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How Not to Criminalize Cyberbullying

Lyrissa Lidsky* and Andrea Pinzon Garcia**

I. INTRODUCTION

Cyberbullying, like its “offline” counterpart, is a form of social aggression,¹ but cyberbullying differs from traditional bullying in significant and disturbing ways.² Geography no longer limits the bully’s reach,³ and the humiliating words or images deployed via computers or cell phones can cause serious emotional trauma⁴ and create a record that haunts the victim into

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1. Rachel E. Maunder et al., *Pupil and Staff Perceptions of Bullying in Secondary Schools: Comparing Behavioural Definitions and Their Perceived Seriousness*, 52 EDUC. RES. 263, 264-65 (2010) (defining bullying as “the intention to cause distress to another pupil; it tends to be carried out by one or more pupil; it occurs repeatedly over time; and there is an imbalance of power between the perpetrator and the victim . . . but there is no universally accepted set of features as to what constitutes bullying” (internal citation omitted)).

2. IAN RIVERS ET AL., *BULLYING: A HANDBOOK FOR EDUCATORS AND PARENTS* 3, 10-11 (2007) (describing the past being “littered” with bullying references, and noting that until the early 1970s, bullying was “viewed as being nothing more than one part of the fabric of human development—a rite of passage for those who survived, and a mark of shame for those who did not escape undamaged”).

3. See Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 650-51, 652 (2011).

4. It is undisputed that cyberbullying can cause severe psychological suffering to its victims. See Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. § 2 (2008) (listing the psychological harms and negative impacts of cyberbullying); see also ROBIN M. KOWALSKI ET AL., *CYBER BULLYING:*

adulthood⁵ – if he or she reaches it. In the past decade, cyberbullying has contributed to the suicides of far too many children,⁶ including Phoebe Prince of Massachusetts,⁷ Amanda Todd of British Columbia,⁸ and Megan Meier of Missouri.⁹ Their tragic stories testify to the severity of harm cyberbullying can inflict, and researchers are concerned that the number of victims is reaching epidemic proportions.¹⁰

BULLYING IN THE DIGITAL AGE 85-86 (2008) (discussing the effects of cyberbullying and comparing them to those of traditional bullying); Michele L. Ybarra et al., *Examining Characteristics and Associated Distress Related to Internet Harassment: Findings from the Second Youth Internet Safety Survey*, 118 PEDIATRICS 1169, 1170 (2006) (showing that such incidents are very stress inducing and showing that victims reported more depression).

5. On the lingering harms of injurious speech spread through social media, see generally Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457 (2012).

6. See BRENDA HIGH, BULLYCIDES IN AMERICA: MOMS SPEAK OUT ABOUT THE BULLYING/SUICIDE CONNECTION (2007) (describing different cases of suicide linked to bullying, as reported by the victims' mothers); see also Michael Wilson & Juliet Linderman, *Family of Boy, 12, Who Hanged Himself Points to Bullying*, N.Y. TIMES (May 31, 2012), http://www.nytimes.com/2012/06/01/nyregion/bullying-may-have-affected-boy-12-who-hanged-himself.html?_r=1&src=rechp. See generally Danah Boyd & Alice Marwick, Op-Ed., *Bullying as True Drama*, N.Y. TIMES (Sept. 22, 2011), <http://www.nytimes.com/2011/09/23/opinion/why-cyberbullying-rhetoric-misses-the-mark.html>.

7. Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate's Suicide*, N.Y. TIMES (Mar. 29, 2010), http://www.nytimes.com/2010/03/30/us/30bully.html?_r=1&hp=&pagewanted=all.

8. Brandon Baur & Reena Ninan, *Bullied Teen Amanda Todd's Video Passes 17M Views*, ABC NEWS (Oct. 24, 2012), <http://abcnews.go.com/US/bullied-teen-amanda-todds-video-passes-13m-views/story?id=17548856>.

9. Steve Pokin, *'MySpace' Hoax Ends with Suicide of Dardenne Prairie Teen*, ST. LOUIS POST DISPATCH (Nov. 11, 2007), http://www.stltoday.com/suburban-journals/stcharles/news/stevepokin/my-space-hoax-ends-with-suicide-of-dardenne-prairie-teen/article_0304c09a-ab32-5931-9bb3-210a5d5dbd58.html. See generally HIGH, *supra* note 6 (describing suicides linked to bullying). Gay and lesbian youth are disproportionately targeted by bullies. For a thoughtful analysis of this issue, see generally Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385 (2012). Cyberharassment also has a gendered dimension that is especially troubling. See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 384-92 (2009) (discussing the targeting of women online); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 404-414 (2009) (arguing that law must protect "cyber civil rights," in part by acknowledging that much cyberharassment is gender harassment).

10. Reliable statistics documenting the prevalence of cyberbullying are hard to come by, perhaps because the extent of the problem depends on how broadly cyberbullying is defined. For example, one survey of teens indicated that thirty-five percent had been subjected to "rude or nasty comments, rumors, and threatening or ag-

In this climate, it is no wonder that public officials have called for the “elimination”¹¹ or “eradication”¹² of cyberbullying, and legislators have proposed and enacted a variety of new laws to curb it. Much of this important new legislation places schools at the vanguard of the anti-bullying campaign,¹³ requiring them to formulate policies and discipline perpetrators.¹⁴ A growing body of legislation, however, targets cyberbullies with criminal sanctions. Most states have electronic harassment or stalking statutes that can

gressive messages,” but given the breadth of the definition, what is shocking is that the numbers are not higher. See ANTI-DEFAMATION LEAGUE, BULLYING/CYBERBULLYING PREVENTION LAW: MODEL STATUTE AND ADVOCACY TOOLKIT 5 (2009), http://www.adl.org/civil_rights/Anti-Bullying%20Law%20Toolkit_2009.pdf. For more statistics, see *Research*, CYBERBULLYING RESEARCH CTR., <http://www.cyberbullying.us/research.php> (last visited Sept. 13, 2012).

11. The Secretary of Education, for example, has called for schools to “eliminate” cyberbullying “as fast as we can.” Liz Goodwin, *Can Schools ‘Eliminate’ Bullying, as Education Secretary Says They Must?*, YAHOO! NEWS: THE UPSHOT BLOG, (Oct. 27, 2010), <http://news.yahoo.com/blogs/upshot/schools-eliminate-bullying-education-secretary-says-must.html>. Similarly, the President of the United States hosted a conference on cyberbullying prevention. See *White House Conference on Bullying Prevention – March 10, 2011*, CYBERBULLYINGNEWS.COM (Mar. 10, 2011), <http://www.cyberbullyingnews.com/2011/03/white-house-conference-on-bullying-prevention-watch-live-today/>.

12. *3 Charged in Bullying Before a Youth’s Suicide, Officials Say*, N.Y. TIMES (May 30, 2012), <http://www.nytimes.com/2012/05/31/nyregion/charges-for-bullying-new-jersey-teenager-who-killed-himself.html> (quoting a New Jersey prosecutor regarding a case of bullying which led to suicide: “This case again underscores our need as a society to eradicate the bullying of our youth, as regrettable consequences such as this case are far too numerous to be anywhere near acceptable”).

13. This Article does not address legislating requiring public schools to implement educational or disciplinary programs to combat cyberbullying

14. See, e.g., FLA. STAT. § 1006.147(4)(i) (2012) (requiring a procedure for immediate notification to the parents of a victim and the parents of the perpetrator of an act); GA. CODE ANN. § 20-2-751.4(b)(3) (West, Westlaw through 2012 Reg. Sess.) (requiring that a method be developed to “notify the parent, guardian, or other person who has control or charge of a student upon a finding . . . that such student has committed an offense of bullying or is a victim of bullying”); MASS. GEN. LAWS ANN. ch. 71, § 37O(d)(viii) (West, Westlaw through 2012 2nd Annual Sess.) (mandating that educational institutions set forth procedures for notifying parents or guardians of a victim and perpetrator); N.Y. EDUC. LAW § 2801-a(2)(e) (McKinney, Westlaw through 2012 legislation) (requiring “policies . . . for contacting parents, guardians or persons in parental relation to the students of the district in the event of a violent incident”); see also STATE OF N.J. DEP’T OF EDUC., MODEL POLICY AND GUIDANCE FOR PROHIBITING HARASSMENT, INTIMIDATION AND BULLYING ON SCHOOL PROPERTY, AT SCHOOL-SPONSORED FUNCTIONS AND ON SCHOOL BUSES (2011), <http://www.state.nj.us/education/parents/bully.htm>; STATE OF WASH. OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, PROHIBITION OF HARASSMENT, INTIMIDATION, AND BULLYING (2008), <http://www.k12.wa.us/SafetyCenter/Guidance/pubdocs/Anti-BullyingPolicyFinal.pdf>.

be used against some types of cyberbullying,¹⁵ and a growing number of states have legislation explicitly using the term “cyberbullying.”¹⁶ In addition, as of the summer of 2012, six states – Georgia,¹⁷ Kentucky,¹⁸ Maine,¹⁹ Nebraska,²⁰ New York,²¹ and Arizona²² – were contemplating passage of criminal cyberbullying laws. At the federal level, Congress introduced, but did not pass, a cyberbullying law.²³

15. *See, e.g.*, CAL. PENAL CODE §§ 422(a), 653.2(a) (West, Westlaw through 2012 Reg. Sess.) (defining harassment as not limited to, written electronic, verbal or physical acts); FLA. STAT. § 784.048 (2012) (including the definition of cyberstalking); MASS. GEN. LAWS ANN. ch. 265 §§ 43-43A (West, Westlaw through 2012 2nd Annual Sess.) (including harassment done by any electronic communication device); N.Y. PENAL LAW § 240.30 (West, Westlaw through 2012 legislation) (including in the definition of harassment communications “to be initiated by mechanical or electronic means”); 18 PA. CONS. STAT. ANN. § 2709(a) (West Supp. 2012) (including “electronic mail, Internet . . . wireless communication or similar” in the definition of harassment).

16. *See, e.g.*, N.C. GEN. STAT. ANN. §14-458.1 (West, Westlaw through 2012 Reg. Sess.); 105 ILL. COMP. STAT. ANN. 5/34-19 (West Supp. 2012) (amending school code to include punishment for electronic threats); H.B. 1466, 97th Gen. Assemb., 1st Reg. Sess. (Ill. 2011) (amending school code to inform and protect students from specific harmful interaction as well as include punishment for electronic threats, but has not been enacted).

17. The End to Cyberbullying Act, H.B. 310, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (Proposing to define school policies related to cyberbullying).

18. The Sam Denham Stand Up for All Students Act, H.B. 490, 2012 Leg., 12th Reg. Sess. (Ky. 2012) (proposing to define specific terms related to harassment, bullying and cyberbullying for school districts and require the notification of local harassment statistics to schools and newspapers); *see also* H.B. 336, 2012 Leg., 12th Reg. Sess. (Ky. 2012) (proposing to define and regulate harassment, bullying and cyberbullying in relationship to schools and students in general and in relation to school property and events).

19. An Act to Prohibit Bullying and Cyberbullying, H.B. 928, 125th Leg., 2nd Reg. Sess. (Me. 2011) (enacted) (proposing the Commissioner of Education to define and develop policy addressing the issues of harassment, intimidation and bullying).

20. L.B. 123, 102nd Leg., 1st Reg. Sess. (Neb. 2011) (proposing school policies in response to cyberbullying and harassment).

21. Dignity for All Students Act, N.Y. EDUC. LAW §§ 10-18 (McKinney, Westlaw through L.2012); *see also* A.B. 9790, 235th Leg., Reg. Sess. (N.Y. 2012) (proposing required courses to deter harassment, bullying and cyberbullying for pupils in grades five through nine).

22. H.B. 2415, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (enacted) (amending school policy to include punishment of harassment, bullying and intimidation through electronic technology).

23. The Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3 (2009) (amending the federal criminal code to impose criminal penalties on “whoever transmits in interstate or foreign commerce a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behavior”).

The legislative zeal that leads to criminalization is understandable. For legislators to stand by while children die is politically unpalatable and morally indefensible.²⁴ Yet reflexive criminalization of common childhood wrongdoing, especially when committed through speech, leads to pernicious consequences. Criminal laws that zealously target cyberbullying risk “overcriminalizing”²⁵ it by creating new crimes that overlap with existing ones.²⁶ New cyberbullying statutes, for example, may overlap existing crimes²⁷ of

24. Of course, most statutes, especially those designed to protect young or vulnerable people, are enacted in response to a community perception of imminent, serious harm. Because legislators may be responding to emotional and political pressures in passing such laws, however, it is often the case that they are neither well-drafted nor successful in deterring the conduct they criminalize. See, e.g., Lisa T. McElroy, *Sex on the Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex*, 34 N.Y.U. REV. L & SOC. CHANGE 708, 729-30 (2010) (arguing that laws criminalizing risky sexual conduct are overly ambitious and unlikely to deter adolescents from engaging in such behavior).

25. Douglas Husak discusses the phenomenon of attempting to formulate a normative theory identifying “criminal laws that are justified” and “those that are not.” DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2008). But see Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 130-31 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930443 (lamenting the democracy deficit in some overcriminalization critiques).

26. Husak identifies the creation of “overlapping crimes” as one instance of overcriminalization. Husak, *supra* note 25, at 36. He explains that overlapping crimes often are produced when

[a] sensationalistic tragedy attracts media attention, and officials solemnly pledge to “do something” to prevent similar events in the future. All too often, this “something” consists in the enactment of a new offense Additions to codes are welcome and necessary when statutes proscribe harmful and culpable conduct that was previously noncriminal. Such cases, however, are unusual; far more typically, the original conduct was proscribed already, and the new offense simply describes the criminal behavior with greater specificity while imposing a more severe sentence. Frequently, the new law involves the use of a technological innovation – a cell phone or computer, for example – as though additional statutes are needed simply because defendants devise ingenious ways to commit existing crimes.

Id. at 36-37.

27. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005) (defining “superfluous offenses” as “duplicative penal code sanctions that

assault, battery, eavesdropping, wiretapping, or threat-making, creating the prospect that “cyberbullies,” many of whom are likely to be adolescents, will be punished disproportionately to their crimes when an overzealous prosecutor deploys the multiple charges at his or her disposal. This Article, however, leaves elaboration of the problem of “disproportionate punishment” to scholars of criminal law²⁸ and instead focuses primarily on the threat criminal cyberbullying laws pose to freedom of speech.²⁹

Viewed from a First Amendment perspective, criminal cyberbullying laws seem especially prone to overreach in ways that offend the First Amendment, resulting in suppression of protected speech, misdirection of prosecutorial resources, misallocation of taxpayer funds to pass and defend such laws, and the blocking of more effective and constitutionally permissible reforms.

The critical constitutional flaw in much of the new criminal legislation is that, in its attempt to “eliminate” cyberbullying, it conflates the definition of cyberbullying as a social problem with the legal definition of cyberbullying as a crime, leading to laws that violate the First Amendment. Cyberbullying as a *social* problem is broad in scope: it is a form of social or relational aggression³⁰ perpetrated by perhaps as many as a third of adolescents,³¹ and it takes many forms. Various definitions have been offered. Consider, for instance, the broad definition the federal government’s interagency working group has provided. Cyberbullying is

any type of harassment or bullying (teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through e-mail, a chat room, instant messaging, a website (includ-

simply retread the same conduct over and over again” or “new, allegedly necessary statutes [] that prohibit behavior already sufficiently addressed by existing law.”).

28. *Id.* at 713. (“[O]vercriminalization is not merely a problem of too many crimes . . . [i]nstead, it encompasses a broad array of issues, including: what should be denominated as a crime and when it should be enforced; who falls within the law’s strictures or, conversely, avoids liability altogether; and what should be the boundaries of punishment and the proper sentence in specific cases.”).

29. Legislation attempting to criminally punish speech clearly protected by the First Amendment might be thought of as a form of disproportionate punishment, or, it might instead be viewed as a problem of overcriminalization because the legislative authority has exceeded its “jurisdiction” in passing such legislation. *See id.* at 717.

30. Relational aggression is “typically aimed at causing psychological rather than physical harm.” SUZANNE GUERIN & EILIS HENNESSY, *AGGRESSION AND BULLYING* 3 (2002).

31. Michel Walrave & Wannes Heirman, *Cyberbullying: Predicting Victimization and Perpetration*, 25 *CHILD & SOC’Y* 59, 65 (2011).

ing blogs), text messaging, and videos or pictures posted on websites or sent through cell phones.³²

Other definitions tend to focus on the repeated nature of the wrongful conduct. The National Conference of State Legislatures, for example, defines cyberbullying as the “willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others.”³³ These definitions are useful in devising broad policy responses, and may even be useful for some legislative purposes, such as establishing response plans for public schools.³⁴ First Amendment principles, however, demand that lawmakers use narrower, perhaps less politically satisfying, definitions.

32. *Electronic Aggression and Teen Dating Violence*, FINDYOUTHINFO.GOV, http://www.findyouthinfo.gov/youth-topics/teen-dating-violence/electronic#_ftn1 (last visited Sept. 14, 2012). The definition was issued by a government “working group” comprised “of representatives from 17 federal agencies that support programs and services focusing on youth.” *About the Working Group*, FINDYOUTHINFO.GOV, <http://www.findyouthinfo.gov/about.shtml> (last visited Sept. 14, 2012).

33. *Cyberbullying*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/cyberbullying.aspx> (last visited Sept. 14, 2012).

34. As my friend, and education law expert, Derek Black has pointed out to me in a conversation concerning this article, schools’ authority to inculcate civic and moral values traditionally has been a basis for allowing them to discipline certain student speech. *See also* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 EDUC. L. REP. 357,359-60 (2011) (“Students are certainly citizens with speech rights, but they are also public charges, such that their speech rights may be limited for their own protection, as well as for the protection of other students engaged in the educational process alongside them.”). This authority arguably obviates the need for criminal punishment of all but the most serious kinds of cyberbullying (e.g., threats) that occur on school property. Of course, requiring schools to take more action against cyberbullying is not without potential difficulties. For example, cyberbullying creates a challenge for schools by blurring the line between on-campus and off-campus conduct. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 217, 219 (3d Cir. 2011) (en banc) (holding that school could discipline off-campus speech only if it created substantial disruption in school environment), *cert. denied*, 132 S. Ct. 1097 (U.S. 2012). Moreover, an attempt to increase educational discipline sanctions for cyberbullying may lead to more suspensions and expulsions of cyberbullies, an approach which has been shown to be less effective than positive behavioral supports. A rich literature points to racial bias with regard to routine discipline in schools, as well as racial bias in applying strict security measures that create prison-like conditions in schools. *See* RUSSELL J. SKIBA ET AL., *THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT* 2-4 (2000), <http://www.indiana.edu/~safeschl/cod.pdf>; Jason P. Nance, *Strict School Security Measures: Empirical Evidence of Perpetuating Racial Inequalities* (forthcoming 2012) [hereinafter Nance, *Strict School Security Measures*] (on file with author Lyriisa Lidsky); Jason P. Nance, *Suspicionless Searches of Public School Students: An Empirical Legal Analysis*, 83 U. COLO. L. REV. (forthcoming 2013) (providing

This Article demonstrates this thesis by conducting sustained “case studies” of recent legislative efforts to criminalize cyberbullying and diagnosing their First Amendment infirmities (Part II). To prevent similar infirmities in future legislation, this Article then provides a First Amendment primer to guide law-makers in distinguishing the kinds of cyberbullying that must be addressed through educating, socializing, and stigmatizing perpetrators from those that can be censored and criminalized (Part III). If law-makers heed the advice provided here, resources can be marshaled more effectively in the future to combat cyberbullying.

II. CYBERBULLYING CRIMINALIZATION CASE STUDIES

Laws criminalizing cyberbullying fall into two categories: some of these laws modernize existing criminal laws, especially harassment or stalking laws, to encompass cyberbullying. Others start from scratch in crafting new criminal laws aimed at cyberbullying. Both paths are fraught with First Amendment perils and pitfalls, which can be illustrated by examining selected legislative efforts. In the first category, Missouri’s attempt to modernize its existing harassment law is especially worthy of sustained attention.³⁵ A Missouri teen’s 2006 suicide was the signal event that galvanized national attention around the problem of cyberbullying and led to calls for legal reforms. The lessons gleaned from Missouri’s experience can be generalized to the many other states that have followed its legislative path. Missouri’s experiences also raise the issue whether legislators would be better off drafting laws that fall into the second category – creating new laws rather than amending old ones. Though relatively few states have taken this path yet, this article will examine their legislation and provide guidance for those states wishing to follow their path.

empirical evidence that in schools that reported no student criminal activity, those with high minority populations were more likely to conduct suspicionless searches of students’ belongings than schools with primarily white students). In addition, there has been an increasing tendency to bring police or resource officers into public schools. See Nance, *Strict School Security Measures*, *supra* note 40. These officials have the ability to conduct searches under lower constitutional standards than exist outside schools. See JUDITH A. BROWNE, *DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK* 38-40 (2003), http://www.advancementproject.org/sites/default/files/publications/Deraillerepor_0.pdf; Catherine Y. Kim, *Policing School Discipline*, 77 *BROOKLYN L. REV.* 861, 867-68 (2012).

35. See *infra* Part II.A-B.

A. Tragedy as Impetus for Reform

The impetus for legal reform in Missouri, as in many other states,³⁶ was a cyberbullying tragedy. Missouri teen Megan Meier took her own life shortly before her fourteenth birthday³⁷ in response to social media bullying by Lori Drew. The forty-nine-year-old Drew, who lived just four doors down from Megan, opened a MySpace account as sixteen-year-old “Josh Evans,” in order to correspond with her,³⁸ evidently, Drew believed Megan may have been spreading rumors about her daughter, and she enlisted the help of an eighteen year-old employee in exacting retribution.³⁹ After winning Megan’s trust, “Josh” cruelly ended the relationship by sending an email to Megan stating “[t]he world would be a better place without you.”⁴⁰ Megan emailed back, “You’re the kind of boy a girl would kill herself over.”⁴¹ Roughly fifteen minutes, Megan took her own life.⁴²

Like most other states at the time, Missouri had no laws explicitly criminalizing cyberbullying of Meier’s death. Perhaps as a result, state prosecutors felt they lacked a basis to charge Drew,⁴³ which prompted a federal prosecutor to “creatively” interpret federal law to charge Drew with a criminal violation under the Computer Fraud and Abuse Act of 1986 (the “Act”).⁴⁴ A jury convicted Drew of, “defrauding” MySpace by misrepresenting her identity and motive to open an account.⁴⁵ The jury found that Drew accessed a computer involved in interstate communication without authorization or in excess of authorization (that is, in violation of MySpace’s terms of

36. See, e.g., Sponsor Memo, S.B. 6132, 235th Leg. Sess. (N.Y. 2011), <http://open.nysenate.gov/legislation/bill/S6132-2011> (a proposed “anti-cyberbullying” and “electronic stalking” law whose stated justification included explicit reference to the suicide of New York teen Jamey Rodemeyer).

37. Pokin, *supra* note 9.

38. Jennifer Steinhauser, *Woman Found Guilty in Web Fraud Tied to Suicide*, N.Y. TIMES, Nov. 27, 2008, at A25; Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23.

39. Steinhauser, *supra* note 38; Jennifer Steinhauser, *Arguments in Case Involving Net and Suicide*, N.Y. TIMES, Nov. 20, 2008, at A26.

40. Rebecca Cathcart, *Judge Throws Out Conviction in Cyberbullying Case*, N.Y. TIMES (July 2, 2009), <http://www.nytimes.com/2009/07/03/us/03bully.html>.

41. *Id.*

42. *Id.*; Maag, *supra* note 38.

43. Kim Zetter, *Experts Say MySpace Suicide Indictment Sets ‘Scary’ Legal Precedent*, WIRED (May 15, 2008, 5:39 PM), <http://blog.wired.com/27bstroke6/2008/05/myspace-indictm.html>; see also *Cyberbully Mom Guilty of Lesser Charge*, CBS NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2008/11/26/national/main4635346.shtml?tag=mncol;1st;1>.

44. Indictment at 5, *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2008) (No. CR 08-00582), 2008 WL 2078622; see also *United States v. Drew*, 259 F.R.D. 449, 451 (C.D. Cal. 2009).

45. See *Drew*, 259 F.R.D. at 461.

service) to obtain information.⁴⁶ However, the trial court overturned the verdict and acquitted Drew, reasoning that the Act was unconstitutionally vague in this instance because it did not put Drew on notice that the breach of the terms of service could be a crime.⁴⁷ The trial court also stated that the Act did not provide guidance for law enforcement regarding when to enforce a breach of terms of service as a criminal act.⁴⁸ Without “clear guidelines” or “objective criteria” “as to [the] prohibited conduct,” “federal law enforcement . . . would be improperly free ‘to pursue their personal predilections.’”⁴⁹ Drew therefore escaped criminal punishment for her conduct,⁵⁰ though she suffered severe social censure.⁵¹

46. *Id.* at 452. For further discussion of the scope and application of the Computer Fraud and Abuse Act, see generally Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003).

47. *See Drew*, 259 F.R.D. at 467.

48. *Id.* at 464.

49. *Id.* at 463, 467 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

50. It is quite clear that Drew's actions would constitute the tort of intentional infliction of emotional distress in those jurisdictions that recognize it as a cause of action. The Restatement (2nd) of Torts, section 46, states:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1965).

The elements of the tort of intentional infliction of emotional distress are the same under both Missouri and California state laws. Those elements of law are: “(1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme or outrageous; and (3) the conduct must be the cause (4) of extreme emotional distress.” *Compare* *Thomas v. Special Olympics Mo., Inc.*, 31 S.W.3d 442, 446 (Mo. App. W.D. 2000) (quoting *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 297 (Mo.App. E.D.1997)), *with* *Hailey v. Cal. Physicians' Serv.*, 69 Cal. Rptr. 3d 789, 806 (Cal. Ct. App. 2007).

51. *Zetter*, *supra* note 43. The social penalties for Drew were severe. She received death threats and was forced to move. *Family Shunned over MySpace Hoax, Teen's Suicide*, FOX NEWS (Dec. 7, 2007), <http://www.foxnews.com/story/0,2933,315823,00.html>; *Woman in MySpace Suicide Case Moving Away from Neighborhood*, FOX NEWS (Sept. 18, 2008), <http://www.foxnews.com/story/0,2933,424481,00.html>.

B. The Constitutional Hazards of Modernizing Criminal Harassment Laws: A Case Study

Responding to the national outrage over the apparent inability of the criminal law to sanction Lori Drew's vicious cruelty to Megan Meier, policy makers in Missouri and elsewhere sprang into action.⁵² The Missouri legislature's approach involved both education⁵³ and criminalization. Missouri's new "Megan's Law" not only required every Missouri school district to have in place an anti-bullying policy,⁵⁴ but also mandated that school officials report electronic harassment or stalking of their students, as redefined in response to the Megan's case.⁵⁵

"Modernization" of pre-existing criminal harassment and/or stalking statutes is a common legislative response to the problem of cyberbullying.⁵⁶

⁵⁷ Missouri's legislature took this route in responding to Meier's suicide; the

52. A federal law was proposed but never passed. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

53. For another example of a state statute putting public schools at the forefront in preventing cyberbullying, see ARK. CODE ANN. §6-18-514 (c)(2)(B)(ii)(a) (West, Westlaw through 2012 Fiscal Sess.) (providing one definition of "bullying" as "an electronic act that results in the substantial disruption of the orderly operation of the school or educational environment.").

54. See MO. REV. STAT. §160.775(2) (Supp. 2011) (defining bullying broadly to include "gestures, or oral, cyberbullying, electronic, or written communication" that would "cause[] a reasonable student to fear for his or her physical safety or property.").

55. *Id.* § 160.775(4).

56. See, e.g., ARIZ. REV. STAT. ANN. § 8-309 (West, Westlaw through Second Reg. Sess. of the Fiftieth Legis.) (amended to include as an offense the "[u]nlawful use of an electronic communication device by a minor"); 720 IL. COMP. STAT. ANN. § 5/26.5-0.1 (West Supp. 2012) (amending the criminal harassment statute to include "electronic device[s] including, but not limited to, a telephone, cellular phone, computer, or pager, which communication includes, but is not limited to, e-mail, instant message, text message, or voice mail."); OKLA. STAT. ANN. tit. 21, § 1172 (West, Westlaw through Second Reg. Sess. of the 53rd Legis.) (including electronic communications as means to commit harassment).

57. In Missouri, Megan Meier's hometown of Dardenne Prairie initiated reform by passing a cyber-harassment ordinance in 2007. DARDENNE PRAIRIE, MO., MUNICIPAL CODE § 210.030 ORDINANCE 1228 § 2 (2007), states in relevant part:

B. Cyber-Harassment. [. . .]

1. A person commits the offense of cyber-harassment if he/she, with intent to harass, alarm, annoy, abuse, threaten, intimidate, torment or embarrass any other person . . . transmits or causes the transmission of an electronic communication or knowingly permits an electronic communication to be transmitted from an electronic communication device under the person's control to such other person or a third (3rd) party:

a. Using any lewd, lascivious, indecent or obscene words, images or language or suggesting the commission of any lewd or lascivious act;

legislature amended Missouri's criminal harassment⁵⁸ and stalking⁵⁹ statutes in 2008 to cover cyber versions of these offenses.⁶⁰ Though amendments of this type seem like minor tweaks to cover new (electronic) means of committing an existing criminal offense, such amendments often piggyback on statutes that may have already been of dubious constitutionality.⁶¹ Moreover, the amendments inevitably target "non-physical" harassment, consisting entirely of expression or expressive conduct that are hard to define with the precision required to avoid constitutional vagueness or overbreadth challenges; thus, without exceedingly careful drafting, tweaks to include cyberharassment and cyberstalking are likely to violate the First Amendment.

The Missouri amendments,⁶² certainly fell prey to this problem. A primary purpose of the new law was to make clear that communicating harassment by the Internet is illegal.⁶³ To this end, the legislators replaced language that targeted harassment "in writing or by telephone"⁶⁴ with language focused more broadly on communication.⁶⁵ In amending the statute, the drafters evidently took pains to "shore up" the constitutionality of some of its provisions. It is instructive, for example, to compare the first subdivision of the prior harassment statute with the amended version. This first subdivision contains the "threats" provision of both the old and the new statute.⁶⁶ Under the old

- b. Anonymously or repeatedly whether or not conversation occurs;
or
- c. Threatening to inflict injury on the person or property of the person communicated with or any member of his or her family or household.

58. See 2008 Mo. Laws 812 (codified at MO. REV. STAT. § 565.090.1(3) (Supp. 2011)).

59. See *id.* (codified at MO. REV. STAT. § 565.225.1).

60. See MO. REV. STAT. §§ 565.225.1(3), 565.090.1(3); see also *Mo. Governor Signs Anti-Cyberbullying Bill into Law*, FIRST AMENDMENT CENTER (July 1, 2008), <http://www.firstamendmentcenter.org/mo-governor-signs-anti-cyberbullying-bill-into-law>.

61. See, e.g., *State v. Johnson*, 191 P.3d 665, 668-69 (Or. 2008) (en banc) (striking down Oregon's criminal harassment law, which made it a crime to harass another person by "[p]ublicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response" (quoting OR. REV. STAT. ANN. § 166.065(1)(a)(B) (West, Westlaw through 2012 Reg. Sess.)).

62. MO. REV. STAT. § 565.090 (Supp. 2011) is "[u]nofficially known as 'Megan's [L]aw,' . . . named after 13-year-old Megan Meier who committed suicide in 2006." Lance Whitney, *Cyberbullying Case to Test Megan's Law*, CNET (Aug. 28, 2009), http://news.cnet.com/8301-13578_3-10320274-38.html.

63. *Mo. Governor Signs Anti-Cyberbullying Bill into Law*, *supra* note 60; see also MO. REV. STAT. § 565.090.1(1), (3) (Supp. 2011).

64. MO. REV. STAT. § 565.090.1(1) (2000) (amended 2008).

65. MO. REV. STAT. § 565.090 (Supp. 2011), *partially invalidated by State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012) (en banc).

66. Compare *id.*, with § 565.090.1(1) (2000).

version, a person could be guilty of harassment if he communicated “a threat to commit *any* felony” “in writing or by telephone” while acting “for the purpose of frightening or *disturbing* another person.”⁶⁷ This prior provision was probably unconstitutional: speech cannot be criminally punished merely because its purpose is to disturb others,⁶⁸ because much of our country’s important political, social, religious, or cultural discourse is disturbing to significant segments of the population. Likewise, although the First Amendment allows the punishment of some types of criminal threats,⁶⁹ the language of the original harassment statute is too broad. Willfully killing an endangered species is a felony,⁷⁰ but the First Amendment no doubt protects a conservative radio host who states: “I know this statement will disturb you animal lovers, but I plan to hunt and kill a North American gray wolf and make his hide into a rug for my den.”

In redrafting and modernizing the harassment statute to encompass cyberharassment and cyberbullying, the drafters of Missouri’s amendments appear to have tried to solve its constitutional problems by changing the mens rea element to require that the perpetrator “[k]nowingly communicates a threat to commit any felony to another person” and also adds the requirement that the threat causes harm to the victim by “frighten[ing], intimidat[ing], or caus[ing] emotional distress to such other person.”⁷¹ These provisions reflect closely, though possibly not closely enough, the definition of true threats provided by the U.S. Supreme Court in *Virginia v. Black*.⁷²

“True threats,” as defined by the Court, are communications in which a speaker manifests a “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.”⁷³ True threats lie outside the First Amendment’s protection because they disrupt the lives of

67. MO. REV. STAT. § 565.090.1 (2000) (emphasis added) (amended 2008).

68. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219-20 (2011); *Cohen v. California*, 403 U.S. 15, 26 (1971). In *State v. Koetting*, 616 S.W.2d 822 (Mo. 1981), the Missouri Supreme Court held that “[t]he terms ‘purpose,’ ‘frighten’ and ‘disturb’ are words of common usage and definition and a person of ordinary intelligence would know by reading the statute that if he acts with the purpose of upsetting another, he subjects himself to criminal liability.” *Id.* at 825. While the terms may not be unconstitutionally vague, the fact remains that the State may not punish speech merely because its purpose is to “disturb” another. To solve the potential overbreadth problem, the Missouri Supreme Court interpreted the statutory provision at issue in *Koetting*, MO. REV. STAT. § 565.090(2) (1978), as “only . . . protect[ing] the privacy of persons within their own homes.” *Id.* at 827.

69. See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

70. The gray wolf is a protected species. See 50 C.F.R. § 17.11(h) (2013).

71. MO. REV. STAT. § 565.090.1(1) (Supp. 2011).

72. 538 U.S. at 359-60.

73. *Id.* (citations omitted).

those at whom they are aimed, engendering fear and intimidation.⁷⁴ Because the Court in *Virginia v. Black* never specified what type of intent a speaker must have if his speech is to be punishable as a “true threat,”⁷⁵ it is unclear whether Missouri’s requirement that the speaker’s threat be made “knowingly” is constitutionally sufficient, though it seems adequate. More constitutionally problematic, however, is the portion of the new “threats” definition that predicates criminal liability on inflicting emotional distress.⁷⁶ Specifically, subdivision one is violated when a person “frightens, intimidates, or causes emotional distress” to another in the course of making a threat.⁷⁷ It is by no means clear, however, that the infliction of emotional distress is a significant enough harm to constitutionally justify the criminalization of the threatening speech, particularly since the harm need not be severe or substantial.⁷⁸

This same problem bedevils other provisions of the amended harassment statute.⁷⁹ The third subdivision of the amended statute provides that a person commits the crime of harassment if he or she “[k]nowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication.”⁸⁰ This subdivision appears to criminalize even a single prank call or “trollish”⁸¹ comment on the Internet, a result which surely cannot be constitutionally permissible. The Supreme Court has recognized that anonymous speech “is an aspect of the freedom of speech protected by the First Amendment,”⁸² though the protec-

74. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (explaining that the First Amendment permits the punishment of threats because individuals deserve protection “from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur”).

76. See Paul T. Crane, Note, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225, 1227-29 (2006) (noting that the intent issue is unresolved).

76. MO. REV. STAT. § 565.090.1(1).

77. *Id.*

78. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that speaker may not be held liable for speech on a matter of public concern even where his speech inflicts severe emotional distress).

79. The second subdivision of the amended statute applies when a person “knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm.” MO. REV. STAT. § 565.090.1(2). To the extent this subdivision duplicates the definition of criminal assault or battery, it is probably constitutional, though one questions whether it is necessary; for example, MO. REV. STAT. § 565.070.1(3) (2000) states that: “A person commits the crime of assault in the third degree if . . . [t]he person purposely places another person in apprehension of immediate physical injury[.]”

80. *Id.* § 565.090.1(3) (Supp. 2011) (emphasis added).

81. See Mattathias Schwartz, *The Trolls Among Us*, N.Y. TIMES (Aug. 3, 2008), <http://www.nytimes.com/2008/08/03/magazine/03trolls-t.html?pagewanted=all>.

82. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (holding that the State may not punish citizens for pseudonymous publication of handbills concern-

tion is by no means absolute, and states may mandate disclosure where the dangers of fraudulent or criminal behavior are particularly high.⁸³ There is no indication that the anonymous speech criminalized by the Missouri statute's amended third subdivision is especially likely to be fraudulent or to cause significant harm to its recipients; the statute does not, for example, target only anonymous threats or abusive anonymous communications targeted at individuals within the privacy of their homes. Instead, the subdivision stretches broadly into the realm of protected speech. For example, an anonymous online review of a restaurant stating that "the chef's attempts at molecular gastronomy were flavorless and overpriced" and "we will never return to this restaurant" is almost sure to cause the chef emotional distress, perhaps severe distress, but the review contains constitutionally protected opinion concerning a matter of public concern and is therefore protected by the First Amendment.⁸⁴ This subdivision of the harassment statute is therefore overbroad, and would likely be struck down as facially invalid.⁸⁵ To guarantee the subdivi-

ing a ballot initiative). Other cases addressing anonymous speech include the following: In *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), the Supreme Court struck down an ordinance forbidding door-to-door canvassing without a permit from the mayor's office, holding that it was overbroad and not sufficiently tailored to the interest of preventing crime and fraud and protecting privacy. *Id.* at 168-69. The Court noted that the ordinance "necessarily results in a surrender of . . . anonymity," which contributes to its "pernicious effect." *Id.* at 166. In *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999), the Court struck down a state law requiring people circulating issue referendum petitions to wear identification badges. In *NAACP v. Button*, 371 U.S. 415, 428-29 (1963), the Court recognized a right to anonymous association, and in *Talley v. California*, 362 U.S. 60, 65-66 (1960), the Court struck down a city ordinance that prohibited all anonymous hand billing. For further discussion of the constitutional protections accorded anonymous speech, see generally Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373 (2009); Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audience, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

83. Disclosure requirements are sometimes upheld in contexts where anonymous speech is thought to pose particular dangers. See, e.g., *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (upholding disclosure requirements); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-02 (2003) (qualifying the right to speak anonymously by upholding a disclosure requirement during elections for federal office to prevent appearance of corruption), *overruled on other grounds by Citizens United*, 130 S. Ct. 876.

84. See *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) (holding that statements that do not imply an assertion of objective fact are not actionable as defamation); see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

85. See David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1337-38 (2005) (noting that the "archetype of a strategic facial challenge is a First Amendment overbreadth claim. Under that doctrine, a statute that prohibits a substantial amount of constitutionally protected speech is invalid on its face

sion would withstand constitutional muster, it would have to be redrafted to focus more narrowly on anonymous threats or other anonymous speech whose harms clearly outweigh its value.

The next provision of the amended statute, subdivision four, is a new provision rather than one modified from the prior statute.⁸⁶ This provision appears to be directly targeted at the conduct that led to Megan Meier's suicide. This provision proscribes knowing communication "with another person who is, or who purports to be, seventeen years of age or younger" when such communication "without good cause recklessly frightens, intimidates, or causes emotional distress to such other person."⁸⁷ The requisite mens rea is recklessness rather than knowledge: a defendant cannot be liable unless it is shown that she consciously disregarded a high degree of probability that her speech would cause "fright[]," "intimidat[ion]," or "emotional distress" to its target.⁸⁸ Although a defendant can escape liability if she spoke with "good cause, the statute does not define what constitutes "good cause," which presumably means that the jury must decide whether the defendant's justification for communicating with the minor was legitimate.

The constitutionality of subdivision four is unclear.⁸⁹ While the legislature's failure to define what speech is protected by the "good cause" exclusion creates constitutional vagueness concerns, the Missouri Supreme Court recently upheld the use of a similar "good cause" exclusion in subdivision five of the harassment statute.⁹⁰ However, in reaching that conclusion, the court determined that the legislature's use of the good cause exclusion signaled its intent to only punish speech in a category clearly unprotected by the First Amendment, namely fighting words.⁹¹ If the court were to limit subdivision four of the statute in a similar manner, as seems likely, the statute

even though it has some valid applications. The doctrine's purpose is to eliminate the chilling effect of a burdensome speech restriction." See generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

86. Compare MO. REV. STAT. § 565.090.1(4) (Supp. 2011), with MO. REV. STAT. § 565.090.1 (2000) (amended 2008).

87. *Id.* § 565.090.1(4) (Supp. 2011).

88. *Id.*

89. Prosecutors invoked this subdivision of the harassment statute in a case against forty-year-old Elizabeth Thrasher, who was prosecuted after creating a listing with a photo and personal contact details of a seventeen-year-old girl in the "Casual Encounters" section of Craigslist. Whitney, *supra* note 62x. The teenage girl received numerous calls, emails, and text messages over her phone after the posting. *Id.* Thrasher was acquitted because "prosecutors failed to prove" that the teenage girl "suffered emotional distress." Shane Anthony, *Jury in Cyber Harassment Trial Found No Proof of 'Emotional Distress'*, ST. LOUIS POST-DISPATCH (Feb. 19, 2011), http://www.stltoday.com/news/local/stcharles/article_5990583f-8aad-5b74-a85c-4dfde5bf4637.html.

90. See *State v. Vaughn*, 366 S.W.3d 513, 521 (Mo. 2012) (en banc).

91. See *id.*

would punish only a tiny subset of unkind or cruel speech and would almost certainly not cover the type of hoax perpetrated by Lori Drew and her daughter against Megan Meier.⁹² Hence, it is by no means clear that the legislature's amendment would have its intended effect.

As to the remaining subdivisions of Missouri's harassment statute, their constitutionality already has been tested in the Missouri Supreme Court,⁹³ and its decision in *Missouri v. Vaughn* represents a significant setback for Missouri legislators in their efforts to combat cyberbullying. Notably, *Missouri v. Vaughn* did not involve cyberharassment or, indeed, electronic communication of any kind.⁹⁴ Instead, it involved a defendant who repeatedly telephoned his ex-wife for the purpose of frightening her,⁹⁵ leading prosecutors to charge him under subdivision five of the harassment statute for "knowingly mak[ing] repeated unwanted communication to another person." Prosecutors also charged him under subdivision six for "[w]ithout good cause engag[ing] in an[]... act with the purpose to frighten, intimidate, or cause emotional distress to another person, [which does in fact] cause such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibility considering the age of such person."⁹⁶

The court held that subdivision five was constitutionally overbroad, despite the State's proffer of a narrowing construction that would have made the statute applicable only when the defendant's communications were repeated, unwanted, and targeted at a "particularized person," whatever that means.⁹⁷ The court rejected the State's attempt to save the statute by offering a narrowing construction: "[e]ven with the State's suggested constructions, subdivision [five] still criminalizes any person who knowingly communicates more than once with another individual who does not want to receive the communications."⁹⁸ The court gave examples illustrating the subdivision's overbreadth, noting that it would apply to peaceful picketers or teachers calling on students

92. No doubt to signal its outrage over Drew's conduct, the Missouri legislature increased penalties for harassment from a misdemeanor to a felony when the harasser is aged twenty-one or older and the victim is aged seventeen or younger, or if the harasser had a previous conviction for harassment. MO. REV. STAT. § 565.090.2(1)-(2) (Supp. 2011).

93. *Vaughn*, 366 S.W.3d at 519 (holding subdivision five of the statute unconstitutionally broad).

94. *Id.* at 516.

95. *Id.*

96. *Id.* at 516 n.2 (quoting MO. REV. STAT. § 565.090.1(5)-(6) (Supp. 2011)).

97. *Id.* at 519. The statute does not define "particularized person." Note that statutes similar to Missouri's have been upheld. See, e.g., *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010) (holding Texas harassment statute was not facially unconstitutional).

98. *Vaughn*, 366 S.W.3d at 519.

once asked to stop.⁹⁹ The court also found that the statute stretched well beyond what might be justified by the protection of residential privacy or captive audience members.¹⁰⁰ The court therefore “severed” and struck the subdivision from the statute.¹⁰¹

The court, by contrast, upheld subdivision six by reading it narrowly to address only fighting words and finding that its prohibition of speech made “without good cause” was not vague.¹⁰² Recall that the language of Section 565.090.1(6) makes it a crime to:

[w]ithout good cause engage[] in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person’s response to the act is one of a person of average sensibilities considering the age of the person.¹⁰³

The court found that the legislature’s exclusion of “the sort of acts for which there could be good cause”¹⁰⁴ meant that it only applied to expressive conduct that was intended to and actually did provoke “immediate *substantial* fright, intimidation, or emotional distress.”¹⁰⁵ Though the reasoning might generously be described as opaque, the court seemed to believe that the “legislature’s intent” underlying the good cause requirement transformed the statutory provision into one that only addressed “unprotected fighting words.”¹⁰⁶ Specifically, the court stated: “because the exercise of constitutionally protected acts clearly constitutes ‘good cause,’ the restriction of the statute to unprotected fighting words comports with the legislature’s intent.”¹⁰⁷

Separately, the court found that subdivision six was not vague.¹⁰⁸ According to the court, there is a “common understanding” regarding what would “frighten,” “intimidate,” or cause “emotional distress” to a reasonable person.¹⁰⁹ More dubiously, the court asserted that the “good cause” language of the statute would give a citizen adequate notice of what expression was unprotected by the statute as well as adequately constrain law enforcement

99. *Id.*

100. *Id.* at 519-20.

101. *Id.* at 520-21.

102. *Id.* at 521-22.

103. MO. REV. STAT. § 565.090.1(6) (Supp. 2011).

104. *Vaughn*, 366 S.W.3d at 521; *see also* § 565.090.1(6).

105. *Vaughn*, 366 S.W.3d at 521.

106. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

107. *Id.*

108. *Id.* at 522.

109. *Id.* at 521-22. “Emotional[] distress,” although typically found in common-law torts, also is utilized in Missouri’s stalking statute along with both “frighten[]” and “intimidate[].” *See* MO. REV. STAT. § 565.225 (Supp. 2011).

discretion.¹¹⁰ Relying on prior case law, the court stated: “‘Good cause’ in subdivision [six] means ‘a cause that would motivate a reasonable person of like age under the circumstances under which the act occurred.’”¹¹¹ Although earlier in the opinion, the court seemed to equate “good cause” with “protected by the First Amendment,”¹¹² here the court seemed to be using a standard legal definition of good cause – meaning done with justifiable motive. Regardless, the court’s determination that the “good cause” language is not vague is certainly contestable.

Although the court upheld subdivision six, the victory is probably a pyrrhic one for advocates of broad laws to address bullying behaviors. The court apparently saved the constitutionality of subdivision six by adopting a ridiculously strained interpretation of it; under this interpretation, it only covers “fighting words – those which by their very utterance inflict injury or tend to incite an immediate breach of peace”¹¹³ – as defined by the Supreme Court in its 1942 decision in *Chaplinsky v. New Hampshire*.¹¹⁴ It is worth noting that the Supreme Court has not upheld a conviction for the utterance of fighting words in the seventy years since it decided *Chaplinsky*.¹¹⁵ Moreover, as free speech scholar Rodney Smolla has noted, there is a “strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence.”¹¹⁶ In other words, the Missouri Supreme Court’s interpretation of subdivision six makes it difficult to use as a tool for addressing cyberharassment, since it is unlikely to trigger immediate

110. *Vaughn*, 366 S.W.3d at 522.

111. *Id.*

112. *Id.* at 521.

113. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

114. *Id.*

115. For criticism of the fighting words doctrine, see Burton Caine, *The Trouble with “Fighting Words”*: *Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 445 (2004) (arguing that state courts have “stretched the fighting words doctrine beyond all recognition”); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 565–69 (1980) (arguing that in state courts fighting words doctrine “is invoked almost uniformly in circumstances in which its application is wholly inappropriate”).

116. Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”*: *The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009); see also *Citizen Publ’g Co. v. Miller*, 115 P.3d 107, 113 (Ariz. 2005) (en banc) (noting that “[t]he fighting words doctrine has generally been limited to ‘face-to-face’ interactions”); *State v. Poe*, 88 P.3d 704, 714 (Idaho 2004) (same); see *Cohen v. California*, 403 U.S. 15, 20 (1971), “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” Michael Mannheimer notes that in several cases during the 1970s, the Supreme Court clarified the doctrine as “a narrowly-tailored device designed to address the problem of responsive violence by the recipient of insulting language.” Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1528 (1993).

violence in the manner envisioned by *Chaplinsky*. Moreover, it makes it likely that the same limitation would be placed on subdivision four of the statute, thereby limiting its usefulness in combating cyberbullying of the sort engaged in by Lori Drew.

C. Are Broader Laws Criminalizing Cyberbullying Needed?

As Missouri's efforts to criminalize cyberbullying demonstrate, even laws that merely broaden existing criminal statutes to cover offenses committed electronically often violate the First Amendment. However, many state legislators have decided that broadening criminal harassment or stalking laws is an insufficient response to the problem of cyberbullying and have proposed criminalizing "cyberbullying" as an independent offense. But these new laws are even more likely to run afoul of the First Amendment than their predecessors, precisely because their aims are so broad and ambitious.¹¹⁷

117. A particularly egregious example of overly ambitious cyberbullying legislation is represented by a proposal put forth in January 2012 by New York State Senator Jeff Klein (D-Bronx) and Congressman Bill Scarborough. S.B. 6132, 235th Leg. Sess. (N.Y., 2011), <http://open.nysenate.gov/legislation/bill/S6132-2011>; see generally Rebecca Fishbein, *New York Gets Its First Anti-Cyberbullying Bill*, GOTHAMIST (June 16, 2012, 5:40 PM), http://gothamist.com/2012/06/16/new_york_gets_its_first_anti-cyberb.php (discussing the cyberbullying bill and its impetus); Press Release, Jeffrey D. Klein, N.Y. Senator, Sen. Klein, IDC, Introduce Legislation to Crack Down on Cyberbullying, (Jan. 9, 2012), <http://www.nysenate.gov/press-release/sen-klein-idc-introduce-legislation-crack-down-cyberbullying> (discussing the background of bullying in New York and the new cyberbullying legislation).

Like previous cyberbullying proposals, the New York bill was triggered by tragedy. Fishbein, *supra*. The proposed New York legislation cites its justification as the death of fourteen-year-old Jamey Rodemeyer, who committed suicide after being bullied about his sexuality. *New York Lawmakers Propose Bill Making 'Bullicide' a Felony*, CBS NEW YORK (Sept. 26, 2011, 9:04 PM), <http://newyork.cbslocal.com/2011/09/26/new-york-lawmakers-propose-bill-making-bullicide-a-felony/>.

Newspapers also attribute the impetus for the legislation to the death of Amanda Cummings, a fifteen-year-old New York teen who committed suicide by stepping in front of a bus after she was allegedly bullied at school and online. Fishbein, *supra*. See generally Jen Chung, *SI Teen Dies After Stepping in Front of Bus, Relative Says She Was Bullied*, GOTHAMIST (Jan. 3, 2012, 5:07 PM), http://gothamist.com/2012/01/03/si_teen_dies_after_stepping_in_from.php. In light of these tragedies, it is easy to see why New York legislators would want to take a symbolic stand against cyberbullying and join the ranks of states taking action against it. The proposed legislation begins modestly enough by modernizing pre-existing New York law criminalizing stalking and harassment. Sponsor Memo, S.B. 6132, *supra* note 36. Specifically, the new law amends various statutes to make clear that harassment and stalking can be committed by electronic as well as physical means. *Id.* More ambitiously, the new law increases penalties for cyberbullying of "child[ren] under the age of 21" and broadly defines the activity that qualifies for criminalization under the act, stating that:

Take Arkansas's new cyberbullying law, for instance. Under this law, which became effective on July 27, 2011, a misdemeanor "cyberbullying" offense takes place when a person "transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, harass, or alarm another person; and [] [t]he transmission

[A] person is guilty of stalking in the third degree when he or she intentionally, and for no legitimate purpose, engages in a *course of conduct* using electronic communication directed at a child . . . and knows or *reasonably should know* that such conduct: (a) causes reasonable fear of material harm to the physical health, safety or property of such child; or (b) causes *material harm* to the physical health, *emotional health*, safety or property of such child.

Id. (emphasis added). Even a single communication to multiple recipients about (and not necessarily to) a child can constitute a "course of conduct" under the statute. *Id.* Like the sponsors of this legislation, the authors of this article deplore cyber-viciousness of all varieties, but we also condemn the tendency of legislators to offer well-intentioned but sloppily drafted and constitutionally suspect proposals to solve pressing social problems. In this instance, the legislation opts for a broad definition of cyberbullying based on legislators' desires to appear responsive to the cyberbullying problem. The broad statutory definition creates positive publicity for legislators, but broad legal definitions that encompass speech and expressive activities are almost always unconstitutionally overbroad under the First Amendment.

Under the New York proposal, for example, the mens rea element of the offense requires only that a defendant "reasonably should know" that "material harm to the . . . emotional health" of his target will result, yet it is not even clear what constitutes "material harm." *Id.* Seemingly, therefore, the proposed statute could be used to prosecute teen girls gossiping electronically from their bedrooms about another teen's attire or appearance. Likewise, the statute could arguably criminalize a Facebook posting by a twenty-year-old college student casting aspersions on his ex-girlfriend. In both instances, the target of the speech almost certainly would be "materially" hurt and offended upon learning of it, and the speakers likely should reasonably know such harm would occur. *See id.* Just as clearly, however, criminal punishment of "adolescent cruelty," which was a stated justification of the legislation, is an unconstitutional infringement on freedom of expression. *Id.*

Certainly the drafters of the legislation may be correct in asserting that "[w]ith the use of cell phones and social networking sites, *adolescent cruelty has been amplified* and shifted from school yards and hallways to the Internet, where a *nasty, profanity-laced comment*, complete with an embarrassing photo, can be viewed by a potentially limited [sic] number of people, both known and unknown." *Id.* (emphasis added). They may also be correct to assert that prosecutors need new tools to deal with a "new breed of bully." *Id.* Neither assertion, however, justifies ignoring the constraints of First Amendment law in drafting a legislative response.

was in furtherance of severe, repeated, or hostile behavior towards the other person.”¹¹⁸

This law suffers from vagueness and overbreadth and is therefore unconstitutional. The law is vague because it fails to put the defendant on notice of the types of electronic communications he or she can engage in without violating the statute and because it gives law enforcement too much leeway to prosecute mere bad manners.¹¹⁹ The law is overbroad because it sweeps a large swath of clearly protected speech into its purview along with the unprotected speech it is designed, and constitutionally allowed, to prohibit.¹²⁰ As examples of the uncertainty the statute creates, consider the following: Would emailing a homophobic, racist, or religiously intolerant cartoon or joke to a known “liberal” trigger the statute? How about posting a picture of two men kissing on the Facebook page of a fundamentalist preacher? One satisfies the mens rea for the offense if one’s purpose is merely to “harass . . . or alarm another,” but the statute nowhere clarifies the

118. ARK. CODE ANN. § 5-71-217(b)(1)-(2) (West, Westlaw through 2012 Fiscal Sess.).

119. Vague statutes violate due process because they fail to provide fair notice of what conduct is prohibited; they set an “unascertainable standard.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (holding an ordinance that made it a crime for three or more people meeting on a sidewalk to “annoy” others was unconstitutionally vague). A statute is vague, and therefore facially invalid, if persons of “common intelligence must necessarily guess at its meaning.” *Id.* (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The Constitution tolerates less vagueness in statutes restricting First Amendment rights. See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 494 (2011) (noting that “vagueness critiques in free speech cases are simply a special application of the vagueness doctrine more generally, with special solicitude for the substantive liberty – freedom of speech – that is, in effect, restricted by overly vague law.”).

120. First Amendment overbreadth doctrine allows “someone whose conduct is not constitutionally protected [to] escape a legal sanction on the ground that the statute under which she is threatened would be constitutionally invalid as applied to someone else[.]” Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 858 (1991). Overbroad statutes risk chilling protected speech; the overbreadth doctrine is designed to allay such concerns. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). It is also designed to reduce discriminatory enforcement and “provid[e] an incentive to legislatures to draft laws that may affect First Amendment activity with as much precision as practicable.” Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 42 (2003); see also *Broadrick*, 413 U.S. at 615 (explaining that to invalidate a law on overbreadth grounds, “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep”).

meaning of these opaque and potentially expansive terms.¹²¹ Many people feel “alarmed” or “harassed” when confronted with ideas they find objectionable, but the First Amendment prohibits states from imposing liability on speech merely because it creates discomfort or annoyance or even “alarm” in its target audience.¹²² Moreover, speakers are free to choose speech because of its emotive impact; words that provoke or “alarm” others are a powerful means of conveying one’s message.¹²³ The exact scope of speech targeted by the statute remains unclear, but the text lends itself to an interpretation that criminalizes speech clearly protected by the First Amendment.

The Arkansas law is not saved, moreover, by its insistence that electronic communications may only be punished when made “in furtherance of severe, repeated, or hostile behavior toward the other person.”¹²⁴ First, it is not even clear what “severe . . . behavior” is.¹²⁵ Second, although the state might legitimately criminalize a course of conduct “repeated” so frequently that it disrupts the target’s well-being, this statute apparently criminalizes objectionable speech repeated only once after the defendant is asked to stop.¹²⁶ Third, the law is unclear with regard to the types of behavior that law enforcement might label as “hostile.”¹²⁷ Sending an ex-boyfriend a tweet saying “my new man is better in bed” certainly might be seen as “hostile” and motivated by an

121. Under Arkansas’s harassment statute, a person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, without good cause, he or she:

- (1) Strikes, shoves, kicks, or otherwise touches a person, subjects that person to offensive physical contact or attempts or threatens to do so;
- (2) In a public place, directs obscene language or makes an obscene gesture to or at another person in a manner likely to provoke a violent or disorderly response;
- (3) Follows a person in or about a public place;
- (4) In a public place repeatedly insults, taunts, or challenges another person in a manner likely to provoke a violent or disorderly response;
- (5) Engages in conduct or repeatedly commits an act that alarms or seriously annoys another person and that serves no legitimate purpose; or
- (6) Places a person under surveillance by remaining present outside that person’s school, place of employment, vehicle, other place occupied by that person, or residence, other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy.

ARK. CODE ANN. § 5-71-208(a). However, the cyberbullying statute does not seem to be using this definition to clarify the meaning of “harass.” See *id.* § 5-7-217(b).

122. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

123. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality)); see also *Virginia v. Black*, 538 U.S. 343, 365-66 (2003).

124. ARK. CODE ANN. § 5-71-217(b)(2) (emphasis added).

125. See *id.*

126. Note there is no frequency requirement in the statute. See *id.*

127. See *id.*

intent to harass or alarm, but this speech, though probably of little constitutional value, does not fall within existing categories of unprotected speech, such as fighting words or threats.¹²⁸ Moreover, the term “hostile” is so malleable that it would inevitably lead to selective prosecution; the law therefore allows prosecutors far too much leeway in suppressing unpopular speech or charging unpopular speakers.

Louisiana’s cyberbullying statute is somewhat more likely to satisfy First Amendment standards than Arkansas’, though it stills risks challenge. Louisiana defines the offense of cyberbullying as follows: “Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.”¹²⁹ Under this provision, a perpetrator may be prosecuted for “transmission” of content he created or content created by others, as long as he had the requisite “malicious and willful intent.”¹³⁰ Although this provision makes one person legally responsible for speech originated by another, it does not necessarily violate the First Amendment, since the mens rea requirement applies to the “transmission.”¹³¹ More troubling from a First Amendment standpoint is that the perpetrator apparently may face criminal liability whether or not his communication has any significant effect on his victim or even if his victim never receives it. In essence, the statute punishes the perpetrator based on bad intent, regardless of whether his speech has bad consequences, a result forbidden by traditional First Amendment principles.¹³² The statute also leaves undefined its key

128. See *supra* notes 73-76 and accompanying text.

129. LA. REV. STAT. ANN. § 14:40.7(A) (West, Westlaw through the 2011 First Extraordinary and Reg. Sess.).

130. *Id.* Defamation law has typically made one who “republished” the defamatory statement of another liable as if he were the originator of the statement; however, in cases involving public officials or public figures, one cannot be liable unless one “republishes” with actual malice, i.e., knowledge or reckless disregard for the falsity of the statement. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring) (“*New York Times Co. v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.”).

131. See LA. REV. STAT. ANN. § 14:40.7(A).

132. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (“Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964))); see also *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (holding that defendant’s words were not intended to produce, or likely to produce, imminent disorder); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam) (suggesting that advocacy of illegal activity is protected unless both intended and likely to cause imminent

terms: “coerce, abuse, torment, or intimidate.” Although the “malice” requirement helps constrain the scope of liability, these terms are vague unless further defined, and they give citizens insufficient notice of what types of speech will trigger criminal liability.

Nonetheless, Louisiana’s cyberbullying statute is laudable in several respects. Unlike other cyberbullying legislation that treats adult and child victims equally, Louisiana imposes liability only when an offense is committed against a child;¹³³ this selectivity increases the likelihood that the state’s interest in regulating the affected speech is high.¹³⁴ Also, unlike other legislative efforts, Louisiana treats child perpetrators of cyberbullying less harshly than adult perpetrators by exempting child perpetrators under the age of seventeen from the statute and instead handling their conduct under a special “Children’s Code.”¹³⁵ Finally, Louisiana attempts to limit the statute’s potential for chilling some types of speech protected by the First Amendment by providing that it may not be used “to prohibit or restrict religious free speech.”¹³⁶ However, this exemption from liability for religious speech highlights the potential for the statute to infringe on other forms of speech protected by the First Amendment.¹³⁷

harm). For further discussion, see Lyrissa Barnett Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091 (2008).

133. LA. REV. STAT. ANN. § 14:40.7(A).

134. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (holding that the First Amendment does not prevent the Federal Communications Commission from regulating indecency in broadcasting due to the distinctive features of the broadcast medium, including its “pervasiveness” and accessibility to children). *But see* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2731 (2011) (striking down California statute prohibiting the sale or rental of “violent video games” to minors and refusing to expand the categories of unprotected speech simply because video games are “directed at children”).

135. LA. REV. STAT. ANN. § 14:40.7(D)(2).

136. *Id.* § 14:40.7(F).

137. This article does not address “sexting,” which is practice of sending sexually explicit materials, images, or videos as a text message over a mobile phone. It is worth noting, however, that cyberbullying and sexting sometimes collide. For example, in 2011 two teen girls created a photo, purportedly of a classmate, by pasting a picture of the classmate’s head on the picture of a nude body. Nina Mandell, *Florida Girls in Trouble with Police After Creating Lewd Fake Facebook Profile for Classmate*, N.Y. DAILY NEWS (Jan. 14, 2011), http://articles.nydailynews.com/2011-01-14/news/27087490_1_facebook-page-illinois-mother-florida-girls. They posted the “fake” nude photo of their classmate on a Facebook page accessible to most of their high school friends. A prosecutor charged the teens with aggravated stalking, or cyberstalking. *Id.* This conduct arguably could constitute cyberstalking, which is defined by a Florida statute as the use of e-mail or other electronic channels to communicate words, images, or language to a specific person, repeatedly, to serve no legitimate purpose, and that causes the person “substantial emotional distress.” FLA. STAT. § 784.048 (2012). When one “willfully, maliciously, and repeatedly” cyberstalks another, he or she can be charged with a misdemeanor offense, though the offense

III. GUIDELINES FOR CRIMINALIZING CYBERBULLYING: A LEGISLATIVE PRIMER

Legislators may find it difficult to address all of the First Amendment ramifications of criminalizing cyberbullying, partly because the term “cyberbullying” itself obscures analysis. Cyberbullying is an umbrella term that covers a wide variety of behaviors that fall into existing legal and linguistic categories, including extortion, threats, stalking, harassment, eavesdropping, spoofing (impersonation), libel, invasion of privacy, fighting words, rumor-mongering, name-calling, and social exclusion.¹³⁸ Some of these behaviors may be criminalized consistently with the First Amendment; others may not. Whether a speech behavior can be criminalized depends on the complex interplay of First Amendment doctrines, which legislators should consult before enacting legislation of dubious constitutionality.¹³⁹ Some key doctrines are summarized briefly below in the interest of providing a modicum of drafting guidance.

The easiest way to ensure the constitutionality of a criminal cyberbullying law is to criminalize speech that falls into one of the “well-defined and narrowly limited classes of speech”¹⁴⁰ that the Supreme Court generally has held to be excluded from the First Amendment’s protection.¹⁴¹ Obvious can-

becomes a felony when the target is under age 16. *Id.* If the harassment includes a threat intended to create reasonable fear of bodily injury to the victim or to the victim’s family, the crime becomes aggravated stalking. *Id.*; see also *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (prosecutors threatened to charge teens with distributing child pornography after they texted explicit images of themselves to “consenting” minors).

138. See generally *What Is Cyber Bullying?*, VIOLENCE PREVENTION WORKS!, http://www.violencepreventionworks.org/public/cyber_bullying_page (last visited Sept. 8, 2012).

139. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785-86 (2004).

140. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)). “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 571-72. In *Stevens*, the Court reiterated its reliance on this categorical approach, and identified the historical and traditional categories that may be restricted as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Stevens*, 130 S. Ct. at 1586.

141. Some crimes that are committed largely through speech, such as fraud or extortion, have never been thought to raise First Amendment concerns. For discussion, see Schauer, *supra* note 139, at 1768. Law-makers easily can “re-criminalize” extortion and fraud to the extent they overlap with cyberbullying behavior.

didates for criminalization are threats¹⁴² or fighting words,¹⁴³ which are excluded from the First Amendment's protection because they are especially likely to provoke violence and disorder. As long as legislators closely track the definitions of threats¹⁴⁴ and fighting words¹⁴⁵ provided in Supreme Court cases, any statute criminalizing them should withstand First Amendment scrutiny.¹⁴⁶

One additional category of "unprotected" speech deserves special mention as a candidate for allowing cyberbullying to be criminalized.¹⁴⁷ "Defamation" is one of the "historic and traditional categories"¹⁴⁸ of unprotected speech, and cyberbullying may sometimes overlap with defamation to the extent it involves speech that harms reputation. However, defamation is a tort in most states rather a crime,¹⁴⁹ and the Supreme Court has crafted a complex

142. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

143. *Chaplinsky*, 315 U.S. at 571-72. Incitement is another category of unprotected speech that is excluded from the First Amendment's protection because of its propensity to provoke violence, but cyberbullying behaviors are unlikely to constitute incitement. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

144. See, e.g., *Black*, 538 U.S. at 359-60 (defining a true threat as a "statement[] 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.").

145. *But see supra* notes 114-17 and accompanying text (discussing the re-continuing vitality of fighting words doctrine).

146. The only limitation is that legislators may not selectively criminalize content-based sub-categories of unprotected speech based on disapproval of that content. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding criminalization of fighting words that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" unconstitutional).

147. "Obscenity" is also an unprotected category of speech, but we have omitted discussion of obscenity on the grounds that cyberbullying is unlikely to involve obscene speech. The constitutional standard for restricting obscene speech is set forth in *Miller v. California*, 413 U.S. 15, 24-25 (1973).

148. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

149. States with criminal statutes include: Florida (FLA. STAT. § 836.01-10 (2012)); Idaho (IDAHO CODE ANN. § 18-4801 to -4809 (West, Westlaw through end of 2012 2nd Reg. Sess. of the 61st Legis.)); Louisiana (LA. REV. STAT. ANN. § 14:47 (West, Westlaw through the 2011 First Extraordinary and Reg. Sess.)); Michigan (MICH. COMP. LAWS ANN. § 750.370 (West, Westlaw through the 2012 Reg. Sess., 96th Legis.)); Minnesota (MINN. STAT. ANN. § 609.765 (West, Westlaw through the 2012 Reg. Sess.)); New Hampshire (N.H. REV. STAT. ANN. § 644:11 (Westlaw through the 2012 Reg. Sess.)); North Carolina (N.C. GEN. STAT. ANN. § 14-47 (West, Westlaw through the 2012 Reg. Sess.)); North Dakota (N.D. CENT. CODE ANN. § 12.1-15-01 (West, Westlaw through 2011 Reg. and Special Sess.)); Oklahoma (OKLA. STAT. ANN. tit. 21, §§ 771-74, 776-81 (West, Westlaw through Second Reg. Sess. of the 53rd Legis.)); Utah (UTAH CODE ANN. § 76-9-404 (West, Westlaw through 2012 Fourth Special Sess.)); Virginia (VA. CODE ANN. § 18.2-417 (West, Westlaw through 2012 Reg. Sess.)); and Wisconsin (WIS. STAT. ANN. § 942.01 (West, Westlaw through 2011)).

body of First Amendment doctrines that vary the level of protection defamatory speech receives based on the identity of the plaintiff, the subject matter of the speech, and other factors.¹⁵⁰ The complexity of this area should be enough to deter all but the most stalwart legislators from attempting to wade in with a cyberbullying defamation statute, especially when the tort law in this area is already well developed. Moreover, although the Supreme Court has not rejected the prospect of criminal libel laws entirely, it suggested over forty years ago that libel may be “inappropriate for penal control.”¹⁵¹ Thus, legislators would do better to focus criminalization efforts on electronic threats or fighting words, and leave defamation to the realm of tort law.

The problem with the above recommendations, however, is that it is politically unsatisfying to only regulate cyberbullying that falls into the narrowly defined categories of fighting words and threats. Moreover, in many states, these behaviors may already be crimes, so a cyberbullying statute aimed at them would be duplicative. What, then, can law-makers do to address the broader range of cyberbullying behaviors that potentially cause deep emotional harm?

First, law-makers should focus criminalization efforts on speech that is repeated so often that it creates substantial disruption to the lives of victims. Even though a single instance of offensive or harassing speech may be protected by the First Amendment,¹⁵² the same speech repeated enough times might become conduct subject to criminalization without exceeding constitutional constraints.¹⁵³ Any statute faced on cyberbullying “harassment” is more likely to be upheld if it focuses on perpetrators who single out one person as the ad nauseum recipients of their speech, because such speech at issue

150. See generally LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 63-90 (2004) (providing an overview of the “constitutionalization” of defamation law); Rodney A. Smolla, Dun and Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, app. (1987) (providing a chart of the permutations that may affect the level of First Amendment protections accorded allegedly defamatory speech).

151. *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964) (internal citation omitted).

152. In *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001), the Third Circuit, with then-Judge Alito writing for the majority, struck down a campus “hate speech code” that forbade “harassment,” stating: “[t]here is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”

153. See *FCC v. Pacifica Found.*, 438 U.S. 726, 739 (1978) (noting that not only is the content important in assessing whether language constitutes protected speech, but the context and circumstances in which it was used must also be examined); see also *In re S.J.N-K.*, 647 N.W.2d 707, 712 (S.D. 2002) (holding that a student’s repeated mouthing of the words “fuck you” and accompanying use of obscene gestures amounted to an “ongoing aggression” that fell outside protected free speech); *State v. James M.*, 806 P.2d 1063 (N.M. Ct. App. 1990) (ruling defendant’s repeated yelling “fuck you” while flailing arms during an argument on a public sidewalk constituted unprotected speech and was punishable disorderly conduct).

is both particularly disruptive to the individual and particularly unlikely to involve matters of public concern.¹⁵⁴ Similarly, statutes that are careful to punish all harassing speech equally, regardless of content,¹⁵⁵ are far more likely to withstand constitutional scrutiny.

Another piece of advice is to focus criminalization efforts on speech by adults that targets and harms children. Bullying speech targeted at children likely can be regulated in ways that speech targeted at adults cannot.¹⁵⁶ Children, especially younger children, are more emotionally vulnerable than adults, and thus the State's interest in protecting them from frequently repeated bullying speech by adults is likely to be very high and possibly compelling.¹⁵⁷

Legislators would also do well to remember that context matters profoundly in determining the scope of First Amendment protection of speech. A thumbnail sketch suffices to illustrate the complexity: speech in schools¹⁵⁸

154. See *infra* note 163 and accompanying text (discussing the relevance of and constitutional test for "speech of public concern"); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (implying that city ordinance would have been valid had it prohibited fighting words directed at a specific person or group).

155. Content-based regulation of speech typically is subject to strict constitutional scrutiny. See *R.A.V.*, 505 U.S. at 404 (White, J., concurring); see also *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (holding that, in order to uphold a content-based limitation on speech, it must be the "least restrictive means" for addressing the problem). In other words, the State must prove that any law restricting speech on the basis of its content "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n.*, 131 S. Ct. 2729, 2738 (2011).

156. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("[T]he State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944))); see *Pacifica*, 438 U.S. at 749-50 (upholding regulation protecting children from broadcast indecency); see also, e.g., *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) ("The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling"); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). But see *Entm't Merchs. Ass'n.*, 131 S. Ct. at 2731 (rejecting California's attempt to protect children from violent video games by creating "a wholly new category of content-based regulation that is permissible only for speech directed at children").

157. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 678 (2006) (arguing that government restrictions on parental speech are constitutional in situations in which a parent with a split custody arrangement uses speech to influence a child against the other parent).

158. Compare *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008) (ruling that the school had authority to take away a student's right to participate in student government when the student posted online comments that substantially disrupted the school), *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39-40 (2d Cir. 2007) (holding that

and workplaces can be regulated¹⁵⁹ in ways that speech in public spaces cannot.¹⁶⁰ Even within schools, the speech of younger minors can be regulated in ways that the speech of older minors cannot,¹⁶¹ and speech in schools that is part of the curriculum can be regulated in ways that political speech can-

the school can regulate student speech where it was reasonably foreseeable that it would reach the school campus), *and* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002) (finding that the school can regulate speech originating off-campus but directed at the school), *with* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010) (finding that the student speech originating off-campus did not substantially disrupt school activity and so the school had no authority to punish the student for that speech), *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (holding that a student's off-campus speech did not rise to the level of being disruptive), *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (holding that because the speech was created off-campus, there was not enough of a connection to the school for the school to have jurisdiction over the speech), *and* *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (finding that the decision to discipline a student for off-campus speech was unacceptable because it was based on the principal's emotional reaction and not any real fear that the speech would cause material disruption). For extended discussion, see generally Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008).

159. *See e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment only protects speech made outside the course of an employee's "official duty"); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 (1995) ("[P]rivate speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer."); *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("[W]e have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. Doubtless some such speech is sometimes nondisruptive; doubtless it is sometimes of value to the speakers and the listeners. But we have declined to question government employers' decisions on such matters."); *see also* J. M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2295, 2298-301 (1999) (arguing that "censorship" under harassment law "is constitutionally permissible when there are good grounds for vicarious liability"); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL'Y & L. 127, 144 (1996) (noting that in certain well-defined circumstances, First Amendment rights must submit to the government's "compelling interest in eradicating discrimination in the workplace").

160. *Compare Pacifica*, 438 U.S. 726, 744, *with* *Cohen v. California*, 403 U.S. 15, 26 (1971). For further analysis on social media forum and First Amendment doctrine, see Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011).

161. *Compare* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (permitting high school administrators to censor school-sponsored speech if their actions are supported by "legitimate pedagogical concerns"), *with* *Joyner v. Whiting*, 477 F.2d 456, 461 (4th Cir. 1973) (holding university may not withdraw support for student newspaper because university disagrees with views expressed in publication).

not.¹⁶² Outside the school setting, speech on matters of public concern receives far more First Amendment protection than speech dealing with other matters, even if the speech on matters of public concern is sure to cause tremendous emotional upset.¹⁶³ In all these instances, First Amendment doctrines draw subtle and sometimes wavering lines, which lawmakers must navigate with precision in order to regulate speech in ways that do not violate the constitution.

Finally, legislators should also be aware that the First Amendment places some of the objectionable behaviors that constitute cyberbullying outside the reach of criminal sanction. Although primary schools often can discipline children for name-calling,¹⁶⁴ the State may not jail people for it.¹⁶⁵

162. Compare, e.g., *Hazelwood*, 484 U.S. at 268 (noting that a school may control speech in student newspaper that is part of the curriculum), with *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that the wearing of black armbands by high school students to protest the Vietnam War was a symbolic act protected by the free speech clause of the First Amendment).

163. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Supreme Court held that a plaintiff could not recover for emotional distress inflicted by those who protested outside his Marine son's funeral with signs with slogans such as "God Hates Fags," "You're Going to Hell," and "Thank God for IEDs." *Id.* at 1220. In *Snyder*, the Supreme Court determined that the speech was "at a public place on a matter of public concern" and was therefore "entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Id.* at 1219. The Court's opinion in *Snyder* helped elucidate the concept of "public concern." The Court observed that "[d]eciding whether speech is of public or private concern requires us to examine 'the content, form, and context' of that speech." *Id.* at 1216 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)). The Court defined the term further by noting "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Id.* (internal quotations and citations omitted).

164. Although teachers and students do not "shed their constitutional rights to freedom of expression at the schoolhouse gate," the Supreme Court held in *Tinker* that the "special characteristics" of the school environment justify limiting or punishing speech that causes "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 506, 507, 513. Subsequent decisions of the Court clarified that "the constitutional rights of student in public schools are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick*, 551 U.S. 393, 404 (2007) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)). Thus, the Court has permitted school officials to discipline students for using "lewd, indecent, or offensive speech" in school, *Fraser*, 478 U.S. at 683, and has allowed schools to exercise editorial control over student speech in school-sponsored publications "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*,

Likewise, though schools may discipline children for socially excluding others in a disruptive way in the classroom,¹⁶⁶ the State may not jail people for refusing to associate with others, or for socially snubbing them.¹⁶⁷ Our First Amendment jurisprudence recognizes that all members of society, even children, are exposed to a great deal of unpleasant speech – to insults and unkindness and verbal viciousness – against which the only recourse is to develop emotional resiliency. The law cannot “intervene in every case where some one’s [sic] feelings are hurt,”¹⁶⁸ nor would most citizens want it to. As the Supreme Court has noted, speech can “inflict great pain,” but if that speech involves matters of public concern, the State “cannot react to that pain

484 U.S. at 261. Most recently in *Morse v. Frederick*, *supra*, the Court permitted school officials to discipline a student for holding up a sign “at a school event” that could be “reasonably viewed as promoting illegal drug use,” in light of the school’s “important – indeed, perhaps compelling interest” in deterring students from using drugs. *Morse*, 551 U.S. at 403.

Name-calling in the elementary or high school classroom will sometimes meet meets *Tinker*’s substantial disruption standard. See *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 268 (3d Cir. 2002) (upholding portion of a school board’s anti-harassment policy forbidding racial name calling where school had history of racial incidents). But see *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (holding university hate speech code overbroad because it could reach “simple acts of teasing and name-calling”). For further discussion of the limits of schools’ disciplinary authority over student speech, see Papandrea, *supra* note 158. For discussion of attempts to regulate racist speech at colleges and universities, see Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 290-317 (1991). For criticism of the First Amendment’s protection of racist speech, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 466-72 (1990).

165. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that public figure could not recover damages for emotional harm caused by publication of a highly offensive ad parody, absent proof of actual malice).

166. See Hans Bader, *Schools Use ‘Bullying’ as a Pretext to Violate Students’ Rights to Free Association and Freedom of Speech*, OPENMARKET (Aug. 10, 2011), <http://www.openmarket.org/2011/08/10/schools-use-bullying-as-a-pretext-to-violate-students-rights-to-free-association-and-freedom-of-speech/>. In addition, the state may impose liability for discrimination in the workplace or in public accommodation. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631 (1984) (upholding the constitutionality of legislation that prohibited gender discrimination in places of public accommodation).

167. In *Healy v. James*, 408 U.S. 169, 181 (1972), the Supreme Court established that, “[w]hile the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.” In *Roberts*, 468 U.S. at 622, the Supreme Court held that implicit in the right to engage in protected activities is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends.” See also Bader, *supra* note 166.

168. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

by punishing the speaker.”¹⁶⁹ Even with regard to “pain-inflicting” speech of private concern, the State would often do well to leave punishment to tort law rather than attempt the arduous task of drafting criminal laws with enough precision and specificity to withstand First Amendment challenge.

IV. CONCLUSION

“Cyberbullying” as a social problem encompasses a broad swath of behavior and speech: some of this behavior is criminal, such as threats, stalking, eavesdropping, or identity theft; some is tortious, such as libel, invasion of privacy, and intentional infliction of emotional distress; and some is merely ill-mannered, such as social exclusion and name-calling. Not all of these problems can, or should be, addressed by criminalization.

Any attempt to use criminal law to address cyberbullying should start with the jurisprudential question of which aspects of the problem are best addressed by criminal law, which aspects are best addressed by other bodies of law, such as school education or discipline programs or tort law, and which aspects are best left to non-legal controls such as shaming and shunning. Once that question is answered, criminalization of cyberbullying should proceed by identifying the various forms cyberbullying can take and then researching the specific First Amendment constraints, if any, on criminalizing that form of behavior or speech. This approach should lead legislators to criminalize only particularly problematic forms of narrowly defined cyberbullying, such as threats, fighting words, bullying speech repeatedly targeted by adults at children, or bullying speech of private concern that targets one person and is repeated so frequently it causes its target substantial disruption. While introducing narrow legislation of this sort may not be as satisfying as criminalizing “adolescent cruelty,”¹⁷⁰ it is far more likely to withstand constitutional scrutiny and become a meaningful tool to combat serious harms.

Currently, some of the legislative efforts to criminalize cyberbullying seem to proceed from the notion that we “will know it when we see it.” In fact, most of us probably will: we all recognize the social problem of cyberbullying, defined as engaging in electronic communication that transgresses social norms and inflicts emotional distress on its targets. But criminal law cannot be used to punish every social transgression, especially when many of those transgressions are committed through speech. Any meaningful legislative response to cyberbullying must steer with care and precision through the shoals of the First Amendment, and legislators must admit to constituents that some cyberbullying must be curtailed through educating, socializing, and

169. *Snyder*, 131 S. Ct. at 1220. For further discussion, see Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CAL. L. REV. CIRCUIT 71, 81-86 (2010).

170. See *supra* note 117 and accompanying text (describing the proposed New York statute aspiring to criminalize “adolescent cruelty”).

stigmatizing perpetrators rather than criminalizing and censoring their speech. To do otherwise is to waste precious resources passing and defending well intentioned but unconstitutional laws.