RUTH BADER GINSBURG AMERICAN INN OF COURT

October 2019 Pupilage Team

Social Media and the Law

Written Materials

I. What is Social Media?

II. Case Studies of Social Media Gone Wrong

   a. Cyber Bullying

   b. Disbarred Federal Prosecutor

   c. Federal Government Employees and Social Media

III. Top Ten List of Social Media No No's

IV. Discussion, time permitting

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Social Media in Legal Practice
What Do You Use? What Could You Be Using?

The number and variety of social-media platforms can overwhelm even those most eager to incorporate social media into their legal practice. And many of us simply do not have (or do not make) time to think through how certain platforms may enhance our practices. With that in mind, this exercise seeks to serve as a cheat sheet, allowing you to hear from those at your table on how they use social media in their professional lives.

Here's the task: for the platforms below that you use in your practice, share with your table how you have done so and how it has enhanced your practice. For those platforms that you (or those at your table) have not used, discuss how you could possibly utilize them. And for those (if any) who scoff at the thought of using social media in legal practice, remember the mantra of our recently departed Russell Westbrook: #WhyNot.

Facebook
profiles, messaging, groups, ads, etc.
2.41 billion MAUs[1]

YouTube
video-sharing, ads, etc.
2 billion MAUs

Twitter
microblogging (280 max), ads
330 million MAUs

Instagram
photo/video sharing, messaging, ads
1 billion MAUs

LinkedIn
professional networking, job postings
303 million MAUs

Skype
video chat and instant messaging
300 million MAUs

WhatsApp
messaging and VoIP service
1.5 billion MAUs

Pinterest
profiles based on saved images, ads
300 million MAUs

Nextdoor
neighborhood networking, ads
30 million MAUs

Quora
question-and-answer platform, ads
300 million MAUs

Telegram
secure messaging and VoIP service
200 million MAUs

Other
Do you use any other platforms?

[1] "MAUs" refers to monthly active users.

37 Cardozo Arts & Ent. L.J. 165

Cardozo Arts and Entertainment Law Journal
2019

Note
Mendel Forta

CYBERBULLYING: ARE YOU PROTECTED? AN ANALYSIS AND GUIDE TO EFFECTIVE AND CONSTITUTIONAL CYBERBULLYING PROTECTIONS [d1]

*166 INTRODUCTION

With the arrival of the Internet Age came a plethora of benefits, such as communicating with people worldwide, access to vast research tools, and opportunities to cultivate social connections for adolescents who have difficulty making friends. [1] Part of these benefits is due to the ease with which adolescents can regularly access and engage with the internet. [2] Along with the emergence of such technology arrived new risks, including online harassment of adolescents who are increasingly becoming victims of their peers' aggression. [3] Such harassment has been given a name: *cyberbullying*. [4] Cyberbullying covers a range of online activities, such as posting pictures and videos, posting mean-spirited content targeting a person or groups of people, or

even sending text messages, as in the case of the tragic death of a young man named Conrad Roy.[5] There seems to be no limit to the extent of such activity; it even permeates the residue of sexual relationships, such as *revenge porn*, wherein ex-lovers post explicit pictures and videos of their previous romantic partner without the person's consent.[6]

This Note will explore some of the more well-known cyberbullying incidents and judicial treatment of legislation aimed at cyberbullying from North Carolina and Albany County in New York, both of which were ultimately struck down as unconstitutional. In doing so, this Note will provide an in-depth analysis of what courts have said about some current legislation. Lastly, this Note will offer (i) ***167** suggestions to some of the constitutional issues that cyberbullying legislation may run afoul of, and (ii) propositions for statutory construction for future cyberbullying legislation based on previous courts' findings and comments.

A. *The Tragic Death of Conrad Roy*

> On the afternoon of July 13, 2014, an officer with the Fairhaven police department located the deceased in his truck, parked in a store parking lot. The medical examiner concluded that the victim had died after inhaling carbon monoxide that was produced by a gasoline powered water pump located in the truck. *The manner of death was suicide*.[7]

Conrad Roy was eighteen-years-old when he killed himself.[8] However, his death was not deemed to be solely his responsibility.[9] His girlfriend, Michelle Carter, seventeen-years-old at the time, was convicted of involuntary manslaughter for the death of Roy.[10] How, one might ask, can a party be charged with involuntary manslaughter, when the cause of death was suicide? Through "a systematic campaign of coercion on which the virtually present defendant embarked--captured and preserved through her text messages--that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own."[11] Over the course of their relationship, the defendant actively encouraged Roy to kill himself, provided insight and advice as to the manner of the act, quashed his concerns over killing himself, and even berated him for delaying the suicide.[12] On the day Roy actually went through with it, Carter had texted him, "You just [have] to do it."[13]

Commonwealth v. Carter has clear First Amendment implications, as Carter's speech was at issue, namely though phone calls and text messaging.[14] However, some see this Massachusetts Supreme Judicial Court decision as saying that the use of words in this manner was the weapon that killed Conrad Roy.[15] Nancy Gertner, a former federal judge ***168** and Harvard law professor, asked, "[w]ill the next case be a Facebook posting in which someone is encouraged to commit a crime? ... This puts all the things that you say in the mix of criminal responsibility."[16] These are just a couple of the comments on this case, but the stage for the question is set: at what point do virtual words stop being merely words and begin to carry criminal responsibility?

B. *The Particular Vulnerabilities of Children*

This is not the first time a cyberbullying case has directed national attention. Thirteen-year-old Megan Meir engaged in an online relationship, via MySpace, with who she thought was a teenage male named Josh Evans; in reality, however, this person was Megan's classmate's mother.[17] Megan hanged herself shortly after receiving an email from Evans saying that the "world would be a better place without you."[18] This case was hailed the "country's first cyberbullying verdict,"[19] but is hardly the only case. Ryan Halligan,[20] Jessica Logan,[21] and Tyler Clementi[22] are just a few of the more well-known victims of cyberbullying.

However, according to NoBullying.com, an online forum comprised of mental health professionals, educators, and parents,[23] as many as fifty-two percent of young people reported being cyberbullied in 2014.[24]

Children, in their particular vulnerability, need protection from this sort of threat; however, "regulation of online speech treads on delicate constitutional territory."[25] Online speech is still speech,[26] and as such it ***169** must be afforded a robust protection under the First Amendment. It is tempting to lay blanket restrictions on online activity such as cyberbullying; however, doing so would implicate free speech rights, which may compromise a basic founding principle of this country: freedom of speech.[27] Legislators should not jump to drastic measures when crafting legislation to deal with this issue, as the First Amendment is imposing, and unless dealt with judiciously, such legislation will unavoidably be struck down as unconstitutional.

As of yet, there are no federal laws in place that directly address bullying, cyber or otherwise.[28] Cyberbullying that takes the form of discriminatory harassment, stalking, criminal threats, and bias intimidation can be grounds for a lawsuit on the theory of defamation or intentional infliction of emotional distress, says Danielle Keats Citron, a University of Maryland law professor.[29] However, there is no actual federal law that comprehensively defines cyberbullying and attaches criminal responsibly to it.[30] There is some federal legislation that by happenstance covers some aspects of cyberbullying, such as the Interstate Communications Act[31] and the Telephone Harassment Act.[32] However, such legislation does not provide the comprehensive protection that cyberbullying warrants, as it does not address the various and growing media of communication through which cyberbullying can occur.[33] Additionally, what meager protections are in place do not specifically protect children who are increasingly becoming the victims of such heinous acts. There is a need for legislation that prohibits and attaches criminal responsibility to such activity on either a state or federal level; however, as of yet, there are no such federal laws.[34]

I. VARIOUS APPROACHES TO CYBERBULLYING AND THEIR CONSTITUTIONALITY

A. *How Has Cyberbullying Been Dealt with So Far?*

Most states have some sort of cyberbullying laws in place;[35] ***170** however, approaches vary from state to state. California for instance has defined cyberbullying "as sharing nude photos or videos of others with the purpose or effect of humiliating or harassing a student."[36] The punishment under California law could be mere expulsion from public school.[37] Yet this definition of cyberbullying, which was updated to include sharing videos,[38] is a narrow definition of the act that only covers posting of nude content and only extends to students.[39] This would hardly go far enough to prevent, or to punish for, the heartbreaking death of Conrad Roy, which occurred outside of school and did not include the acts of cyberbullying as defined in the California law. California even went as far as proposing legislation that would allow warrantless searches of K-12 students' cell phones, analogizing them to lockers, in an effort to promote student safety and investigate cyberbullying.[40] However, this legislation did not pass the State Legislature,[41] as it produced a host of privacy issues.

Some states, like Florida, have sought to enforce bullying laws through the scope of school-related activity via the Jeffrey Johnston Stand Up for All Students Act.[42] This Act limits what can statutorily be construed as cyberbullying, or bullying in general, to activity that is school-related.[43] This includes activity through school computers or non-school computers, but only covers acts that interfere with school participation or school-related activities.[44] Like the California statute,[45] this too falls short of covering what happened to Conrad Roy entirely outside of school.[46] This case serves to demonstrate what statutes like the Jeffrey Johnston Stand Up for All Students Act fail to address: instances of cyberbullying can and do occur outside school, and the ***171** results can be just as devastating.[47]

Other jurisdictions, like North Carolina and the County of Albany, New York, have attempted to construct legislation that would impose criminal sanctions for cyberbullying. [48] In fact, the State of New York already had laws in place that aimed to provide an environment free from bullying, cyber or otherwise, in public schools. [49]

> The Act relied on the creation and implementation of school board policies to reduce bullying in schools through the appropriate training of personnel, mandatory instruction for students on civility and tolerance, and reporting requirements. The Act did not criminalize bullying behaviors; instead, it incorporated educational penalties such as suspension from school. [50]

Even with this law in place, Albany County found that cyberbullying was too great a danger to be remedied via mere preventative education. [51] The Legislature noted that "forty two percent (42%) of children in the fourth through eighth grade surveyed in a recent poll reported being bullied online." [52] The Albany County Legislature also noted that there have been measures by some states to criminalize cyberbullying; however, the New York Legislature did not adequately address this growing concern. [53] The Albany Legislature had its own idea of how to approach the issue and was clear about what it intended to do: "the purpose of this law is to ban the cyber-bullying in the County of Albany." [54]

The variations in approach to cyberbullying attest to the novelty of the issue and display the uncertainty of how to deal with this growing concern. While the criminalization of cyberbullying seems to be a popular and effective approach, it invariably brings with it the hefty weight of the Constitution, as such laws necessarily implicate free speech rights. [55] The challenge facing those who adopt a criminalization ***172** approach is drafting legislation that serves as adequate protection from the dangers of cyberbullying, while simultaneously respecting delicate free speech rights.

B. *Judicial Treatment*

Cyberbullying, as an act, and the legislative responses to it are still in the infancy stages. Consequently, the scope of the problem itself and the nature of laws dealing with it are still being ironed out. Currently, only two such laws have been subject to judicial treatment; [56] however, there are current cases that are challenging cyberbullying laws in other states as well. [57] Organizations such as the ACLU and the Electronic Frontier Foundation, as well as First Amendment expert and UCLA law professor, Eugene Volokh, are some of the names behind such lawsuits. [58] However, the only two cases thus far to have dealt with cyberbullying legislation, in New York and North Carolina, were not brought by any of the aforementioned parties. These cases resulted from convictions and subsequent appeals to each of the states' highest courts, both of which ultimately struck down the legislation as unconstitutional. [59]

1. *People v. Marquan M.*: The Albany County Law

People v. Marquan M. concerns the Albany law, [60] which--after reaching the New York Court of Appeals--was found to be unconstitutional. Defendant, Marquan M., a sixteen-year-old student attending Cohoes High School in Albany County, created a Facebook page titled "Cohoes Flame." [61] On this page, he anonymously posted pictures of his classmates with detailed descriptions of their supposed sexual practices, proclivities, sexual partners, and other varieties of personal information. [62] The captions of the posting, which the court ***173** called "vulgar and offensive," [63] elicited responses that threatened the creator

of the page with physical harm.[64] A police investigation found Marquan M. was the creator of the page and the one behind the postings.[65] Marquan M. admitted to his involvement and was subsequently charged with cyberbullying under the Albany law.[66]

This case grew in magnitude from a mere criminal prosecution to a constitutional issue, when defendant argued that "Albany County's cyberbullying law violates the Free Speech Clause of the First Amendment because it is overbroad in that it includes a wide array of protected expression, and is unlawfully vague since it does not give fair notice to the public of the proscribed conduct."[67] The court, in finding this local law to be unconstitutional, found two constitutional defects: vagueness and infringement of First Amendment free speech protection. However, the primary concern of the court was the free speech implications of this law.[68]

a. The Albany Cyberbullying Law Restricts Free Speech

The Free Speech Clause of the First Amendment does not allow the government power "to restrict expression because of its message, its ideas, its subject matter, or its content."[69] However, where there is a compelling government interest, a fundamental right such as free speech can be restricted, so long as the legislation in question is narrowly tailored as the least restrictive means of doing so.[70] An abridgment of fundamental rights can be permissible, so long as what is being accomplished by such an abridgment is important enough to the government to be called a "compelling government interest," and that the manner of accomplishing such a goal is done via the least restrictive means possible; this two-part test bears the name *strict scrutiny*. Free speech is unquestionably a fundamental right;[71] as such, the New York Court of Appeals applied the two-part strict scrutiny test to the Albany law. The two prongs of a strict scrutiny analysis are (1) the law must be justified by a *compelling government interest*, and (2) the law is ***174** *narrowly drawn* to serve that interest.[72]

The County acknowledged that the cyberbullying law encroached on known areas of free speech, and thus triggered strict scrutiny.[73] Because this would require a showing that the government has compelling interest and the law is narrowly tailored, a very high standard, the County requested that the court sever the offending portions of the statute to judicially create a version of the statute that could meet constitutional muster under strict scrutiny.[74] The court declined to do so, finding that it is precluded from severing the legislation based on the doctrine of separation of governmental powers, as that would constitute a rewriting of a legislative enactment that is incompatible with the language of the statute.[75] The court reasoned that to remove the word "person"[76] from the statute "would not cure all the law's constitutional ills."[77] As the statute would need an abundance of modifications, the final *judicially legislated* version would hardly resemble the original text of the law. The court found that such modifications are unconstitutionally vague, as a reading of the statute by any person would not provide fair notice of what is a legal act and what is a criminal one.[78]

b. The Cyberbullying Law Is Overbroad

The overbreadth of the Albany statute comes in two forms. The first, as mentioned previously, is the word "person" in Section 3 of the statute.[79] The court found this overbroad, as it covers communications aimed at more than just minors and can cover adults and corporate entities.[80] This language steps beyond the protection of children, which was the Legislature's stated intent,[81] and serves to provide a blanket restriction on cyberbullying against *anyone*. Because the language ***175** providing protection spans far beyond the intended protection of minors, the second prong of strict scrutiny, "narrowly tailored," is offended by this overbreadth, fostering what the court poetically titled a "constitutional ill."[82]

The second form of overbreadth are the modes of communication covered by this statute. The Albany law includes "posting statements on the internet or through a computer or email network[;] disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information[;] or sending hate mail." [83] The court found this law overbroad, as it contains every imaginable form of electronic communication, such as telephone conversations, a radio transmission, or even a telegram. [84] Considering the breadth of this language, [85] the court found the provision as written to criminalize a broad array of speech stretching far beyond the conventional understanding of cyberbullying, such as an email to a corporation that discloses private information. [86]

The court acknowledged that the First Amendment may not protect the actions of Marquan M. [87] However, the Albany statute in its current form criminalizes modes of expression far greater than the stated intent; it goes beyond covering acts of cyberbullying aimed at children. [88] The New York Court of Appeals reversed the lower court's ruling and dismissed the accusatory instrument, finding it "facially invalid under the Free Speech Clause of the First Amendment." [89]

c. The Dissent

The dissent mentioned other portions of the statute which the majority also found problematic as unconstitutionally vague: words such as "annoy" and "humiliate" used to reference acts that fall under the definition of cyberbullying. [90] In doing so, the dissent agreed that ***176** such words "are not remarkable for their precision." [91] However, when words such as "annoy" and "humiliate" are read in conjunction in a later portion in the clause, "with no legitimate private, personal, or public purpose," [92] the dissent stated that the words can withstand a constitutional challenge on grounds of vagueness. [93] The dissent found it perfectly reasonable to read the statute as listing terms like "annoy" and "humiliate" as a non-exhaustive list of actions that are prohibited, so long as they only intended to inflict significant emotional harm. [94] The dissent ultimately found that while this particular law may have been overbroad, speech that generally serves no legitimate purpose is prohibited and not protect under free speech. [95] This leaves hope that there is, in theory, a formulation of a cyberbullying law that could lend criminal responsibility for actions that are valueless and harmful speech and still meet constitutional muster.

2. *State v. Bishop*: The North Carolina Law

The other cyberbullying law that has received judicial treatment is a North Carolina statute [96] addressed in *State v. Bishop*. Defendant, Robert Bishop, and victim, Dillion Price, were both students at Southern Alamance High School in 2011. [97] During the fall of 2011,

> [s]ome of Price's classmates began to post negative pictures and comments about Price on Facebook, including on Price's own Facebook page. In September 2011, a male classmate posted on Facebook a screenshot of a sexually themed text message Price had inadvertently sent him. Below that post, several individuals commented, including Price and defendant. Price accused the posting student of altering or falsifying the screenshot and threatened to fight him over the matter; defendant commented that the text was "excessively homoerotic" and accused others of being "defensive" and "pathetic for taking the internet so seriously." [98]

***177** This was not the only such incident; at least two others followed in which both Bishop and Price commented on the posts. [99] These comments escalated to accusations about each other's sexual inclinations, name-calling, and insults. [100]

In December of 2011, Price's mother found Price upset in his room, crying, throwing things, and hitting himself in the head. [101] She saw some of the comments and pictures that were posted by his classmates on his cell phone. [102] His mother, fearing for his well-being, contacted the police who investigated the postings through the use of an undercover Facebook account. [103] In February of 2012, Bishop along with some, but not all, of the others involved in these discussions, was arrested and charged under the cyberbullying statute. [104]

Bishop was tried in district court, appealed to Superior Court in Alamance County, was convicted by a jury of violating the statute, and then appealed to the Court of Appeals, which affirmed the lower court's ruling. [105] Throughout these various trials and appeals, Bishop had three primary arguments as to the unconstitutionality of the statute: (1) it restricts speech protected under the First Amendment; (2) this restriction is content-based; and (3) it sweeps too broadly to satisfy the exacting demands of strict scrutiny. [106] The Supreme Court of North Carolina, in finding this law to be unconstitutional, was persuaded by all three arguments.

a. The North Carolina Cyberbullying Statute Restricts Free Speech

The court began its analysis by determining whether the First Amendment is actually implicated; in doing so, the court asked if the cyberbullying statute restricts free speech and expressive conduct, or whether it merely affects non-expressive conduct. [107] This determination is central to the constitutional question raised by the statute, as the Supreme Court stated that "we have extended First Amendment protection only to conduct that is inherently expressive." [108] Thus, if the statute is seen as merely regulating non-expressive conduct, there would be no implication of the First Amendment and Bishop's argument that the statute abridges his First Amendment rights would fail. The question of expressive or non-expressive conduct arises here, because the ***178** "speech" in question is not traditional speech, but is expression via posting online. This distinction did not sway the court, which found that "we are satisfied that N.C.G.S. § 14-458.1(a)(1)(d) applies to speech and not solely, or even predominantly, to nonexpressive conduct." [109]

In illustrating its point, the court references *Hest Tech., Inc. v. Perdue*. [110] In *Hest*, North Carolina Supreme Court found that a statute regulating electronically conducted sweepstakes did not implicate the First Amendment, as it regulated non-communicative conduct rather than protected speech. [111] The law in *Hest* stands in contrast to the cyberbullying law in this case, as the law here prohibited the posting of certain subject matter online with specific intent. [112] Because the court deemed posting particular subject matter on the internet to be protected free speech, the North Carolina cyberbullying law necessarily regulated protected free speech, and not conduct, [113] thus implicating the First Amendment.

b. The North Carolina Cyberbullying Statute Is a Content-Based Restriction

The court then turns to the restriction itself to ascertain whether it is content-based or content-neutral. [114] This inquiry serves to determine the level of scrutiny that the court should apply when ascertaining the constitutionality of the statute. [115] A content-based restriction must satisfy *strict scrutiny*, [116] whereas a content-neutral restriction need only meet the lesser *intermediate scrutiny*. [117] To meet constitutional muster under strict scrutiny, the government must demonstrate that the restriction (1) furthers

a compelling government interest, and (2) does so via the least restrictive means possible.[118] On the other hand, an intermediate scrutiny analysis requires a showing that the restriction (1) ***179** furthers an important government interest, and (2) does so by means that are substantially related to that interest.[119]

The court turns to the 2015 United States Supreme Court decision, *Reed v. Town of Gilbert*,[120] for a multi-pronged analysis of whether a restriction is content-based or content-neutral. The *Reed* court advises that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[121] Simply put, if the regulation only applies because a certain topic or message is being conveyed, then the restriction is content-based. Yet, there is a certain amount of ambiguity with this standard, as regulation of speech based on topic or message can be less than obvious. While it clearly can be noted whether speech is regulated based on message, it is unclear if this applies to regulation of speech based on function or purpose. The *Reed* court clarified this by explicitly stating there can be two routes to a content-based restriction. The first is a restriction that on its face draws a distinction based on message conveyed within the speech.[122] The second is the subtler restriction based on function and purpose of the speech.[123] However, because both a function-based restriction and message-based restriction necessarily require an examination of the message a speaker conveys, both will be content-based and subject to the more rigorous strict scrutiny.[124]

With that introduction, the *Bishop* court ultimately expressed that the cyberbullying law is content-based. Defendant was arrested and charged in violation of the provision that prohibits one, with intent to torment, to "post or encourage others to post private, personal, or sexual information pertaining to a minor."[125] The statute, as written, criminalizes a portion of messages but not others, and a determination of violation requires scrutinization of the communicated content.[126] Because the statute requires an examination of the content of the speech itself in order to determine whether it is covered by the statute, the statute is necessarily content-based and can only be upheld if it meets ***180** the requirements of strict scrutiny.[127]

c. The North Carolina Statute Is Overbroad and Does Not Meet Strict Scrutiny

The court finds axiomatic that "protecting children from online bullying is a compelling governmental interest."[128] Normally, the government would have to demonstrate with clarity that its purpose is both constitutional and substantial.[129] However, here the State and the defendant agree that there is a compelling government interest in protecting children from physical and psychological harm. In doing so, the North Carolina Supreme Court is consistent with the United States Supreme Court precedent that held the State has "a compelling interest in protecting the physical and psychological well-being of minors."[130] Thus, the first prong of strict scrutiny, the compelling government interest, is satisfied.

The second prong of the strict scrutiny analysis, "narrowly drawn to serve that interest,"[131] is where the difficulty lies. "Narrowly drawn" is satisfied by a showing that the means chosen to effectuate the compelling government interest are the *least restrictive means* of doing so.[132] The question then becomes, is the formulation of  Section 14-458.1(a)(1)(d) the least restrictive means of accomplishing the compelling government interest of protecting children from psychological and physical harm? The North Carolina Supreme Court did not think so and identified two issues that render the cyberbullying statute overbroad. The first is lack of a requirement of injury or even awareness of the offense by the victim.[133] The second issue is with the definitions of terms within the statute.[134]

i. There Is No Requirement of Injury in the North Carolina Statute

The court does not expound on its objections to the statutory language based on lack of injury or awareness of the posting by the victim. However, it falls in line with the rest of the court's findings of overbreadth, which take issue with every aspect of the statute that goes to the protection of children from cyberbullying. It seems as if the court sees the object of the statute to punish for the offense of cyberbullying, as opposed to deter such action from the outset. If the court felt the object was to deter cyberbullying, then any action that could manifest as ***181** cyberbullying would be covered as prohibitive measure. However, where fundamental rights are at issue, such as here, the court sheds the deterring aspect, finding that only an offense resulting in injury, or at the very least, when the victim is actually aware of the posting, can be upheld as the least restrictive means.

ii. The North Carolina Statutory Definitions Are Too Vague and Sweeping

Aside from the fact that the North Carolina cyberbullying statute contains no requirements of injury or even a victim's knowledge of the harmful conduct, the court takes issue with a host of definitions within the statute. The first group concerns those that relate to the motive and intent aspect of the crime under section 14-458.1(a)(1). The statute reads, in part, "[i]t shall be unlawful for any person to use a computer or computer network ... with the intent to intimidate or torment a minor ... to [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor."[135] Yet, the statute did not define terms such as "intimidate" or "torment." The court found that absent such definitions the statute stretches far beyond the State's legitimate interest in protecting the psychological well-being of minors.[136] The State, in arguing that the statute should be read broadly, said that "torment" should include intent to "annoy, pester, or harass,"[137] and "intimidate" should be read as "to make timid: fill with fear."[138]

The court dismissed the State's interpretation of "torment" somewhat comically, saying that "[t]he protection of minors' mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from *online annoyance*."[139] The court did not find the act of annoying, pestering, or harassing to be enough of a peril to fall within the effectuation of the compelling government interest purported to be accomplished by this statute. As such, this definition is too sweeping to satisfy the narrowly tailored prong of a strict scrutiny analysis.

The court similarly dismissed the State's interpretation of the word "intimidate," when it found that it does not need to address what it dubs a "hypothetical statute."[140] However, the court did mention that such a definition would present a closer constitutional question, as there is jurisprudence that unprotected true threats, such as "those statements ***182** where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,"[141] are not protected free speech.[142] The threat need not be truthful in its intent of violence; however, if it is such that it would engender fear, there is protection from it.[143] In the instant case, however, the cyberbullying statute offered no definition on the word "intimidate"; as such, there is an overbreadth issue that falls short of strict scrutiny.

The other definitions that the court found to be overly broad are those that deal with the subject matter of the restricted activity itself. The relevant part of the statue reads, "[p]ost or encourage others to post on the internet private, personal, or sexual information pertaining to a minor."[144] The court similarly objected, stating that the statute criminalizes posting certain information pertaining to a minor, such as private, personal, or sexual information, but does not offer definitions for these terms.[145] While colloquially such words as "private" and "personal" have meaning, in the context of a statute subjected to strict scrutiny, every term must be defined precisely to avoid overbreadth. The State again offered an explanation for each of the terms that the court should read into the language of the statute. The State proposed that (i) "private" be defined as "secluded from the sight, presence, or intrusion of others," or "of or confined to the individual";[146] (ii) "personal" be defined as "of or relating to a particular person," or "concerning a particular person and his or her private business, interests, or activities";[147]

and (iii) "sexual" be defined as "of, relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions," or "implying or symbolizing erotic desires or activity."[148] In a manner as sweeping as the statute itself, the court dismissed all of these definitions as broad.[149] In particular, the court took issue with the State's proposed definition of the word "personal." In a strongly worded statement, the court said:

> The State's proposed definition of "personal" as "[o]f or relating to a particular person" is especially sweeping. Were we to adopt the State's position, it could be unlawful to post on the Internet *any information "relating to a particular [minor]*." Such an ***183** interpretation would essentially criminalize posting any information about any specific minor if done with the requisite intent.[150]

This is a perfect example of not the least restrictive way to effectuate the compelling government interest. This statute, as written, and the State's proposed explanation stretch far beyond the intent of the statute to begin with "protecting children from online bullying."[151] This definition, as the court stated, would criminalize a host of other activity that "a robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior."[152]

The court found the goal of the statute laudable.[153] However, it noted that because there is no requirement for actual injury and the overbreadth of the various terms in the statutory language, the cyberbullying statute is unconstitutional. As such, the court "reverse[d] the decision of the Court of Appeals finding no error in defendant's conviction for cyberbullying."[154]

II. DISCUSSION

The New York Court of Appeals in *Marquan M*. expressed hope for a cyberbullying statute that could meet constitutional muster.[155] While no cyberbullying statutes thus far have been held constitutionally valid, with careful treading around the delicate constitutional issues that will necessarily arise from such legislation, it can possibly be done.

Strict scrutiny will be the standard by which a cyberbullying law must be analyzed; this is because such a restriction on free speech will necessarily be a content-based restriction. The test provided by the *Reed* court stated that a restriction is content-based if it applies because of the idea expressed or message conveyed.[156] No matter how a cyberbullying statute is legislated, there invariably will be some inspection of the language used in every instance to determine if the statute will apply. The analysis will look at both the idea being expressed and the message being conveyed to ascertain the applicability of the statute. This will always be true, as one cannot possibly know whether the cyberbullying statute applies by any means other than looking at the idea being expressed or the message conveyed.[157] Thus, the standard will always ***184** be strict scrutiny, and legislatures have some difficult work cut out for them.

In order to draft cyberbullying legislation that could be constitutionally valid, there are five aspects that must be addressed and sufficiently narrowly tailored: (1) who is protected, and who can be responsible under such legislation; (2) what actions are covered and prohibited; (3) what mens rea or requisite intent is necessary to trigger a prohibition under the statute; (4) what subject matter or content is to be covered by the statute; and (5) what injury, if any, is required to make a case under the statute.

A. *Subject: Who Does the Statute Deal With?*

Who will be covered by the statute? This inquiry is twofold: it encompasses both who will be protected by the statute and who will be criminally responsible for a violation of the cyberbullying law. As the unfortunate story of Megan Meir [158] illustrates, minors are not the only ones who can cyberbully with devastating results. Both the Albany and North Carolina statutes held minors and adults are included in the word "person" [159] and consequently included in the cyberbullying prohibition. Neither of the courts found issue with adults and minors being liable for a violation of the statute; as such, it seems unlikely that a future court might find issue with it either.

The second part, who shall be protected, is also somewhat straightforward. The Albany law was broader than the North Carolina one in this regard, reading, "no person shall engage in cyber-bullying against any minor or *person* in the County of Albany." [160] Not only were minors protected from cyberbullying, but virtually everyone else was as well, as the statute's definition of *person* went far beyond minors. [161] This kind of broad and unnecessary protection is exactly the kind of behavior the North Carolina Supreme Court stated a "robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior." [162] The compelling government interest of this legislation is to protect *minors* from cyberbullying. The court in *Bishop* found this governmental interest ***185** "undisputed," [163] and only a law that effectuates that compelling government interest can meet constitutional muster under strict scrutiny, due to the narrowly tailored requirement of the analysis. The Albany law stated its purpose was "to ban the [c]yber-bullying in the County of Albany," [164] and it failed as overly broad. The government does not seem to have a compelling government interest in protecting *everyone* from cyberbullying so as to abridge First Amendment rights; thus, the legislative proposal to address cyberbullying must only serve to protect minors.

B. *Actions: What Actions Can Be Covered by This Statute?*

The scope of what actions can be covered by such a statute is another consideration that must be addressed in the legislative process. While the acts themselves are not as simply stated as who can be protected by such a statute, there is some flexibility in that the acts are subject to the subject matter and intent element of the crime, which can narrow the act in scope and render it as the least restrictive manner of effectuation, thus satisfying strict scrutiny. It is likely that because of this, neither of the courts found issue with the action component of the statutes.

The bigger issue with the action component of the statute is not a constitutional one, but a policy issue to create the most comprehensive protection possible to effectuate the compelling government interest of protecting minors from the dangers of cyberbullying. As the internet and other networks becomes more commonplace and accessible, and the number of platforms increase, manners of communicating and terminology for such communication will invariably change in ways that may be unanticipated by the drafters. The Albany statute took a different approach here, using broad language such as "communicating," "causing to communicate," "posting statements on the internet or through a computer or email network," and "disseminating ... information." [165] The problem with such broad language, such as "communicating" or "causing to communicate," is that there is a risk of overbreadth, due to the stringent requirement of strict scrutiny. In fact, the court took issue with the language of the Albany statute, finding that this broad inclusion of acts extends far ***186** beyond instances of cyberbullying. [166] Therefore, while it is tempting to draft a statute that is somewhat broad so as to not require delving into the variety of media through which cyberbullying can occur, it is ill advised, as there is a risk of constitutional invalidity, considering the standard by which the statute will be analyzed.

The North Carolina statute took a step in the direction of specificity with the language it used:

> (1) a. Build a fake profile or Web site; b. Pose as a minor in: 1. An Internet chat room; 2. An electronic mail message; or 3. An instant message; c. Follow a minor online or into an Internet chat room; or d. Post or encourage

> others to post on the Internet private, personal, or sexual information pertaining to a minor ... (2) a. Post a real or doctored image of a minor on the Internet; b. Access, alter, or erase any computer network, computer data, computer program, or computer software ... or c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor. (3) Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor. (4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network). (5) Sign up a minor for a pornographic Internet site ... (6) Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages. [167]

This statute covers an array of acts, such as "sign[ing] up a minor for a pornographic internet site," [168] that one might not typically consider, including when drafting cyberbullying legislation. Stereotypical cyberbullying seems to be acts like taunting or threatening, [169] whereas this statute goes far beyond that. It is not inconceivable that a court, when adjudicating the constitutionality of such legislation, might look to what "regular" cyberbullying is, and find that only language aimed at criminalizing such conduct could be both in furtherance of the compelling government interest and narrowly tailored as the least effective means of doing so. Thus, while this North Carolina statute is somewhat broad, and the court found no issue in terms of the ***187** acts prohibited, it might be prudent to include language that is aimed at the compelling government interest, such as "taunting" or "threatening."

C. *Intent: What Must Be the Requisite State of Mind to Fall Under the Statute?*

What intent is required for an act to fall under a cyberbullying statute? On its face, this question seems somewhat forthright; however, both the Albany and North Carolina statutes were met with judicial brick walls on this issue. Strict scrutiny requires precise definitions for all areas; however, specifically in regard to intent, neither Albany nor North Carolina provided such precision within their statutes, which were struck down as unconstitutional.

The North Carolina statute stated that acts must be accompanied "[w]ith the intent to intimidate or torment a minor" to satisfy the intent component. [170] However, as the *Bishop* court noted, "neither 'intimidate' nor 'torment' is defined in the statute." [171] When the State argued that the language should be construed broadly, [172] the court declined to follow such a proposition, finding it exceeded the compelling interest of the statute, as children do not need protection from mere online annoyance. [173] Similarly, in *Marquan M.*, the New York Court of Appeals found language such as "harass, annoy ... taunt ... [or] humiliate" problematic, as it too exceeded the scope of protection that the statute aims to provide, which is conduct far more egregious than a mere annoyance. [174]

So, what language would suffice to provide protection and meet constitutional muster under strict scrutiny? This is hard to say for certain. As the court in *Bishop* noted, "it is perhaps unsurprising that few content-based restrictions have survived this inquiry." [175] That is, one cannot be certain whether a statute of this nature will meet constitutional muster until it comes face to face with the judiciary.

However, there is some language that might be narrower than what was proposed in either of the statutes. The Albany statute went in the right direction by including a portion of such language "with no legitimate private, personal, or public purpose."[176] However, the statute went awry by then including language such as "harass, annoy, threaten, [and] abuse."[177] The statute should not have included such broad ***188** undefined language; instead, it should have read something like, "no legitimate private, personal, or public purpose, with the intent to cause significant mental anguish or inflict significant emotional harm." This narrows the statute to address only those acts aimed at causing a specific kind of harm that has been associated with cyberbullying.[178] In doing so, there may be slight losses in the protection provided, as the intent for the act must be (1) with no legitimate private, personal, or public purpose, and (2) with the intent to cause significant mental anguish or inflict significant emotional harm. Because these are very specific intent aspects, there will likely be instances of cyberbullying that could be covered by legislation, but will not rise to the prohibition of this statute because of these stringent intent requirements.[179] However, such a sacrifice in protection must be made, as the abridgement of First Amendment rights cannot be "strict in theory but feeble in fact."[180]

D. *Subject Matter: What Content in an Act Will Trigger the Statute?*

The biggest, and perhaps most difficult, obstacle that drafters of cyberbullying statutes face is the subject matter or content of the act requirement. Stated more simply, what content can or cannot be used in a cyberbullying act that would render a violation of the statute? Both the Albany and North Carolina statutes bear some similarity here in that they cover communications that are sexual in nature--the Albany statute references "sexually explicit photographs ... or sexual information,"[181] and the North Carolina statute mentions "sexual information."[182] Only the *Bishop* court took issue with not defining "sexual information"; however, what this phrase entails is axiomatic. As Justice Stewart famously stated in *Jacobellis v. Ohio*, he will not define hardcore pornography, "[b]ut [he] know[s] it when [he] see[s] it."[183] So, maybe the State's definition of sexual information to include "relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions, or [i]mplying or symbolizing erotic desires or activity,"[184] was too broad; however, it was not far from the most narrow version that could serve as adequate protection. That definition ***189** of sexual information might look something like, "relating to or involving the victim's sexual proclivities, identity, tendencies, experiences true or false, or sex organs."

Sexual information, however, is not the only type used to bully. In fact, neither the Megan Meier nor the Conrad Roy instance mentioned sexuality at all.[185] Both statutes problematically addressed this issue by using language such as "personal," "private," or even "false information";[186] however, the courts found this language, especially the word "personal," to be overbroad.[187] Personal, while colloquially used to describe "one's private life, relationship, or emotions,"[188] was used by the State to suggest a different meaning. The State's definition covers virtually all types of information, if a person is involved. A much narrower definition and subject matter requirement is necessary to meet strict scrutiny as the least restrictive manner. As tedious as this may seem, there would likely need to be a mention of specific "personal" information that can be included with the breadth of this statute. Neither of the statutes did this, and this was the biggest issue in terms of overbreadth.

It is a daunting task to try and anticipate all manners in which information could be used to bully; however, that is necessary to meet the extreme stringency of strict scrutiny. There can be no catch-all language here, such as "hurtful information" or "information likely to cause hurt"; that would be too broad. The Legislature must delve into the murky water of a minor's sensitivities to discover what topics or subjects can be used in a cyberbully attack so as to ascertain what can be covered in the statute. This will not be easy and will probably require amendments over time to meet the needs of situations as they arise. Some suggested topics to include relate to physical appearance, race, gender identity, sexual orientation, habits, character traits, disabilities, origin, and socioeconomic background. This is by no means an exhaustive or comprehensive list, and the Legislature

might find this to be extraneous or overly cautious language; however, there must be exactitude in definitions that are clear and unambiguous, if this statute is to stand a chance.

E. *Injury: What Must Result from the Act?*

The last element a cyberbullying statute would require is some sort of injury or awareness on the part of the victim. This, however, is not a ***190** given. Only the North Carolina Supreme Court found this to be an issue,[189] leaving the possibility that such an element may not be absolutely necessary, depending on the jurisdiction. As mentioned previously, it is possible the *Bishop* court only required injury to narrow the scope of the statute to serve as a penal device as opposed to an instrument of deterrence.

Requiring injury, however, in a sense defeats the goal of a cyberbullying statute, which according to the Albany statute was "to ban cyberbullying in the County of Albany."[190] In other words, if we want to banish a damaging behavior, such as cyberbullying, why have an injury requirement that necessitates an incident and negative consequence before action can be taken? The response to this is the theme that prevails throughout the entire drafting of a cyberbullying statute: the least restrictive means is necessary to meet the constitutional muster in a content-based restriction, which the injury requirement undoubtedly is.

III. MODEL CYBERBULLYING STATUTE

The findings of the New York and North Carolina courts provide invaluable insight as to the constitutional concerns of drafting cyberbullying legislation. A close reading and analysis of the opinions gives a glimpse into what other courts might find in their examination of similar laws. Below is a model draft of portions of a cyberbullying statute, based on the findings of the courts discussed in this Note. This model draft is largely based on the substance and format of the Albany statute, as it reads more simply and is more comprehensive than the North Carolina one.[191]

"CYBERBULLING" shall mean any act causing a communication to be sent via electronic means, including posting or sending statements, photographs, or videos, relating to or involving the victim's sexual orientation, gender identity, sexual tendencies, sexual experiences true or false, sexual organs, appearance, religion, race, or ethnicity, with no legitimate private, personal, or public purpose, with the intent to cause significant mental anguish or inflict significant emotional harm.

"MINOR" shall mean any natural person or individual under the age of eighteen (18).

"PERSON" shall mean any natural person, individual, corporation, ***191** unincorporated association, proprietorship, firm, partnership, joint venture, joint-stock association, or other entity or business organization of any kind.

"COMMUNCIATION" shall mean conveyance or disclosure, including but not limited to posting, sending, tweeting, emailing, commenting, sharing, messaging, instant messaging, texting, blogging, snapping, or vlogging.

PROHIBITION - No person shall engage in cyberbullying against any minor in [insert jurisdiction].

CONCLUSION

Cyberbullying is a travesty that ails the youth of our generation.[192] Education, while a great tool with the hope to prevent, arguably does not rise to the necessity of creating consequences that can punish and deter such heinous acts and the results that inevitably follow. While there has been limited judicial treatment on such legislation, there has been enough to realize that

drafting cyberbullying legislation will be no simple task, and there will be no guarantee of success. However, considering the language that we now have from the courts, legislatures can draft legislation that can meet the requirements of strict scrutiny, and thus attempt to curb this kind of action, so that minors may flourish in an Internet Age and engage in the benefits of it, while limiting the exposure to risk and harmful interactions through it. The fact that such legislation may not be effortlessly constitutional should not deter the legislative process. Even if there are forms of communication that are not includable due to their current non-existence, amendments can be made; regardless, some legislative protection should be put in place to effectuate this compelling government interest of protecting minors from the dangers of cyberbullying.

Footnotes

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1 Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media, Violence and Adolescents: An Emerging Public Health Problem*, 41 J. ADOLESCENT HEALTH S1, S1-S5 (2007).

2 Janis Wolak, Kimberly Mitchell & David Finkelhor, *Online Victimization of Youth: Five Years Later*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD. (2006), http://www.unh.edu/ccrc/pdf/CV138.pdf (stating that by 2005, ninety-one percent of children had regular access to the internet and online materials).

3 *Id*.; Justin W. Patchin, *Summary of our Cyberbullying Research (2004-2016)*, CYBERBULLYING RES. CTR. (Nov. 26, 2016), https://cyberbullying.org/summary-of-our-cyberbullying-research (demonstrating that in recent years close to thirty percent of adolescents claim to have been the victim of some manner of cyberbullying).

4 *Cyberbullying*, DICTIONARY.COM, http://www.dictionary.com/browse/cyberbullying?s=t (last visited Aug. 17, 2018) ("The act of harassing someone online by sending or posting mean messages, usually anonymously.").

5 *See* Lizzie Crocker, *The Bully Waging War Against Bullies*, DAILY BEAST (Oct. 10, 2013), http://www.thedailybeast.com/the-bully-waging-war-against-bullies?source=dictionary; Megan A. Moreno, *Cyberbullying*, 168 JAMA PEDIATRICS 397 (May 2014) (defining cyberbullying as "an aggressive, intentional act or behavior that is carried out by a group or an individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself"); Commonwealth v. Carter, 52 N.E.3d 1054, 1056 (Mass. 2016).

6 *Revenge Porn*, DICTIONARY.COM, http://www.dictionary.com/browse/revenge-porn (last visited Aug. 14, 2018).

7 *Carter*, 52 N.E.3d at 1056.

8 *Id*.

9 *Id*. at 1065.

10 *Id*. at 1056.

11 *Id*. at 1064.

12 *Id*. at 1057-58 ("[T]he defendant encouraged the victim to kill himself, instructed him as to when and how he should kill himself, assuaged his concerns over killing himself, and chastised him when he delayed doing so.").

13 *Id*. at 1059.

14 *Id*.

15 Katharine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html?mcubz=1 (quoting Matthew Segal of the ACLU) ("[W]hat she did is killing him, that her words literally killed him, that the murder weapon here was her words.").

16 *Id*.

17 Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES (Nov. 26, 2008), http://www.nytimes.com/2008/11/27/us/27myspace.html?mcubz=1.

18 *Id*.

19 *Id*.

20 Lisa Capretto, *A Father's Painful Crusade Against Bullying 12 Years After His Son's Suicide*, HUFFINGTON POST: OWN (Apr. 6, 2016), http://www.huffingtonpost.com/entry/john-halligan-ryan-suicide_us_57043f13e4b0537661880e93.

21 *Jessica Logan Suicide: Parents of Dead Teen Sue School, Friends Over Sexting Harassment*, HUFFINGTON POST (Mar. 18, 2010), http://www.huffingtonpost.com/2009/12/07/jessica-logan-suicide-par_n_382825.html.

22 Patrick McGeehan, *Conviction Thrown Out for Ex-Rutgers Student in Tyler Clementi Case*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/nyregion/conviction-thrown-out-for-rutgers-student-in-tyler-clementi-case.html?mcubz=1.

23 NOBULLYING.COM, (May 2, 2017), https://nobullying.com/about.

24 *Cyberbullying Statistics*, NOBULLYING.COM (June 12, 2017), https://nobullying.com/cyber-bullying-statistics-2014/.

25 Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 847 (2010).

26 *In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011) ("[O]nline speech stands on the same footing as other speech."); *see also* Danielle Keats Citron, *Free Speech Does Not Protect Cyberharassment*, N.Y. TIMES: ROOM FOR DEBATE (updated Dec. 3, 2014, 12:54 PM), https://www.nytimes.com/roomfordebate/2014/08/19/the-war-against-online-trolls/free-speech-does-not-protect-cyberharassment.

27 *See* U.S. CONST. amend. I.

28 *Federal Laws*, STOPBULLYING.GOV, https://www.stopbullying.gov/laws/federal/index.html (last visited Sept. 30, 2017).

29 Citron, *supra* note 26.

30 *Key Components in State Anti-bullying Laws*, STOPBULLYING.GOV, https://www.stopbullying.gov/laws/key-components/index.html (last visited Sept. 30, 2017) (explaining key components of state anti-bullying laws on the *Key Components in State Anti-bullying Laws* page).

31 18 U.S.C. § 875 (2012).

32 47 U.S.C. § 223 (2012).

33 18 U.S.C. § 875 (2012) (covering interstate communications, but really geared at harassment communication that deals with extortion or ransom); 47 U.S.C. § 223 (2012) (applying only to interstate communications, specifically phone calls).

34 *Federal Laws, supra* note 28.

35 *Bullying Laws Across America*, CYBERBULLYING RES. CTR., https://cyberbullying.org/bullying-laws (last visited on Oct. 27, 2017) (explaining that forty-eight states have laws that include some sort of measure for cyberbullying or harassment, forty-four states have laws imposing criminal sanctions for cyberbullying or electronic harassment, and only sixteen states include laws that cover off campus activity).

36 Sophia Bollag, *Students Who Cyberbully Using Sexting and Video Can Be Expelled Under Bills Signed by Governor*, L.A. TIMES, (Sept. 21, 2016), http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-students-who-cyberbully-using-sexting-1474489610-htmlstory.html.

37 *Id*.

38 *Id*.

39 The law would fall short of many kinds of cyberbullying, including harassment, stalking, or shaming that do not include photos or videos. This would not cover bullying in the Conrad Roy case, which was a conversation over text.

40 David Kravets, *Legislation Allowing Warrantless Student Phone Searches Dies for Now,* ARTSTECHNIA, (Apr. 13, 2017), https://arstechnica.com/tech-policy/2017/04/legislation-allowing-warrantless-student-phone-searches-dies-for-now/.

41 *Id*.

42 FLA. STAT. ANN. § 1006.147(1) (West 2016).

43 *Id*. at § 1006.147(2).

44 *Id*.

45 Bollag, *supra* note 36.

46 *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1052 (Mass. 2016).

47 *Id*.

48 N.C. GEN. STAT. ANN. § 14-458.1(b) (2012) ("Any person who violates this section shall be guilty of cyber-bullying, which offense shall be punishable as a Class 1 misdemeanor if the defendant is 18 years of age or older at the time the offense is committed. If the defendant is under the age of 18 at the time the offense is committed, the offense shall be punishable as a Class 2 misdemeanor.") (invalidated by State v. Bishop, 787 S.E.2d 814 (N.C. 2016)); Albany County, N.Y., Local Law No. 11 (Nov. 8, 2010) ("Any person who knowingly violates the provisions of this local law shall be guilty of an unclassified misdemeanor ....").

49 N.Y. Educ. § 10 (McKinney 2012) ("It is hereby declared to be the policy of the state to afford all students in public schools an environment free of discrimination and harassment.").

50 People v. Marquan M., 19 N.E.3d 480, 483 (N.Y. 2014).

51 Albany County, N.Y., Local Law No. 11 (Nov. 8, 2010).

52 *Id*.

53 *Id*. ("[T]he New York State Legislature has failed to address this problem.").

54 *Id*.

55 Eugene Volokh, *New York's Highest Court Strikes Down Cyber-bullying Law*, WASH. POST (Jul. 1, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/01/new-yorks-highest-court-strikes-down-cyber-bullying-law/?utm_term=.a8d03c628e17.

56 State v. Bishop, 787 S.E.2d 814 (N.C. 2016); People v. Marquan M., 19 N.E.3d 480 (N.Y. 2014).

57 Eric Heisig, *Lawsuit Challenges Ohio Internet Harassment Law Claiming It Stifles Criticism of Public Officials*, CLEVLAND.COM (May 17, 2017), https://www.cleveland.com/court-justice/index.ssf/2017/05/lawsuit_challenges_ohio_intern.html ("A liberal blog and conservative group filed a federal lawsuit Tuesday to challenge an Ohio law passed last year that prohibits internet harassment, saying it's overly broad and infringes on the First Amendment."); *see also* David Lumb, *Privacy Group Says Washington Cyberbullying Law Is Censoring Instead*, ENGADGET (Aug. 23, 2017), https://www.engadget.com/2017/08/23/privacy-group-washington-cyberbullying-law-censors-instead/ (mentioning Rynearson v. Ferguson, No. 3:17-CV-05531(RBL), 2017 WL 4517790 (W.D. Oct. 10, 2017), which the ACLU and Electronic Frontier Foundation (EFF) filed amicus briefs for).

58 Volokh, *supra* note 55; *see also* Lumb, *supra* note 57.

59 *See generally Bishop*, 787 S.E.2d 814; *Marquan M.*, 19 N.E.3d 480.

60 Albany County, N.Y., Local Law No. 11 § 1 (Nov. 8, 2010).

61 *Marquan M.*, 19 N.E.3d at 484.

62 *Id*. ("He anonymously posted photographs of high-school classmates and other adolescents, with detailed descriptions of their alleged sexual practices and predilections, sexual partners, and other types of personal information.").

63 *Id*.

64 *Id*.

65 *Id*.

66 *Id*. (explaining that Marquan M. was charged under the aforementioned law from Albany County).

67 *Id*.

68 *Id*. at 485-88 ("Our task therefore is to determine whether the specific statutory language of the Albany County legislative enactment can comfortably coexist with the right to free speech.").

69 *Id*. at 485 (citing U.S. v. Stevens, 559 U.S. 460, 468 (2010)).

70 *Id*.

71 Cox v. Louisiana, 379 U.S. 536 (1965) ("The rights of free speech and assembly ... [are] fundamental in our democratic society ....").

72 Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 798 (2011) (mentioning that a state "can demonstrate that it passes strict scrutiny ... [if] it is [one] justified by a compelling government interest and [two] is narrowly drawn to serve that interest.").

73 *Marquan M.*, 19 N.E.3d at 486-87.

74 *Id*. at 487.

75 *Id*. ("The doctrine of separation of governmental powers prevents a court from rewriting a legislative enactment through the creative use of a severability clause when the result is incompatible with the language of the statute.").

76 Albany County, N.Y., Local Law No. 11 § 3 (Nov. 8, 2010) ("No person shall engage in cyber-bullying against any minor or *person* in the County of Albany."). The use of the word *person* expands the breadth of the statute, such that it is directed at a group more expansive than just minors. The court found that a prohibition from cyberbullying against anyone exceeded the scope of the compelling government interest of protecting minors from the harms of cyberbullying.

77 *Marquan M.*, 19 N.E.3d at 484.

78 *Id*. at 488 ("[E]nters the realm of vagueness because any person who reads it would lack fair notice of what is legal and what constitutes a crime.").

79 Albany County, N.Y., Local Law No. 11 § 3 (Nov. 8, 2010).

80 *Marquan M.*, 19 N.E.3d at 486 ("[O]n its face, the law covers communications aimed at adults, and fictitious or corporate entities.").

81 Albany County, N.Y., Local Law No. 11 § 3 (Nov. 8, 2010).

82 *Marquan M.*, 19 N.E.3d at 487.

83 Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010).

84 *Marquan M.*, 19 N.E.3d at 487. While the County was satisfied with cutting most of this language and leaving just three types of electronic communications: "(1) sexually explicit photographs; (2) private or personal sexual information; and (3) false sexual information with no legitimate public, personal or private purpose," the court found that it could not sever the law so greatly without entering the realm of vagueness, *id*.

85 The scope of people and types of acts covered.

86 *Marquan M.*, 19 N.E.3d at 486 ("[T]he provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult.").

87 The dissent takes this point even further, saying that cyberbullying is "valueless and harmful speech when the government proves, among other things, that the speaker had no legitimate purpose for engaging in it. The speech so prohibited (i.e. that which is covered by the Albany statute) is not protected speech." *Id*. at 488.

88 *Id*.

89 *Id*.

90 *Id*.

91 *Id*.

92 Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010).

93 *Marquan M.*, 19 N.E.3d at 488 ("We have twice held, however, that they are clear enough to withstand a constitutional challenge for vagueness (People v. Shack, 86 N.Y.2d 529, 533 (1995) (holding valid a prohibition on the making of a telephone call 'with intent to harass, annoy, threaten or alarm another person ... with no purpose of legitimate communication'); People v. Stuart, 100 N.Y.2d 412, 428 (2003) (holding valid an anti-stalking statute prohibiting a described course of conduct when engaged in 'for no legitimate purpose')).").

94 "Significant emotional harm" is another portion of the cyberbullying definition under Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010).

95 *Marquan M.*, 19 N.E.3d at 489 ("[T]he Cyber-Bullying law prohibits a narrow category of valueless and harmful speech when the government proves, among other things, that the speaker had no legitimate purpose for engaging in it. The speech so prohibited is not protected speech.").

96 *See generally* N.C. GEN. STAT. ANN. § 14-458.1 (2012).

97 State v. Bishop, 787 S.E.2d 814, 815 (N.C. 2016).

98 *Id*.

99 *Id*.

100 *Id*.

101 *Id*.

102 *Id*.

103 *Id*.

104 *Id*.

105 *Id*.

106 *Id*.

107 *Id*. at 816.

108 Rumsfeld v. Forum for Acad. & Inst'l Rights, 547 U.S. 47, 66 (2006).

109 *Bishop*, 787 S.E.2d at 816 (stating that the distinction between traditional speech and internet based speech is a fictitious one. "Posting information on the Internet--whatever the subject matter--can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby--activities long protected by the First Amendment.").

110 Hest Tech., Inc. v. Perdue, 749 S.E.2d 429 (N.C. 2012).

111 *Id*. at 439.

112 *Bishop*, 787 S.E.2d at 817 ("[T]his statute outlawed posting particular subject matter, on the internet, with certain intent.").

113 *Id*. ("Such communication does not lose protection merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety--whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket.").

114 *Id*.

115 *Id*.

116 *Id*. at 818 ("Content based speech regulations must satisfy strict scrutiny. Such restrictions 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'") (citing Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015)).

117 *Id*.

118 *Strict Scrutiny*, CORNELL L. SCH., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Nov. 18, 2017).

119 *Intermediate Scrutiny*, CORNELL L. SCH., https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Nov. 18, 2017).

120 Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).

121 *Id*. at 2227.

122 *Id*.

123 *Id*.

124 *Id*. (explaining that no matter whether the function of the message is being looked at, the fact that there is some sort of examination requirement of the speech to determine if the regulation applies is--in and of itself--the characteristic that renders a regulation content-based).

125 N.C. GEN. STAT. ANN. §14-458.1(a)(1)(d) (2012).

126 State v. Bishop, 787 S.E.2d 814, 818 (N.C. 2016) ("The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication.").

127 *Id*.

128 *Id*.

129 *Id*. (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013)).

130 Sable Commc'ns. of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

131 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 798 (2011).

132 McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 196 (2014).

133 *Bishop*, 787 S.E.2d at 821.

134 *Id*.

135 N.C. GEN. STAT. ANN. § 14-458.1(a)(1)(d) (2012).

136 *Bishop*, 787 S.E.2d at 819.

137 *Id*.

138 *Id*.

139 *Id*.

140 *Id*.

141 Virginia v. Black, 538 U.S. 343, 359 (2003).

142 *Id*.

143 *Id*.

144 N.C. GEN. STAT. ANN. § 14-458.1(a)(1)(d) (2012).

145 *Bishop*, 787 S.E.2d at 821 ("The statute criminalizes posting online 'private, personal, or sexual information pertaining to a minor.' Again, these terms are not defined by the statute.").

146 *Id*.

147 *Id*.

148 *Id*.

149 *Id*.

150 *Id*.

151 *Id*. at 819.

152 *Id*. at 821.

153 *Id*.

154 *Id*.

155 People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014) (Smith, J., dissenting) ("It seems to me that those provisions can be readily severed from the rest of the legislation and that what remains can, without any strain on its language, be interpreted in a way that renders it constitutionally valid.").

156 Reed v. Town of Gilbert, 135 S.Ct. 2218, 2227 (2015).

157 If an instance of cyberbullying occurred, there would have to be an examination to determine whether the language is such that it falls within the statuary language. This constant examination is sufficient to render the statute a content-based restriction.

158 Steinhauer, *supra* note 17 (stating that a classmate's mother was the aggressing party who cyberbullied Megan Meir).

159 Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010) ("[N]o *person* shall engage in cyberbullying."); N.C. GEN. STAT. ANN. § 14-458.1(a) (2012) ("[I]t shall be unlawful for any *person* to use a computer or computer network to do any of the following ....").

160 Albany County, N.Y., Local Law No. 11 § 3 (Nov. 8, 2010).

161 *Id*. at § 2 ("PERSON shall mean any natural person, individual, corporation, unincorporated association, proprietorship, firm, partnership, joint venture, joint-stock association, or other entity or business organization of any kind.").

162 State v. Bishop, 787 S.E.2d 814, 821 (N.C. 2016).

163 *Id*. at 819.

164 § 1.

165 *Id*. at § 2 ("CYBER-BULLYING shall mean any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing

or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.").

166 People v. Marquan M., 19 N.E.3d 480, 486 (N.Y. 2014).

167 N.C. GEN. STAT. ANN. § 14-458.1(a) (2012).

168 *Id*. at § 14-458.1(a)(5).

169 Albany County, N.Y., Local Law No. 11 § 1 (Nov. 8, 2010) ("[P]erpetrators of cyber-bullying are often more extreme in the *threats* and *taunts* they inflict on their victims ....").

170 N.C. GEN. STAT. ANN. §14-458.1(a)(1) (2012).

171 State v. Bishop, 787 S.E.2d 814, 821 (N.C. 2016).

172 *Id*. (mentioning the terms "annoy, pester, or harass").

173 *Id*.

174 People v. Marquan M., 19 N.E.3d 480, 486 (N.Y. 2014) (citing Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010)).

175 *Bishop*, 787 S.E.2d at 819.

176 § 2.

177 *Id*.

178 *Id*. at § 1 ("This Legislature further finds that victims of cyber-bullying suffer very real and serious harm as a result of these incidents, often showing signs of depression, anxiety, social isolation, nervousness when interacting with technology, and low self esteem.").

179 E.g., an instance of intimidation or taunting that does not cause significant mental anguish or emotional harm.

180 *Bishop*, 787 S.E.2d at 819 (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013)).

181 § 2.

182 N.C. GEN. STAT. ANN. §14-458.1(a)(1)(d) (2012).

183 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

184 *Bishop*, 787 S.E.2d at 821.

185 Megan Meir was bullied by a friend's mother for not being a "nice" person, and Conrad Roy was pushed to suicide by his girlfriend.

186 § 14-458.1(a)(1)(d); Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010).

187 *Bishop*, 787 S.E.2d at 821 ("The State's proposed definition of personal as '[o]f or relating to a particular person' is especially sweeping.").

188 *Personal*, DICTIONARY.COM, http://www.dictionary.com/browse/personal (last visited Feb. 3, 2018).

189 *See* *Bishop*, 787 S.E.2d at 820 ("At the outset, it is apparent that the statute contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting.").

190 Albany County, N.Y., Local Law No. 11 § 1 (Nov. 8, 2010).

191 This choice to base the model draft off the Albany statute is largely personal; however, it is motivated by both the ease of reading that is apparent in the Albany statute and the paragra ph format, as opposed to various subsections of the North Carolina one.

192 § 1 ("This Legislature finds that cyber-bullying is rampant.").

37 CDZAELJ 165

22 Suffolk J. Trial & App. Advoc. 292

Suffolk Journal of Trial and Appellate Advocacy
2016-2017

Note
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THE TRANSFORMATION OF INDIRECT HARASSMENT IN THE 21ST CENTURY: HARASSMENT TELEPHONE LAWS, CYBERBULLYING, AND NEW WAYS OF ANALYZING FIRST AMENDMENT RIGHTS

I. INTRODUCTION

With the introduction of the Internet, smartphones, and the continuing development of social media, our society has adopted new ways of communicating that transcends our ancestor's imaginations.[1] Nevertheless, with this transformation of online communication came a new set of dangers, including identity theft, hacking, and online harassment, which led to civil lawsuits and criminal cases of first impression.[2] This ***293** conflict led to what is now known as "cyberbullying," which has not been precisely defined.[3] Provisions, however, have been in place for other indirect modes of harassment such as the Federal Harassment Telephone Law, which criminalizes perpetrators of harassing telephone calls.[4] This provision ***294** sparked inspiration for present-day cyberbullying statutes in various states.[5] However, critics argue that these cyberbullying statutes and the Telephone ***295** Harassment Law prohibit a broad range of speech protected by the First Amendment.[6] While this prohibition will decrease the amount of indirect ***296** harassment cases and ultimately lead to a more peaceful society, our nation must analyze these types of laws critically before implementing them.[7]

This note will: (I) examine the development of indirect harassment laws from the Harassment Telephone Laws passed in the early 1930's to present cyberbullying laws;[8] (II) look to cases analyzing the validity of these aforementioned laws, the issues arising out of these laws, and how they alter our understanding of the First Amendment;[9] (III) argue that, while these laws may have changed our understanding of the First Amendment in beneficial ***297** ways, they may not be the best solution in resolving indirect harassment;[10] and (IV) the note will conclude that these indirect harassment laws ultimately affect the First Amendment in a vital, yet dangerous way.[11]

II. HISTORY

A. Telephone Harassment

The invention of the telephone has allowed individuals to communicate with one another from across the globe in an inexpensive way; but such an invention has also led to new ways for harassers to induce fear upon others.[12] One of the first examples of telephone harassment came in the late 1890's, when the first telephones were used by early switchboard ***298** operators,

who mainly consisted of "notoriously rude" teenage boys. [13] The problem of telephone harassment, nevertheless, expanded as the telephone increased in popularity, which led to lawsuits against ex-lovers, stalkers, and others because of their "telephonic assaults" on others. [14] As a result, federal and state legislators sought to pass laws to crack down on this type of harassment. [15]

***299** However, statutes that criminalize harassment via telephone calls encounter challenges to their validity on the grounds of vagueness, and lend themselves to numerous types of interpretation. [16] For example, the use of terms such as "obscene" and "profane" to describe the type of calls prohibited are academic terms that are difficult to apply in specific circumstances. [17] Nonetheless, telephone harassment laws have had great ***300** implications in our society today and act as a model for other harassment laws such as cyberbullying statutes. [18]

B. Cyberbullying

Cyberbullying received national recognition after the suicide of thirteen-year-old Megan Meier, who received numerous insulting messages on her MySpace account that ultimately led to her suicide in 2006. [19] However, when the incident arose in 2007, local law enforcement said that the crime, while it "might've been rude, it might've been immature ... it wasn't illegal." [20] Cyberbullying has now become more prevalent, as more children experience it through increased social media and cell phone use. [21] ***301** Consequently, after Meier's tragic death and an increase in cyberbullying incidents, numerous jurisdictions sought to pass legislation to criminalize internet harassment. [22] Massachusetts became one of these jurisdictions after ***302** the death of, Phoebe Prince, a high school student who committed suicide after she was harassed online by her fellow classmates. [23] In response to this tragic incident, Massachusetts legislatures defined cyberbullying in "An Act Relative to Bullying in Schools" to confront the issue of cyberbullying in schools throughout the State. [24] This law has come into question after the ***303** death of Conrad Roy III on July 13, 2014; here, Roy committed suicide after Michelle Carter sent text messages and Facebook posts persuading Roy to kill himself. [25] On July 1, 2016, the Massachusetts Supreme Judicial Court ("SJC") ruled that Carter must stand trial facing a charge for manslaughter ***304** based on her text messages to Roy. [26] Nonetheless, Carter's attorney claimed that Carter's texts, while suggesting a "systematic campaign of coercion" targeting Roy's insecurities, were protected by the First Amendment; thus, although Massachusetts legislators have passed the aforementioned "Act Relative to Bullying in Schools", there is still debate over whether Carter's speech should be protected or exposed to criminal punishment. [27]

Although these statutes have the inherent positive quality of eliminating cyberbullying, they also have numerous negative qualities; for example, cyberbullying statutes can limit a broad array of speech protected under the First Amendment: analogous to the Harassment Telephone Law. [28] ***305** Cyberbullying is also difficult to equate to other forms of harassment because of the ways in which a cyberbully could harass another in an indirect, rather than a direct, way. [29] In fact, cyberbullying is extremely different from a direct physical altercation between a bully and his or her victim, and even different from a harassing telephone call directed at the victim; thus, it is questionable whether one should be criminalized for such an indirect act like cyberbullying. [30] Furthermore, even if there were ***306** cyberbullying statutes enacted nationwide, this would not mean the cyberbully would automatically face punishment. [31] Rather, it would still be "up to a prosecutor to make a good case," demonstrating the heavy responsibility placed on attorneys when confronting and litigating cyberbullying cases. [32] Finally, support for cyberbullying statutes is tantamount to support for a more refined First Amendment, where freedom of speech "is employed as a conditional privilege that can be revoked." [33] ***307** Notwithstanding the negativity surrounding cyberbullying statutes, they have passed with rapid speed throughout the United States, including in Massachusetts, to keep young individuals safe from the serious dangers of harassment. [34]

III. FACTS

A. Interpretation of Telephone Harassment Laws

One of the preeminent cases that first demonstrates the validity of the Telephone Harassment Laws was *United States v. Lampley*.[35] In the case, ***308** Lampley had briefly dated Hatlen; but seventeen years after the relationship ended, Lampley contacted Hatlen, who was now married and had four children.[36] Lampley then explained that he wanted to see Hatlen again; and when she refused, Lampley declared that he would "make life miserable for her."[37] Subsequently, Lampley made ten to twelve harassing telephone calls a week to Hatlen for approximately a year.[38] As a result, Lampley was charged primarily with conducting a harassing interstate telephone call under 47 U.S.C. § 223(1)(D).[39] Lampley later appealed the decision, arguing that Section 223(1)(D) violated his right to free speech under the First Amendment of the United States Constitution because the statute does not say that the telephone call must include harassing language.[40] Arguably according to Lampley, without the harassing language requirement, the court charged him for simply communicating with another; thus, going against his ***309** right to free speech.[41] However, the court did not agree with Lampley; rather, it held that not all speech can be protected under the First Amendment and in passing Section 223, Congress had a compelling interest to protect others from fear.[42]

In addition, 47 U.S.C. § 223 has been analyzed in *United States v. Bowker*.[43] In *Bowker*, the defendant sent harassing emails to Tina Knight's place of employment at WKBN Television in Ohio, made 146 calls within eight months to WKBN, and made sixteen calls to Knight's residential phone in a seventeen day period.[44] Consequently, Bowker was charged under ***311** 47 U.S.C. § 223(a)(1)(C) for making a call with the "intent to annoy, abuse, ... or harass any person ...."[45] However, Bowker argues that because Knight recognized his voice, he is not in violation of Section 223(a)(1)(C) since calls under the statute must be made without disclosing identity.[46] Nonetheless, the court found Bowker's argument inadequate due to the frequency with which he made calls to Knight in an eight-month period while using a caller identification blocking feature.[47] Additionally, Bowker made calls to Knight on multiple occasions where no conversation followed; thus, this supports the argument that his calls were harassing and that Knight had no way of identifying him as the caller.[48] Subsequently, the court convicted Bowker under the telephone harassment law.[49]

B. Interpretation of Cyberbullying Statutes

Even in our technologically advanced society with the widespread use of touch phones, wifi, and social media, courts still use the telephone ***312** harassment law to analyze cyberbullying.[50] For example, in *State v. Bishop*,[51] the court analyzed North Carolina's recently passed cyberbullying statute by noting the statute's comparison to the State's harassing telephone law.[52] In this case, high school student Dillon Price received negative comments on Facebook from his classmates.[53] One of these classmates was ***313** Robert Bishop, who posted numerous comments about Price calling him homophobic, homosexual, and stating that Bishop "never got the chance to slap [Dillon] down before Christmas break."[54] As a result, police charged Bishop with one count of cyberbullying under the North Carolina Cyberbullying Statute, N.C. GEN. STAT. § 14-458.1(a)(1)(d).[55] However, ***314** Bishop argued that the statute was an overbroad criminalization of protected speech and that the statute, overall, was unconstitutionally vague on its face.[56] The Appeals Court disagreed with this argument, stating that while

the cyberbullying statute may regulate some aspects of speech, such regulation is valid since the statute's main purpose is to prohibit the communication of information pertaining to a minor with the intent to intimidate or torment; consequently, the Appeals Court held that the statute was constitutional under the First Amendment. [57]

Additionally in *Rosario v. Clark County Sch. Dist.*, [58] the District of Nevada upheld a cyberbullying policy when a student posted obscene language on his Twitter account. [59] In *Rosario*, Juliano Rosario was a student at Desert Oasis High School in Nevada who played on the school's basketball team. [60] After the final basketball game of the season, Juliano and his parents went out for dinner outside the school's campus at a local restaurant. [61] While eating dinner with his parents, Juliano posted several vulgar tweets directed at school officials. [62] When the tweets were later discovered, school officials and administrators filed a complaint against ***315** Juliano, charging him under the school's cyberbullying policy. [63] Juliano then filed this action stating that the above complaint violated his First Amendment rights. [64] While the cyberbullying policy for most of the tweets that he posted, the court ruled that one of his tweets could not be protected under the First Amendment, as it signified "obscene material"; thus, for this tweet, Juliano violated the school's cyberbullying policy. [65]

Although the Appeals Court in *Bishop* and the District Court of Nevada ruled that their respective cyberbullying policies did not violate the Free Speech Clause of the First Amendment, other courts have held that their states' cyberbullying statutes were unconstitutional and violated the Free Speech Clause. [66] In fact, in a recent decision by the North Carolina Supreme Court in *State v. Bishop*, [67] the court overruled the decision of the North Carolina Appeals Court and held that the State's cyberbullying statute was unconstitutional and "create[s] a criminal prohibition of alarming breadth." [68] The North Carolina Supreme Court overruled their predecessors' unanimous decision by conducting a detailed First Amendment analysis to determine whether the statute prohibited free speech. [69] First, the court asked whether the North Carolina cyberbullying statute, particularly Section (a)(1)(d), ***316** prohibited protected speech or "inherently" expressive conduct; if it did prohibit either of these, then the statute would be unconstitutional against the First Amendment. [70] Because the court concluded that the statute prohibited protected speech in the form of internet positing, the court then debated whether (a)(1)(d) of the cyberbullying statute is content-based or content-neutral, which ultimately determines the level of scrutiny that the court must apply when analyzing a First Amendment issue. [71] In response to this debate, the court held that because the statute defines the speech that it seeks to prohibit, but forces the court to analyze the content of the communication before it criminalizes the suspect, the statute is content-based; thus, it must be analyzed through the strict scrutiny standard. [72] For the state to succeed in upholding its cyberbullying statute through strict scrutiny, it must show that the statute "serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest." [73] While the court held that ***317** protecting children from cyberbullying attacks is definitively a compelling government interest, the state statute was not narrowly tailored. [74] In other words, the statute here was not "the least restrictive means" in order to restrict cyberbullying attacks because it does not require a victim of cyberbullying to sustain injury as a result of the attack, nor does it define what conduct is forbidden in the statute. [75] As a result, because the North Carolina cyberbullying statute did not pass the strict scrutiny test, it represented a "criminal prohibition of alarming breadth" and was, therefore, unconstitutional. [76]

Furthermore, in *People v. Marquan M.*, [77] the court held that the Albany County cyberbullying statute was unconstitutional. [78] In *Marquan M.*, a high school student anonymously posted sexual photographs and information about a classmate on Facebook. [79] The classmate was extremely offended by such posting and as a result, the defendant was prosecuted for cyberbullying under the Albany County cyberbullying statute. [80] When the defendant later argued that the Albany County

cyberbullying statute violated free speech under the First Amendment, the court agreed and ruled that the ***318** statute embraced a wide array of speech that goes "far beyond the cyberbullying of children." [81]

Similarly, in *Bell v. Itawamba Cnty. Sch. Bd.* [82] the dissenting justices recognized the importance of protecting free speech under the First Amendment, specifically against school board prohibitions that restricted it. [83] In the case, Bell posted a rap video on the Internet outside school grounds containing threatening and harassing language against two teachers ***319** at his high school. [84] As a response, the school board suspended Bell and placed him in an alternative school for nine weeks. [85] Bell then sued the school board stating that it took away his right to free speech under the First Amendment. [86] As a result, the majority argued that this video contained threatening and harassing language that the federal government, and in this case the school board, could regulate. [87] The dissent, however, highlighted ***320** that minors are entitled to First Amendment protection, including the right to speak about violence and public issues. [88] Because Bell's video aimed to address the teachers' alleged sexual misconduct against two students, it could fall under free speech about violence and public issues. [89] In addition, the dissent recognized that the majority overlooked Supreme Court precedents that restrict the government's capacity to regulate Internet ***321** speech. [90] Although Bell's video arguably contains threatening language that caused disruption in the school setting, the video addresses public concern; therefore, one can argue that the school board inappropriately expanded sanctions in prohibiting Bell's video and punishing him for its publication. [91]

IV. ANALYSIS

There has been a significant transformation in conduct constituting indirect harassment, as technology increases accessibility to victims on various platforms. [92] After discussing the Harassment Telephone Laws and Cyberbullying statutes, it is apparent that society views indirect harassment as a significant threat; as such, constituents have supported an increase in legislation to combat indirect harassment. [93] However, there has been discussion surrounding how these pieces of legislation adversely affect an individual's right of protected speech under the First Amendment to the United States Constitution. [94] In fact, the passage of these laws can ultimately limit our right to free speech by effectively changing our common understanding of the First Amendment, despite the law attempting to effectuate positive change. [95]

Critics of cyberbullying statutes believe that the laws are vague and unclear about what is prohibited and non-prohibited speech; in fact, critics ***322** state that cyberbullying statutes restrict speech protected under the First Amendment and ultimately undermine the rights of those seeking to use the Internet as a way to communicate freely. [96] This results in charging potential suspects based on speech arguably protected by the First Amendment. [97] Additionally, a majority of cyberbullying laws do not include provisions that regulate tracking anonymous users on social media sites; therefore, it becomes impossible to determine the identities of these harassers and properly prosecute them in court. [98] Critics further debate whether these cyberbullying statutes should legally or facially extend to comments made in a public forum when they are not directed at a specific individual. [99] For instance, in *State v. Ellison* [100] the prosecution carried the burden of proof to determine whether the suspect had the "specific purpose to harass" where he posted an annoying comment on a public website. [101]

***323** Finally, despite states rapidly passing cyberbullying statues to protect children and young adults from potentially offensive speech online, such speech alone cannot fall outside the protection of the First Amendment. [102] As stated in *Hammond v. Adkisson*, [103] if isolated offensive speech was limited and not included under the protections of the First Amendment, then all forms of debates and arguments would be limited. [104] Consequently, one of the main purposes of the free speech clause-

encouraging debates amongst citizens and challenges to leadership-would be frustrated if this interpretation was followed. [105] As a result, to maintain the intent of the Framers of the U.S. Constitution in implementing the protection of the right to free speech, we must be cautious when drafting statutory prohibitions of harassment. [106] Otherwise, by extending our harassment statutes to prohibit merely offensive comments, free speech will become a privilege and be greatly controlled by expansive legislation. [107]

As the issue in *Bell v. Itawamba Cnty. Sch. Bd.* [108] demonstrates, our education system has undergone an increase in the level of control of the right to free speech in school environments. [109] The dissent of *Bell* recognized this problem and held that students are entitled to specific First Amendment protection, including the right to engage in free speech regarding violence and matters of public concern. [110] Here, the dissent ***324** criticized the majority for overlooking Supreme Court precedents that restrict the government's ability to regulate Internet speech, particularly speech involving topics of public concern. [111] Without these established precedents, students would be limited in expressing their opinion concerning issues of public concern and, therefore, would be forced to agree with the speech of another. [112] Additionally, the dissent argues that the majority ignores the most prevalent interpretation of the First Amendment, which requires the government to show "more than mere negligence before imposing penalties for so-called 'threatening' speech." [113] Moreover, the video posted by Bell did not lead to a "substantial disruption" of school activities: the burden of proof needed to prohibit off-campus speech as declared in *Tinker*. [114] As a result, by approving of free speech limitations in its cyberbullying policy, this court upheld a cyberbullying provision that potentially violated a student's right to free speech. [115] Again, Bell's speech arguably may have been protected as a matter of public safety and, further, may represent a ruling that modifies the meaning of our Freedom to Speech under the First Amendment. [116]

Analogous to the cyberbullying statutes, the Harassment Telephone Laws have been challenged constitutionally for prohibiting rights to free speech under the First Amendment. [117] While legislatures urged that the Telephone Harassment Law adhered to the First Amendment because it did not prohibit "the communication of thoughts or ideas", the law still may be ***325** vague or overbroad. [118] In other words, even though a Harassment Telephone Law may ban calls involving indecent language or character, it may be extremely difficult to determine if the call was truly an unwelcome intrusion upon another. [119] Consequently, by charging callers with telephone harassment, the individual right to free speech via telephone may be chilled. [120]

However, strong public policy justifications exist to encourage the passage of harassment telephone laws and cyberbullying legislation. [121] First, harassment telephone laws protect others from receiving attacks from callers via the telephone, as seen in *United States v. Lampley*. [122] These attacks can include the caller screaming obscenities during the call, calling the victim multiple times throughout the day, and calling the victim's relatives and friends without permission. [123] Therefore, if a repetitive telephone call reaches a requisite level that would bring about a threat of peace, and the caller's purpose is to harass the victim, then there is no protection afforded under the First Amendment; and in that instance, the harasser may be charged under the Harassment Telephone Law to protect the victim from additional harm or fear. [124]

Further, with the increased use of the Internet amongst teenagers and young adults, which leads to more cyberbullying attacks, there are strong policy reasons for implementing cyberbullying laws. [125] In 2006, forty-three percent of children reported that they had been victims of cyberbullying; and ***326** with the increased use of cell phones and social media in 2016, this percentage has most likely increased. [126] While legislatures could be inactive in this area and could allow parents to be wholly responsible for their children, cyberbully legislation is meant to more effectively combat cyberbullying for children to feel more comfortable in the school setting. [127] The deaths of victims such as Megan Meier and Phoebe Prince have raised

awareness that cyberbullying leads to a significant increase in incidents of depression among teenagers, subsequently leading to suicide. [128] In response to this growing epidemic of suicides because of cyberbullying, legislation was passed to define the crime of cyberbullying, allowing injured parties to charge the harasser. [129] Without legislation, victims would not be afforded the opportunity to seek criminal penalties against their harasser. [130] For example, in Massachusetts after the death of Prince, local legislators created a law for public schools to include an anti-bullying curriculum to combat cyber harassment. [131] Although certain cyberbullying statutes, such as the Albany County statute in New York, failed to pass constitutional requirements, many of these statutes have been upheld because they prohibit specific conduct of intentionally or tormenting minors rather than prohibiting speech. [132] However, even if a statute included an incidental limitation on speech, this limitation may be valid when speech combines with conduct because an important governmental interest exists to regulate the non-speech element, particularly when the non-speech element threatens harm to another. [133]

However, one simply cannot disregard potential incidental limitations on the First Amendment when implementing cyberbullying laws. [134] The line between such limitations and protected First Amendment ***327** rights is extremely thin; again, this could lead to a more refined First Amendment where freedom of speech becomes a privilege that we must earn rather than a right automatically retained. [135] Although passage of these laws can be beneficial for individuals facing cyberbullying, we cannot choose to ignore how this limitation could change our outlook and meaning of the First Amendment. [136] In particular, courts are now balancing the line between preventing cyberbullying and protecting First Amendment rights, as exemplified in the recent reversal of *Bishop*, where the court held that the State's cyberbullying law is unconstitutional because it does not pass the strict scrutiny standard of review. [137] Nonetheless, if these limits will decrease harassment and promote more peace among citizens, then such limitation on freedom of speech may be a positive step in our nation's understanding of the First Amendment. [138] Overall, the American people must decide whether to change our historical interpretation of the First Amendment; and, consequently, if the people decide to choose the interpretation allowing further control, leading to the implementation of the 'privilege status' for the First Amendment, citizens must be wary not to allow local and state governments to control more elements of protected freedoms. [139] Hypothetically, if such scenario were to develop, a slippery slope may lead the government to control more retained freedoms than envisioned by America's Founding Fathers. [140]

V. CONCLUSION [141]

The increased use of the Internet, cell phones, and other technological devices has led to indirect forms of harassment carried out by ***328** the telephone or by social media outlets, both of which constitute significant problems facing society today. Whether it is locally here in Massachusetts, or nationwide, individuals of all ages have suffered because of this inherent problem that is finally being raised by legislatures and school boards.

An increase in legislation has ultimately defined the crime of cyberbullying and harassing telephone calls, and sought to criminalize the perpetrators of these harassment actions. However, such legislative actions may not be the most effective solution to handle these problems. Besides the risk that perpetrators may not be fully punished under this legislation, cyberbullying and harassing telephone statutes threaten to obscure the fine line between the right of freedom of speech and the privilege of freedom of speech. Furthermore, these indirect harassment statutes may prohibit the speech of individuals rather than mere conduct, thus threatening our First Amendment right to free speech.

Nonetheless, due to the dramatic effects of cyberbullying which has led to multiple suicides, depression, and mental illness amongst teenagers, our society may be willing to embrace increased legislation on this issue: even if said legislation transforms our freedom of speech into more of a privilege than a right. Irrespective of our opinion on this recent legislation's aim to curb

cyberbullying and harassment telephone calls, we must realize such legislation is inherently close to controlling our protected right to speech. If there are necessary measures to eliminate the problem of cyberbullying, harassing telephone calls, and other forms of indirect harassment, then society may have no viable option but to pass this speech legislation, which will forever change the historically rooted idea of the right to freedom of speech.

Footnotes

1 *See* Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 846 (2010) (signifying benefits and dangers of Internet). While the Internet creates a new virtual world that provides numerous benefits for our society, such as endless amounts of news, easy access to research, and social networking, it also brings about dangers such as cyberbullying that parents and legislators alike must confront. *Id*. Nevertheless, "the even greater challenge ... is to balance these vital protections with the equally compelling freedoms of speech, expression, and thought." *Id. See also* Jerry Will & Clim Clayburn, *The Psychological Impact of Cyber Bullying,* U. BUS. (Nov. 4, 2011), http://www.universitybusiness.com/article/psychological-impact-cyber-bullying (noting high percentage of teenagers that go online). Specifically in 2007, 94% of teenagers aged 12 to 17 use the internet, 89% of these teens use the internet while at home, and 63% of them use the internet daily. *Id.*; Meryl Ain, *Increased Use of Smartphones Among Teens: What's a Parent to Do?*, HUFFINGTON POST (May 16, 2013, 12:27 PM), http://www.huffingtonpost.com/meryl-ain-edd/increased-use-of-smartpho_b_2884442.html (explaining increase in use of smartphones among teenagers between 2012 and 2013). In the United States, 78% of children aged 12 to 17 own a cellphone and one out of four teenagers uses his or her smartphone to surf the Internet. *Id*. However, with the increased use of cellphones comes new hurdles for parents to control their teenager's behavior that could include acts such as sexting and cyberbullying. *Id*.

2 *See* State v. Bishop, 774 S.E.2d 337, 343 (N.C. Ct. App. 2015) (signifying case of first impression concerning constitutionality of cyberbullying statute). While the Internet is a virtual world, it can have real-life consequences for many individuals faced with the dangers of identity theft, hacking, and online harassment. King, *supra* note 1, at 846. *See also* Lisa M. Jones, Kimberly J. Mitchell, & David Finkelhor, *Online Harassment in Context: Trends from Three Youth Internet Safety Surveys*, 3 PSYCHOL. OF VIOLENCE 53, 53 (2012), http://www.unh.edu/ccrc/pdf/Online%20Harassment%C20in%20Context.pdf (demonstrating increase in online harassment for children and teenagers from 2000 to 2010). While children and teenager's internet use rose drastically from 2000 to 2010, they also changed who they talked to: a study measuring internet use characteristic among youth found that children talked to their friends online more in 2010 than they talked to those they had just met online. *Id*. at 60. Nevertheless, indirect harassment online has increased significantly as the rise in social media sites have given children a new avenue in which to bully their fellow classmates. *Id*. at 64. *See also The Top Six Unforgettable Cyberbullying Cases Ever,* NOBULLYING.COM, http://nobullying.com/six-unforgettable-cyber-bullying-cases/ (last modified Mar. 26, 2017) (emphasizing striking number of cyberbullying cases leading to suicide among teenagers). The suicide of Ryan Halligan demonstrates one of numerous examples of suicide caused by cyberbullying. *Id*. Halligan suffered from a lack of adequate motor skill development and received special education services to help with this problem. *Id*. Because of these physical struggles, Halligan was the target of bullying. *Id*. This bullying led to cyberbullying after Halligan started communications with a female student. *Id*. However, the girl convinced him to share personal information about himself, which she posted in her instant messaging exchanges with friends; after finding this out, Halligan was distraught and hung himself in his family's bathroom. *Id. See generally What Is Indirect Bullying? A Guide Released by NoBullying Today,* PRWEB (July 18, 2014), http://www.prweb.com/releases/2014/07/prweb12025232.htm (describing bullying and distinguishing indirect bullying from direct bullying). When one is bullying another, there is often a power struggle between the bully and the victim where the bully desires to impose direct or indirect harm upon the victim. *Id*. Unlike direct bullying which involves directly hurting another in a physical or emotional way, indirect bullying includes actions such as excluding someone from an activity or spreading negative rumors about an individual either offline or online. *Id*. These actions are indirect and do not directly attack another. *Id*. Consequently, NoBullying.com and prweb.com call for more practical laws to prevent bullying and for parents to teach their children about the negative effects of bullying both offline and online. *Id*.

3 *See Why do Kids Cyberbully Each Other?,* STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Apr. 19, 2017) (providing definition of cyberbullying). Cyberbullying, according

to stopbullying.org is "when a child ... is tormented, threatened, harassed, humiliated, embarrassed, or otherwise targeted by another child ... using the Internet, interactive and digital technologies or mobile phones." *Id*. The site also provides examples of cyberbullying, which include text messages, emails, and embarrassing rumors or photos posted on social media sites. *See id. See generally* Justin Patchin, *Summary of Our Cyberbullying Research (2004-2016),* CYBERBULLYING RESEARCH CENTER (Nov. 26, 2016), http://cyberbullying.org/summary-of-our-cyberbullying-research (demonstrating increase in cyberbullying over last decade). Studies conducted by cyberbullying.org indicate that from May 2007 to August 2016, reports of cyberbullying rose 15% from 18.8% to 33.8%. *Id*. In 2016, around 28% of students stated they had been cyberbullied at least once during their lifetime, while 16% stated they have cyberbullied other students. *Id. But see* Shirvell v. Dep't of Attorney General, 866 N.W.2d 478, 490 (Mich. Ct. App. 2015) (demonstrating cyberbullying argument carried out by adults). In *Shirvell*, Attorney General Shirvell was conducting an anti-cyberbullying policy in Michigan public schools. *See id*. However, when Solicitor General Restuccia discovered Shirvell had posted an anti-homosexual blog, Restuccia claimed such actions contradicted the Attorney General's anti-cyberbullying policy and was analogous to cyberbullying. *Id*.

4 *See* 47 U.S.C.S. § 223 (2017) (preventing obscene and harassing telephone calls). The statute states, in pertinent part:

(a) Prohibited acts generally. Whoever--

(1) in interstate or foreign communications--

(A) by means of a telecommunications device knowingly--

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or child pornography, with intent to abuse, threaten, or harass another person;

(B) by means of a telecommunications device knowingly--

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to abuse, threaten, or harass any specific person;

(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any specific person; or

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

Id.; *see also* United States v. Lampley, 573 F.2d 783, 787-88 (3d Cir. 1978) (discussing constitutionality and purpose of 47 U.S.C. § 223). *But see* Sable Commc'ns of Cal. v. F.C.C., 492 U.S. 115, 124 (1989) (holding provision under 47 U.S.C.S. § 223 inapplicable because it controls obscene telephone messages). In *Sable Commc'ns of Cal. v. FCC*, Sable Communications offered sexual telephone messages through Pacific Bell and charged customers a fee for receiving the message. *Id*. at 117-18. However, in 1988, when 47 U.S.C. § 223(b) prohibited indecent and obscene telephone messages, Sable Communications was upset as its messages could be interpreted as obscene. *Id*. at 118. Nonetheless, the Court held that, because the First Amendment does not protect against merely obscene speech, 47 U.S.C. § 223 was unconstitutional. *Id*. at 124.

5 *See* N.C. GEN. STAT. § 14-196 (2016) (prohibiting use of profane, vulgar, or lewd language over telephone). The North Carolina statute states in pertinent part:

(a) It shall be unlawful for any person: (1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation; (2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent or physical injury to the property of any

person, or for the purpose of extorting money or other things of value from any person; (3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number; (4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another; (5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass; (6) To knowingly permit any telephone under his control to be used for any purpose prohibited by this section. (b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received. For purposes of this section, the term "telephonic communications" shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem. (c) Anyone violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

Id.; *Bishop*, 774 S.E.2d at 343 (demonstrating analogous nature of Harassing Telephone Law and cyberbully statute). Similar to its Harassing Telephone Law, which criminalized repeated phone calls that harassed or abused another, North Carolina's cyberbullying statute forbids the "act of posting or encouraging another to post on the Internet *with the intent* to intimidate or torment." *Id*. Such similarity between the two laws is valid since both the telephone and the Internet can be used "as an instrumentality for communication." *Id*. States have also implemented bullying policies to combat cyberbullying. *See* R.I. GEN. LAWS § 16-21-34(a)(1)-(3) (2011). The Rhode Island statute states in pertinent part that:

[T]he statewide [bullying] policy shall apply to all schools that are approved for the purpose of § 16-9-1 and shall contain the following: (1) Descriptions of and statements prohibiting bullying, cyber-bullying and retaliation of school; (2) Clear requirements and procedures for students, staff, parents, guardians and others to report bullying or retaliation; (3) A provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report ....

Id. See Goldman, *infra* note 23 (noting Massachusetts has similar bullying policy for its public schools).

6 *See* People v. Marquan M., 19 N.E.3d 480, 486 (N.Y. 2014) (criticizing Albany County cyberbullying statute as it criminalizes speech outside popular understanding of cyberbullying). Cyberbullying was defined in Albany County as:

[A]ny act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.

Id. at 484. Although the government has a compelling interest to protect children from harmful information, and the above statute seeks to achieve this interest, it nevertheless represents a "criminal prohibition of alarming breadth" as the text of the law criminalizes protected speech that goes far beyond the normal understanding of cyberbullying. *Id*. at 486 (quoting United States v. Stevens, 559 U.S. 460, 474 (2010)). Consequently, the court determined that the statute was invalid because it was contrary to the Free Speech Clause of the First Amendment. *Id*. at 488; State v. Bishop, 787 S.E.2d 814, 822 (N.C. 2016) (holding North Carolina cyberbullying statute as unconstitutional as it violates guarantee of freedom of speech). *See generally* Doug Linder, *Introduction to the Free Speech Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/firstaminto.htm (last visited Mar. 21, 2017) (defining right to free speech under First Amendment and different approaches in analyzing it). The right to free speech under the First Amendment states that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. CONST. amend I. There are three approaches in analyzing the right to free speech under the First Amendment: the absolutist approach, the categorical approach, and the balancing approach. *Id*. The absolutist approach says that Congress shall not make a law threating the freedom of speech. *Id*. Here, the question is whether an individual's actions are either speech or conduct; and in some instances, like screaming "fire," because the speech interconnects with an action that most likely will be performed, then it is not speech and not protected under the right to free speech. *Id*. The categorical approach states that speech can be broken down into categories; and if the speech is determined as commercial speech or fighting words, then the speech is not protected under the First Amendment. *Id*. Finally, the balancing approach says that in each instance, a court must weigh the individual's interest in protecting one's right to free speech against the government's interest in restricting the speech; and the preference is to rule in favor of the individual over the government unless there is a strong government interest in prohibiting the speech. *Id*. Therefore, because the Albany County cyberbullying statute in *Marquan* included numerous forms of electronic speech that arguably were not

connected to conduct or fighting words, and, thus, fundamentally threatened the individual's right to free speech, the statute was unconstitutional and could not be used to charge the high school student. 19 N.E.3d at 488.

7 *See* King, *supra* note 1, at 884 (emphasizing that legislators need to act quickly to address cyberbullying problem plaguing nation). *But see* James Tucker, *Free Speech and "Cyber-bullying,"* AM. CIVIL LIBERTIES UNION (Jan. 16, 2008, 10:29 AM), https://www.aclu.org/blog/speakeasy/free-speech-and-cyber-bullying?redirect=blog/free-speech/free-speech-and-cyber-bullying (explaining cyberbullying as stacking deck against First Amendment). In fact, Tucker suggests that society should not automatically try to implement legislation to resolve the problem of offensive online speech. *Id*. Rather, parents should monitor their children's online usage so that society can continue to promote the free exchange of information, while simultaneously recognizing that online speech could benefit or hurt others. *Id. See also* Stephanie Hanes, *Anti-Bullying Laws: A Mom Dares to Critique the Social Trend,* THE CHRISTIAN SCIENCE MONITOR (Sept. 25, 2012), http://www.csmonitor.com/The-Culture/Family/Modern-Parenthood/2012/0925/Anti-bullying-laws-A-mom-dares-to-critique-the-social-trend (criticizing anti-bullying laws). Hanes notes that legislators first implemented bullying statutes after the Columbine High School shooting in 1999; after this tragic event, state legislatures throughout the country introduced or amended around 120 bills regarding bullying. *Id*. However, most states have definitions of bullying that are usually not in conformity with the "research-based" definition of bullying, which involves an intent to harm another, a power struggle between the bullyer and the bullyee, etc. *Id*. In addition, states such as New Jersey have implemented anti-bullying policies that threaten free speech and "interfere with the orderly operation of the institution." *Id. See also The Rise in Cyberbullying,* Heard on *All Things Considered*, NPR (Sept. 30, 2010, 3:00 PM), http://www.npr.org/templates/story/story.php?storyId=130247610 [hereinafter *The Rise in Cyberbullying*] (showing cyberbullying legislation not doing enough to charge perpetrators of cyberbullying crimes).

8 *See infra* Part II, A-B.

9 *See infra* Part III, A-B.

10 *See infra* Part IV.

11 *See infra* Part V.

12 M. Sean Royall, Case Comment, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. CHI. L. REV. 1403, 1403 (1989) (recognizing benefits and problems with telephone). "[The telephone] provides convenient and virtually unlimited access to people wherever they may work or reside, but this capability can also make the telephone an 'instrument for inflicting incalculable fear, abuse, annoyance, hardship, disgust, and grief on innocent victims.'" *Id*. (quoting H.R. Rep. No. 1109, 90th Cong. (1968)). *See* Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 507-08 (1984) (evaluating legal needs of harassment victims). Because there are various types of harassment by telephone, such as harassment by creditors, harassment by ex-lovers, or harassment by teenage bullies, the legal system's response is equally varied. *Id*. "Only by accounting for the diversity of the harassers, their methods, and their victims' attitudes can one determine whether harassment warrants legal sanctions and what remedial scheme may be appropriate." *Id. See generally* MASS. ANN. LAWS ch. 269, § 14A (LexisNexis 2010) (representing legislation responding to problems of harassment). The law states:

[W]hoever telephones another person or contacts another person by electronic communication, or causes a person to be telephoned or contacted by electronic communication, repeatedly, for the sole purpose of harassing, annoying or molesting the person or the person's family, whether or not conversation ensues, or whoever telephones or contacts a person repeatedly by electronic communication and uses indecent or obscene language to the person, shall be punished by a fine of not more than $500 or by imprisonment for not more than 3 months, or by both such a fine and imprisonment.

Id. See Commonwealth v. Wilcox, 841 N.E.2d 1240, 1244 (Mass. 2006) (noting violation of § 14A because defendant charged with four counts of making annoying calls). In *Wilcox*, the defendant called young girls at random and asked them to make videotapes of themselves for him. *Id*. As a result, he was charged with four counts of making annoying or indecent phone calls and two counts of accosting a person of the opposite sex; as such, the defendant was placed on probation. *Id. But see* Commonwealth v. Wotan, 665 N.E.2d 976, 976-77 (Mass. 1996) (reversing guilty ruling although defendant made annoying telephone calls). In *Wotan*, the court explained that although it is a misdemeanor under G.L. ch. 269, section 14A to make a telephone call merely to harass, annoy, or

molest another, these calls must be made repeatedly to be considered a crime. *Id*. Furthermore, even though Wotan made two calls to the Kegans where he simply hung up, this was not enough to constitute "repeating" calls under the statute. *Id*.

13 *See* Jennifer Latson, *The Woman Who Made History by Answering the Phone*, TIME (Sept. 1, 2015), http://time.com/4011936/emma-nutt/ (showing progress of women in workforce replacing teenage boys as switchboard operators). One of the main reasons that these teenage boys seemed so rude was because they were frustrated with the telephone connection problems. *Id*. In fact, when women replaced these boys as switchboard operators, the women were also frustrated at these connection problems, as one reported saying "number please" over 120 times per hour for eight hours a day because she could not understand the person on the other line. *Id*.

14 *See* United States v. Lampley, 573 F.2d 783, 786 (3d Cir. 1978) (charging defendant with making threatening and harassing interstate telephone calls). Because the defendant, who previously dated the plaintiff for a few weeks, launched a "telephonic assault" on the plaintiff and her family, he was later guilty of violating 18 U.S.C. § 875(c) and 47 U.S.C. § 223(a)(1)(D). *Id*. at 785-86. *Compare* 18 U.S.C. § 875(c) (1994) ("Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."), *with* 47 U.S.C. § 223(a)(1)(D) (2003) ("Whoever ... makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number ... shall be fined under title 18, or imprisoned not more than two years, or both."). *See* United States v. Bowker, 372 F.3d 365, 370 (6th Cir. 2004) (recognizing constitutionality of federal harassing telephone law); *see generally Telecommunications Law: Telephone Harassment*, LAWYERS.COM, http://communications-media.lawyers.com/telecommunications-law/telephone-harassment.html (last visited Mar. 26, 2017) [hereinafter *Telecommunications Law: Telephone Harassment*] (explaining characteristics of harassing telephone call). Frequent calls by telemarketers or heavy breathing from the caller are two examples of calls that can be considered either annoying or non-annoying calls depending on the person answering the phone. *Id*. However, calls relating to business matters or family affairs are usually not considered harassing, irrespective of how annoying the call may be to that particular individual. *Id*.

15 *See* N.C. GEN. STAT. § 14-196 (2015) (defining telephone harassment in North Carolina). This law is arguably in accordance with First Amendment principles because it prohibits conduct, not the "communication of thoughts or ideas." State v. Camp, 295 S.E.2d 766, 768 (N.C. Ct. App. 1982) (upholding North Carolina's Harassing Telephone Statute as defendant harassed sheriff department employees through telephone); WASH. REV. CODE § 9.61.230 (2015) (explaining telephone harassment in Washington). The Washington codes states:

(1) Every person who, with intent to harass, intimidate, torment, or embarrass any other person, shall make a telephone call to such other person: (a) Using any lewd, lascivious, profane ... language ... or ... (c) Threatening to inflict injury on the person or property of the person called ... is guilty of a gross misdemeanor.

Id. In fact under the statute, one does not have to prove that the caller had the intent to harass; as long as the evidence shows an intent to harass, this intent can be enough to charge the harasser. State v. Alphonse, 197 P.3d 1211, 1216 (Wash. Ct. App. 2008) (arguing that because defendant threatened to kill plaintiff, such facts show intent to harass); CONN. GEN. STAT. § 53a-183 (2015) (describing telephone harassment in Connecticut). The Connecticut law states:

[A] person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network ... or (3) with intent to harass ... he makes a telephone call ... in a manner likely to cause annoyance or alarm.

Id. This Connecticut law does not only regulate speech, but also the content of the call. State v. Moulton, 78 A.3d 55, 69-71 (Conn. 2013) (holding Connecticut Harassing Telephone Statute prohibits harassing speech and conduct). One could consider the content of the call when determining if the call was made "in a manner likely to cause annoyance or alarm." *Id*. at 61. *See generally* Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 102-07 (1986) (demonstrating legislators and court's view of harassing telephone statutes). The Supreme Court has held that individuals should be left alone at their residence and deserve privacy, particularly regarding unsolicited telephone calls. *Id*. Legislators responded to this ruling by passing legislation regarding harassing telephone calls; in fact, some states prevent calls from being made at "inconvenient hours" while bills

in twenty-two states limit calls made from telemarketers. *Id*. at 107-09. Invariably, these laws should not encroach on the freedom of speech under the First Amendment and "further inquiry is often necessary to determine the legality of a particular piece of protective legislation." *Id*. at 104; *see Telecommunications Law: Telephone Harassment,* supra note 14 (highlighting characteristics of harassing telephone calls and how they act as unwelcome intrusions on privacy). Some of these characteristics include calls that continually ring, calls that only consist of heavy breathing on the other line, and calls that include obscene comments. *Id*. Finally, the timing and frequency of the call may also be important in determining whether the call was harassing. *Id*.

16 *See* Royall, *supra* note 12, at 1403 (arguing that vagueness in harassing telephone laws subjects such laws to constitutional challenge). Specifically, the Fourteenth Amendment bans vague and overbroad laws. *Id*. at 1405-06. Vague laws are those where people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Id*. (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). Overly broad laws are those that forbid not only potentially criminal behavior, but also behavior protected by the First Amendment. *Id. See also* Spears v. State, 337 So. 2d 977, 980 (Fla. 1976) (quoting Lewis v. New Orleans, 415 U.S. 130, 134 (1974)) ("Where a legislative enactment 'is susceptible of application to protected speech,: it is constitutionally overbroad and therefore is facially invalid."'). *But see* Info. Providers' Coal. for Def. of First Amendment v. FCC, 928 F.2d 866, 874 (9th Cir. 1991) (holding Harassment Telephone Law was not unconstitutional as term "indecent" was not vague). *See generally* Radford v. Webb, 446 F. Supp. 608, 610-11 (W.D.N.C. 1978) (citations omitted) ("A statute whose terms are thus susceptible of constitutional as well as unconstitutional application can only survive if it has been authoritatively construed to exclude speech which, though vulgar or offensive, is protected by the First and Fourteenth Amendments."). In particular, the court here ruled that because the statute restricted not only obscene speech, but also words that some considered vulgar, it represented a "sweeping prohibition" that would restrict even the ordinary obscene phone call. *Id*. Provisions of the statute did not differentiate between speech that was abusive and non-abusive; and as such, the court declared the statute unconstitutional. *Id*.

17 *Compare* Royall, *supra* note 12, at 1423 (recognizing ambiguity in defining "offensive content"), *with* State v. Ray, 733 P.2d 28, 29-30 (Or. 1987) (quoting State v. Moyle, 705 P.2d 740, 745-46 (Or. 1985)) ("The constitutional prohibition against laws restraining speech or writing cannot be evaded ... by phrasing statutes so as to prohibit 'causing another person to see' or 'to hear' ... legislative power to select the objectives of legislation is plenary, except as it is limited by the state and federal constitutions.").

18 *See* State v. Bishop, 774 S.E.2d 337, 343 (N.C. Ct. App. 2015), *overruled by* State v. Bishop, 787 S.E.2d 814 (N.C. 2016) (recognizing telephone and Internet used as mechanisms for harassing conduct).

19 *See* King, *supra* note 1, at 846-47 (describing dangerous implications of cyberbullying). Before her suicide, Meier was in an online relationship with a fellow teen, who she met online. *Id*. The relationship soon deteriorated as Meier received "cruel and insulting attacks" in person and online that eventually led her to commit suicide. *Id*. Ironically, the purported online teen never existed; rather, the perpetrator was Lori Drew, a forty-seven year-old mother who wanted to find out more about Meier's opinion of her own daughter. *Id*. Meier suffered from clinical depression, which worsened through the online identity that Drew concocted. *Id.*; *see generally* Donna St. George, *Cyber-bullying Linked to Spike in Depression*, WASH. POST (Sept. 21, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/20/AR2010092006150.html (demonstrating increase in depression as bullying increases). Through social media cites, such as Facebook, Twitter, and Instagram, victims of bullying are at a large. *Id.*; Will & Clayburn, *supra* note 1 (explaining effects of cyberbullying and stalking via cell phones on teenagers). Not only can cyberbullying exacerbate depression in a child, but it can also affect a teenager's social life and academic performance in school. Will & Clayburn, *supra* note 1; *Cyber-Bullying and its Effect on Our Youth*, AM. OSTEOPATHIC ASS'N, http://www.osteopathic.org/osteopathic-health/about-your-health/health-conditions-library/general-health/Pages/cyber-bullying.aspx (last visited June 2, 2016) (highlighting emotional and psychological effects associated with cyberbullying amongst children). Cyberbullying is just as destructive on a child's development as traditional forms of bullying. *Id*. According to Dr. Jennifer N. Caudle, DO, "[k]ids who are bullied are likely to experience anxiety, depression, loneliness, unhappiness, and poor sleep." *Id*. Additionally, most children will not admit to being bullied because they feel embarrassed about the situation; thus, sometimes, cyberbully actions against a child will continue and not be resolved. *Id*.

20 Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES (Nov. 28, 2007), http://www.nytimes.com/2007/11/28/us/28hoax.html?_r=0 (demonstrating no laws existed to hold perpetrator accountable for Meier's

suicide). Meier's local town board passed an ordinance after Meier's death stating that an individual could face a fine of $500 and receive a ninety day imprisonment for Internet harassment. *Id*. According to Mayor Pam Fogarty, while this law did not amount to much, it was "the most [the Board] could do." *Id*.

21 *See* S. Cal Rose, Legislative Note, *From LOL to Three Months in Jail: Examining the Validity and Constitutional Boundaries of the Arkansas Cyberbullying Act of 2011*, 65 ARK. L. REV. 1001, 1004 (2012) (providing statistics of cyberbullying victims). Specifically, 43% of teens were victims of cyberbullying in 2006, but only 10% of cyberbullying victims reported the bullying incident to the authorities. *Id. See also The Rise in Cyberbullying*, *supra* note 7 (explaining façade of internet may show why cyberbullying has increased over last decade). When teenagers or young adults post a harassing or cruel message or picture online, they may or may not see it as harassment or cyberbullying. *Id*. In fact, they may think that the comment or picture is just a joke. *Id*. Nevertheless, because this comment or post is conducted online, the actor's intent is impossible to determine. *Id.*; Chris Michaud, *Cyberbullying a Problem Around the Globe: Poll*, REUTERS (Jan. 11, 2012, 4:28 PM), http://www.reuters.com/article/us-cyberbullying-poll-idUSTRE80A1FX20120111 (indicating global citizens desire targeted response to cyberbullying). In particular, 82% of Americans know about cyberbullying and more than three-quarters of individuals questioned in the Reuters poll said that cyberbullying "warranted special attention and efforts from parents and schools" since cyberbullying is different from other forms of harassment. Michaud, *supra*. Additionally, 10% of parents globally responded to the poll saying that their child had been cyberbullied. Michaud, *supra. See generally Stop Cyberbullying Before it Starts*, NAT'L CRIME PREVENTION COUNCIL, http://www.ncpc.org/resources/files/pdf/bullying/cyberbullying.pdf (last visited June 2, 2016) (advocating for parents to help their children against cyberbullying attacks). Current studies show that 43% of teens were cyberbully victims; in fact, over 50% of teens felt angry when they were cyberbullied, while 15% were scared over specific cyberbullying instances. *Id*. To reduce anger and fear among children, parents should teach their children about cyberbullying and monitor their online activities so that they do not become either the victims of cyberbullying or the cyberbullies themselves. *Id. See generally What is Cyberbullying*, STOPBULLYING.GOV, http://www.stopbullying.gov/cyberbullying/what-is-it/index.html#effectsofcyberbullying (last visited June 2, 2016) (tracking ways to see if one's child is victim of cyberbullying or is cyberbully themselves). Some signs used to determine if a child is a victim of cyberbullying include lower self-esteem, self-destructive behaviors, and poor grades. *Id.*; *Stop Cyberbullying,* WIREDSAFETY.ORG, http://www.stopcyberbullying.org/why_do_kids_cyberbully_each_other.html (last visited June 2, 2016) (addressing additional reasons why child is cyberbullying others). For example, cyberbullies tend to bully others online because of their own feelings of anger or to get a reaction from their victim to boost their reputation or remind others of their place in the school community. *Stop Cyberbullying*, *supra*. Regardless, the motivations to cyberbully vary significantly and, as such, responses to control cyberbullying must account for these variations. *Stop Cyberbullying supra*. Additionally, although cyberbullying occurs to people of all ages, many victims are usually teenagers. *See* Rose, *supra*, at 1004 (noting increase in cyberbullying with internet regulation).

22 *See* N.C. GEN. STAT. § 14-458.1 (2016) (defining cyberbullying in North Carolina). The statute says:

(a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following: (1) With the intent to intimidate or torment a minor: a. Build a fake profile or Web site; b. Pose as a minor in: 1. An internet chat room; 2. An electronic mail message; or 3. An instant message .... (2) With the intent to intimidate or torment a minor or the minor's parent or guardian: .... c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmission, to a minor .... (b) Any person who violates this section shall be guilty of cyber-bullying, which offense shall be punishable as a Class 1 misdemeanor if the defendant is 18 years of age or older at the time the offense is committed. If the defendant is under the age of 18 at the time the offense is committed, the offense shall be punishable as a Class 2 misdemeanor.

Id.; *Bishop*, 774 S.E.2d at 342 (ruling statute did not violate First Amendment). North Carolina has recently analyzed this law in a case of first impression, where the court analyzed whether the statute criminalized speech protected under the First Amendment. *Id. See also* ARK. CODE ANN. § 5-71-217(b) (2015) ("A person commits the offense of cyberbullying if: (1) He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, or harass another person; and (2) [t]he transmission was in furtherance of severe, repeated, or hostile behavior toward [another] person."). Arkansas passed a cyberbullying law in response to an incident similar to the Meier story, where in 2009, twelve year-old Sarah Butler received a host of harassing messages on her MySpace account. *See* Rose, *supra* note 21, at 1007. Specifically, the last of these messages said "that she would be easily forgotten and that nobody would miss her if she was gone." *Id*. Because of such disturbing messages, Butler hanged herself. *Id*. Similar to the Meier story, prosecutors could not bring charges against the perpetrator

because there was no law against cyberbullying. *Id*. Therefore, in 2011 Arkansas passed the above cyberbullying statute, looking to the Megan Meier Cyberbullying Prevention Act for guidance. *Id*. at 1010-12. The Megan Meier Cyberbullying Prevention Act criminalizes communications made "with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behavior ...." H.R. 1966, 111th Cong. (2009). Although the Act set out to solve an inherent problem with harassment through the Internet, the Act itself could be argued as regulating free speech and limiting a broad array of speech that is protected under the First Amendment. Rose, *supra* note 21, at 1007. *But see The Rise in Cyberbullying*, *supra* note 7 (demonstrating that legislation not doing enough to combat cyberbullying). Here, Professor Patchin of the University of Wisconsin-Eau Claire argued "the vast majority of cases of cyberbullying fall short of sort of criminal sanction. And so it really takes ... informal remedies to both respond and to try to prevent [cyberbullying]." *Id*.

23 *See* Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged Herself,* ABC NEWS (Mar. 29, 2010), http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357 (detailing suicide of Massachusetts student tormented by cyberbullying). High school student Phoebe Prince was harassed online by students, who resented Prince for dating one of the school's football players. *Id*. Analogous to the death of Megan Meier, there was no cyberbullying statute in Massachusetts at the time to charge the cyberbullies for their actions. *Id*. In response, the Massachusetts legislature sought to pass a law for public schools to include an anti-bullying curriculum. *Id*.

24 *See* An Acting Relative to Bullying in Schools, ch. 92, Acts (defining cyberbullying and what schools should do to prevent bullying). According to the Massachusetts legislature under the above Session Law, cyber-bullying is:

[B]ullying through the use of technology or any electronic communication, which shall include ... any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

Id. On May 3, 2010, Massachusetts Governor Deval Patrick signed this law, which ultimately contains strict prohibitions on a young person's technology use when centered against another individual. *Massachusetts Bullying Prevention Law*, MASS.GOV, http://www.mass.gov/ago/public-safety/bullying-and-cyberbullying/the-law-and-regulations/massachusetts-bullying-prevention-law.html (last visited July 21, 2016). The law also seeks to determine and implement appropriate resources that will "create a school climate in which every student feels safe - in and out of school." *Id*. Massachusetts makes clear, however, that the law is meant for all young people, not just students. *Id*. Because of the law's detailed description of bullying, it has arguably become a more inclusive law when dealing with crimes "such as assault and battery, cyber-bullying, and harassment." *Bullying*, ALTMAN | ALTMAN ATTORNEYS AT LAW, https://criminal.altmanllp.com/bullying.html (last visited July 21, 2016). *See also* Shira Schoenberg, *Massachusetts House Passes Updated Anti-Bullying Bill*, MASSLIVE (Feb. 26, 2014, 4:36 PM), http://www.masslive.com/politics/index.ssf/2014/02/massachusetts_house_passes_ant.html (showing death of eleven-year-old boy also motivated legislators to pass anti-bullying law). As Schoenberg explains, bullying became a major problem after the deaths of Phoebe Prince in 2010 and Carl Walker Hoover in 2009. *Id*. Specifically, Hoover was a 6th grader who was bullied persistently by fellow classmates. Anne-Gerard Flynn, *Springfield Bullying Suicide Victim Carl Walker-Hoover to be Remembered at Road Race*, MASSLIVE (Sept. 1, 2010, 10:38 PM), http://www.masslive.com/news/index.ssf/2010/09/springfield_bullying_suicide_v.html. A year after Prince committed suicide, Massachusetts legislators signed the above anti-bullying law, requiring the Department of Elementary and Secondary Education to submit data on bullying to the Massachusetts Attorney General and schools to implement programs against bullying and cyberbullying. Schoenberg, *supra. But see* Daniel Adams & Sarah Black, *Massachusetts Anti-Bullying Law Seen as Unfunded, Ineffective*, MASS LIVE (July 21, 2013, 5:00 AM), http://www.masslive.com/news/index.ssf/2013/07/massachusetts_anti-bullying_la_1.html (arguing that promise of law to address bullying and deaths of students has been unmet). While educators agree that bullying has increased with the use of technology, and reporting of bullying incidents has also increased, there is still an absence of reporting requirements for such incidents in schools. *Id*. In fact, there is no requirement that schools gather statistics on bullying incidents and send them to the State; rather, only teachers are mandated to report bullying incidents to the principal, which does not accurately provide a baseline to assess how to address bullying and cyberbullying. *Id*. Even if educators

and parents try to argue for schools to record more statistics on cyberbullying, such statistics may not be the answer; and as Mary Lou Bergeron, Assistant Superintendent of Lawrence Public Schools stated, "[a]dding one more [statistical requirement for cyberbullying] is not, maybe, going to change the approach and how we're dealing with [bullying]." *Id*.

25 *See Massachusetts' Highest Court Rules Girl Accused of Texting Boyfriend, Urging Suicide Must Stand Trial*, FOX 6 NOW (July 4, 2016), http://fox6now.com/2016/07/04/massachusetts-highest-court-rules-girl-accused-of-texting-boyfriend-urging-suicide-must-stand-trial/ (detailing facts of case); Commonwealth's Response to Defendant's Motion to Dismiss at 2, Commonwealth v. Carter, No. 15YO0001NE (Mass. Dist. Ct. 2015) (explaining persuasion Carter used in assisting Roy's suicide). A portion of Carter's text to Roy stated, "[y]ou said your mom saw a suicide thing on your computer and she didn't say anything. I think she knows .... Everyone will be sad for a while, but they will get over it and move on." Commonwealth's Response to Defendant's Motion to Dismiss, *supra*, at 2.

26 *See Massachusetts' Highest Court Rules Girl Accused of Texting Boyfriend, Urging Suicide Must Stand Trial*, *supra* note 25 (explaining ruling of SJC regarding case). If convicted of manslaughter, Carter could face twenty years in prison. *Id*.

27 *Id.*; *see also* An Act Relative to Bullying in Schools, *supra* note 24 (containing full text of Massachusetts cyberbullying statute); Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law,* SLATE (Apr. 30, 2010, 4:13 PM), http://primary.slate.com/articles/life/bulle/2010/04/bullies_beware.html (commending Massachusetts' anti-bullying law). Bazelon emphasizes that bullying can now be done through text messages and Facebook. *Id*. Through Massachusetts' inclusion of bullying done through electronic communication or expression, the State has recognized cyberbullying and has taken action against it. *Id. But see* Monica Steiner, *Cyberbullying in Massachusetts*, CRIM. DEF. LAWYER, http://www.criminaldefenselawyer.com/resources/cyberbullying-massachusetts.htm (last visited June 9, 2016) (listing defense when one is charged with cyberbullying). These defenses include an individual's right to free speech and speech that is not threatening enough to be prohibited. *Id*. Additionally, Steiner details the punishment for annoying telephone calls and electronic communication, which usually involves a fine of up to $500 or three months in jail depending on the severity of the call or electronic communication. *Id.*; *see also* Adams & Black, *supra* note 24 (criticizing Massachusetts anti-bullying law).

28 *See* State v. Bishop, 787 S.E.2d 814, 815 (N.C. 2016) (reversing North Carolina Appeals Court and stating that cyberbullying statute violates First Amendment rights); Rose, *supra* note 21, at 1026 (asserting Arkansas Cyberbullying Statute is unconstitutional because it prohibits broad array of speech). Because the Arkansas legislature failed to clarify what was meant by "speech that had the purpose to threaten or frighten another," the law could potentially criminalize "mere ... alarming speech, which is expressly prohibited by the First Amendment." *Id*. In addition, the law leaves out critical questions such as the way to track anonymous users of Twitter/Facebook profiles. *Id.*; Izzy Kalman, *Is Our Obsession with Bullying Limiting Freedom of Speech?*, MERCATORNET (July 16, 2012), http://www.mercatornet.com/articles/view/is_our_obsession_with_bullying_limiting_freedom_of_speech (criticizing anti-bullying laws). Kalman concludes that the freedom of speech itself can be the solution to bullying rather than passing legislation against it. *Id*. For example, even though one may say something critical against someone, the latter individual has every right to attack the perpetrator through the freedom of speech. *Id*. Additionally, Kalman states that if we continue to block a person's right to say something, he or she will only want to say these prohibited words in a more vehement way. *Id.*; Elbert Chu, *Should Cyberbullying Be a Crime?*, WNYC (Apr. 27, 2012), http://www.wnyc.org/story/302021-should-cyberbullying-be-a-crime/ (noting legislation may not be correct answer to resolve cyberbullying). The co-director of the national Cyberbullying Research Center, Justin Patchin, in fact stated that there are better ways to criminalize cyberbullying than through a statute. *Id*. As Patchin notes, teens do not care if there will be formal punishment for their actions; they will continue to act how they want, like any other rule that a school official places upon them. *Id. See generally* Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976) (demonstrating that speech must do more than offend to lose constitutional protections). If all offensive speech went against the First Amendment, then individuals would not be able to argue or debate with each other. *Id*. In fact, one of the main reasons why the Founding Fathers enacted the Free Speech Clause of the U.S. Constitution was to promote these healthy, lively arguments. *Id*. Therefore, if offensive speech were limited in the above way, it would lead to the "standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id*. (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)). *But see* T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011) (holding no constitutional right to act like a bully). The First Amendment also provides that the right to be let alone inherently includes "the right to be free from physical intrusions as well as psychological attacks." *Id*. In *T.K.,* the court also explains the approach nationwide to control bullying in schools and defines cyberbullying specifically as "willful and repeated harm inflicted through the

use of computer, cell phone, and other electronic devices." *Id.* at 299 (quoting Sameer Hinduja & Justin W. Patchin, *Overview of Cyberbullying White Paper for the White House Conference on Bullying Prevention*, 21 (Mar. 10, 2011), http://people.uwec.edu/patchinj/cyberbullying/white_house_conference_materials_Hinduja&Patchin.pdf.

29 *See* Susan W. Brenner & Megan Rehberg, *Symposium: Cyberspeech: Article: "Kiddie Crime"? The Utility of Criminal Law In Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 24 (2009) (explaining difference between direct and indirect cyberbullying and its implications on First Amendment protections). Direct cyberbullying involves situations where the cyberbully conducts online harassment directly at the victim. *Id*. An example of direct cyberbullying is when a cyberbully calls an individual "fat" online. *Id*. As a result, because this form of cyberbullying is directed at an individual, it satisfies the same requirement as harassment statutes such as the Harassing Telephone Law; thus, such harassment statutes can be used to prosecute cyberbullies. *Id.* at 25. Indirect cyberbullying is when the cyberbully does not direct the harassing comment at the individual, but posts a harassing message about the individual in a public forum. State v. Ellison, 900 N.E.2d 228, 229 (Ohio Ct. App. 2008). In *Ellison*, a high school student was charged with cyberbullying after posting a photo of a classmate on MySpace with the caption, "[m]olested a little boy." *Ellison*, 900 N.E.2d at 229. Because the student posted the photo publicly, rather than posting it directly on the victim's profile, the student conducted an act of indirect cyberbullying. *Id*. Furthermore, under the telecommunications statute of which the defendant was charged, the government has the burden to prove that the defendant had the "specific purpose to harass." *Ellison*, 900 N.E.2d at 230. The defendant can meet this burden by "establishing beyond a reasonable doubt that [the defendant's] specific purpose in making the telecommunication was to harass [the plaintiff]." *Id.* at 231. Consequently, since the government could only show that the defendant should have known that posting such a comment would probably cause harassment, the government did not meet its burden. *Id.* at 230.

30 *See* Raychelle Cassada Lohmann, *Cyberbullying Versus Traditional Bullying: When Joking Crosses the Line*, PSYCHOL. TODAY (May 14, 2012), https://www.psychologytoday.com/blog/teen-angst/201205/cyberbullying-versus-traditional-bullying (explaining difference between traditional bullying and cyberbullying). While standard bullying normally includes a pre-meditated, aggressive action focusing on the victim and desiring control over the victim, cyberbullying might or might not have these features. *Id*. Moreover, traditional bullying is performed face-to-face against the victim, whereas cyberbullying occurs through "the use of cell phones/Smartphone's, computers/tablets, and other electronic devices (including Wi-Fi gaming devices)." *Id*. Finally in cyberbullying, the cyberbully can post the harassing message so that multiple individuals can see the bullying carried out, which might or might not happen in traditional bullying. *Id. See also* sources cited *supra* note 14 (showing characteristics of harassing telephone calls). Regardless of the type of harassing call that is made, the important thing to note is that the call is made directly to the person: unlike in cyberbullying where the harassment can be performed in a public online forum rather than directly at the victim. *See supra* sources cited note 29. *See generally Cyberbullying: Communication of Threats*, UNC SCH. OF L., http://www.unc.edu/courses/2010spring/law/357c/001/Cyberbully/communication-of-threats.html (last visited June 7, 2016) (showing failure to connect indirect cyberbullying with threat laws). One form of speech that is not protected as free speech under the First Amendment is speech that entails a "true threat." *Id.*; *see* sources cited *infra* note 33 (emphasizing that some people consider First Amendment as privilege not right). However, because "true threat" speech normally requires that one threaten another directly, and indirect cyberbullying is again conducted indirectly against another, then most indirect cyberbullying will probably not be considered a "true threat." *See* sources cited *infra* note 41. *But see Massachusetts' Highest Court Rules Girl Accused of Texting Boyfriend, Urging Suicide Must Stand Trial*, *supra* note 25 (describing case where cyberbullying led to true threat).

31 *See* Chu, *supra* note 28 ("When we create a law, it isn't an automatic conviction ....").

32 *See id*. (noting conviction depends on prosecutor's case). *See also Stopping Your Cyberbully*, LAWYERS.COM (Jan. 17, 2013), http://blogs.lawyers.com/2013/01/stopping-your-cyberbully (discussing legal process of introducing cyberbully case). In *Stopping Your Cyberbully*, Enrico Schaefer, an internet-law attorney, explained the complicated process in which a lawyer introduces a cyberbully case. *Id*. First, Schaefer emphasizes that determining how much damage is necessary to demonstrate a legal issue is "a big gray area." *Id*. For example, simply sending a threatening message to someone else may not be enough to be considered cyberbullying, even if an individual sends numerous threatening messages with the intent to annoy or bully. *Id*. However, one can argue that the sender has engaged in cyberbullying because most states require the suspect have the "actual intent ... to cause the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." *Id*. Nevertheless, determining whether a suspect possessed the requisite intent is difficult. *Id*. In fact, Schaefer recommends entering the perpetrator's mind and analyzing the specific circumstances of his or her background and social media use to determine the individual's intent. *Id*. While this could introduce free speech issues, it

also could lead to the correct conclusion that the harasser intended to harm his or her victim. *Id*. If this occurs, then the victim must report it to the police and, only after the police determine a crime has occurred, will they refer the case to an attorney. *Id*. Finally, Schaefer concludes by stating that prosecuting against a cyberbully may not be the best solution because the cyberbully may become more aggressive after the case is introduced. *Id*. If there is no choice, however, prosecution may be the only effective method to end cyberbullying attacks. *Id*.

33 *See Cyberbullying: A Report on Bullying in a Digital Age,* INDEP. DEMOCRATIC CONF. 1, 34 (Sept. 2011)*Cyberbullying: A Report on Bullying in a Digital Age,* INDEP. DEMOCRATIC CONF. 1, 34 (Sept. 2011), http://educationnewyork.com/files/final%20cyberbullying_report_september_2011.pdf (highlighting emergency of cyberbullying as new form of harassment that must be stopped). The report emphasizes cyberbullying as a serious threat to society that legislative action must control and end. *Id*. at 4. Although the report recognizes the need to protect freedom of speech when passing cyberbullying legislation, it nonetheless concludes that freedom of speech protections under the First Amendment "are exactly what enable harmful speech and cruel behavior on the internet," thus siding with supporters of a more refined First Amendment. *Id*. at 34-35. *But see The State of the First Amendment: 2014*, FIRST AMENDMENT CENTER (2014), http://www.firstamendmentcenter.org/madison/wp-content/uploads/2014/06/State-of-the-First-Amendment-2014-report-06-24-14.pdf (demonstrating changes in American thinking of First Amendment). According to the First Amendment Center's findings, an increasing percentage of Americans believe that the First Amendment goes too far in protecting rights for citizens while a declining percentage of Americans believe that the First Amendment does not overextend its boundaries through the rights that it provides to citizens. *Id*. Consequently, the report ultimately supports the transformation of the country's mindset to a more refined First Amendment that may, in fact, treat free speech as a privilege rather than a right. *Id*. Nevertheless, in the school setting many Americans still believe that high school students should exercise First Amendment rights in the same way as adults. *Id. See generally* AJ Oatsvall, *How to Tell the Difference Between a Right and a Privilege*, VOICES OF LIBERTY (Apr. 22, 2015, 5:17 PM), http://www.voicesofliberty.com/2015/04/22/how-to-tell-the-difference-between-a-right-and-a-privilege/ (distinguishing between rights and privileges). According to Oatsvall, a privilege is an entitlement given only to a particular group of people that can be revoked at any time. *Id*. Examples of a privilege include political power, wealth, and social status. *Id*. A right, in contrast, is held by all people, is universal, and inalienable. *Id*. Examples of a right include the right to life, liberty, and the pursuit of happiness, which are found in the United States Declaration of Independence. *Id*. Oatsvall also notes that one needs permission to invoke a privilege, whereas a right can be invoked freely and individually. *Id*. Ironically, however, Oatsvall stipulates that the unnecessary use of the freedom of speech is a right rather than a privilege, showing a contrast to what cyberbully-legislative supporters believe. *Id*.

34 *See Cyberbullying: Law and Policy*, CONSTITUTIONAL RIGHTS FOUNDATION 1, 2 (2010), http://www.crfcap.org/images/pdf/cyberbullying.pdf (portraying effects of cyberbullying and legislative approach to handle phenomenon). Cyberbullying, while involving indirect harassment online, can also lead to physical violence. *Id*. at 1-2. For example, Phoebe Prince, a Massachusetts high school student, was bullied on social media networking sites and face-to-face by other students. *Id*. As a result of the bullying, Prince committed suicide. *Id*. Because of this, nine students faced criminal charges for their involvement in bullying Prince in person and through the Internet. *Id*. In fact, there are currently both criminal and civil laws aimed at preventing cyberbullies from causing extraneous harm to their victims. *Id*. at 2, 4.

35 573 F.2d 783, 786 (3d Cir. 1978). *See* United States v. Eckhardt, 466 F.3d 938, 943-44 (11th Cir. 2006) (upholding telephone harassment law). In *Eckhardt*, Robert Eckhardt made around 30 harassing telephone calls a week to an employee that worked in his office. *Id*. at 942. These harassing calls involved Eckhardt swearing at the worker and making inappropriate comments. *Id*. When he was later charged under 47 U.S.C. § 223, Eckhardt argued that the statute was unconstitutionally vague and that his conduct did not qualify as obscene under the statute. *Id*. However, the statute was not unconstitutionally vague because a statute will only be vague when it "(1) fails 'to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits' or (2) authorizes or encourages 'arbitrary and discriminatory enforcement.'" *Id*. at 944 (quoting City of Chicago v. Morales, 527 U.S. 41, 56 (1999)). Eckhardt's telephone calls were also obscene because they were "sexually laced" and did not address a matter of public concern. *Id. But see* Reynolds v. Jamison, 488 F.3d 756, 769-71 (7th Cir. 2007) (Rovner, J., dissenting) (explaining report of calls not enough to establish telephone harassment). In *Jamison*, police arrested Reynolds after Jamison provided Officer Darr with information regarding Reynolds' calls, including a computer document of the calls and what she told Darr about the call. *Id*. at 769. However, the dissenting justice explained that responses to interrogatories, affidavits, statements or reports by lawyers and

police officers are self-serving and not enough to base a charge against an individual for a harassing telephone call. *Id.* at 769-70. These documents are not enough because they may not tell the entire truth; and here, where the district court believed that discovery was unnecessary, Officer Darr's report of the incident was never tested; thus, Reynolds was unable to question Jamison or Darr of the incident. *Id.* at 770-71.

36 *See* *Lampley*, 573 F.2d at 786 (explaining relationship of defendant and Hatlen).

37 *Id.* In fact, Lampley's declaration demonstrated his intent to harass Hatlen and served as sufficient language for the government to charge him under 47 U.S.C. § 223(1)(D) of the Telephone Harassment Law. *See* *id.* at 787.

38 *Id.* at 786 (demonstrating charge against defendant for making harassing telephone calls). In fact, it was reported that Lampley screamed obscenities throughout the call and even made collect calls asking for his "wife, [the plaintiff]" after they had broken up years prior. *Id.* The defendant even went so far as to make harassing telephone calls to the plaintiff's mother and husband. *Id.*

39 *Id.* at 785-86 (charging defendant for violating telephone harassment laws).

40 *See id.* at 786-87 (outlining Lampley's argument); *see also* 47 U.S.C. § 223(a)(1)(D)(2013)
Prohibited acts generally. Whoever--in interstate or foreign communications--... makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number ... shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.
Id. Therefore, because the statute clearly explains that one needs to call another "with intent to harass any person," the defendant cannot claim he did not violate the statute. *Lampley*, 573 F.2d at 787.

41 *See* *Lampley*, 573 F.2d at 786-87 (alleging statute unconstitutional for lack of specificity). *But see, e.g.*, Virginia v. Black, 538 U.S. 343, 358-59 (2003) (identifying when government can prohibit speech). For example, under the First Amendment the government can prohibit speech that may bring about a breach of the peace, imminent lawless action, or a true threat. *Id.* Specifically, true threats are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.*; Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONGRESSIONAL RESEARCH SERVICE 1, 1-5 (Sept. 8, 2014), https://www.fas.org/sgp/crs/misc/95-815.pdf (explaining major exceptions to freedom of speech). While the First Amendment states that, "Congress shall make no law ... abridging the freedom of speech ...." which has restricted the government from infringing on society's freedom of speech, the Amendment does not allow such freedom to extend in all forms of speech. Ruane, *supra*. In fact, the Supreme Court declared some speech unprotected by the First Amendment including speech representing "fighting words," obscenities, and child pornography. Ruane, *supra* at 1-5. Specifically, the First Amendment does not protect fighting words because they bring about a breach of peace and "have a direct tendency to cause acts of violence by the person to whom ... the remark [was] addressed." Ruane, *supra* at 4 (quoting Chaplinsky v. N.H., 315 U.S. 568, 572 (1942) (affirming state statute consistent with freedom of speech)). Nevertheless, to be unprotected, the speech must follow the high standard stated above; otherwise, the speech would be protected under the First Amendment. Ruane, *supra*.

42 *See* *Lampley*, 573 F.2d at 787 (finding that district court properly refused request to charge on necessity of harassing language). *See also* United States v. Darsey, 342 F. Supp. 311, 313-14 (E.D. Pa. 1972) (analyzing § 223(1)(D)). There are two conditions one must satisfy to be charged under the provision of § 223. *Id.* First, the defendant's calls must be repeated, meaning that they must be "in close enough proximity to one another to rightly be called a single episode, and not separated by periods of months or years." *Id.* Second, the sole purpose of the calls must be to harass only. *Id. See generally* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420 (1996) (analyzing strict scrutiny test). Although the government has not stated a clear definition for what it deems to be a compelling interest, evidence of a law being underinclusive, such as a law not reaching all forms of speech it tries to prohibit, may be shown to prove that an interest is not compelling. *Id.*

In addition, compelling interests include the promotion of a stable political system and the protection of people that have received discrimination in the past. *Id.* at 2420-21. Finally, specific to speech restriction, the government must establish three points: (1) the law advances the interest it sets out to promote, (2) contains no overinclusiveness (or include speech that it does not mean to prohibit) or underinclusiveness, and (3) the law must be one that restricts speech the least with no reasonable alternatives that can be taken. *Id.* at 2421-23.

43 372 F.3d 365, 365 (6th Cir. 2004).

44 *See* *id.* at 371-73 (6th Cir. 2004) (describing substantive facts of case). During these calls, Bowker revealed himself as Mike, referenced Knight's neighbors, family members, and even recited her social security number. *Id.* at 372-73. In addition, he said that he would be watching Knight with binoculars. *Id.* at 373. As a result, Bowker was charged under 47 U.S.C. § 223(a)(1)(C) which states that anyone who:

(1) in interstate or foreign communications ...

(c) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to abuse, threaten, or harass any specific person ... shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a)(1)(C) (2013). Bowker also sent harassing emails to Knight's place of employment at WKBN. *Bowker*, 372 F.3d at 371. In the emails, Bowker made disturbing comments to Knight saying that he might hide in the bushes and watch her come home. *Id.* Consequently, the court charged Bowker with cyberstalking. *Id.* at 370. Cyberstalking is another harassment act that is penalized by the legislature under 18 U.S.C. § 2261A(2) which states:

Whoever--...

(1) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to [a person described in clause (i), (ii), or (iii) of paragraph (1)(A);] or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A) ...

shall be punished as provided in section 2261(b) of this title [18 USCS § 2261(b)].

18 U.S.C. § 2261A(2) (2013). *See also* United States v. Sayer, 748 F.3d 425, 433-34 (1st Cir. 2014) (explaining elements of cyberstalking statute). Analogous with the Telephone Harassment Act, here the defendant could be guilty of cyberstalking if he or she had the intent to harass a victim under surveillance, or cause substantial emotional distress. *Id.* at 433. Even though Sayer argued that his conduct should not fall under the statute because it involved online communications, the court held that Sayer's false online accounts made in Jane Doe's name served a criminal purpose. *Id.* at 434. *See also* United States v. Petrovic, 701 F.3d 849, 853-54 (8th Cir. 2012) (holding defendant liable under cyberstalking statute). Here, Petrovic created a website that publicly displayed dozens of nude photos, sexually explicit videos, and personal messages of his ex-wife. *Id.* at 852. He sent packages containing sexually explicit images of his ex-wife to his ex-wife's relatives and co-workers. *Id.* at 853. He used these images to harass his ex-wife; thus, the court convicted him of interstate (or internet/cyberstalking) stalking. *Id.* at 853-54. *But see* ACLU v. Reno, 929 F. Supp. 824, 832-36 (E.D. Pa. 1996) (exploring 47 U.S.C. § 223 with Internet use). In *Reno*, the court explained numerous ways one can communicate through the Internet, including one-to-one messaging or real time communication in a chat room. *Id.* at 834. However, the court ruled that section 502 of the Communications Decency Act (or 47 U.S.C. § 223(a)(1)(B)) was unconstitutional under the First Amendment. *Id.* at 883. Although the government has a compelling interest to protect children from "indecent"

communication, if its prohibition "chills the expression of adults, it has overstepped onto" protected First Amendment rights. *Id.* at 854. As a result, only obscene communication is prohibited. *Id.* at 856-60; 47 U.S.C. § 223(a)(1)(B) (2013).

45 *Bowker*, 372 F.3d at 374 (quoting 47 U.S.C. § 223(a)(1)(C) (1996)).

46 *See id*. (arguing magistrate judge's findings were flawed). While 47 U.S.C. § 223(a)(1)(C) requires the caller not to reveal his identity, this does not mean that Bowker would have been free of all charges under the statute. *See* 47 U.S.C.S. § 223. For example, Bowker's 146 telephone calls in eight months would be sufficient to charge him with repeatedly calling another with the intent to harass under subsection (a)(1)(E) or for making the telephone continuously ring with the intent to harass under subsection (a)(1)(D). *See id*.

47 *See Bowker*, 372 F.3d at 375 (finding defendant's argument without merit). Bowker's number was unrecognizable in telephone records. *Id.* at 373. For example, when he called Knight's home telephone in August 2001, his number was preceded by the vertical service code, *67, which allows the caller to block his or her number from others. The use of *67 illustrates how Bowker used an identification-blocking feature to conceal his identity from Knight. *Id*. Furthermore, Bowker identified himself falsely as "Mike" during a call made to Knight's job in June 2001, further showing that Bowker failed to identify himself. *Id*. As a result of Bowker falsely identifying himself to make harassing phone calls, he was arrested and charged under 47 U.S.C. § 223 (C). *Id.* at 373-74.

48 *See Bowker*, 372 F.3d at 375 (detailing Bowker's attack on Knight). According to the statute, no conversation needs to occur during the call for it to be harassing. 47 U.S.C. § 223(a)(1)(C). Therefore, when the defendant called without speaking, this could still be considered a harassing telephone call under 47 U.S.C. § 223(a)(1)(C) if it is proven that such call was made with an intent to harass. *Bowker*, 372 F.3d at 375. Moreover, when Bowker argued that 47 U.S.C. § 223 was unconstitutionally vague, the court rejected this argument analogous with *Lampley*. *Id*. at 382-83; United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978). The court in *Bowker* looked to the applicable Michigan law defining harassment stating that such definition is clear, not vague, and would be understandable for a reasonable person. *Bowker*, 372 F.3d at 380-81 (citing Staley v. Jones, 239 F.3d 769, 791-92 (6th Cir. 2000)).

49 *See Bowker*, 372 F.3d at 370 (convicting Bowker for his actions under 47 U.S.C. § 223(a)(1)(C)). Even if it were wrong for the government to rely on the telephone-blocking feature, which the defendant used to declare a guilty verdict, the court did not charge Bowker solely for using this feature; rather, he was mainly charged with the intent to harass the plaintiff. *Id.* at 375.

50 *See* N.Y. PENAL LAW § 240.30 (Consol. 2017) (explaining telephone threats in second degree). In particular, § 240.30 says, "A person is guilty of aggravated harassment in the second degree when: ... [w]ith intent to harass or threaten another person, he or she makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication." *Id.*; State v. Bishop, 774 S.E.2d 337, 343 (N.C. Ct. App. 2015) (using telephone harassment laws when forming North Carolina's cyberbullying statute); People v. Dixon, 2014 NY005400, 2014 N.Y. Misc. LEXIS at *6-7 (N.Y. Crim. Ct. 2014) (demonstrating comparison between Albany County's failed cyberbullying statute and New York's pre-amended aggravated harassment statute). *See* Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, AMERICAN COMMUNITY SURVEY REPORTS (Nov. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf (demonstrating increased computer and internet use of Americans). The report found that in 2013, 74.4% of American households used the Internet and 78.5% of Americans had a desktop or laptop computer. *Id*. at 4. These percentages have increased significantly over the last few decades compared to 1984 when 8.2% of people had a computer and in 1997, only 18% of American households used the Internet. *Id*. Furthermore, 77.7% of these Americans who use the Internet are between 15-34 years old. *Id. Compare* Will & Clayborn, *supra* note 1 (disclosing increased percentage of teenagers online), *with* Ain, *supra* note 1 (demonstrating increased use of smart phones among teenagers to surf internet).

51 774 S.E.2d 337 (N.C. Ct. App. 2015).

52 *See* *id.* at 343. By recognizing the analogous nature of the Harassing Telephone Law and the Cyberbullying statute, the court looked to the constitutionality of the Harassing Telephone Law to determine if the cyberbullying statute could be equally constitutional. *Id.* Since the Harassing Telephone Law prohibited the conduct of making a harassing telephone call, rather than the speech itself, the court held that it was constitutional and not a form of speech protected under the First Amendment. *Id.* As a result, since the Cyberbullying statute similarly prohibits conduct rather than speech, then it can also be deemed constitutional. *Id. But see* State v. Bishop, 787 S.E.2d 814, 819 (N.C. 2016) (overruling Appeals Court and recognizing unconstitutionality of North Carolina cyberbullying statute).

53 *See* *Bishop*, 774 S.E.2d at 340, 349 (explaining facts of case and upholding conviction for cyberbullying). *But see* Gauthier v. Manchester Sch. Dist., SAU #37, 123 A.3d 1016, 1020-21 (N.H. 2015) (holding school board innocent even though cyberbullying attack occurred against student). In this case, student Morgan Graveline received threatening Facebook messages from another student, which eventually lead to a physical altercation and Morgan's transportation to the emergency room. *Id.* at 1017. As a result, Morgan's mother sued the school board for failure to notify her as a parent of the victim of cyberbullying 48 hours after the bullying incident in accordance with the Pupil Safety and Violence Prevention statute passed by the New Hampshire legislature. *Id.* at 1018. One of the statute's purposes is to provide school boards throughout the state with a written policy prohibiting acts of bullying including cyberbullying. *Id.* at 1017. Specifically, the statute says:

I. Bullying or cyberbullying shall occur when an action or communication as defined in RSA 193-F:3:

(a) Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

(b) Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.

II. The school board of each school district and the board of trustees of a chartered public school shall, no later than 6 months after the effective date of this section, adopt a written policy prohibiting bullying and cyberbullying. Such policy shall include the definitions set forth in RSA 193-F:3. The policy shall contain, at a minimum, the following components:

(a) A statement prohibiting bullying or cyberbullying of a pupil. ...

(h) A procedure for notification, within 48 hours of the incident report, to the parent or parents or guardian of a victim of bullying or cyberbullying and the parent or parents or guardian of the perpetrator of the bullying or cyberbullying. The content of the notification shall comply with the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g.

N.H. REV. STAT. ANN. § 193-F:4(I.)-(II.)(a)(h) (LexisNexis 2017). While the student's action constituted cyberbullying through Facebook, the anti-bullying policy pursuant to N.H. REV. STAT. ANN. § 193-F:9 (LexisNexis 2017) specifically states that "[n]othing in this chapter shall supersede or replace existing rights or remedies under any other general or special law, including criminal law, nor shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state." *Gauthier*, 123 A.3d at 1019 (quoting § 193-F:9). Therefore, the court granted summary judgment in favor of the defendant school board. *Id.* at 1021. *See generally* Sarah Perez, *More Cyberbullying on Facebook, Social Sites than Rest of Web*, READWRITE (May 10, 2010), http://readwrite.com/2010/05/10/more_cyberbullying_on_facebook_social_sites_than_rest_of_web (explaining reason for increase in online harassment on Facebook). Considering more young adults have been subscribing to social media sites, such as Facebook, they are more vulnerable to cyberbullying and online harassment acts. *Id.* According to Perez, 39% of social network users have been the victim of online harassment. *Id.* Specifically, the problem of online harassment was intensified in 2009 when Facebook became more public, allowing profiles to also become more public, including the activities on those profiles. *Id.*

54 *See* *Bishop*, 774 S.E.2d at 340. In addition, Bishop posted screen shots of his text messages on his Facebook, further insulting Price. *Id.* at 340-41. One of these posts included a picture of Price and his dog with comments saying that his anus was stressed from having penises in it. *Id.* Furthermore, because of these harassing posts, his mother witnessed Price beating himself on the head, throwing things around his bedroom, and crying. *Id.* When Price's mother later discovered the harassing posts on her son's cellphone, she immediately contacted law enforcement, which led to this case. *Id.*

55 *See* *id.* at 341 (alleging defendant intended to torment Dillon on Facebook); *see also* N.C. GEN. STAT. § 14-458.1(a)(1)(d) (2016) ("Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following: With the intent to intimidate or torment a minor ... post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor."). *But see* *Bishop*, 787 S.E.2d at 821 (holding cyberbullying statute's restriction on speech not narrowly tailored to State interest, finding statute unconstitutional).

56 *See* *Bishop,* 774 S.E.2d at 341 (explaining defendant's argument that statute is overbroad and vague). The court admitted that determining this issue would be a case of first impression where it had to analyze whether the State's cyberbullying statute criminalizes protected speech found in the First Amendment. *Id.* at 342; *see also* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (explaining 'overbreadth' doctrine regarding conduct and speech). If conduct and speech are involved in a supposedly overbroad statute, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

57 *See* *Bishop*, 774 S.E.2d at 344-45 (rejecting defendant's argument). *See also* United States v. O'Brien, 391 U.S. 367, 376 ("We [the court] cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. ... [W]hen speech and nonspeech elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Besides an "important" government interest, the Supreme Court has used a multitude of words to describe such government interest. *Id*. These words include compelling, paramount, strong, etc. *Id.* at 376-77. Nevertheless, there has not been a clear definition of what these modifiers truly mean, especially the modifier "compelling," regarding a compelling government interest. *See* Volokh, *supra* note 42, at 2420 (questioning what interest is compelling enough to regulate speech). Regardless, since the North Carolina General Assembly professed that the statute was simply to protect children from the effects of harassment, the court held it was justified to promote the statute's constitutionality even if regulates some elements of free speech. *Bishop*, 774 S.E.2d at 344.

58 No. 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963 (D. Nev. July 3, 2013).

59 *See id*. at *10-11 (explaining court's reasoning behind decision).

60 *See id*. at *1-2 (discussing factual background of case).

61 *See id*. (noting importance of location and time of comments as they relate to school regulated speech). The defendant argued that the court can regulate off-campus student speech if it causes a substantial disruption. *Id*. at *8.

62 *Id*. at *2, *8. Some of these Tweets included "Mr. Isaacs is a b*tch too;" "I hope Coach Brown gets f*ck*d in the *ss by 10 black d*cks;" and "F*ck coach browns b*tch *ss." *Id*.

63 *See Rosario*, 2013 U.S. Dist. LEXIS 93963, at *2 (explaining school's response after discovering Juliano's vulgar tweets).

64 *See id*. at *7-8 (outlining plaintiff's argument that school exceeded its authority).

65 *Id*. at *9 (holding tweet, "I hope Coach brown gets f*ck*d in tha *ss ..." was obscene); Miller v. California, 413 U.S. 15, 23 (1973) (defining obscene speech). As explained in *Miller*, obscene speech cannot receive First Amendment protection and includes speech meets the following criteria:
(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (internal citations omitted). *See also* S. J. W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (holding schools can control off-campus speech when it reaches campus and causes "substantial disruption").

66 *See* People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014) (holding that Albany County cyberbullying statute is vague). In fact, the Albany County cyberbullying statute was so vague that it arguably criminalized a broad array of speech that would not normally be considered cyberbullying. *Id.* at 486. For example, the statute included prohibitions on speech that are meant to simply annoy or humiliate another, conducted on multiple forms of electronic communication devices such as the telephone. *Id*. Because the cyberbullying statute could even criminalize telephone conversations simply meant to annoy another, one can see a further connection between cyberbullying and the Harassment Telephone Laws. *Id*.

67 787 S.E.2d 814 (N.C. 2016).

68 *Id*. at 821 (quoting United States v. Stevens, 559 U.S. 460, 474 (2010)) (finding statute unconstitutional).

69 *See id*. at 818-21 (asking whether cyberbullying statute burdens free speech, is content based, and passes strict scrutiny).

70 *See id*. at 817. Because the Free Speech Clause of the First Amendment inherently provides the right of protected speech, if the North Carolina cyberbullying statute prohibited this right, the statute would clearly be unconstitutional; thus, the real conflict would be if the statute prohibited conduct. *Id*. at 816-18. Courts throughout the country have ruled differently on whether the First Amendment protects expressive conduct; however, the Supreme Court in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, held that the First Amendment can only protect an individual's rights if the conduct was "inherently" expressive. *Rumsfeld*, 547 U.S. at 66. An example of inherently expressive is burning a flag. *Id*. Nevertheless, such conduct is not automatically deserving of First Amendment protection, for example, if it involves communication "integral to criminal conduct." *Bishop*, 787 S.E.2d at 817 (quoting United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012)). However, at the same time, one cannot be prevented from acting in a certain way merely because the action was carried out by online communication; therefore, there is still not a clear answer on what conduct is and is not protected by the First Amendment. *Bishop*, 787 S.E.2d at 818.

71 *Bishop*, 787 S.E.2d at 818 (weighing if posting online is speech or conduct). According to the North Carolina Supreme Court in *Bishop*, internet posting is a definitive form of protected speech analogous to flyers on bulletin boards and pamphlets given to the public. *Id*. at 817. If a piece of legislation contains content-based regulations, the court will apply a strict scrutiny standard to determine whether the statute is constitutional. *Id*. at 818. However, if a piece of legislation merely contains content-neutral restrictions, the court will apply intermediate scrutiny when determining the statute's constitutionality. *Id*. Content neutral restrictions include "those governing ... the time, manner, or place of First Amendment-protected expression ...." *Id*. Nevertheless, in recent years there seems to have been a liberalization in determining whether a statute's restrictions are content-based; this is evidenced by the holding in *Reed v. Town of Gilbert*, where the court defined "several paths" that one can take to conclude that a restriction is content based and, thus, requires a strict scrutiny analysis. *Reed*, 135 S. Ct. at 2227-28. *Reed* also concluded that if the statute is content based "on its face or when the purpose and justification for the law are content based," then the strict scrutiny standard will apply when analyzing the statute's constitutionality. *Reed*, 135 S. Ct. at 2228.

72 *See Bishop*, 787 S.E.2d at 819 (finding cyberbullying statute creates content based restriction). In fact, the court here was frustrated that it had to analyze the content of the communication before criminalizing one for cyberbullying. *Id*. Because "[t]he statute criminalizes some messages but not others ... [it] makes it impossible to determine whether the accused has committed a crime without examining the content of his [or her] communication." *Id*.

73 *Id*. at 819 (requiring strict scrutiny review of North Carolina cyberbullying statute).

74 *Id*. at 822; *see* Tucker, *supra* note 7 (explaining that cyberbullying can be prevented in non-legislative ways). *But see supra* Part II, B (detailing importance of cyberbullying statutes due to increased number of suicides amongst teenagers).

75 *See* *Bishop*, 787 S.E.2d at 820-21 (holding statute is far beyond government's interest in protecting children's psychological health). As such, even though Price suffered psychologically because of the cyberbullying incident, Bishop should not have been charged for going against North Carolina's cyberbullying statute because the statute never defined what is meant by intimidating or tormenting conduct. *Id.* at 821. Therefore, without these definitions, it is impossible to determine whether Bishop was intimidating or tormenting a minor even if it arguably seems clear that he was doing so through his vulgar online posts. *Id.* at 821. As the court holds, although "[t]he protection of minors' mental well-being may be a compelling governmental interest ... it is hardly clear that teenagers require protection via the criminal law from online annoyance." *Id*. In fact, the court held that if it were to adopt the State's cyberbullying legislation, it could potentially mean that any information posted online against a child would be cyberbullying. *Id*.

76 *See* *Bishop*, 787 S.E.2d at 821-22 (finding North Carolina cyberbullying statute unconstitutional).

77 19 N.E.3d 480 (N.Y. 2014).

78 *See* *id.* at 488 (holding statute violates First Amendment as law did not help state achieve its intended goal).

79 *See* *id.* at 482. In this case, Marquan M. created a Facebook page called "Cohoes Flame" which contained photographs of his classmates and other peers. *Id.* at 484. These photographs also had captions detailing sexual practices of the classmates, their sexual partners, and other explicit personal information. *Id*.

80 *See id*. at 484, 486 (defining cyberbullying statute in Albany County). Overall, the statute explained that cyberbullying involved any act of communicating through electronic means with the intent to harass, annoy, etc. *Id*. Furthermore, the statute outlawed cyberbullying against minors or other persons, which was broadly defined to include natural persons, individuals, corporations, etc. *Id*.

81 *See id*. at 486 (finding statute was too broad). Specifically, the court conceded that while the federal government has a compelling interest in protecting children from harm, the government usually has no power to restrict free speech because of its subject matter or content. *Id*. at 485. Rather, the government can only prohibit speech if it can be qualified as fighting words or true threats. *Id*. at 486. Therefore, because the Albany County Cyberbullying Statute involved prohibitions on a "variety of constitutionally-protected modes of expression," including words that may annoy another person instead of restricting itself to fighting words or true threats, the statute was deemed overbroad, facially invalid, and, thus, unconstitutional under the Free Speech clause of the First Amendment. *Id*. at 488. *See also* People v. Golb, 15 N.E.3d 805, 813 (N.Y. 2014) (noting First Amendment does not prohibit annoying and embarrassing speech). Here, the court rejected N.Y. PENAL LAW § 240.30(1)(a) (Consol. 2017) which states:

[A] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, [he or she] ... communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication.

Id. (quoting N.Y. PENAL LAW § 240.30 (Consol. 2017)). This statute was rejected because it ultimately prohibited annoying or alarming speech, which is protected speech under the First Amendment; thus, the statute was deemed overbroad. *Id.*; People v. Dietze, 549 N.E.2d 1166, 1168 (N.Y. 1989) ("[A]ny proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence ....").

82 799 F.3d 379 (5th Cir. 2015).

83 *See* *id.* at 404 (noting importance of allowing parents to regulate off-campus speech). In fact, the dissent says that the majority overlooks Supreme Court precedent, stating that children are provided with 'significant' First Amendment protection and that the government does not have any "free-floating power to restrict the ideas to which children may be exposed." *Id*. (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 794 (2011)). Additionally, under First Amendment precedents, the government must prove more than mere negligence with the harassing or threatening speech before imposing penalties on the individual who made such threatening speech. *Id.* at 404-05. *See also* Virginia v. Black, 538 U.S. 343, 359 (2003) (defining 'true threats' when analyzing whether speech is prohibited under First Amendment). According to the *Black* Court, 'true threats' "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of

individuals." *Id*. Therefore, since these statements include an intent to commit unlawful violence on another, the First Amendment does not protect this speech because if protected, then individuals could face the "fear of violence." *Id*. at 360; D.C. v. R.R., 182 Cal. App. 4th 1190, 1221 (Cal. App. 2d 2010) (recognizing true threat in cyberbullying context). Here, R.R. posted a message to D.C. online stating, among other indecent comments, that he wanted to "rip out [D.C.'s] fucking heart and feed it to [him]." *R.R.*, 182 Cal. App. 4th at 1121. The court concluded that these statements signified true threats to D.C. and were not just part of a joke, as R.R.'s parents even prohibited him from Internet use and even sent him to a psychiatrist to discover the central cause of his actions. *R.R.*, 182 Cal. App. 4th at 1222.

84 *See Bell*, 799 F.3d at 383. Specifically, Bell posted the video on his public Facebook page and on YouTube for all to listen. *Id*. Bell threatened violent acts against these teachers because he believed that the teachers sexually abused female students at the school. *Id*. Some excerpts of the rap video include:
[T]his niggha telling students that they sexy, *betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack* / Quit the damn basketball team / the coach a pervert / can't stand the truth so to you these lyrics going to hurt[.] What the hell was they thinking when they hired Mr. R [.] / dreadlock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as hell / Talking about you gangsta / drive your mama's PT Cruiser / *Run up on T-Bizzle / I'm going to hit you with my rueger*[.]
Id. at 384.

85 *See id*. at 385-87. First, Bell was suspended pending a disciplinary-committee hearing because his video violated the district's administrative disciplinary policy, which views "'[h]arassment, intimidation, or threatening other students and/or teachers' as a severe disruption." *Id*. at 399. After the hearing, the school board determined that since he violated the above school-district policy, Bell had to attend the county's alternative school for the remainder of the grading period. *Id*. at 386. In fact, his video did disrupt the school; particularly, the teachers mentioned in his video were adversely affected by it. *Id*. at 388. For example, while teaching a gym class, Coach R. noticed that more students were going to the gym after the incident. *Id*. Furthermore, he said that he could no longer work with the girls' track team because of the incident and had to teach the boys' team how to help with the girls' team. *Id*. The video also affected Coach W., commenting that she was scared because "you never know in today's society ... what somebody means, [or] how they mean it." *Id*.

86 *See id*. at 387 (outlining parties' arguments). Bell also asked to be reinstated to his high school with "'all privileges to which he was and may be entitled as if no disciplinary action had been imposed,' and all references to the incident being expunged from his school records." *Id*.

87 *See Bell*, 799 F.3d at 389-90. Bell posted the video on his public Facebook page and on YouTube for all of the school community to see. *Id*. at 383, 385. Specifically in the school setting, the majority argued the First Amendment does not provide students absolute rights to freedoms of speech because such freedoms should be regulated in light of the school's duty to "teach[ ] students the boundaries of socially appropriate behavior ...." *Id*. at 390 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)). Although the decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, provided that a student may express his or her opinion, such opinion should still not collide with "the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id*. at 390 (quoting *Tinker*, 393 U.S. 503, 503, 513 (1969)); Beussink v. Woodland R-IV School District, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (holding school's punishment of student for disturbing speech on Internet invalid). Specifically, Beussink created a website off-campus, which vulgarly criticized school officials; as a result, the school punished Beussink. *Id*. at 1180. However, the court ruled that because the website was not materially disruptive of school activities, the school could not punish Beussink for his off-campus activities online. *Id*. at 1181. *But see* Virginia v. Black, 538 U.S. 343, 359 (2003) (explaining when government can prohibit speech). The concurring opinion by Justice Costa in *Bell* also brings the discussion into the cyberbullying realm. *See Bell*, 799 F.3d at 402-03. Although the dissent praises Bell's speech because it combats sexual harassment, the dissent's ultimate rule to prohibit schools from possessing the authority to punish students for their off-campus speech online would not only further potential sexual harassment actions, but would also allow for "ferocious cyberbullying that affect our classrooms to go unchecked." *Id*. at 403. *See generally Should Off-Campus Cyberbullying be Grounds for Suspension?*

The Supreme Court May Weigh in Soon, BULLYING EDUCATION (Jan. 27, 2012), http://www.bullyingeducation.org/2012/01/27/should-off-campus-cyberbullying-be-grounds-for-suspension-the-supreme-court-may-weigh-in-soon/ (debating whether school has power to punish cyberbullies off-campus). One case involved Kara Kowalski, a high school senior, who created a degrading online profile of another student, stating that the student was a "slut who had herpes." *Id*. Because the profile was deemed a targeted attack on another student, the Fourth Circuit Court of Appeals ruled Kowalski violated the school's anti-bullying and harassment policy, and such speech was beyond protection from the First Amendment. *Id*.

88 *See* *Bell*, 799 F.3d at 404 (highlighting importance of free speech). According to the dissent, because Bell's free speech involved a matter of public concern, students' free speech should not be restricted. *Id*. at 411. In fact, speech on matters of public concern, including those of a violent nature, are "at the heart of the First Amendment's protection." *Id*. at 406 (quoting Snyder v. Phelps, 562 U.S. 443, 451-52 (2011)); *see also* Watkins v. Bowden, 105 F.3d 1344, 1353 (11th Cir. 1997) (defining speech that involves a matter of public concern). Speech of public concern involves speech that relates to "a matter of political, social, or other concern to the community." *Watkins*, 105 F.3d at 1353. When deciding whether speech involves a matter of public concern, the court must analyze "the content, form, and context of the speech" to determine if an illegal prohibition against free speech has occurred. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)). While the workplace has been a frequent source of speech involving matters of public concern in recent years, students can also face this form of speech in the school setting. *See* *Tinker*, 393 U.S. at 506 (defending students' right to free speech); *Bell*, 799 F.3d 739 (upholding school board's disciplinary against a student for rap song recorded off-campus). In particular, the speech in *Tinker* involved a matter of public concern for its time: wearing black armbands in protest against the Vietnam War. *Tinker*, 393 U.S. at 504. Because it did not disrupt the school's educational activities, however, it was not seen as threatening or harmful speech, which could be restricted; rather, it was protected under the First Amendment. *Id*. at 514. The speech in *Tinker* was also important because it was analogous to "pure speech," which is entitled to First Amendment protection. *Id*. at 505-06; *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 794-95 (2011) (holding government has no power to prohibit ideas to which students may be introduced); Cox v. Louisiana, 379 U.S. 536, 555 (1964) ("[The Court] reject[s] the notion ... that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

89 *Bell*, 799 F.3d at 408-10 (Dennis, J., dissenting) (explaining speech about violence and public issues could be protected under First Amendment).

90 *See* *id*. at 404 (arguing inability to regulate internet speech). Here, the dissent acknowledges the majority's opinion that school administration now faces new challenges when establishing regulations against students because of the use of the Internet and other technological devices in recent years. *Id. See also* Reno v. American Civil Liberties Union, 521 U.S. 844, 844, 868-70 (1997) (rejecting Communications Decency Act which was part of 47 U.S.C.S. § 223). In *Reno*, under 47 U.S.C.S. § 223, it was illegal to send communications to a minor under 18, through a computer service, that were "patently offensive." *Reno*, 521 U.S. at 844. However, the Act included numerous ambiguities and used different terms to describe the prohibited speech. *Id*. at 870-71. Such terms ranged from 'indecent' to "patently offensive." *Id*. Consequently, because the statute was so vague, the Supreme Court ruled that the Act 'chilled' free speech and was, therefore, unconstitutional. *Id*. at 871-72.

91 *Bell*, 799 F.3d at 408-10 (Dennis, J., dissenting) (stating school board would be given too much authority if allowed to control Bell's actions).

92 *See supra* notes 1-2 and accompanying text (discussing technology increasing indirect harassment vulnerability).

93 *See* King, *supra* note 1, at 846-49 (2010) (demonstrating positive and negatives of Internet usage and need for legislative involvement); File & Ryan, *supra* note 50 (showing increased Internet usage in recent years); *see also* case cited *supra* note 18 and accompanying text (discussing new means of harassment); Jones, Mitchell, & Finkelhor, *supra* note 2, at 66 (noting online harassment).

94 *See* People v. Marquan M., 19 N.E.3d 480, 486-88 (N.Y. 2014) (holding cyberbullying statute threatening to one's right of free speech); Royall, *supra* note 12, at 1403 (challenging constitutionality of Harassing Telephone laws).

95 *See* sources cited *supra* note 33 and accompanying text (arguing that first amendment interpretation has changed with new legislation intact).

96 *See Marquan M.*, 19 N.E.3d at 486 (rejecting Albany County cyberbullying statute because unconstitutional); Rose, *supra* note 21, at 1007, 1026 (arguing Arkansas cyberbullying statute could regulate free speech protected under first amendment). In Arkansas, for example, the local legislature did not define speech that is threatening or harmful, meaning that those charged under the Arkansas cyberbullying law could be penalized for speech that arguably is protected under the First Amendment. *Rose*, *supra* note 21 at 1007, 1026. *See also* Royall, *supra* note 12, at 1403 (discussing telephone communication); King, *supra* note 1, at 846 (demonstrating need to balance protections of using Internet with protections afforded under First Amendment).

97 *See The Rise in Cyberbullying*, *supra* note 7 (noting data regarding cyberbullying). With the increasing use of social media sites, suspects can cyberbully others by posting negative visual images or commentary of their victims online. *Id.*; *see also* sources cited *supra* note 1 and accompanying text (explaining increased cyberbullying threat with popular usage of social media sites).

98 *Compare* File & Ryan, *supra* note 50, at 1-2 (finding 74.4% of Americans use Internet), *with* Perez, *supra* note 53 (highlighting recent increase in young adults using social media sites). *See also* Rose, *supra* note 21, at 1026-28 (indicating difficult nature of prosecuting under statute).

99 *See* Brenner & Rehberg, *supra* note 29, at 24 (explaining texts can construe different meaning). For example, if one posts negative comments about another in a public forum on Facebook instead of on a person's Timeline or through Facebook Messenger, there has been debate over whether such action is cyberbullying. *See id*. at 31. While Brenner and Rehberg would argue that this conduct is indirect cyberbullying that could lead the victim to suffer negative impacts, including loss of employment, humiliation, and the straining of personal relationships, the court in *State v. Ellison* would hold differently. *See* State v. Ellison, 900 N.E.2d 228, 231 (Ohio Ct. App. 2008); Brenner & Rehberg, *supra* note 29, at 31-32. Because there was no proof demonstrating that the perpetrator had the "specific purpose" in harassing the alleged victim when posting an embarrassing caption to a photo on MySpace, then the perpetrator was not cyberbullying. *See Ellison*, 900 N.E.2d at 230-31 (noting action was not cyberbullying).

100 900 N.E.2d 228 (Ohio Ct. App. 2008).

101 *See id*. at 230-31 (noting burden of proof government required to show intent). Again, it may be extremely difficult to determine whether an individual had the specific intent to harass another, especially when one posts a comment or picture in a public forum. *Id*. Consequently, if the individual is found to not have such specific intent, he or she would be unjustly prevented from freedom of speech rights. *Id*. at 231 (Painter, J., concurring). As stated in the concurring opinion by Justice Painter:
[P]osting an annoying--but nonthreatening--comment on a website is not a crime under [the Ohio telecommunications harassment statute]. ... The First Amendment would not allow punishment for making a nonthreatening comment on the Internet, just as it would not for writing a newspaper article, posting a sign, or speaking on the radio.
Id.

102 *See* Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976) ("[W]ords must do more than offend, cause indignation or anger the addressee to lost the protection of the First Amendment.").

103 *Id*. at 237.

104 *See id*. (noting to restrict speech for merely provoking or angering individual would be unconstitutional). Without the protection of free speech, there would be a "standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id*. (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)).

105 *See id*. at 239-40 (noting protection for dispute speech distinguished from "fighting words"). Words even determined to be explicit may not be words that would be "likely to incite the addressee to a violent reaction under the circumstances of the case." *Id*.

106 *See* King, *supra* note 1, at 846 (discussing need for balance regarding constitutional restrictions).

107 *See* Tucker, *supra* note 7 (noting First Amendment concerns in cyber laws).

108 799 F.3d 379 (5th Cir. 2015).

109 *See id*. at 389-91 (demonstrating school's control over their students' freedom of speech).

110 *See id*. at 404 (Dennis, J., dissenting) (stating that matters of public concern occupy First Amendment values); United States v. Eckhardt, 466 F.3d 938, 944 (11th Cir. 2006) (holding speech did not involve public concern). Because the speech did not involve a matter of public concern and, in fact, was laced with sexuality, Eckhardt was guilty of violating the Harassing Telephone Law. *Eckhardt*, 466 F.3d at 944. *See generally* Rosario v. Clark County Sch. Dist., No 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, at *11-12 (D. Nev. July 3, 2013) (explaining difference between public and private speech).

111 *See Bell*, 799 F.3d at 403-04 (Dennis, J., dissenting) (reviewing important protections of public concern speech). "First and foremost, the majority opinion erroneously fails to acknowledge that Bell's rap song constitutes speech on 'a matter of public concern' and therefore 'occupies the highest rung of the hierarchy of First Amendment values.'" *Id*. at 404 (citing Snyder v. Phelps, 562 U.S. 443, 452 (2011)).

112 *See* Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976) (stating importance of ability to voice one's opinions).

113 *See Bell*, 799 F.3d at 405 (Dennis, J., dissenting) (citing Virginia v. Black, 538 U.S. 343, 359 (2003)) (explaining negative effects of imposing negligence penalties).

114 *See id*. (noting that majority ignores *Tinker* reasoning); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (supporting free speech because students' actions did not cause substantial disruption in school).

115 *See Bell*, 799 F.3d at 405-06 (Dennis, J., dissenting) (noting censorship of protected speech); People v. Marquan, M., 19 N.E.3d 480, 486 (N.Y. 2014) (rejecting cyberbullying statute because embraced wide array of speech). Ultimately, the statute encompassed prohibitions "far beyond the cyberbullying of children" and prohibited speech that is essentially protected under the First Amendment. *Id*. Finally, the statute was deemed vague and was reasonably susceptible to numerous different interpretations. *Id*. at 486-87. For example, Harassment Telephone Laws and Cyberbullying Statutes could prevent obscene or profane language from another. *See* sources cited *supra* note 12 (noting multiple meanings of statutes). Further, these terms are merely academic and may be difficult to apply to real life scenarios. *See supra* Part II, A and accompanying text.

116 *See supra* notes 28-29 and accompanying text (noting protections and meanings of protected speech).

117 *See* Royall, *supra* note 12, at 1403 (discussing telephone issues in indirect harassment).

118 *See* State v. Camp, 295 S.E.2d 766, 768 (N.C. Ct. App. 1982) (upholding statute regulating conduct not communication of ideas); Nadel, *supra* note 15, at 102-07 (describing legislative action to pass statutes prohibiting harassing telephone calls). *But see* Royall, *supra* note 12 and accompanying text (noting challenges due to vagueness).

119 *See Telecommunications Law: Telephone Harassment,* supra note 14 (describing instances when telephone call considered harassing).

120 *See* Lewis v. New Orleans, 415 U.S. 130, 134 (1974) (holding law invalid if susceptible in regulating protected speech); Radford v. Webb, 446 F. Supp. 608, 610-11 (W.D.N.C. 1978) (discussing concerns with restrictive free speech).

121 *See* United States v. Lampley, 573 F.2d 783, 785 (3d Cir. 1978) (holding Lampley guilty for violating harassing telephone statute because of telephonic attack against victim); *The Top Six Unforgettable Cyberbullying Cases Ever, supra* note 2 (listing numerous cases dealing with suicides caused by cyberbullying); St. George, *supra* note 19 (showing increase in depression due to cyberbullying).

122 *See Lampley*, 573 F.3d at 783; sources cited *supra* note 14 and accompanying text (explaining types of calls at issue).

123 *See* United States v. Eckhardt, 466 F.3d 938, 942 (11th Cir. 2006) (describing frequency and context of call to be harassing).

124 *See* sources cited *supra* note 15 and accompanying text (noting protection for victim under statute); *see also* Royall, *supra* note 12, at 1403 (noting telephone can be instrument for bringing about fear).

125 *See* Patchin, *supra* note 3 (finding dramatic increase in frequency of cyberbullying incidents); *see also* sources cited *supra* notes 19-20 and accompanying text (explaining heightened need for statutes addressing cyberbullying).

126 *See* Rose, *supra* note 21, at 1004 (reviewing data of reported cyber incidents).

127 *See* Tucker, *supra* note 7 (arguing parents should control cyberbullying not legislators). Additionally, legislators should not be involved in controlling cyberbullying; rather, parents should bear responsibility in resolving this problem by monitoring their child's internet usage. *Id.*; *Stop Cyberbullying Before it Starts*, *supra* note 21 (highlighting parents' role in monitoring children's online activity). Parents' role in preventing cyberbullying are critical, not only to protect their children from cyberbullying attacks, but also to ensure their children are not cyberbullying others. *Stop Cyberbullying Before it Starts*, *supra* note 21. *But see* King, *supra* note 1, at 846 and accompanying text (arguing both parents and legislators must work together to find solution to cyberbullying).

128 *See* St. George, *supra* note 19 (explaining cyberbullying's effect of depression on victims).

129 *See* sources cited *supra* note 24 (defining acts of cyberbullying in Massachusetts).

130 *See* Maag, *supra* note 20 and accompanying text (explaining in greater detail).

131 *See* Goldman, *supra* note 23 (explaining death of Prince due to cyberbullying); sources cited *supra* note 24 (defining Massachusetts cyberbullying and anti-bullying required conduct).

132 *See* sources cited *supra* note 5 (noting Rhode Island statute prohibiting cyberbullying).

133 *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (ruling nonspeech elements combined with speech elements, government needs important reason to regulate nonspeech).

134 *See* sources cited *supra* note 33 (describing first amendment limitations leading to transformed interpretation of free speech).

135 *See The State of the First Amendment*, *supra* note 33 (explaining new perspective where Americans believe First Amendment overextends in protecting rights). Ultimately, this new perspective involves the idea of a refined First Amendment where our freedom of speech is no longer seen as a right, but a privilege that we must earn. *Id.*; AJ Oatsvall, *supra* note 33 (defining differences between privileges and rights).

136 *See supra* note 24 and accompanying text (noting various cyberbullying statutes passed throughout country). The many suicides that have occurred because of cyberbullying, and the lack of statutory authority to charge the alleged perpetrators, demonstrates that cyberbullying statutes are beneficial and crucial. King, *supra* note 1, at 846-47. *But see* sources cited *supra* note 33 (altering meaning of First Amendment with cyberbullying legislation).

137 *See* State v. Bishop, 787 S.E.2d 814, 819-21 (N.C. 2016) (holding unconstitutionality of North Carolina cyberbullying statute).

138 *See Cyberbullying: A Report on Bullying in a Digital Age, supra* note 33 (explaining threat of cyberbullying should be stopped through legislative enactments).

139 *See* Kalman, *supra* note 28 (noting limitations will usurp freedom of speech).

140 *See* sources cited *supra* note 33 (noting complex nature of how to interpret constitutional amendments).

141 *This paper was drafted before Michelle Carter was found guilty of involuntary manslaughter on June 16, 2016 at Bristol County Juvenile Court in Massachusetts. Ray Sanchez & Natisha Lance, *Judge Finds Michele Carter Guilty of Manslaughter in Texting Suicide Case*, CNN (June 16, 2017, 3:08 PM), http://www.cnn.com/2017/06/16/us/michelle-carter-texting-case/index.html (discussing case and text messages influencing Roy to commit suicide). This judgment may signify a transformation of the legal landscape regarding cyberbullying and the repercussions for sending threatening messages via text or social media to another. *See id*. (explaining spark by lawmakers to pass legislation in future that would criminalize Carter's behavior). Nevertheless, the argument above discussing the Carter case still holds true, as various organizations, such as the ACLU of Massachusetts, commented that the judgment against Carter "exceeds the limits of our criminal laws and violates free speech protections guaranteed by the Massachusetts and U.S. Constitutions." *Michelle Carter Text Suicide Trial Verdict: Guilty*, CBS NEWS (June 16, 2017, 11:16 AM), http://www.cbsnews.com/news/michelle-carter-text-suicide-trial-verdict-guilty/.

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Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #053

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **5th day of December, 2018**, are as follows:

PER CURIAM:

2018-B-1233 IN RE: SALVADOR R. PERRICONE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, the briefs, and oral argument, it is ordered that Salvador R. Perricone, Louisiana Bar Roll number 10515, be and he hereby is disbarred. His name shall be stricken from the roll of attorneys, and his license to practice law in the State of Louisiana shall be revoked. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

Retired Judge Gay Gaskins, assigned as Justice ad hoc, sitting for Guidry, J., recused.

Retired Judge Hillary Crain, assigned as Justice ad hoc, sitting for Weimer, J., recused.

WEIMER, J., recused.
GUIDRY, J., recused.
CRICHTON, J., additionally concurs and assigns reasons.

12/05/18

SUPREME COURT OF LOUISIANA

NO. 2018-B-1233

IN RE: SALVADOR R. PERRICONE

ATTORNEY DISCIPLINARY PROCEEDING

PER CURIAM[*]

This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Salvador R. Perricone, an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

The underlying facts of this case are largely undisputed. By way of background, respondent commenced employment as an Assistant United States Attorney ("AUSA") with the United States Attorney's Office for the Eastern District of Louisiana ("USAO") in 1991. At all times relevant to these proceedings, respondent was a Senior Litigation Counsel and the USAO's training officer.

During the times pertinent to these proceedings, a New Orleans newspaper, *The Times-Picayune*, maintained an Internet website identified as nola.com. The website typically permitted readers to post comments to news stories using pseudonyms and/or anonymous identities.

Beginning in or around November 2007 and continuing through March 14, 2012, respondent was a frequent poster of comments on a myriad of subjects on nola.com,[1] including comments on cases which he and/or his colleagues at the

[*] Retired Judge Gay Gaskins, assigned as Justice Ad Hoc, sitting for Guidry, J., recused; Retired Judge Hillary Crain, assigned as Justice Ad Hoc, sitting for Weimer, J., recused.

[1] All nola.com comments cited in this memorandum are set forth precisely as they were posted by

USAO were assigned to prosecute. Of the more than 2,600 comments respondent posted, between one hundred and two hundred – less than one percent – related to matters being prosecuted in the USAO. None of the comments identified respondent by name or as an employee of the USAO. Rather, respondent posted on nola.com using at least five online identities: "campstblue," "legacyusa," "dramatis personae," "Henry L. Mencken1951," and "fed up."

Count I

In 2009, the FBI and the USAO commenced an investigation into allegations of corruption against various Jefferson Parish officials. In particular, investigations included allegations involving improper health insurance contracts between government entities and/or contractors and an insurance company owned by Tim Whitmer, the Jefferson Parish Chief Administrative Officer. Among the insurance contracts under investigation was one with River Birch, Inc., a privately held landfill company owned by Fred Heebe, whose company had been awarded a $160 million landfill contract with Jefferson Parish.

In February 2011, a federal grand jury indicted Henry Mouton, a former member of the Louisiana Wildlife and Fisheries Commission. The indictment charged that "co-conspirator A" paid Mr. Mouton more than $400,000 to use his influence with the Commission to force the closure of the Old Gentilly Landfill, which competed with River Birch. In June 2011, Mr. Mouton pleaded guilty to conspiracy.

An additional investigation alleged embezzlement by Dominick Fazzio, the chief financial officer for River Birch, and his brother-in-law, Mark Titus. Mr. Titus pleaded guilty and cooperated in the subsequent indictment of Mr. Fazzio for

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respondent, without corrections of typographical errors, spelling, grammar, or punctuation.

fraud and money laundering. Respondent was not on the prosecution team in that case, which was assigned to United States District Judge Ginger Berrigan in the Eastern District, but he did enroll for the limited purpose of disqualifying attorney Stephen London as Mr. Fazzio's trial counsel.

During the pendency of these investigations and prosecutions, respondent began commenting on nola.com using the pseudonym "Henry L. Mencken1951":

> If Heebe had one firing synapse, he would go speak to Letten's posse and purge himself of this sordid episode and let them go after the council and public officials. Why prolong this pain...perhaps Queen Jennifer has something to say about that.[2]
> -December 18, 2011, 10:21 a.m.
>
> Heebe comes from a long line of corruptors.
> -September 3, 2011, 10:55 a.m.
>
> Heebe's goose is cooked.
> -September 4, 2011, 10:45 a.m.

As regards a nola.com story announcing the indictment of Mr. Mouton, respondent commented using his pseudonym "legacyusa," writing:

> I read the indictment...there is no legitimate reason for this type of behavior in such a short period of time and for a limited purpose. GUILTY!!!
> -February 26, 2011, 9:16 a.m.

As regards a nola.com article on the indictment of Mr. Fazzio, respondent posted a comment using his pseudonym "dramatis personae" and wrote:

> Well, Mr. Fazzio, I hope you have room in your scrap book for your conviction and mug shot. London didn't too well with Archie Kaufman. You're next.[3]
> -August 5, 2011, 3:09 p.m.

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[2] "Jennifer" is Mr. Heebe's wife, Jennifer Sneed, who was a member of the Jefferson Parish Council when the River Birch contract was approved.

[3] Mr. London also represented NOPD officer Archie Kaufman in the Danziger Bridge trial. See Count III.

Following Judge Berrigan's decision to disqualify Mr. Fazzio's attorney due to a conflict, Mr. Fazzio hired Arthur "Buddy" Lemann as his new attorney, as reported on nola.com. Respondent commented using "Henry L. Mencken1951," writing:

> Looks like Fazzio got a lemon. That book you refer to Mr. Rioux is about all of his losses. The guy is a clown and Fazzio is going down.
> -January 13, 2012, 10:36 p.m.

In another post following Judge Berrigan's disqualification order, respondent commented as "Henry L. Mencken1951" and wrote:

> It's the right decision. Judges don't take this action lightly. There must be something going on we don't know about or the TP is too stupid (more likely) to understand. Please get to the bottom of this, PLEASE!!!
> -January 5, 2012, 7:36 p.m.

Radio personality Garland Robinette was featured in an article in *The Times-Picayune* which reported that Mr. Heebe provided him a $250,000 interest-free loan allegedly in exchange for Mr. Robinette's on-air opposition to reopening the Old Gentilly Landfill rather than honoring the $160 million River Birch contract. Mr. Robinette had been notified that he was the subject of an investigation by the FBI and the USAO. Using "Henry L. Mencken1951," respondent wrote on nola.com:

> Looks like he got another 250K to keep his mouth shut. What a show!! WWL radio is dead!!!
> -September 6, 2011, 10:13 a.m.

> TRANSLATION: Heebe's attorney won't let me talk, lest I implicate his client. Additionally, I am New Orleans Royalty and I don't have to explain anything to anyone.
> -September 7, 2011, 7:59 a.m.

Count II

Respondent prosecuted Mose Jefferson, the brother of Congressman William Jefferson, in a case in which he was indicted for bribing former Orleans Parish School Board president Ellenese Brooks-Simms. During the trial, respondent

posted comments on nola.com about Mose Jefferson and his attorney, Mike Fawer, under the pseudonym "campstblue":

> Fawer has screwed his client!!!! He revealed exactly what Mose needed on the board to get what Mose wanted. Good job Mike!!!! You're just as arrogant as Ellenese ... and the jury knows it.
> -August 15, 2009, 9:19 p.m.
>
> They got the corrupted, now they have to get the corruptor.
> -August 16, 2009, 7:41 p.m.

In a second indictment not personally prosecuted by respondent, Mose Jefferson, his sister Betty Jefferson, and Renee Gill Pratt were charged with sending funds to a Jefferson-controlled non-profit. William Jefferson was then pending trial on corruption charges in Virginia. Using the name "legacyusa," respondent posted:

> The sad part of all this is that Bill is preventing his siblings from pleading guilty and cooperating, thus exposing them to more prison time. Additionally, local defense attorneys are just milking these cases for their own ego gratification and financial enrichment. Something is sick about our system.
> -May 22, 2009, 9:40 p.m.

Count III

On September 4, 2005, six days after Hurricane Katrina struck New Orleans, a group of New Orleans police officers shot at unarmed civilians crossing the Danziger Bridge. Two persons were killed and four others were wounded. In July 2010, six officers were indicted in federal court for their roles in either the shooting or the ensuing alleged cover-up of the shooting. United States District Judge Kurt Engelhardt presided over the trial which commenced on June 22, 2011 and ended on August 5, 2011, when the jury returned guilty verdicts against all defendants. On April 4, 2012, Judge Engelhardt sentenced the defendants to terms of incarceration ranging from 6 to 65 years.

While respondent was not part of the prosecution team, he nevertheless posted comments on nola.com prior to and during the trial, including as the jury was deliberating. Posting as "dramatis personae," respondent stated:

> I agree with [nola.com poster] Cauane. The same hurricane that hit Orleans Parish, hit Jefferson, St. Bernard, Plaquemine, and St. Tammany. Yet, the only police force to use deadly force throughout the city was the venerable NOPD. Perhaps we would be safer if the NOPD would leave next hurricans and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED.
> -August 3, 2011, 7:06 a.m.

Even prior to the trial, in response to an article regarding a rumored plea by a police officer co-defendant, respondent, posting as "legacyusa," warned:

> Despite defense attorneys protestations to the contrary, It would be prudent for those involve to consider the track record of the US Attorney's Office. Letten's people are not to be trifled with.
> -February 23, 2010, 6:17 p.m.

As regards police officer co-defendant Archie Kaufman, respondent wrote:

> The cover up is always worse than the crime. Archie, your time is up.
> -February 23, 2010, 10:44 p.m.

Following the publication of an article about a cooperating defendant and government witness, respondent as "legacyusa" wrote:

> The Feds never forget....this officer is doing the right thing....wish the others would, then IT would be over.
> -May 20, 2010, 10:41 p.m.

During the trial, respondent as "legacyusa" posted:

> NONE of these guys should had have ever been given a badge. We should research how they got on the police department, who trained them, who supervised them and why were they ever been promoted. You put crap in – you get crap out!!!
> -June 22, 2011, 8:19 a.m.

Also during the trial, respondent as "dramatis personae" denigrated the testimony given by one of the defendants:

> Where is Madison's gun? Come on officer, tell us. You shot because you wanted to be part of something, you thought, was bigger than you. You let your ego control your emotions. You wanted to be viewed as a big man among the other officers. That's the creed of the NOPD and I hope the jury ignores your lame explanation and renders justice for Mr. Madison. To do less, is to sanction any cop who decides it is in his best interest to put a load of buckshot in the back of a disabled american in broad daylight.
> -July 28, 2011, 8:16 a.m.

While the jury deliberated, respondent as "dramatis personae" stated:

> I don't think the jury will leave the dead and wounded on the bridge.
> -August 4, 2011, 5:53 p.m.

When respondent's online commenting was discovered and reported to Judge Engelhardt, an investigation ensued. Following the investigation, Judge Engelhardt reversed the convictions of the Danziger Bridge defendants and granted their motions for new trial, citing "grotesque prosecutorial misconduct," including respondent's online commenting as well as other instances of prosecutorial misconduct by the USAO, by members of the Department of Justice, and by federal law enforcement.[4] In finding defendants were denied due process, Judge Engelhardt stated:[5]

> [I]t is difficult to conceive, much less accept, that this time-honored constitutional procedure successfully withstood an attack of the ferocity seen here, a campaign extending back to the commencement of the DOJ's active investigation of this case in 2008, and continuing through the acceptance of related plea agreements, the indictment, and the trial itself. To conclude that such misconduct was only a little unfair, but not enough to be harmful, turns the fundamental principle of due process on its head.

Judge Engelhardt clearly found the conduct of Perricone to be intentional. Judge Engelhardt found Perricone "viewed posting of highly-opinionated comments as a

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[4] *United States v. Bowen*, 969 F. Supp. 2d 546 (E.D. La. 2013).

[5] 969 F. Supp. 2d at 617.

'public service.'"[6] The district court also found that the fact that the government's actions, including Perricone's actions, were conducted anonymously made "it all the more egregious, and forces the Court, the defendants, and the public into an indecent game of 'catch-me-if-you-can.'"[7]

The Department of Justice appealed Judge Engelhardt's decision, and on August 18, 2015, the United States Fifth Circuit Court of Appeals affirmed the order and remanded the case for a new trial.[8] In so doing, the court noted that the government acknowledged "significant, repeated misconduct by Perricone," and explained:[9]

> The government concedes Perricone "intentionally committed professional misconduct" violating (a) federal regulations restricting extrajudicial statements by DOJ personnel relating to civil and criminal proceedings, (b) DOJ policies and (c) court and state bar rules of professional conduct. The government acknowledges that besides his postings in this case, Perricone posted "thousands" of anonymous comments on various topics over the course of several years.

Following this ruling, Judge Engelhardt accepted a plea deal brokered by defense lawyers and the Department of Justice, which called for the Danziger Bridge defendants to plead guilty to significantly lesser offenses in exchange for substantially reduced prison sentences ranging from 3 to 12 years.

DISCIPLINARY PROCEEDINGS

In April 2017, the ODC filed formal charges against respondent. The ODC alleged that because respondent's client (the Department of Justice and the USAO)

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[6] *Id.* at 619-20.

[7] *Id*. at 626.

[8] *United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015).

[9] *Id.* at 350.

forbid extrajudicial statements by an AUSA such as those set forth in the formal charges, respondent placed his own interests above those of his client, in violation of Rule 1.7(a)(2) of the Rules of Professional Conduct. The ODC further alleged that respondent made extrajudicial statements about the guilt or innocence of defendants and/or others under investigation or prosecution that had a substantial likelihood of materially prejudicing an adjudicative proceeding, in violation of Rule 3.6, and of heightening public condemnation of the accused, in violation of Rule 3.8(f); that respondent's conduct was prejudicial to the administration of justice, in violation of Rule 8.4(d); and that respondent violated or attempted to violate the Rules of Professional Conduct, or did so through another, in violation of Rule 8.4(a).

Respondent answered the formal charges and admitted the factual allegations therein, including all of the quoted posts on nola.com. He stated that he made the anonymous online comments to relieve stress, not for the purpose of influencing the outcome of a defendant's trial. He further stated that his anonymous comments did not identify him as an AUSA, and as such, he did not intend, nor did he reasonably expect, that his conduct would influence the outcome of a trial, prejudice the fairness of any subsequent legal proceeding, or otherwise prejudice the administration of justice. Accordingly, respondent denied violating the Rules of Professional Conduct.

Hearing Committee Report

Prior to a hearing in the matter, respondent and the ODC filed into the record a stipulation that respondent violated Rules 3.6, 3.8(f), 8.4(a), 8.4(d) of the Rules of Professional Conduct. Respondent reserved his right to present evidence of his mental intent as regards those violations, and all other factors under Supreme Court Rule XIX, § 10(C).

A hearing in mitigation was conducted. Respondent presented the testimony of various character witnesses. Additionally, respondent called Dr. Ron Cambias, his treating psychologist since May 2016. Dr. Cambias testified that respondent suffered from complex post-traumatic stress disorder ("PTSD") triggered by numerous situations in which respondent, who was formerly employed as a police officer and FBI agent, had witnessed the gruesome deaths of others and had, himself, been threatened with physical harm, including gunfire. Dr. Cambias opined that respondent's online postings were the result of his PTSD.

At the conclusion of the hearing, the committee rendered its report. The committee explained that respondent testified he thought his blogging activities would help him to deal with the stress of his work as an AUSA, although he acknowledged that it actually exacerbated his stress and anxiety. The committee also discussed the expert testimony of Dr. Cambias. After reviewing this evidence, the committee found credible respondent's testimony that he was under a great deal of stress at work, especially in the period following Hurricane Katrina, when public corruption being investigated by the USAO was rampant. However, the committee noted it was "skeptical" of Dr. Cambias' diagnosis of PTSD and its causative role in respondent's blogging, but recognized no countervailing opinion testimony was offered.

The committee accepted respondent's stipulations that his actions violated Rules 3.6, 3.8(f), 8.4(a), and 8.4(d). The committee found that respondent also violated Rule 1.7(a)(2) by placing his own interests, *i.e.*, his need to "vent" about the criminal cases being prosecuted by the USAO, above the interests of that office, his client, in having those cases proceed unimpeded.

The committee determined that respondent violated duties owed to his client, the public, the legal system, and the profession, and found he acted knowingly. The

mistrial granted in the Danziger Bridge case was certainly an actual, serious injury,[10] as was the harm done by respondent to the post-Katrina recovery in New Orleans. Considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the applicable baseline sanction is suspension.

In aggravation, the committee found the following factors: a selfish (but not dishonest) motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law (admitted 1979). In mitigation, the committee recognized that at the time of respondent's misconduct, there were no regulations, rules, or guidelines regarding anonymous Internet postings.[11] Other mitigating factors are the absence of a prior disciplinary record, absence of a dishonest motive, personal or emotional problems, full and free disclosure and a cooperative attitude toward the disciplinary proceedings, character and reputation, imposition of other penalties or sanctions, and remorse.

Considering all of these factors, especially the absence of any guidelines or other authority in the 2007-2012 time period during which respondent's anonymous, online postings occurred, and the longstanding harm respondent's actions caused to the USAO, a majority of the committee recommended respondent be suspended from the practice of law for two years, with one year deferred. One member of the committee would have recommend that the entire suspension be deferred.

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[10] The committee acknowledged that respondent's postings were not the sole cause of the mistrial, and that it would be speculative to consider whether the mistrial would have been granted absent the other contributing causes.

[11] Extrajudicial commentary was addressed in both the guidelines of the Justice Department and the Rules of Professional Conduct, but nothing addressed anonymous Internet commentary. Both respondent and former United States Attorney Jim Letten testified that they were unaware of any such guidelines in the critical 2007-2012 time period.

Disciplinary Board Recommendation

After reviewing this matter, the disciplinary board determined that the hearing committee's factual findings are not manifestly erroneous, and that the committee correctly found respondent violated the Rules of Professional Conduct, both as stipulated (Rules 3.6, 3.8(f), 8.4(a), and 8.4(d)) and as additionally found by the committee (Rule 1.7(a)(2)).

The board determined that respondent violated duties owed to his client (the USAO), the public, the legal system, and the profession. He acted knowingly and intentionally. For example, although his online comments materially prejudiced the Danziger Bridge case, respondent did not intend that particular outcome. Thus, his conduct with regard to Rule 3.6 was knowing. However, his conduct with regard to Rule 3.8(f) was intentional, as there is clear evidence that respondent intended to heighten public condemnation of various individuals being investigated or prosecuted by the USAO. As recounted in the formal charges, respondent's comments speculated on the guilt of various individuals subject to prosecution or investigation and cast these individuals in a very negative light. Respondent claims he did this only to relieve the stress he was under caused by his undiagnosed PTSD. However, respondent also testified that he engaged in "arguments" with other online commenters that were not related to matters being investigated or prosecuted by the USAO, such as LSU football. The board did not find it credible that while respondent was attempting to influence other commenters regarding benign topics like LSU football, he was not attempting to influence others with his comments about the guilt of various individuals subject to investigation or prosecution. Rather, the board found that respondent intended to heighten public condemnation of the individuals referenced in the formal charges with his online comments.

The board found the actual harm and potential for harm caused by respondent's misconduct is significant. Among other things, it found respondent's misconduct was a significant factor – although not the sole factor – that led Judge Engelhardt to grant a new trial in the Danziger Bridge case. It also noted respondent's online commenting received significant media attention. These actions harmed the perception of the legal profession and tarnished the reputation of the USAO. The publicity that respondent's conduct received diminished the public's faith in the legal system. Additionally, his actions caused delay and additional expenses in several pending proceedings.

In aggravation, the board found the following factors: a selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. In mitigation, the board found the absence of a prior disciplinary record, absence of a dishonest motive, personal or emotional problems, full and free disclosure and a cooperative attitude toward the disciplinary proceedings, character and reputation, imposition of other penalties or sanctions, and remorse.[12]

However, the board specifically rejected respondent's argument that the hearing committee should have recognized the mitigating factor of mental disability due to his PTSD diagnosis. Citing ABA Standard 9.32(i) and *In re: Stoller*, 04-2758 (La. 5/24/05), 902 So. 2d 981, the board found respondent failed to prove his PTSD caused the misconduct. It pointed out Dr. Cambias testified that someone with PTSD can operate at a high level and that respondent knew right from wrong.[13]

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[12] Although the hearing committee had recognized in mitigation that there were no regulations, rules, or guidelines regarding anonymous Internet postings at the time of respondent's misconduct, the board rejected this as a mitigating factor. The board reasoned that first, this is not a mitigating factor recognized by the ABA Standards, and second, respondent should not benefit from the lack of a specific policy or rule prohibiting otherwise unethical misconduct.

[13] At this point in its report the board speculated whether respondent and First AUSA Jan Mann "were aware of each other's other online commenting as it was occurring," despite its express acknowledgment that "this issue was not discussed at length at the hearing or in pleadings." The board concluded, based upon a discussion of the issue in Judge Engelhardt's order, that "collusion" between respondent and Ms. Mann "undermines Respondent's claim that his online commentary

Thus, there does not appear to be clear and convincing evidence supporting the causation element. Based on the foregoing, the board concluded that the committee's determination that mental disability is not a mitigating factor appears to be reasonable and not erroneous.

Turning to the issue of an appropriate sanction, the board noted that there is no disciplinary case law in Louisiana discussing inappropriate extrajudicial statements by a prosecutor. However, the board took guidance from *In re: McCool*, 15-0284 (La. 6/30/15), 172 So. 3d 1058, in which an attorney was disbarred for launching a lengthy social media campaign to affect the outcome of a case she was handling. The board found that the extensive scope of respondent's misconduct and the significant actual and potential harm it caused justifies a sanction on par with that imposed in *McCool*.

Based on this reasoning, the board recommended respondent be disbarred. The board also recommended that respondent be assessed with the costs and expenses of the proceeding.

One board member dissented as to the sanction, finding that disbarment is not warranted and that a two- to three-year suspension is appropriate for respondent's misconduct.

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Supreme Court Rule XIX, § 11(G)(1)(b).

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was something he did to relieve the stress caused by his undiagnosed PTSD." The issue of "collusion" between respondent and Ms. Mann is not at issue in this matter and therefore it was highly inappropriate for the board to engage in such speculation.

DISCUSSION

The underlying facts of this matter are not in dispute. It suffices to say that beginning in November 2007 and continuing through mid-March 2012, respondent, under various pseudonyms, frequently posted comments on an online site. Although these comments concerned a myriad of subjects, some pertained to cases which he and/or his colleagues at the USAO were assigned to prosecute. When discovered, respondent's actions caused serious, actual harm in the River Birch and Danziger Bridge cases and, most profoundly, to the reputation of the USAO. There was a potential for harm in the Jefferson and Gill-Pratt cases.

Respondent stipulated that his conduct violated Rules 3.6, 3.8(f), 8.4(a), and 8.4(d) of the Rules of Professional Conduct. He did not admit to the violation of Rule 1.7(a)(2) alleged in the formal charges, but that rule violation was found by both the hearing committee and the disciplinary board, and respondent did not lodge an objection in this court to said finding. Accordingly, like the underlying facts, the rule violations in this matter are not in dispute.

We now turn to a determination of the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis*, 513 So. 2d 1173 (La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington*, 459 So. 2d 520 (La. 1984).

Here, respondent violated duties owed to his client, the public, the legal system, and the profession. Respondent acted knowingly in that he knew his online postings were forbidden; however, he did not make the posts with the specific intent

to harm the outcome of the various criminal proceedings. Respondent acted intentionally in that he intended his posts would have the effect of heightening public condemnation of the individuals referenced in the formal charges.

Standard 5.22 of the ABA's *Standards for Imposing Lawyer Sanctions* provides that suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process. Considering this standard, the applicable baseline sanction in this matter is suspension.

In aggravation, the following factors apply: a selfish motive, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. In mitigation, the following factors apply: absence of a prior disciplinary record, absence of a dishonest motive, personal or emotional problems, full and free disclosure and a cooperative attitude toward the disciplinary proceedings, character and reputation, imposition of other penalties or sanctions, and remorse.

Respondent's arguments in this court center almost entirely on whether we should recognize the mitigating factor of mental disability due to his diagnosis of complex PTSD. In *In re: Stoller*, 04-2758 (La. 5/24/05), 902 So. 2d 981, we cited four criteria which must be met for respondents to properly assert chemical dependency or mental disability as a mitigating factor: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely. The ABA commentary indicates that in considering issues of chemical

dependency or mental disability offered as mitigating factors in disciplinary proceedings, the "greatest weight" should be assigned when the disability is the sole cause of the offense.

As noted by the board, the focus of the inquiry in the instant case is on the second factor – namely, whether respondent's PTSD caused the misconduct at issue. Based on our review of the record, we find no clear and convincing support for the conclusion that respondent's mental condition had any causative effect on his misconduct. Respondent's psychologist testified that someone with PTSD can operate at a high level and that respondent knew right from wrong. This testimony is corroborated by respondent's own admission that even before his conduct was discovered, he knew he should not be engaged in posting extrajudicial comments. When asked why he engaged in commenting in a prohibited way, respondent candidly admitted that he was angry over public corruption and he vented this anger in the caustic criticism leveled against all who, in his judgment, warranted accountability, even though he knew this was improper.

Respondent's own testimony reveals he was aware that he should not post these comments, yet he decided to do so anyway. Clearly, any mental disability from which respondent suffered did not prevent him from knowing his actions were wrong. Under these circumstances, we find absolutely no support for the conclusion that respondent has proven his mental condition caused the misconduct. Accordingly, we decline to consider his mental disability in mitigation.

In formulating an appropriate sanction, we acknowledge the situation presented in this case is *res novo* in our jurisprudence, and our prior case law provides little useful guidance. However, we begin from the well-settled proposition that public officials (and prosecutors in particular) are held to a higher standard than ordinary attorneys. *In re: Griffing*, 17-0874 (La. 10/18/17), 236 So.

3d 1213. Respondent was clearly in an important position of public trust. His actions betrayed that trust and caused actual harm to pending prosecutions. Once discovered, his conduct tarnished the reputation of the USAO and brought the entire legal profession into disrepute.

In this age of social media, it is important for all attorneys to bear in mind that "[t]he vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991). As the Court in *Gentile* wisely explained, "[a] profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom." *Id.*

Respondent's conscious decision to vent his anger by posting caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system. Our decision today must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet.

In summary, considering respondent's position of public trust as a prosecutor, his knowing and intentional decision to post these comments despite his acknowledgment that it was improper to do so, and the serious harm respondent's conduct has caused both to individual litigants and to the legal profession as a whole, we must conclude he has failed to comply with the high ethical standards we require of lawyers who are granted the privilege to practice law in this state. The only appropriate sanction under these facts is disbarment.[14]

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[14] Respondent suggested that he should be entitled to credit for the time he has spent away from the practice of law on a "voluntary" basis. Absent a formal interim suspension, there is no authority in Rule XIX for making discipline retroactive, and we decline to do so here. The period for seeking readmission from respondent's disbarment shall commence from the finality of our

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, the briefs, and oral argument, it is ordered that Salvador R. Perricone, Louisiana Bar Roll number 10515, be and he hereby is disbarred. His name shall be stricken from the roll of attorneys, and his license to practice law in the State of Louisiana shall be revoked. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

judgment in this case.

12/05/18

SUPREME COURT OF LOUISIANA

NO. 2018-B-1233

IN RE: SALVADOR R. PERRICONE

ATTORNEY DISCIPLINARY PROCEEDING

CRICHTON, J., additionally concurs and assigns reasons

I agree with the per curiam in all respects, and in particular, that respondent has failed to prove by clear and convincing evidence that Post Traumatic Stress Disorder was the cause for his misconduct. I write separately to note that this case highlights the difference between disbarment and permanent disbarment in attorney disciplinary proceedings.[1] Respondent took a voluntary absence from the practice of law during the pendency of these proceedings (approximately five years), in lieu of receiving an interim suspension. However, as the per curiam discusses in footnote 10, absent a formal interim suspension, La. Supreme Court Rule XIX does not provide authority for respondent to receive credit for self-imposed absence from the profession.[2] Had respondent agreed to interim suspension at the outset and received disbarment upon conclusion of formal disciplinary proceedings, respondent would be legally entitled to file a petition for reinstatement much sooner than under the

[1] Appendix E of Rule XIX provides the Guidelines for disbarment, and under Supreme Court Rule XIX, § 24(A), permanent disbarment prohibits an attorney from ever being readmitted to the practice of law in this state. Regular disbarment allows an attorney to petition for readmission five years after the effective date of disbarment.

[2] Rule XIX, § 24(A) states that a lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the effective date of the interim suspension. This rule also states that when a lawyer is placed on interim suspension and is then suspended for the same misconduct that was the ground for the interim suspension, at the court's discretion, the term of the suspension may be applied retroactively to the date of the interim suspension. This Court has historically chosen to exercise our discretion in order to make suspensions run retroactive to the date of prior interim suspensions. See, e.g., *In re: Lacobee*, 03–2010 (La.2/20/04), 866 So.2d 237; *In re: Gaudin*, 00–2966 (La.5/4/01), 785 So.2d 763; *In re: Ferrouillet*, 99–3434 (La.6/30/00), 764 So.2d 948; *In re: Edwards*, 99–1783 (La.12/17/99), 752 So.2d 801; *In re: Sterling*, 08–2399 (La.1/30/09), 2 So.3d 408.

present circumstances. In other words, the sanction of disbarment imposed at this point in respondent's profession, at the age of 67, is arguably akin to permanent disbarment and essentially a legal profession death sentence. Whether respondent would ever be readmitted – even conditionally readmitted – is a question for another day, but the sanction of disbarment now precludes any consideration of it for five years from the date of this opinion.

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Two USPS Employees to Serve Suspensions for Hatch Act Violations

FOR IMMEDIATE RELEASE
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WASHINGTON, D.C./May 24, 2018 – The U.S. Office of Special Counsel (OSC) today announced that it has reached disciplinary action settlements with two U.S. Postal Service employees who violated the Hatch Act in October 2016. Both employees work in the same post office in Ashtabula, Ohio.

The first employee violated the Hatch Act's prohibition against engaging in political activity while on duty and in the federal workplace when he brought campaign signs promoting a presidential candidate into the post office. He had obtained them from his union to distribute to other union members, but was advised not to distribute the signs at work. Nonetheless, he announced during a morning staff meeting that the union had endorsed the candidate, and he had signs in his workspace for anyone who was interested. In a settlement agreement, he agreed to serve a 30-day suspension for his violation.

The next morning, post office employees received a briefing on the Hatch Act. The second employee, who supported a different presidential candidate, then filmed himself inside of his postal vehicle and posted the video to Facebook. In it, he identified himself as a postal employee, criticized the presidential candidate whom the union had endorsed, and praised the candidate he supported. He concluded by stating, "I don't care about this Hatch law. If I lose my job, so be it. But I want my country back." OSC also discovered that the second employee had posted several other messages that either supported or opposed a presidential candidate while he was on duty or in his postal vehicle. The settlement agreement provides that he will serve a 60-day suspension for his knowing and willful Hatch Act violations.

To learn more about the Hatch Act, visit www.osc.gov.

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The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: The Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act. OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.

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ICE Employee Resigns with 5-Year Debarment for Flagrant Hatch Act Violations

FOR IMMEDIATE RELEASE
CONTACT: Zachary Kurz, (202) 804-7065; zkurz@osc.gov

WASHINGTON, D.C./August 7, 2018 – The U.S. Office of Special Counsel (OSC) today announced a settlement agreement reached with an Immigration and Customs Enforcement (ICE) employee who agreed to resign and not return to federal service for five years after committing numerous Hatch Act violations. The employee admitted to posting more than 100 social media messages between March and November 2016 in support of then-presidential candidate Hillary Clinton while on duty or in the workplace. She also admitted to, while at work, telling coworkers to vote for Hillary Clinton and inviting them to attend a campaign rally. The punitive settlement terms considered that the employee had significant Hatch Act knowledge and received guidance from ICE via email and annual ethics training, but failed to change her behavior, even after OSC interviewed her.

"When a federal employee emphatically and repeatedly engages in political activity while on duty or in the workplace, OSC takes that very seriously," **Special Counsel Henry J. Kerner** said. "This employee thumbed her nose at the law and engaged in vocal partisan politics both with her colleagues and on social media. Considering her knowledge of the Hatch Act and continuing disregard for the law, this employee's resignation and debarment from federal service are proportionate disciplinary actions. This case serves as an important reminder that federal employees must be mindful of the Hatch Act's prohibitions, especially given the upcoming midterm elections."

Penalties for Hatch Act violations range from reprimand or suspension to removal and debarment from federal employment, such as this case, and may also include a civil fine. More information about the Hatch Act and how federal employees can ensure they're in compliance is available here.

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The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: The Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.

International Municipal Lawyers Association
2019 Annual Conference
Atlanta, Georgia

Social Media and Municipal Legal Issues

Julie Tappendorf
Equity Partner, Ancel Glink
Chicago Illinois

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Be aware that State Law can vary

Public records – disclosure & retention

- Most state open records laws define public records to include “electronic communications,” which would include social media content
- Check your statute or local rules on records retention to see how they treat social media content – what needs to be preserved (original content only? Comments, replys, retweets? DMs?)

Open meetings

- Members of boards, councils, commissions, and committees should be cautioned about social media activity that violates open meeting requirements

Copyright issues

- No government exemption from copyright laws
- “Fair use” has its limits
- Practice Tip: create your own content!

First Amendment

- U.S. Supreme Court says *government* social media is subject to First Amendment
- First Amendment does not apply to private persons or to Facebook, Twitter, etc.

What do comments have to do with the First Amendment?

- U.S. Supreme Court says that the First Amendment right of free speech means citizens have a right to disagree with the government and express their opinions without fear of censorship
- When the government opens a “forum” on social media, it invites speech, including criticism

Comment moderation: what NOT to do

- Be cautious with the “hide” button – it could create the same problems as deleting a comment

Comment moderation: what NOT to do

Comment moderation: what NOT to do

- Honolulu Police Department removed all critical negative comments from the PD's Facebook page
- Settled lawsuit for $31,000

Comment moderation: what NOT to do

- South Pittsburg adopted a social media policy that prohibited any negative comments about the town or any of its officials or employees on social media
- Settled lawsuit and rewrote policy

Comment moderation: what NOT to do

- Virginia PD social media policy banned the following:
  - Posts that tend to discredit or reflect unfavorably on the department
  - Negative comments on internal operations of the department
  - Discussions about specific conduct of supervisors or coworkers

Comment moderation: what NOT to do

- Harris County Sherriff's Office social media policy bans employees from social media conduct that:
  - Brings the office in disrepute
  - Impairs working relationships
  - Includes information about other employees
  - Engages in negative speech about the office

Comment moderation: what you CAN do

- Adopt and enforce a neutral comment policy/TOS
  - The policy should identify the type of content that is not allowed and will be subject to removal
  - The policy can prohibit and remove non-protected speech

Pop quiz 1 - which of these type of comments can be banned?

A. Inappropriate comments
B. Inflammatory posts
C. Colorful language
D. Hate speech
E. Content that might defame someone
F. Posts that hold an individual up to public ridicule, derision, or embarrassment
G. Negative or critical comments about the government or any official or employee

Pop quiz 2 - which of these type of comments can be banned?

1. Obscene, sexual, or pornographic content and/or language
2. Content that promotes discrimination on the basis of race, age, religion, gender
3. Content that violates a legal ownership interest (copyright or trademark)
4. Threats to any person
5. Conduct that violates any federal, state, or local law or encourages illegal activity
6. Promotion of any commercial activities not related to government business
7. Spam or links to malware/viruses

Pop quiz 3 – comment moderation

A city posts on its Facebook page about renovation of its police station. The following comments appear on the post:

1. This is a terrible idea and a waste of taxpayer money. Whoever made this decision should be fired.
2. Moving? Call ABC Movers for a quote.
3. Great idea! We need more police.
4. F*** the police. You are all a bunch of f ****** a *******! I'm going to shoot up the place!

Which comments would you remove?

Employees Behaving Badly

Oh my…

So, what about employees?

Employers can discipline employees for:

- Excessive use of social media at work
- Individual gripes about job or boss, even on personal sites
- Illegal (or improper) personal social media activities
- Violating employer's social media policy

Employers should be careful not to discipline for:

- Protected concerted activities among co-workers
- Matters of public concern
- Political or other protected speech

Bad timing?

- Shortly after a government agency sent around a notice to employees of mandatory training, an employee posted this on Snapchat:

  *Mandatory 2 hour sexual harassment training. And they aren't even gonna show me the proper way to grab a woman's a**…*

- Employee was fired by his boss, a state senator

“Patient privacy, what’s that?”

A dispatcher posts a screenshot of a patient call, including name, personal information, and description of a medical emergency.

Justifiable termination?

It's my first (and last) day on the job

- On his first day on the job, an aide for the Illinois governor was fired for racist tweets, including:

  "To the Indian people in the library, SHUT THE F--- UP!"

Justified?

Another Illinois example

- Illinois Governor candidate fired campaign staffer for posting “blackface” photos on Instagram

Bad teacher, part 1

credit: @CarlyCrunkBear on Twitter

Bad teacher, part 2

- Middle school teacher on FB:
  - Called students “thugs.”
  - Said “take the hood off your head, and pull up your dang pants, and quit impregnating everybody.”
  - Emphasized "all lives matter” in post.
- She was suspended for 5-days by the school board.

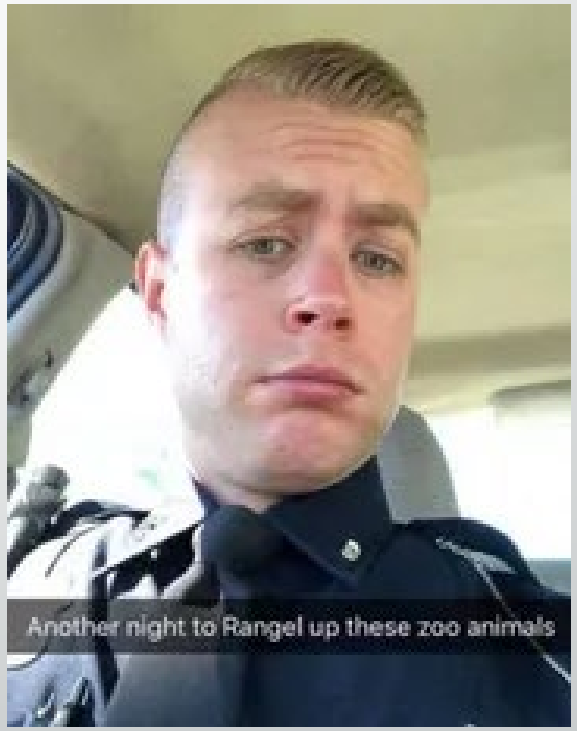
Justified?

Detroit officer fired for Snapchat post

- Police officer terminated for posting a selfie with the caption:

  "*another night to Rangel (sic) up these zoo animals.*"

- Suspended a day after the post; terminated shortly after.
- Department Chief said, "[t]his is not reflective of this department. . .[w]e expect a high level of professionalism when we're serving the public."



Tupelo, MS police officer fired for Facebook rant about body cameras

- Officer posted:

  "Sometimes you have to use profanity and threaten a persons [sic] well being to get their attention; sometimes you have to kill them"

- City fired officer, stating that although it respects its employee's right to free speech outside of work, "their speech does not impair working relationships, impede the performance of duties, impair discipline and harmony among coworkers or negatively affect the public perception of the City, including the Police Department."

Ok to swear at your boss?

*Bob is a nasty mother f***** don't know how to talk to people. F*** his mother and entire f****** family. What a LOSER!!! Vote yes for the UNION.*

- Several employees saw the post, as did members of management, and he was fired.
- Protected speech?

Campaign “like” = political speech

- Deputies reinstated after sheriff fired them for “liking” his opponent’s Facebook campaign page.
- A “like” can be speech, and political speech is protected.

Importance of a social media policy

- Put the public on notice on what comments will not be tolerated on government social media sites
- Inform employees of social media activities (on and off duty) that could subject them to discipline
- Address elected officials' social media activities to avoid First Amendment claims and violations of open meetings and records laws
- Train your administrators on the legal issues with government social media use – don't put the intern in charge

TOS for comments/posts

The policy should identify the type of content that is not allowed and will be subject to removal.

TAKE HOME TIP: Make sure your comment policy/TOS (or a link to that policy) is posted on your social media sites.

Employee usage policy

- Establish clear guidelines and boundaries for employee social media activities.
  - Conduct on the employer's official social media sites.
  - Conduct "on the job" or on employer equipment.
  - Conduct outside of work that may impact employer.
- Communicate whether social media use at work will be banned or minimal use allowed.

Avoid overbroad policies

- A Virginia police department's social media policy was found unconstitutionally overbroad because it bans employees from speaking on "matters of public concern."
- Court had concerns with provisions that banned:
  - posts that "tend to discredit or reflect unfavorably on the department"
  - negative comments on internal operations of the department
  - discussions about specific conduct of supervisors or co-workers

Be careful not to discriminate in enforcing social media policy

Louisiana court overturned termination of a reporter, finding that TV station employer inconsistently applied its social media policy – the employer had terminated one employee for negative Facebook posts about a viewer, but did not discipline a co-worker for similar Facebook posts.

TAKE HOME TIP: Zero tolerance policies are difficult to enforce. Be careful of unequal enforcement.

Employee training

- Employee training is important, particularly because technology changes so quickly.

TAKE HOME TIP: Have employees sign an acknowledgment that they (1) read the policy and (2) received training.

QUESTIONS?

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IMMIGRATION JUDGE WHO VIOLATED THE HATCH ACT FINED $1K WITH 30-MONTH DEBARMENT FROM FEDERAL SERVICE

9/17/2019

HATCH ACT

The U.S. Office of Special Counsel (OSC) today announced that an Administrative Law Judge (ALJ) on behalf of the Merit Systems Protection Board (MSPB) has imposed significant disciplinary action against Carmene “Zsa Zsa" DePaolo, an immigration judge formerly employed by the U.S. Department of Justice who violated the Hatch Act from the bench. The ALJ's decision sides with OSC, finding that DePaolo violated the Hatch Act when she promoted then-Presidential candidate Hillary Clinton's plan for immigration reform during a deportation hearing over which DePaolo presided in March 2016.

The individual at the immigration hearing was facing deportation and a subsequent ten-year bar on reentry into the United States, which DePaolo called “a pretty harsh thing" that Clinton intended to change, provided “the Senate becomes a Democratic body and there's some hope that they can actually pass immigration legislation." DePaulo said the Republicans, on the other hand, “aren't going to do anything" about immigration “if they can help it," other than to “try to deport everybody." The hearing was open to the public.

In the decision, the ALJ finds DePaolo's actions merit “a considerable sanction given the public nature of her position." The decision imposes a fine of $1000, the maximum possible civil penalty, along with a 30-month debarment from federal service since DePaolo has since retired.

The decision states:

“Respondent's actions raises the specter that this nation's courtrooms are partisan, and that judges consider political platforms when advising litigants. The very nature of her offense politicizes the judiciary and the federal workforce and militates toward a more severe sanction…. This conduct sends a bad message to subordinates, and possibly instils the notion that political activity is allowed at work. If a judge can say it from the bench, what stops other employees from making these statements in the office?"

Special Counsel Henry J. Kerner: “We are very pleased with the outcome of this case and believe the significant disciplinary action imposed against Judge DePaolo is appropriate and warranted."

In June 2018, OSC **filed the Complaint** charging DePaolo with violating the Hatch Act's prohibitions against engaging in political activity while on duty or in the federal workplace and using her official authority or influence to interfere with or affect the result of an election.

First Amendment and Social Media

Are the social media accounts belonging to public officials subject to the First Amendment when used for official purposes?

Overall holding: Public officials using private social media accounts to conduct public business (holding public forums, soliciting community feedback and discussion, etc.) are subject to First Amendment – officials cannot block opposing viewpoints.

Cases in Support:

Packingham v. North Carolina, 137 S.Ct. 1730 (2017). Statute prohibiting sex offenders from accessing social media networking sites violated First Amendment (similar to blocking feature in the Trump case)

Knight First Amendment Institute at Columbia University v. Trump, 928 F.3d 226 (2nd Cir. 2019).

- Trump can't use blocking function to silence some viewpoints (discriminatory)
- Holding: First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise–open online dialogue because they expressed views with which the official disagrees. *Id.* at 230.
- We also conclude that once the President has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with. 234.
- Specify that not every account used by a public official is a government account subject to the First Amendment; the President's twitter account is different because he uses it as a primary vehicle of carrying out his duties.

Davison v. Rose, 2017 WL 3251293 (E.D. Vir. 2017). Held opposite of Trump

Davison v. Loudoun County: Held consistent with Trump and ruled on soon after other Davison case (opposite findings related to the same plaintiff in both cases)

Limits:

Trump Court only looked to issue of whether public official blocking someone on a page they use primarily for public business constitutes violation of First Amendment – private pages are treated differently as long as they are not a vehicle for carrying out one's governmental duties.