, stressful, and rigorously competitive as the admissions process can be, one spurned applicant took his spite to an unusual extreme against a Georgetown Law interviewer after failing to secure an offer of admission. Nearly a year later, the interviewer found himself subjected to intense online harassment— including, for example, false accusations of membership in the Ku Klux Klan.[1] This surreal turn of events, though, was just the beginning for the unfortunate Hoya, who found himself facing a "nightmare" of cyber harassment.[2] It all arose after an interview went horribly wrong with one prospective law student — Ho Ka Terence Yung.[3]

Yung's online harassment eventually rose in intensity to the level of criminal cyberstalking, forbidden conduct under 18 U.S.C. §§ 2261A(2)(B) and 2261(b). By creating false postings that the interviewer sexually harassed coworkers, solicited sex slaves, and raped men, women, and children alike, Yung exposed himself to criminal liability.[4] While federal investigators compiled a "mountain of evidence" eventually linking Yung to the crime, such that he opted to accept a plea agreement, he nevertheless appealed his conviction on constitutional grounds.[5] Yung first argued that the federal cyberstalking statute under

1. United States v. Yung, 37 F.4th 70, 74 (3d Cir. 2022).
2. *Id.* at 75.
3. *Id.* at 74.
4. *Id.* at 74-75.
5. *Id.* at 75.

which he had been convicted, 18 U.S.C. § 2261A, was unconstitutionally overbroad and thus invalid under the First Amendment.[6] Second, Yung contested the district court's award of restitution damages to his victim, the interviewer, for investigative costs, and also to Georgetown University for security measures initiated to protect the interviewer's son, a student.[7] The United States Court of Appeals for the Third Circuit *held* that (1) 18 U.S.C. § 2261A was not overbroad based on a constitutionally required narrow reading of the statute, and (2) the statute required restitution from Yung to the interviewer, but not to Georgetown University. *United States v. Yung*, 37 F.4th 70, 75-76, 81 (3d Cir. 2022).

II. BACKGROUND

In 2006, Congress criminalized cyberstalking by adopting the first version of 18 U.S.C. § 2261A(2) and subsequently broadened its scope in 2013.[8] The statute creates three elements the United States must meet to convict a defendant: (1) the usage of mail or electronic services;[9] (2) with "the intent to kill, injure, harass, or intimidate another person";[10] and (3) creating a "reasonable fear of death, or serious bodily injury" or "substantial emotional distress."[11]

Congress expanded § 2261A(2) in 2013.[12] The amendment's scope went beyond the prior prohibition of speech with a simple intent to harass; rather, the amendment encapsulated speech with an intent to intimidate.[13] This created the possibility for a renewed First Amendment challenge. Criminal cyberstalking defendants may assert the First Amendment defense of overbreadth, which holds a law facially unconstitutional if "a 'substantial number' of its applications" violate the First Amendment, even if their conduct does not fall into a protected speech category.[14] This

6. *Id.*

7. *Id.*

8. *Id.* at 76.

9. 18 U.S.C. § 2261A(2) ("[u]ses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce").

10. *Id.* ("with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person").

11. 18 U.S.C. § 2261A(2)(A), (B) ("engage in a course of conduct that—places that person in reasonable fear of the death of or serious bodily injury to a person . . . or causes . . . substantial emotional distress to a person").

12. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 107 (2013).

13. *Id.*

14. United States v. Stevens, 559 U.S. 460, 461 (2010) (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, n.6 (2008)).

doctrine is different from other kinds of facial challenges, where the mere fact that a law "may conceivably be applied unconstitutionally" is inadequate to establish standing.[15]

Instead, courts must conclude that a statute's alleged overbreadth "is both 'real' and 'substantial'" before striking it down.[16] Courts must also consider that a law is likelier to be overbroad if it punishes a wider variety of speech.[17] For this reason, the United States Supreme Court holds that this doctrine must be applied "sparingly" because its unique standing requirement can threaten protected speech.[18]

The Third Circuit has followed Supreme Court precedent holding that speech "integral to criminal conduct" cannot receive First Amendment protection.[19] For example, it previously held harassing internet postings and letters with communicative intent unprotected because their sole "purpose [was to further a] criminal cyberstalking conspiracy."[20] When faced with similar challenges, other federal circuit courts have not held § 2261A(2) unconstitutional, holding instead it primarily forbids "speech integral to criminal conduct."[21] Thus, courts will avoid construing challenged statutes as overbroad if possible.[22]

As technological progress advances, the boundary of protected speech expands.[23] Nevertheless, Supreme Court precedent strongly discourages lower federal courts from addressing constitutional issues head-on except only when "strictly necessary."[24] The doctrine of constitutional avoidance developed from this precedent. It consists of a series of seven guiding rules for the federal courts when faced with the

15. *Compare* Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) *with* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

16. United States v. Yung, 37 F.4th 70, 76 (3d Cir. 2022) (quoting *Broadrick*, 413 U.S. at 615).

17. Virginia v. Hicks, 539 U.S. 113, 124 (2003).

18. *Broadrick*, 413 U.S. at 613.

19. United States v. Gonzalez, 905 F.3d 165, 191-192 (3d Cir. 2018) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

20. *Id.* at 193.

21. *See* United States v. Ackell, 907 F.3d 67, 75 (1st Cir. 2018) (quoting United States v. Alvarez, 567 U.S. 709, 717 (2012)) (holding that the statute's plain text does not implicate the First Amendment).

22. New York v. Ferber, 458 U.S. 747, 769 n.24 (1982).

23. *See, e.g.*, United States v. Mendelsohn, 896 F.2d 1183, 1185 (9th Cir. 1990) (acknowledging that some computer programs may constitute protected speech); Bernstein v. U.S. Dept. of State, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996), *aff'd*, 176 F.3d 1133 (9th Cir. 1999) (holding that encryption code, as a form of language, fell under definition of protected speech)); Junger v. Daley, 209 F.3d 482 (6th Cir. 2000) (holding likewise that encryption code was First-Amendment protected speech).

24. Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 568 (1947).

possibility of interpreting the Constitution, including: (1) Judicial Minimalism,[25] (2) the Last Resort Rule,[26] (3) the Constitutional-Doubt Canon.[27]

These three all cover questions faced by the federal courts in cases under their current review, urging against the superfluous and encouraging the narrow interpretation.

III. THE COURT'S DECISION

In the noted case, the Third Circuit reexamined the cyberstalking statute, considering whether the statute was overbroad and therefore facially invalid. First, the court examined the elements of the statute, distinguishing the act and result elements as insufficient to limit the breadth of the statute. Second, the court analyzed the intent element, applying a narrow construction to limit the statute's overall breadth. Third, the court reaffirmed the defendant's criminal conviction, rejecting the underlying premise that the defendant could not knowingly and intelligently enter the plea after the Court's analysis of the statute's validity. Fourth, the court reaffirmed the order granting restitution to the interviewer under the special restitution provision, but vacated the order granting restitution to Georgetown Law after applying the general restitution provision.

The court acknowledged that it had previously considered and rejected an overbreadth challenge to the then-unamended version of 18 U.S.C. § 2261A.[28] However, under the law's 2013 amendments, a defendant is liable under a wider set of circumstances.[29] Specifically, a

25. Judicial Minimalism provides that federal courts should refrain from creating "rule[s] of constitutional law broader than is required by the precise facts to which it is to be applied." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs, 113 U.S. 33, 39 (1885)).

26. The Last Resort Rule urges courts to "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," *id.*

27. The Constitutional Doubt Canon prompts federal courts to avoid addressing constitutional questions if "a construction of the statute is fairly possible by which the question may be avoided," *id.* at 348 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

28. United States v. Yung, 37 F.4th 70, 76 (3d Cir. 2022) (citing *Gonzalez*, 905 F.3d at 190-91 n.10 ("Section 2261A is neither overbroad nor unconstitutionally vague. It is not targeted at 'speech or to conduct necessarily associated with speech,' but with harassing and intimidating conduct that is unprotected by the First Amendment. Thus, because 'a substantial number of the statute's applications' are not unconstitutional, it is not overbroad . . . Every one of our sister Courts of Appeals to consider similar overbreadth and vagueness challenges to § 2261A has rejected them.")) (internal citations omitted).

29. *Id.* (citing 18 U.S.C. § 2261A (2006) and 18 U.S.C. § 2261A (2013)).

defendant "no longer has to *cause* substantial emotional distress."[30] Rather, if the conduct in question could simply '"reasonably [be] expected to cause' such distress," the court was obligated to construe the statute under the principle of constitutional avoidance—the narrower lens.[31] It proceeded to analyze each of 18 U.S.C. § 2261A(2)'s three components: the "act," "result" and "intent" elements.

First, the Third Circuit rejected the act and result elements as limitations to the breadth of the statute, distinguishing these elements from the intent element.[32] The court noted that this argument, "that the cyberstalking 'statute focuses [*only*] on conduct, not speech'" was untenable.[33] The statute's "act" element went beyond covering simple criminal *conduct*, targeting speech in online and social media form. Likewise, the result element was insufficient, expanding the definition of an emotional distress reaction for a cyberstalking victim.[34] The court noted here the amount of protected speech that is "substantially emotionally distressing," citing numerous famous (or infamous) examples.[35] Deeply offensive as some may be, they were still protected under the First Amendment.[36]

Second, the court analyzed the intent element, noting that (1) a broad construction of the intent element potentially implicated Constitutional conflicts; and (2) though the statute's text supported a broad interpretation, the doctrine of constitutional avoidance supported a narrow reading of the statute. Looking to the potential Constitutional implications of criminalizing speech, the court compared the effect of a broad versus narrow construction of "harassment" and "intimidation."[37] Here, the court noted that laws that broadly criminalized speech often conflict with the

30. *Id.*

31. *Id.* (citing 18 U.S.C. § 2261A(2)(A), (B)).

32. *Id.* at 76-77 (citing 18 U.S.C. § 2261A(2)).

33. *Id.* at 77 (citing Gov't Br. at 24).

34. *See id.* ("[T]he law captures much speech, in part because it does not require that emotional distress be objectively reasonable. Though we hope that Americans can discuss sensitive issues without taking offense, that is not always so. And the law penalizes speech even when a listener's distress is unexpected or idiosyncratic.")

35. *Id.* (citing Snyder v. Phelps, 562 U.S. 443, 448 (2011)) ("Protesters may picket a marine's funeral with signs like 'Thank God for Dead Soldiers,' 'God Hates Fags,' and "You're Going to Hell."); Hustler Mag. v. Falwell, 485 U.S. 46, 47-48(1988) ("a pornographer may parody a famous minister as having drunken sex with his mother.")

36. *Id.*

37. The Third Circuit notes here that the dictionary definition of harassment falls on "a spectrum from repeated annoyance to outright violence," *id.* at 78. By contrast, a narrow construction of intimidation "can mean a specific, violent action," while a broad construction can mean "[t]o render timid, inspire with fear; to overawe, cow," *id.*

First Amendment; thus, the court remained mindful of the Constitutional dangers posed by broad interpretation of the cyberstalking statue at issue.[38]

To solve the friction between the broad (protected) and narrow (unprotected) constructions, the Third Circuit employed the doctrine of constitutional avoidance, concluding that a narrow reading of the statute is preferred.[39] Before diving into its reasons for why its narrow reading of the intent element was correct, the Third Circuit acknowledged "the strong textual arguments" for reading 18 U.S.C. § 2261A(2) broadly, including via the doctrines of "usage" and "surplusage."[40] However, the court noted § 2261A(2)'s "intent" element merely uses the term "intimidate" without elaborating, creating an inconsistent usage problem.[41] This problem suggests that the statute's usage of "intimidate" is used to mean something different from "intent to cause fear of harm or death," an inconsistent but plausible result that only arises from the statute's broad reading.[42] The court still held that even in the face of this allegedly terminal construction, it "[did] not foreclose the narrower reading"—demonstrating the power of the constitutional avoidance doctrine.[43]

It continued that, far from foreclosing the narrower interpretation method, the broader in fact "suppl[ied] a clue" on the intent element's proper meaning, instead of creating a redundancy or surplusage issue.[44] It so concluded, even while acknowledging Congress "occasionally 'use[s] different words to denote the same concept.'"[45] In frankly reconciling this reality, the court further noted that, for example, this very issue still had not prevented the U.S. Supreme Court from accepting certain unclear constructions of the Affordable Care Act.[46]

38. *Id*. at 78-79. However, the Court does note that both "[h]arassment and intimidation, narrowly construed, are punishable," *id*. at 78.

39. *Id*. at 79 (citation omitted); *see id*. (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 BOSTON U. L. REV. 109, 141 (2010)) ("Because that definition will not 'twist the text beyond what it will bear,' we must adopt [the narrow reading of the statute].").

40. *Id*.

41. *Id*. (citing 18 U.S.C. § 2261A(2)).

42. *Id*.

43. *Id*.

44. *Id*. at 80.

45. *Id*. (quoting ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (Thomson, 2012).

46. *See id*. at 80 (citing King v. Burwell, 576 U.S. 473, 491 (2015)) (constructing ACA despite acknowledgement that "inartful drafting" created a surplusage issue)).

Third, the court acknowledged that it is certainly true jurors are asked to infer intent broadly, lending credence to a broad construction.[47] Nevertheless the narrower construction of the statute's intent element was ultimately proper because its "neighboring words" indicated a reading "limit[ing] intent to harass to 'criminal harassment.'"[48] Ultimately, the court decided that this consideration "ensure[s] that protected speech largely escapes the law's net."[49] The Third Circuit thus affirmed Yung's conviction, rejecting his overbreadth challenge.[50]

In reversing an award of restitution to Georgetown Law while upholding an award of restitution to the interviewer, the court analyzed the differences in harassment suffered by the interviewer versus Georgetown Law. Subject to the special restitution statute for cyberstalking, the interviewer was entitled to "any . . . losses suffered . . . as a proximate result of the offense."[51] Here, expenses "[t]o make that campaign of harassment stop" were foreseeable such that restitution could be awarded pursuant to the statute.[52]

By contrast, the court distinguished Georgetown Law, applying the general restitution statute for cyberstalking as "Georgetown [Law] was never itself harassed."[53] Pursuant to the general restitution statute, Georgetown Law was required to show "damage to or destruction of property."[54] Here, the court broadly concluded that it "do[es] not treat safety and security as a property right."[55] Further the court rejected a broader construction of "tangible property" sufficient to award restitution and declined to clearly define what would be considered a property right in future cases.[56] Additionally, the court remained unconvinced that

47. *See id*. ("We often instruct them to 'consider the natural and probable results or consequences' of a defendant's acts and ask if he 'intended these results or consequences.'")

48. *See id*. (citing United States v. Ackell, 907 F.3d 67, 76 (1st Cir. 2018)) ("Here, both 'kill' and 'injure' are violent verbs. After those verbs, one naturally reads 'intimidate' to mean putting the victim in fear of death or injury . . . Yung's campaign of terror, inciting sexual violence against the interviewer and his family at their home, exemplifies the narrower kind of harassment and intimidation.")

49. *Id.*

50. *Id.* at 81.

51. *Id.* at 83 (citing 18 U.S.C. § 2264(b)(3)(E), (G)).

52. In discussing the relevant expanses, the court noted that "Yung used pseudonyms to defame the interviewer and recruited others to threaten his family," *id*. Thus, expenses to "track Yung down, report him to the authorities, and get charges filed against him" were all sufficiently foreseeable, *id*.

53. *Id*.

54. *Id*. (citing 18 U.S.C. § 3663(b)(1)).

55. *Id*.

56. *Id*.

Georgetown Law could sufficiently demonstrate injury to the hypothetical property.[57] Rather, the court noted that "Yung's threats never made Georgetown's campus unusable for students and faculty, or its security systems unusable for run-of-the-mill disturbances."[58] Notably, the court declined to give a definition of what constitutes property for the purpose of criminal restitution.[59]

IV. ANALYSIS

The court's decision scrupulously followed the Supreme Court's precedent cautioning against liberal grants of overbreadth challenges.[60] In narrowly constructing § 2261A(2)'s intent element, the Third Circuit preserved an effective enforcement mechanism for deterring cyber harassment, especially in its most extreme forms. The court also substantively accounted for cyber harassment's real life severity and impacts. Though characterizing Yung's actions as a "campaign of terror," the court duly remarked that Yung's actions exemplified a "narrower kind of harassment and intimidation."[61] Here, the Court's substantive apprehension of these real-world consequences significantly contributed to it narrowly constructing the statute's intent element.

The Third Circuit relies on the doctrine of constitutional avoidance to conclude that the statute requires a narrow construction.[62] However, the court exerts most of its energy outlining why the statute's broad construction is so strongly supported. For example, the court cites one textual argument for the broad construction, holding such a reading "fits with how juries infer intent."[63] Further, the court emphasizes a broad reading of the statute would allow juries to find an "intent to intimidate" in situations "causing an emotional reaction generally."[64] In the digital context, perhaps a broad reading would better encompass some of the harms posed by cyberbullying.

Reading the court's analysis of the plausible broad interpretation of the statute's intent element suggests that this decision could have easily

57. *See id*. (quoting United States v. Quillen, 335 F.3d 219, 225 (3d Cir. 2003)) ("Damage . . . reduces the value or usefulness of the [property] or spoils its appearance.").

58. *Id.*

59. *Id*. at 83 (citing United States v. Hand, 863 F.2d 1100, 1104 (3d Cir. 1988)).

60. *E.g*., Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); Virginia v. Hicks, 539 U.S. 113, 124 (2003); New York v. Ferber, 458 U.S. 747, 796 n.24 (1982).

61. *Yung*, 37 F.4th at 80.

62. *Id*. at 79.

63. *Id*. at 80.

64. *Id.*

gone the other way. The court laboriously scrutinized just how "strong [the] textual arguments [are] in favor of the broad reading."[65] While the Third Circuit was not persuaded, these admittedly "strong" arguments in favor of granting the overbreadth challenge might persuade another circuit court.

The court concluded further that damage to a facility must be tangible and physical for criminal restitution to be due.[66] In so concluding, it did not find the cost spent by Georgetown in strengthening its security as loss worthy of restitution.[67] This was in contrast to the Third Circuit's previous holding that "an anthrax scare damaged a mail room by making it temporarily 'unusable.'"[68] Today, tangible harm in a cyber context is a reality. Cyberattacks and hacking cause damage to digital infrastructure, rendering it "'unusable.'"[69] The court is possibly wary of this fact – acknowledging that "[e]ven if safety and security were property, Georgetown showed no *damage* to them."[70]

It is interesting to imagine how a court would treat an overbreadth challenge to § 2261A(2) based on its restriction of a more ambiguous form of cyber expression than Yung's overt "campaign of terror."[71] Courts have already held encryption codes as protectable speech.[72] Just because a court can construe online conduct as speech, however, does not necessarily mean it is protected.[73] If a defendant allegedly cyber harassed a victim using one of these recognized forms, a court would have to distinguish between that which was protected and that which was unprotected criminal harassment. Thus, the potential future collision of § 2261A(2)'s proscription of one of these forms of cyber expression, combined with a court constructing the statute broadly, which the Third

65. *Id.* at 79.

66. *Id.* at 83 ("Yung harmed no land, buildings, intellectual property, or the like.")

67. *Id.*

68. *Id.* (citing United States v. Quillen, 335 F.3d 219, 222 (3d Cir. 2003)).

69. *Quillen*, 335 F.3d at 222.

70. *Id.*

71. *Yung*, 37 F.4th at 83.

72. Bernstein v. U.S. Dept. of State, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996); *see also* Junger v. Daley, 209 F.3d 481, 481-82 (6th Cir. 2000) (holding software source code is protected by the First Amendment).

73. RALPH D. CLIFFORD, CYBERCRIME: THE INVESTIGATION, PROSECUTION, AND DEFENSE OF A COMPUTER-RELATED CRIME 254-55 (3d ed. 2011).

Circuit painstakingly acknowledged was plausible, could very well lead to a future successful First Amendment challenge—disrupting mightily America's ability to fight cyberstalking and harassment.

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