The Transformation of Indirect Harassment in the 21st Century: Harassment Telephone Laws, Cyberbullying, and New Ways of Analyzing First Amendment Rights

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

I. INTRODUCTION

With the introduction of the Internet, smartphones, and the continuing development of social media, our society has adopted new ways of communicating that transcends our ancestor’s imaginations. Nevertheless, with this transformation of online communication came a new set of dangers, including identity theft, hacking, and online harassment, which led to civil lawsuits and criminal cases of first impression. This conflict led to what is now known as “cyberbullying.”

1 See Alison Virginia King, Note, Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech, 63 VAND. L. REV. 845, 846 (2010) (signifying benefits and dangers of Internet). While the Internet creates a new virtual world that provides numerous benefits for our society, such as endless amounts of news, easy access to research, and social networking, it also brings about dangers such as cyberbullying that parents and legislators alike must confront. Id. Nevertheless, “the even greater challenge...is to balance these vital protections with the equally compelling freedoms of speech, expression, and thought.” Id. See also Jerry Will & Chm Clayburn, The Psychological Impact of Cyber Bullying, U. BUS. (Nov. 4, 2011), http://www.universitybusiness.com/article/psychological-impact-cyber-bullying (noting high percentage of teenagers that go online). Specifically in 2007, 94% of teenagers aged 12 to 17 use the internet. 89% of these teens use the internet while at home, and 63% of them use the internet daily. Id.; Meryl Ain, Increased Use of Smartphones Among Teens: What’s a Parent to Do?, HUFFINGTON POST (May 16, 2013, 12:27 PM), http://www.huffingtonpost.com/meryl-ain-edd/increased-use-of-smartphone_b_2884442.html (explaining increase in use of smartphones among teenagers between 2012 and 2013). In the United States, 78% of children aged 12 to 17 own a cellphone and one out of four teenagers uses his or her smartphone to surf the Internet. Id. However, with the increased use of cellphones comes new hurdles for parents to control their teenager’s behavior that could include acts such as sexting and cyberbullying. Id.

2 See State v. Bishop, 774 S.E.2d 357, 343 (N.C. Ct. App. 2015) (signifying case of first impression concerning constitutionality of cyberbullying statute). While the Internet is a virtual world, it can have real-life consequences for many individuals faced with the dangers of identity theft, hacking, and online harassment. King, supra note 1, at 846. See also Lisa M. Jones, Kimberly J. Mitchell, & David Finkelhor, Online Harassment in Context: Trends from Three Youth Internet Safety Surveys, 3 PSYCHOL. OF VIOLENCE 53, 53 (2012), http://www.unh.edu/ccrc/pdf/Online%20Harassment%20in%20Context.pdf (demonstrating increase in online harassment for children and teenagers from 2000 to 2010). While children and teenager’s internet use rose drastically from 2000 to 2010, they also changed who they talked to: a study measuring internet use characteristic among youth found that children talked to their friends online more in 2010 than they talked to those they had just met online. Id. at 60. Nevertheless, indirect harassment online has increased significantly as the rise in social media
which has not been precisely defined. Provisions, however, have been in place for other indirect modes of harassment such as the Federal Harassment Telephone Law, which criminalizes perpetrators of harassing telephone calls. This provision sparked inspiration for present-day sites have given children a new avenue in which to bully their fellow classmates. Id. at 64. See also The Top Six Unforgettable Cyberbullying Cases Ever, NOBULLYING.COM, http://nobullying.com/six-unforgettable-cyber-bullying-cases/ (last modified Mar. 26, 2017) (emphasizing striking number of cyberbullying cases leading to suicide among teenagers). The suicide of Ryan Halligan demonstrates one of numerous examples of suicide caused by cyberbullying. Id. Halligan suffered from a lack of adequate motor skill development and received special education services to help with this problem. Id. Because of these physical struggles, Halligan was the target of bullying. Id. This bullying led to cyberbullying after Halligan started communications with a female student. Id. However, the girl convinced him to share personal information about himself, which she posted in her instant messaging exchanges with friends; after finding this out, Halligan was distraught and hung himself in his family’s bathroom. Id. See generally What Is Indirect Bullying? A Guide Released by NoBullying Today, PRWEB (July 18, 2014), http://www.prweb.com/releases/2014/07/prweb12025232.htm (describing bullying and distinguishing indirect bullying from direct bullying). When one is bullying another, there is often a power struggle between the bully and the victim where the bully desires to impose direct or indirect harm upon the victim. Id. Unlike direct bullying which involves directly hurting another in a physical or emotional way, indirect bullying includes actions such as excluding someone from an activity or spreading negative rumors about an individual either offline or online. Id. These actions are indirect and do not directly attack another. Id. Consequently, NoBullying.com and prweb.com call for more practical laws to prevent bullying and for parents to teach their children about the negative effects of bullying both offline and online. Id. See Why do Kids Cyberbully Each Other?, STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Apr. 19, 2017) (providing definition of cyberbullying). Cyberbullying, according to stopbullying.org is “when a child... is tormented, threatened, harassed, humiliated, embarrassed, or otherwise targeted by another child... using the Internet, interactive and digital technologies or mobile phones.” Id. The site also provides examples of cyberbullying, which include text messages, emails, and embarrassing rumors or photos posted on social media sites. See id. See generally Justin Patchin, Summary of Our Cyberbullying Research (2004-2016), CYBERBULLYING RESEARCH CENTER (Nov. 26, 2016), http://cyberbullying.org/summary-of-our-cyberbullying-research (demonstrating increase in cyberbullying over last decade). Studies conducted by cyberbullying.org indicate that from May 2007 to August 2016, reports of cyberbullying rose 15% from 18.8% to 33.8%. Id. In 2016, around 28% of students stated they had been cyberbullied at least once during their lifetime, while 16% stated they have cyberbullied other students. Id. But see Shirvell v. Dep’t of Attorney General, 866 N.W.2d 478, 490 (Mich. Ct. App. 2015) (demonstrating cyberbullying argument carried out by adults). In Shirvell, Attorney General Shirvell was conducting an anti-cyberbullying policy in Michigan public schools. See id. However, when Solicitor General Restuccia discovered Shirvell had posted an anti-homosexual blog, Restuccia claimed such actions contradicted the Attorney General’s anti-cyberbullying policy and was analogous to cyberbullying. Id.

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

(a) Prohibited acts generally. Whoever—

(1) in interstate or foreign communications—

(A) by means of a telecommunications device knowingly—


cyberbullying statutes in various states. However, critics argue that these cyberbullying statutes and the Telephone Harassment Law prohibit a broad

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

(B) by means of a telecommunications device knowing—

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

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

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

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

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

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

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

(a) It shall be unlawful for any person: (1) To use in telephonic communications any words or language of a profane, vulgar, lascivious or indecent character, nature or connotation; (2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or to that person’s child, sibling, spouse, or dependent or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person; (3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called
range of speech protected by the First Amendment. While this prohibition will decrease the amount of indirect harassment cases and ultimately lead

number; (4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another; (5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass; (6) To knowingly permit any telephone under his control to be used for any purpose prohibited by this section. (b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received. For purposes of this section, the term “telephonic communications” shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem. (c) Anyone violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

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

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

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

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

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

Id. at 484. Although the government has a compelling interest to protect children from harmful information, and the above statute seeks to achieve this interest, it nevertheless represents a “criminal prohibition of alarming breadth” as the text of the law criminalizes protected speech that goes far beyond the normal understanding of cyberbullying. Id. at 486 (quoting United States v. Stevens, 559 U.S. 460, 474 (2010)). Consequently, the court determined that the statute was invalid because it was contrary to the Free Speech Clause of the First Amendment. Id. at 488; State v. Bishop, 787 S.E.2d 814, 822 (N.C. 2016) (holding North Carolina cyberbullying statute
to a more peaceful society, our nation must analyze these types of laws critically before implementing them.\(^7\)

This note will: (I) examine the development of indirect harassment laws from the Harassment Telephone Laws passed in the early 1930’s to present cyberbullying laws;\(^8\) (II) look to cases analyzing the validity of as unconstitutional as it violates guarantee of freedom of speech). See generally Doug Linder, *Introduction to the Free Speech Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/firstaminto.htm (last visited Mar. 21, 2017) (defining right to free speech under First Amendment and different approaches in analyzing it). The right to free speech under the First Amendment states that “Congress shall make no law... abridging the freedom of speech, or of the press.” U.S. CONST. amend I. There are three approaches in analyzing the right to free speech under the First Amendment: the absolutist approach, the categorical approach, and the balancing approach.\(^9\) The absolutist approach says that Congress shall not make a law threatening the freedom of speech.\(^9\) Here, the question is whether an individual’s actions are either speech or conduct; and in some instances, like screaming “fire,” because the speech interconnects with an action that most likely will be performed, then it is not speech and not protected under the right to free speech.\(^9\) The categorical approach states that speech can be broken down into categories; and if the speech is determined as commercial speech or fighting words, then the speech is not protected under the First Amendment.\(^9\) Finally, the balancing approach says that in each instance, a court must weigh the individual’s interest in protecting one’s right to free speech against the government’s interest in restricting the speech; and the preference is to rule in favor of the individual over the government unless there is a strong government interest in prohibiting the speech.\(^9\) Therefore, because the Albany County cyberbullying statute in *Marquan* included numerous forms of electronic speech that arguably were not connected to conduct or fighting words, and, thus, fundamentally threatened the individual’s right to free speech, the statute was unconstitutional and could not be used to charge the high school student. 19 N.E.3d at 488.

See King, supra note 1, at 884 (emphasizing that legislators need to act quickly to address cyberbullying problem plaguing nation). But see James Tucker, *Free Speech and “Cyberbullying,”* AM. CIVIL LIBERTIES UNION (Jan. 16, 2008, 10:29 AM), https://www.aclu.org/blog/speakeasy/free-speech-and-cyber-bullying?redirect=blog/free-speech/free-speech-and-cyber-bullying (explaining cyberbullying as stacking deck against First Amendment). In fact, Tucker suggests that society should not automatically try to implement legislation to resolve the problem of offensive online speech.\(^9\) Rather, parents should monitor their children’s online usage so that society can continue to promote the free exchange of information, while simultaneously recognizing that online speech could benefit or hurt others.\(^9\) See also Stephanie Hanes, *Anti-Bullying Laws: A Mom Dares to Critique the Social Trend*, THE CHRISTIAN SCIENCE MONITOR (Sept. 25, 2012), http://www.csmonitor.com/The-Culture/Family/Modern-Parenthood/2012/0925/Anti-bullying-laws-A-mom-dares-to-critique-the-social-trend (criticizing anti-bullying laws). Hanes notes that legislators first implemented bullying statutes after the Columbine High School shooting in 1999; after this tragic event, state legislatures throughout the country introduced or amended around 120 bills regarding bullying.\(^9\) However, most states have definitions of bullying that are usually not in conformity with the “research-based” definition of bullying, which involves an intent to harm another, a power struggle between the bullyer and the bullyee, etc.\(^9\) In addition, states such as New Jersey have implemented anti-bullying policies that threaten free speech and “interfere with the orderly operation of the institution.”\(^9\) See also The Rise in Cyberbullying, Heard on All Things Considered, NPR (Sept. 30, 2010, 3:00 PM), http://www.npr.org/templates/story/story.php?storyId=130247610 [hereinafter The Rise in Cyberbullying] (showing cyberbullying legislation not doing enough to charge perpetrators of cyberbullying crimes).

\(^1\) See infra Part II, A-B.
these aforementioned laws, the issues arising out of these laws, and how they alter our understanding of the First Amendment; (III) argue that, while these laws may have changed our understanding of the First Amendment in beneficial ways, they may not be the best solution in resolving indirect harassment; and (IV) the note will conclude that these indirect harassment laws ultimately affect the First Amendment in a vital, yet dangerous way.

II. HISTORY

A. Telephone Harassment

The invention of the telephone has allowed individuals to communicate with one another from across the globe in an inexpensive way; but such an invention has also led to new ways for harassers to induce fear upon others. One of the first examples of telephone harassment

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See infra Part III, - B.

See infra Part IV.

See infra Part V.

See infra Part V.

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

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

Id. See Commonwealth v. Wilcox, 841 N.E.2d 1240, 1244 (Mass. 2006) (noting violation of § 14A because defendant charged with four counts of making annoying calls). In Wilcox, the defendant called young girls at random and asked them to make videotapes of themselves for him. Id. As a result, he was charged with four counts of making annoying or indecent phone calls and two counts of accosting a person of the opposite sex; as such, the defendant was placed on probation. Id. But see Commonwealth v. Wotan, 665 N.E.2d 976, 976-77 (Mass. 1996)
came in the late 1890's, when the first telephones were used by early switchboard operators, who mainly consisted of "notoriously rude" teenage boys.13 The problem of telephone harassment, nevertheless, expanded as the telephone increased in popularity, which led to lawsuits against ex-lovers, stalkers, and others because of their "telephonic assaults" on others.14 As a result, federal and state legislators sought to pass laws to crack down on this type of harassment.15

( reversing guilty ruling although defendant made annoying telephone calls). In Wotan, the court explained that although it is a misdemeanor under G.L. ch. 269, section 14A to make a telephone call merely to harass, annoy, or molest another, these calls must be made repeatedly to be considered a crime. Id. Furthermore, even though Wotan made two calls to the Kegans where he simply hung up, this was not enough to constitute "repeating" calls under the statute. Id. See Jennifer Latson, The Woman Who Made History by Answering the Phone, TIME (Sept. 1, 2015), http://time.com/4011936/emma-nutt/ (showing progress of women in workforce replacing teenage boys as switchboard operators). One of the main reasons that these teenage boys seemed so rude was because they were frustrated with the telephone connection problems. Id. In fact, when women replaced these boys as switchboard operators, the women were also frustrated at these connection problems, as one reported saying "number please" over 120 times per hour for eight hours a day because she could not understand the person on the other line. Id.14

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


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

Id. In fact under the statute, one does not have to prove that the caller had the intent to harass; as long as the evidence shows an intent to harass, this intent can be enough to charge the harasser.
TRANSFORMATION OF INDIRECT HARASSMENT

However, statutes that criminalize harassment via telephone calls encounter challenges to their validity on the grounds of vagueness, and lend themselves to numerous types of interpretation. For example, the use of terms such as “obscene” and “profane” to describe the type of calls prohibited are academic terms that are difficult to apply in specific contexts.


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

Id. This Connecticut law does not only regulate speech, but also the content of the call. State v. Moulton, 78 A.3d 55, 69-71 (Conn. 2013) (holding Connecticut Harassing Telephone Statute prohibits harassing speech and conduct). One could consider the content of the call when determining if the call was made “in a manner likely to cause annoyance or alarm.” Id. at 61. See generally Mark S. Nadel, Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy, 4 Yale J. on Reg. 99, 102-07 (1986) (demonstrating legislators and court’s view of harassing telephone statutes). The Supreme Court has held that individuals should be left alone at their residence and deserve privacy, particularly regarding unsolicited telephone calls. Id. Legislators responded to this ruling by passing legislation regarding harassing telephone calls; in fact, some states prevent calls from being made at “inconvenient hours” while bills in twenty-two states limit calls made from telemarketers. Id. at 107-09. Invariably, these laws should not encroach on the freedom of speech under the First Amendment and “further inquiry is often necessary to determine the legality of a particular piece of protective legislation.” Id. at 104; see Telecommunications Law: Telephone Harassment, supra note 14 (highlighting characteristics of harassing telephone calls and how they act as unwelcome intrusions on privacy). Some of these characteristics include calls that continually ring, calls that only consist of heavy breathing on the other line, and calls that include obscene comments. Id. Finally, the timing and frequency of the call may also be important in determining whether the call was harassing. Id.

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

B. Cyberbullying

Cyberbullying received national recognition after the suicide of thirteen-year-old Megan Meier, who received numerous insulting messages on her MySpace account that ultimately led to her suicide in 2006. However, when the incident arose in 2007, local law enforcement said that the crime, while it "might've been rude, it might've been immature . . . it wasn't illegal." Cyberbullying has now become more prevalent, as more

17 Compare Royall, supra note 12, at 1423 (recognizing ambiguity in defining "offensive content"), with State v. Ray, 735 P.2d 28, 29-30 (Or. 1987) (quoting State v. Moyle, 705 P.2d 740, 745-46 (Or. 1985)) ("The constitutional prohibition against laws restraining speech or writing cannot be evaded . . . by phrasing statutes so as to prohibit 'causing another person to see' or 'to hear' . . . legislative power to select the objectives of legislation is plenary, except as it is limited by the state and federal constitutions.").


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

20 Christopher Maag, A Hoax Turned Fatal Draws Anger But No Charges, N.Y. TIMES (Nov. 28, 2007), http://www.nytimes.com/2007/11/28/us/28hoax.html?_r=0 (demonstrating no laws existed to hold perpetrator accountable for Meier’s suicide). Meier’s local town board passed an ordinance after Meier’s death stating that an individual could face a fine of $500 and receive a ninety day imprisonment for Internet harassment. Id. According to Mayor Pam Fogarty, while this law did not amount to much, it was “the most [the Board] could do.” Id.
children experience it through increased social media and cell phone use. Consequently, after Meier’s tragic death and an increase in cyberbullying incidents, numerous jurisdictions sought to pass legislation to criminalize internet harassment. Massachusetts became one of these jurisdictions

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

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

(a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following: (1) With the intent to intimidate or torment a minor: a. Build a fake profile or Web site; b. Pose as a minor in: 1. An internet chat room; 2. An electronic mail message; or 3. An instant message . . . . (2) With the intent to intimidate or torment a minor or the minor’s parent or guardian: . . . . c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmission, to a
after the death of Phoebe Prince, a high school student who committed suicide after she was harassed online by her fellow classmates. 23 In response to this tragic incident, Massachusetts legislatures defined cyberbullying in “An Act Relative to Bullying in Schools” to confront the issue of cyberbullying in schools throughout the State. 24 This law has

... (b) Any person who violates this section shall be guilty of cyber-bullying, which offense shall be punishable as a Class 1 misdemeanor if the defendant is 18 years of age or older at the time the offense is committed. If the defendant is under the age of 18 at the time the offense is committed, the offense shall be punishable as a Class 2 misdemeanor.

Id.; Bishop, 774 S.E.2d at 342 (ruling statute did not violate First Amendment). North Carolina has recently analyzed this law in a case of first impression, where the court analyzed whether the statute criminalized speech protected under the First Amendment. Id. See also Ark. Code Ann. § 5-71-217(b) (2015) (“A person commits the offense of cyberbullying if: (1) He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, or harass another person; and (2) [t]he transmission was in furtherance of severe, repeated, or hostile behavior toward [another] person.”). Arkansas passed a cyberbullying law in response to an incident similar to the Meier story, where in 2009, twelve year-old Sarah Butler received a host of harassing messages on her MySpace account. See Rose, supra note 21, at 1007. Specifically, the last of these messages said “that she would be easily forgotten and that nobody would miss her if she was gone.” Id. Because of such disturbing messages, Butler hanged herself. Id. Similar to the Meier story, prosecutors could not bring charges against the perpetrator because there was no law against cyberbullying. Id. Therefore, in 2011 Arkansas passed the above cyberbullying statute, looking to the Megan Meier Cyberbullying Prevention Act for guidance. Id. at 1010-12. The Megan Meier Cyberbullying Prevention Act criminalizes communications made “with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behavior . . .” H.R. 1966, 111th Cong. (2009). Although the Act set out to solve an inherent problem with harassment through the Internet, the Act itself could be argued as regulating free speech and limiting a broad array of speech that is protected under the First Amendment. Rose, supra note 21, at 1007. But see The Rose in Cyberbullying, supra note 7 (demonstrating that legislation not doing enough to combat cyberbullying). Here, Professor Patchin of the University of Wisconsin-Eau Claire argued “the vast majority of cases of cyberbullying fall short of sort of criminal sanction. And so it really takes . . . informal remedies to both respond and to try to prevent [cyberbullying].” Id.

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

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

[B]ullying through the use of technology or any electronic communication, which shall include . . . any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-
come into question after the death of Conrad Roy III on July 13, 2014; here, Roy committed suicide after Michelle Carter sent text messages and Facebook posts persuading Roy to kill himself. On July 1, 2016, the

bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

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

25 See Massachusetts’ Highest Court Rules Girl Accused of Texting Boyfriend, Urging Suicide Must Stand Trial, FOX 6 NOW (July 4, 2016), http://fox6now.com/2016/07/04/massachusetts-highest-court-rules-girl-accused-of-texting-
Massachusetts Supreme Judicial Court ("SJC") ruled that Carter must stand trial facing a charge for manslaughter based on her text messages to Roy. Nonetheless, Carter’s attorney claimed that Carter’s texts, while suggesting a “systematic campaign of coercion” targeting Roy’s insecurities, were protected by the First Amendment; thus, although Massachusetts legislators have passed the aforementioned “Act Relative to Bullying in Schools”, there is still debate over whether Carter’s speech should be protected or exposed to criminal punishment.

Although these statutes have the inherent positive quality of eliminating cyberbullying, they also have numerous negative qualities; for example, cyberbullying statutes can limit a broad array of speech protected under the First Amendment: analogous to the Harassment Telephone Law. Cyberbullying is also difficult to equate to other forms of...
harassment because of the ways in which a cyberbully could harass another in an indirect, rather than a direct, way. In fact, cyberbullying is extremely different from a direct physical altercation between a bully and his or her victim, and even different from a harassing telephone call directed at the victim; thus, it is questionable whether one should be perpetrator through the freedom of speech. Additionally, Kalman states that if we continue to block a person’s right to say something, he or she will only want to say these prohibited words in a more vehement way. Id. Elbert Chu, Should Cyberbullying Be a Crime?, WNYC (Apr. 27, 2012), http://www.wnyc.org/story/302021-should-cyberbullying-be-a-crime/ (noting legislation may not be correct answer to resolve cyberbullying). The co-director of the national Cyberbullying Research Center, Justin Patchin, in fact stated that there are better ways to criminalize cyberbullying than through a statute. Id. As Patchin notes, teens do not care if there will be formal punishment for their actions; they will continue to act how they want, like any other rule that a school official places upon them. Id. See generally Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976) (demonstrating that speech must do more than offend to lose constitutional protections). If all offensive speech went against the First Amendment, then individuals would not be able to argue or debate with each other. Id. In fact, one of the main reasons why the Founding Fathers enacted the Free Speech Clause of the U.S. Constitution was to promote these healthy, lively arguments. Id. Therefore, if offensive speech were limited in the above way, it would lead to the “standardization of ideas either by legislatures, courts, or dominant political or community groups.” Id. (quoting Termiello v. Chicago, 337 U.S. 1, 4-5 (1949)). But see T.K. v. N.Y.C. Dep’t of Educ., 779 F. Supp. 2d 289, 398 (E.D.N.Y. 2011) (holding no constitutional right to act like a bully). The First Amendment also provides that the right to be let alone inherently includes “the right to be free from physical intrusions as well as psychological attacks.” Id. In T.K., the court also explains the approach nationwide to control bullying in schools and defines cyberbullying specifically as “willful and repeated harm inflicted through the use of computer, cell phone, and other electronic devices.” Id. at 299 (quoting Sameer Hinduja & Justin W. Patchin, Overview of Cyberbullying White Paper for the White House Conference on Bullying Prevention, 21 (Mar. 10, 2011), http://people.uwec.edu/patchinj/cyberbullying/whitehouseconference-materials Hinduja&Patchin.pdf.

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

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

31 See Chu, supra note 28 (“When we create a law, it isn’t an automatic conviction . . . ”).

32 See id. (noting conviction depends on prosecutor’s case). See also Stopping Your Cyberbully, LAWYERS.COM (Jan. 17, 2013), http://blogs.lawyers.com/2013/01/Stopping-your-cyberbully (discussing legal process of introducing cyberbully case). In Stopping Your Cyberbully, Enrico Schaefer, an internet-law attorney, explained the complicated process in which a lawyer introduces a cyberbully case. Id. First, Schaefer emphasizes that determining how much damage is necessary to demonstrate a legal issue is “a big gray area.” For example, simply sending a threatening message to someone else may not be enough to be considered cyberbullying, even if an individual sends numerous threatening messages with the intent to annoy or bully. Id. However, one can argue that the sender has engaged in cyberbullying because most states require the suspect have the “actual intent . . . to cause the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.” Id. Nevertheless, determining whether a suspect possessed the requisite intent is difficult: Id. In fact, Schaefer recommends entering the perpetrator’s mind and analyzing the specific circumstances of his or her background and social media use to determine the individual’s intent. Id. While this could introduce free speech issues, it also could lead to the correct conclusion that the harasser intended to harm his or her victim. Id. If this occurs, then the victim must report it to the police and, only after the police determine a crime has occurred, will they refer the case to an attorney. Id. Finally, Schaefer concludes by stating that prosecuting against a cyberbully may not be the best solution because the cyberbully may become more aggressive after the case is introduced. Id. If there is no choice, however, prosecution may be the only effective method to end cyberbullying attacks. Id.
tamtamount to support for a more refined First Amendment, where freedom of speech “is employed as a conditional privilege that can be revoked.”

Notwithstanding the negativity surrounding cyberbullying statutes, they have passed with rapid speed throughout the United States, including in Massachusetts, to keep young individuals safe from the serious dangers of harassment.

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

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

A. Interpretation of Telephone Harassment Laws

One of the preeminent cases that first demonstrates the validity of the Telephone Harassment Laws was United States v. Lampley.\(^{35}\) In the case, Lampley had briefly dated Hatlen; but seventeen years after the relationship ended, Lampley contacted Hatlen, who was now married and had four children.\(^{36}\) Lampley then explained that he wanted to see Hatlen again; and when she refused, Lampley declared that he would “make life miserable for her.”\(^{37}\) Subsequently, Lampley made ten to twelve harassing telephone calls a week to Hatlen for approximately a year.\(^{38}\) As a result, Lampley was charged primarily with conducting a harassing interstate telephone call under 47 U.S.C. § 223(1)(D).\(^{39}\) Lampley later appealed the decision, arguing that Section 223(1)(D) violated his right to free speech under the First Amendment of the United States Constitution because the statute does not say that the telephone call must include harassing

\(^{35}\) 573 F.2d 783, 786 (3d Cir. 1978). \(\text{See United States v. Eckhardt, 466 F.3d 938, 943-44 (11th Cir. 2006) (upholding telephone harassment law). In Eckhardt, Robert Eckhardt made around 30 harassing telephone calls a week to an employee that worked in his office.} \) \(\text{ld. at 942. These harassing calls involved Eckhardt swearing at the worker and making inappropriate comments.} \) \(\text{ld. When he was later charged under 47 U.S.C. § 223, Eckhardt argued that the statute was unconstitutionally vague and that his conduct did not qualify as obscene under the statute.} \) \(\text{ld. However, the statute was not unconstitutionally vague because a statute will only be vague when it “(1) fails ‘to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits’ or (2) authorizes or encourages ‘arbitrary and discriminatory enforcement.”’} \) \(\text{ld. at 944 (quoting City of Chicago v. Morales, 527 U.S. 41, 56 (1999)). Eckhardt’s telephone calls were also obscene because they were “sexually laced” and did not address a matter of public concern.} \) \(\text{ld. but see Reynolds v. Jamison, 488 F.3d 756, 769–71 (7th Cir. 2007) (Rovner, J., dissenting) (explaining report of calls not enough to establish telephone harassment). In Jamison, police arrested Reynolds after Jamison provided Officer Darr with information regarding Reynolds’ calls, including a computer document of the calls and what she told Darr about the call.} \) \(\text{ld. at 769. However, the dissenting justice explained that responses to interrogatories, affidavits, statements or reports by lawyers and police officers are self-serving and not enough to base a charge against an individual for a harassing telephone call.} \) \(\text{ld. at 769-70. These documents are not enough because they may not tell the entire truth; and here, where the district court believed that discovery was unnecessary, Officer Darr’s report of the incident was never tested; thus, Reynolds was unable to question Jamison or Darr of the incident.} \) \(\text{ld. at 770-71.} \)

\(^{36}\) \(\text{See Lampley, 573 F.2d at 786 (explaining relationship of defendant and Hatlen).} \)

\(^{37}\) \(\text{ld. In fact, Lampley’s declaration demonstrated his intent to harass Hatlen and served as sufficient language for the government to charge him under 47 U.S.C. § 223(1)(D) of the Telephone Harassment Law. See ld. at 787.} \)

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

\(^{39}\) \(\text{ld. at 785-86 (charging defendant for violating telephone harassment laws).} \)
Arguably according to Lampley, without the harassing language requirement, the court charged him for simply communicating with another; thus, going against his right to free speech. However, the court did not agree with Lampley; rather, it held that not all speech can be protected under the First Amendment and in passing Section 223, Congress had a compelling interest to protect others from fear.

Prohibited acts generally. Whoever—in interstate or foreign communications—makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number shall be fined under title 18, United States Code, or imprisoned not more than two years, or both. Id. Therefore, because the statute clearly explains that one needs to call another "with intent to harass any person," the defendant cannot claim he did not violate the statute.

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

There are two conditions one must satisfy to be charged under the provision of § 223. Id. First, the defendant's calls must be repeated, meaning that they must be "in close enough proximity to one another to rightly be called a single episode, and not separated by periods of months or years." Id. Second, the sole purpose of the calls must be to harass only. Id. See generally Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2420 (1996) (analyzing strict scrutiny test). Although the government has not stated a clear definition for what it deems to be a compelling interest, evidence of a law being underinclusive, such as a law not reaching all forms of speech it tries to prohibit, may be shown to prove that an interest is not compelling. Id. In addition, compelling interests include the promotion of a stable political system and the protection of people that have received discrimination in the past. Id. at 2420-21. Finally, specific to speech restriction, the government must establish three points: (1) the law advances the interest it sets out to promote, (2) contains no overinclusiveness (or include speech that it does not mean...
In addition, 47 U.S.C. § 223 has been analyzed in *United States v. Bowker*. \(^{43}\) In *Bowker*, the defendant sent harassing emails to Tina Knight’s place of employment at WKBN Television in Ohio, made 146 calls within eight months to WKBN, and made sixteen calls to Knight’s residential phone in a seventeen day period. \(^{44}\) Consequently, Bowker was charged to prohibit) or underinclusiveness, and (3) the law must be one that restricts speech the least with no reasonable alternatives that can be taken. *Id.* at 2421-23. 

\(^{43}\) See *id.* at 371-73 (6th Cir. 2004) (describing substantive facts of case). During these calls, Bowker revealed himself as Mike, referenced Knight’s neighbors, family members, and even recited her social security number. *Id.* at 372-73. In addition, he said that he would be watching Knight with binoculars. *Id.* at 373. As a result, Bowker was charged under 47 U.S.C. § 223(a)(1)(C) which states that anyone who:

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

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

**Whoever— . . .**

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

- **(A) places that person in reasonable fear of the death of or serious bodily injury to [a person described in clause (i), (ii), or (iii) of paragraph (1)(A)], or**
- **(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A) . . .**

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

18 U.S.C. § 2261A(2) (2013). See also *United States v. Sayer*, 748 F.3d 425, 433-34 (1st Cir. 2014) (explaining elements of cyberstalking statute). Analogous with the Telephone Harassment Act, here the defendant could be guilty of cyberstalking if he or she had the intent to harass a victim under surveillance, or cause substantial emotional distress. *Id.* at 433. Even though Sayer argued that his conduct should not fall under the statute because it involved online communications, the court held that Sayer’s false online accounts made in Jane Doe’s name served a criminal purpose. *Id.* at 434. See also *United States v. Petrovic*, 701 F.3d 849, 853-54.
under 47 U.S.C. § 223(a)(1)(C) for making a call with the “intent to annoy, abuse, . . . or harass any person . . .”45 However, Bowker argues that because Knight recognized his voice, he is not in violation of Section 223(a)(1)(C) since calls under the statute must be made without disclosing identity.46 Nonetheless, the court found Bowker’s argument inadequate due to the frequency with which he made calls to Knight in an eight-month period while using a caller identification blocking feature.47 Additionally, Bowker made calls to Knight on multiple occasions where no conversation followed; thus, this supports the argument that his calls were harassing and
that Knight had no way of identifying him as the caller. 48 Subsequently, the court convicted Bowker under the telephone harassment law. 49

B. Interpretation of Cyberbullying Statutes

Even in our technologically advanced society with the widespread use of touch phones, wifi, and social media, courts still use the telephone harassment law to analyze cyberbullying. 50 For example, in State v. Bishop, 51 the court analyzed North Carolina’s recently passed cyberbullying statute by noting the statute’s comparison to the State’s harassing telephone law. 52 In this case, high school student Dillon Price

48 See Bowker, 372 F.3d at 375 (detailing Bowker’s attack on Knight). According to the statute, no conversation needs to occur during the call for it to be harassing. 47 U.S.C. § 223(a)(1)(C). Therefore, when the defendant called without speaking, this could still be considered a harassing telephone call under 47 U.S.C. § 223(a)(1)(C) if it is proven that such call was made with an intent to harass. Bowker, 372 F.3d at 375. Moreover, when Bowker argued that 47 U.S.C. § 223 was unconstitutionally vague, the court rejected this argument analogous with Lampley. Id. at 382-85; United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978). The court in Bowker looked to the applicable Michigan law defining harassment stating that such definition is clear, not vague, and would be understandable for a reasonable person. Bowker, 372 F.3d at 380-81 (citing Staley v. Jones, 239 F.3d 769, 791-92 (6th Cir. 2000)).

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

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


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

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

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

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

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

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

N.H. REV. STAT. ANN. § 193-F:4(I.)-(II.) (LexisNexis 2017). While the student’s action constituted cyberbullying through Facebook, the anti-bullying policy pursuant to N.H. REV. STAT. ANN. § 193-F:9 (LexisNexis 2017) specifically states that “Nothing in this chapter shall supersede or replace existing rights or remedies under any other general or special law, including criminal law, nor shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state.” Gauthier, 123 A.3d at 1019 (quoting § 193-F:9). Therefore, the court granted summary judgment in favor of the defendant school board. Id. at 1021. See generally Sarah Perez, More Cyberbullying on Facebook, Social Sites than Rest of Web, READWRITE (May 10, 2010), http://readwrite.com/2010/05/10/more Cyberbullying on Facebook, Social Sites than Rest of Web (explaining reason for increase in online harassment on Facebook). Considering more young adults have been subscribing to social media sites, such as Facebook, they are more vulnerable to
about Price calling him homophobic, homosexual, and stating that Bishop “never got the chance to slap [Dillon] down before Christmas break.” 54 As a result, police charged Bishop with one count of cyberbullying under the North Carolina Cyberbullying Statute, N.C. GEN. STAT. § 14-458.1(a)(1)(d). 55 However, Bishop argued that the statute was an overbroad criminalization of protected speech and that the statute, overall, was unconstitutionally vague on its face. 56 The Appeals Court disagreed with this argument, stating that while the cyberbullying statute may regulate some aspects of speech, such regulation is valid since the statute’s main purpose is to prohibit the communication of information pertaining to a minor with the intent to intimidate or torment; consequently, the Appeals Court held that the statute was constitutional under the First Amendment. 57

cyberbullying and online harassment acts. Id. According to Perez, 39% of social network users have been the victim of online harassment. Id. Specifically, the problem of online harassment was intensified in 2009 when Facebook became more public, allowing profiles to also become more public, including the activities on those profiles. Id.

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

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

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

57 See Bishop, 774 S.E.2d at 344-45 (rejecting defendant’s argument). See also United States v. O’Brien, 391 U.S. 367, 376 (“We [the court] cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea. . . . [W]hen speech and nonspeech elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”). Besides an “important” government interest, the Supreme Court has used a multitude of words to describe such government interest. Id. These words include compelling, paramount, strong, etc. Id. at 376-77. Nevertheless, there has not been a clear definition of what these modifiers truly mean, especially the modifier “compelling,” regarding a compelling government interest. See Volokh, supra note 42, at 2420 (questioning what interest is compelling enough to regulate speech). Regardless, since the North Carolina General Assembly professed that the statute was simply to
Additionally in Rosario v. Clark County Sch. Dist., the District of Nevada upheld a cyberbullying policy when a student posted obscene language on his Twitter account. In Rosario, Juliano Rosario was a student at Desert Oasis High School in Nevada who played on the school’s basketball team. After the final basketball game of the season, Juliano and his parents went out for dinner outside the school’s campus at a local restaurant. While eating dinner with his parents, Juliano posted several vulgar tweets directed at school officials. When the tweets were later discovered, school officials and administrators filed a complaint against Juliano, charging him under the school’s cyberbullying policy. Juliano then filed this action stating that the above complaint violated his First Amendment rights. While the cyberbullying policy for most of the tweets that he posted, the court ruled that one of his tweets could not be protected under the First Amendment, as it signified “obscene material”; thus, for this tweet, Juliano violated the school’s cyberbullying policy.

Although the Appeals Court in Bishop and the District Court of Nevada ruled that their respective cyberbullying policies did not violate the Free Speech Clause of the First Amendment, other courts have held that their states’ cyberbullying statutes were unconstitutional and violated the
Free Speech Clause. In fact, in a recent decision by the North Carolina Supreme Court in *State v. Bishop*, the court overruled the decision of the North Carolina Appeals Court and held that the State’s cyberbullying statute was unconstitutional and “create[s] a criminal prohibition of alarming breadth.” The North Carolina Supreme Court overruled their predecessors’ unanimous decision by conducting a detailed First Amendment analysis to determine whether the statute prohibited free speech. First, the court asked whether the North Carolina cyberbullying statute, particularly Section (a)(1)(d), prohibited protected speech or “inherently” expressive conduct; if it did prohibit either of these, then the statute would be unconstitutional against the First Amendment. Because the court concluded that the statute prohibited protected speech in the form of internet posting, the court then debated whether (a)(1)(d) of the cyberbullying statute is content-based or content-neutral, which ultimately determines the level of scrutiny that the court must apply when analyzing a First Amendment issue. In response to this debate, the court held that

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


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

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

71 *Bishop*, 787 S.E.2d at 818 (weighing if posting online is speech or conduct). According to the North Carolina Supreme Court in *Bishop*, internet posting is a definitive form of protected speech analogous to flyers on bulletin boards and pamphlets given to the public. *Id.* at 817. If a piece of legislation contains content-based regulations, the court will apply a strict scrutiny standard to determine whether the statute is constitutional. *Id.* at 818. However, if a piece of legislation merely contains content-neutral restrictions, the court will apply intermediate scrutiny.
because the statute defines the speech that it seeks to prohibit, but forces the court to analyze the content of the communication before it criminalizes the suspect, the statute is content-based; thus, it must be analyzed through the strict scrutiny standard. For the state to succeed in upholding its cyberbullying statute through strict scrutiny, it must show that the statute "serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest." While the court held that protecting children from cyberbullying attacks is definitively a compelling government interest, the state statute was not narrowly tailored. In other words, the statute here was not "the least restrictive means" in order to restrict cyberbullying attacks because it does not require a victim of cyberbullying to sustain injury as a result of the attack, nor does it define what conduct is forbidden in the statute. As a result, because the North Carolina cyberbullying statute did not pass the strict scrutiny test, it represented a "criminal prohibition of alarming breadth" and was, therefore, unconstitutional.

when determining the statute’s constitutionality. Id. Content neutral restrictions include “those governing . . . the time, manner, or place of First Amendment-protected expression . . . .” Id. Nevertheless, in recent years there seems to have been a liberalization in determining whether a statute’s restrictions are content-based; this is evidenced by the holding in Reed v. Town of Gilbert, where the court defined “several paths” that one can take to conclude that a restriction is content based and, thus, requires a strict scrutiny analysis. Reed, 135 S. Ct. at 2227-28. Reed also concluded that if the statute is content based “on its face or when the purpose and justification for the law are content based,” then the strict scrutiny standard will apply when analyzing the statute’s constitutionality. Reed, 135 S. Ct. at 2228.

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

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

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

See Bishop, 787 S.E.2d at 821-22 (finding North Carolina cyberbullying statute unconstitutional).
Furthermore, in *People v. Marquan M.*, the court held that the Albany County cyberbullying statute was unconstitutional. In *Marquan M.*, a high school student anonymously posted sexual photographs and information about a classmate on Facebook. The classmate was extremely offended by such posting and as a result, the defendant was prosecuted for cyberbullying under the Albany County cyberbullying statute. When the defendant later argued that the Albany County cyberbullying statute violated free speech under the First Amendment, the court agreed and ruled that the statute embraced a wide array of speech that goes "far beyond the cyberbullying of children."

Similarly, in *Bell v. Itawamba Cnty. Sch. Bd.* the dissenting justices recognized the importance of protecting free speech under the First Amendment, specifically against school board prohibitions that restricted

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77 19 N.E.3d 480 (N.Y. 2014).
78 See id. at 488 (holding statute violates First Amendment as law did not help state achieve its intended goal).
79 See id. at 482. In this case, Marquan M. created a Facebook page called “Cohoes Flame” which contained photographs of his classmates and other peers. Id. at 484. These photographs also had captions detailing sexual practices of the classmates, their sexual partners, and other explicit personal information. Id.
80 See id. at 484. 486 (defining cyberbullying statute in Albany County). Overall, the statute explained that cyberbullying involved any act of communicating through electronic means with the intent to harass, annoy, etc. Id. Furthermore, the statute outlawed cyberbullying against minors or other persons, which was broadly defined to include natural persons, individuals, corporations, etc. Id.
81 See id. at 486 (finding statute was too broad). Specifically, the court conceded that while the federal government has a compelling interest in protecting children from harm, the government usually has no power to restrict free speech because of its subject matter or content. Id. at 485. Rather, the government can only prohibit speech if it can be qualified as fighting words or true threats. Id. at 486. Therefore, because the Albany County Cyberbullying Statute involved prohibitions on a “variety of constitutionally-protected modes of expression,” including words that may annoy another person instead of restricting itself to fighting words or true threats, the statute was deemed overbroad, facially invalid, and, thus, unconstitutional under the Free Speech clause of the First Amendment. Id. at 488. See also *People v. Golb*, 15 N.E.3d 805, 813 (N.Y. 2014) (noting First Amendment does not prohibit annoying and embarrassing speech). Here, the court rejected N.Y. PENAL LAW § 240.30(1)(a) (Consol. 2017) which states:

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

Id. (quoting N.Y. PENAL LAW § 240.30 (Consol. 2017)). This statute was rejected because it ultimately prohibited annoying or alarming speech, which is protected speech under the First Amendment, thus, the statute was deemed overbroad. Id.; *People v. Dietze*, 549 N.E.2d 1166, 1168 (N.Y. 1989) ("[A]ny proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence . . . ").
82 799 F.3d 379 (5th Cir. 2015).
In the case, Bell posted a rap video on the Internet outside school grounds containing threatening and harassing language against two teachers at his high school. As a response, the school board suspended Bell and placed him in an alternative school for nine weeks. Bell then sued the school board stating that it took away his right to free speech.

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83 See id. at 404 (noting importance of allowing parents to regulate off-campus speech). In fact, the dissent says that the majority overlooks Supreme Court precedent, stating that children are provided with ‘significant’ First Amendment protection and that the government does not have any “free-floating power to restrict the ideas to which children may be exposed.” Id. (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 794 (2011)). Additionally, under First Amendment precedents, the government must prove more than mere negligence with the harassing or threatening speech before imposing penalties on the individual who made such threatening speech. Id. at 404-05. See also Virginia v. Black, 538 U.S. 343, 359 (2003) (defining ‘true threats’ when analyzing whether speech is prohibited under First Amendment). According to the Black Court, ‘true threats’ “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Id. Therefore, since these statements include an intent to commit unlawful violence on another, the First Amendment does not protect this speech because if protected, then individuals could face the “fear of violence.” Id. at 360; D.C. v. R.R., 182 Cal. App. 4th 1190, 1221 (Cal. App. 2d 2010) (recognizing true threat in cyberbullying context). Here, R.R. posted a message to D.C. online stating, among other indecent comments, that he wanted to “rip out D.C.’s fucking heart and feed it to [him].” R.R., 182 Cal. App. 4th at 1121. The court concluded that these statements signified true threats to D.C. and were not just part of a joke, as R.R.’s parents even prohibited him from Internet use and even sent him to a psychiatrist to discover the central cause of his actions. R.R., 182 Cal. App. 4th at 1222.

84 See Bell, 799 F.3d at 383. Specifically, Bell posted the video on his public Facebook page and on YouTube for all to listen. Id. Bell threatened violent acts against these teachers because he believed that the teachers sexually abused female students at the school. Id. Some excerpts of the rap video include:

[T]his niggha telling students that they sexy, betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack / Quit the damn basketball team / the coach a pervert / can't stand the truth so to you these lyrics going to hurt[,] What the hell was they thinking when they hired Mr. R[.] / dreadslock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as hell / Talking about you gangsta / drive your mamas PT Cruiser / Run up on T-Bizzle / I'm going to hit you with my rueger[]

Id. at 384.

85 See id. at 385-87. First, Bell was suspended pending a disciplinary-committee hearing because his video violated the district’s administrative disciplinary policy, which views “[h]arassment, intimidation, or threatening other students and/or teachers’ as a severe disruption.” Id. at 399. After the hearing, the school board determined that since he violated the above school-district policy, Bell had to attend the county’s alternative school for the remainder of the grading period. Id. at 386. In fact, his video did disrupt the school; particularly, the teachers mentioned in his video were adversely affected by it. Id. at 388. For example, while teaching a gym class, Coach R noticed that more students were going to the gym after the incident. Id. Furthermore, he said that he could no longer work with the girls’ track team because of the incident and had to teach the boys’ team how to help with the girls’ team. Id. The video also affected Coach W., commenting that she was scared because “you never know in today’s society . . . what somebody means, [or] how they mean it.” Id.
under the First Amendment.86 As a result, the majority argued that this video contained threatening and harassing language that the federal government, and in this case the school board, could regulate.87 The dissent, however, highlighted that minors are entitled to First Amendment protection, including the right to speak about violence and public issues.88

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86 See id. at 387 (outlining parties’ arguments). Bell also asked to be reinstated to his high school with “all privileges to which he was and may be entitled as if no disciplinary action had been imposed,” and all references to the incident being expunged from his school records. Id. at 390 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)). Although the decision in Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 503, 513 (1969); Beussink v. Woodland R-IV School District, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (holding school’s punishment of student for disturbing speech on Internet invalid). Specifically, Beussink created a website off-campus, which vulgarly criticized school officials; as a result, the school punished Beussink. Id. at 1180. However, the court ruled that because the website was not materially disruptive of school activities, the school could not punish Beussink for his off-campus activities online. Id. at 1181. See, e.g., Virginia v. Black, 538 U.S. 343, 359 (2003) (explaining when government can prohibit speech). The dissent by Justice Costa in Bell also brings the discussion into the cyberbullying realm. See, e.g., Bell, 799 F.3d at 402–03. Although the dissent praises Bell’s speech because it combats sexual harassment, the dissent’s ultimate rule to prohibit schools from possessing the authority to punish students for their off-campus speech online would not only further potential sexual harassment actions, but would also allow for “ferocious cyberbullying that affect [s] our classrooms to go unchecked.” Id. at 403. See generally Should Off-Campus Cyberbullying be Grounds for Suspension? The Supreme Court May Weigh in Soon, BULLYING EDUCATION (Jan. 27, 2012), http://www.bullyingeducation.org/2012/01/27/should-off-campus-cyberbullying-be-grounds-for-suspension-the-supreme-court-may-weigh-in-soon/ (debating whether school has power to punish cyberbullies off-campus). One case involved Kam Kowalski, a high school senior, who created a degrading online profile of another student, stating that the student was a “slut who had herpes.” Id. Because the profile was deemed a targeted attack on another student, the Fourth Circuit Court of Appeals ruled Kowalski violated the school’s anti-bullying and harassment policy, and such speech was beyond protection from the First Amendment. Id.

87 See Bell, 799 F.3d at 404 (highlighting importance of free speech). According to the dissent, because Bell’s free speech involved a matter of public concern, students’ free speech should not be restricted. Id. at 411. In fact, speech on matters of public concern, including those of a violent nature, are “at the heart of the First Amendment’s protection.” Id. at 406 (quoting Snyder v. Phelps, 562 U.S. 443, 451-52 (2011)); see also Watkins v. Bowden, 105 F.3d 1344, 1353 (11th Cir. 1997) (defining speech that involves a matter of public concern). Speech of public concern involves speech that relates to “a matter of political, social, or other concern to the community.” Watkins, 105 F.3d at 1353. When deciding whether speech involves a matter of public concern, the court must analyze “the content, form, and context of the speech” to determine if an illegal prohibition against free speech has occurred. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)). While the workplace has been a frequent source of speech involving matters of public concern in recent years, students can also face this form of speech in the school setting. See Tinker, 393 U.S. 506 (defending students’ right to free speech); Bell, 799 F.3d 739 (upholding school board’s disciplinary against a student for rap song recorded off-campus). In particular, the
Because Bell’s video aimed to address the teachers’ alleged sexual misconduct against two students, it could fall under free speech about violence and public issues. In addition, the dissent recognized that the majority overlooked Supreme Court precedents that restrict the government’s capacity to regulate Internet speech. Although Bell’s video arguably contains threatening language that caused disruption in the school setting, the video addresses public concern; therefore, one can argue that the school board inappropriately expanded sanctions in prohibiting Bell’s video and punishing him for its publication.

IV. ANALYSIS

There has been a significant transformation in conduct constituting indirect harassment, as technology increases accessibility to victims on various platforms. After discussing the Harassment Telephone Laws and Cyberbullying statutes, it is apparent that society views indirect harassment speech in Tinker involved a matter of public concern for its time: wearing black armbands in protest against the Vietnam War. Tinker, 393 U.S. at 504. Because it did not disrupt the school’s educational activities, however, it was not seen as threatening or harmful speech, which could be restricted; rather, it was protected under the First Amendment. Id. at 514. The speech in Tinker was also important because it was analogous to “pure speech,” which is entitled to First Amendment protection. Id. at 505-06; see also Brown v. Entm’t Merchs. Ass’n, 564 U.S. 786, 794-95 (2011) (holding government has no power to prohibit ideas to which students may be introduced); Cox v. Louisiana, 379 U.S. 536, 555 (1964) (“[The Court] reject[s] the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.”); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”).

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

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

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

See supra notes 1-2 and accompanying text (discussing technology increasing indirect harassment vulnerability).
as a significant threat; as such, constituents have supported an increase in legislation to combat indirect harassment.\textsuperscript{93} However, there has been discussion surrounding how these pieces of legislation adversely affect an individual’s right of protected speech under the First Amendment to the United States Constitution.\textsuperscript{94} In fact, the passage of these laws can ultimately limit our right to free speech by effectively changing our common understanding of the First Amendment, despite the law attempting to effectuate positive change.\textsuperscript{95}

Critics of cyberbullying statutes believe that the laws are vague and unclear about what is prohibited and non-prohibited speech; in fact, critics state that cyberbullying statutes restrict speech protected under the First Amendment and ultimately undermine the rights of those seeking to use the Internet as a way to communicate freely.\textsuperscript{96} This results in charging potential suspects based on speech arguably protected by the First Amendment.\textsuperscript{97} Additionally, a majority of cyberbullying laws do not include provisions that regulate tracking anonymous users on social media sites; therefore, it becomes impossible to determine the identities of these harassers and properly prosecute them in court.\textsuperscript{98} Critics further debate whether these cyberbullying statutes should legally or facially extend to comments made in a public forum when they are not directed at a specific

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

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

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

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

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

\textsuperscript{98} Compare File & Ryan, supra note 50, at 1-2 (finding 74.4% of Americans use Internet), with Perez, supra note 53 (highlighting recent increase in young adults using social media sites). See also Rose, supra note 21, at 1026-28 (indicating difficult nature of prosecuting under statute).
individual. For instance, in \textit{State v. Ellison}\textsuperscript{99} the prosecution carried the burden of proof to determine whether the suspect had the “specific purpose to harass” where he posted an annoying comment on a public website.\textsuperscript{101}

Finally, despite states rapidly passing cyberbullying statues to protect children and young adults from potentially offensive speech online, such speech alone cannot fall outside the protection of the First Amendment.\textsuperscript{102} As stated in \textit{Hammond v. Adkisson},\textsuperscript{103} if isolated offensive speech was limited and not included under the protections of the First Amendment, then all forms of debates and arguments would be limited.\textsuperscript{104} Consequently, one of the main purposes of the free speech clause—encouraging debates amongst citizens and challenges to leadership—would be frustrated if this interpretation was followed.\textsuperscript{105} As a result, to maintain the intent of the Framers of the U.S. Constitution in implementing the protection of the right to free speech, we must be cautious when drafting

\begin{quote}
[Posting an annoying—but nonthreatening—comment on a website is not a crime under [the Ohio telecommunications harassment statute]. . . . The First Amendment would not allow punishment for making a nonthreatening comment on the Internet, just as it would not for writing a newspaper article, posting a sign, or speaking on the radio.]
\end{quote}

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

\textsuperscript{100} 900 N.E.2d 228 (Ohio Ct. App. 2008).

\textsuperscript{101} \textit{See id.} at 230-31 (noting burden of proof government required to show intent). Again, it may be extremely difficult to determine whether an individual had the specific intent to harass another, especially when one posts a comment or picture in a public forum. \textit{Id.} Consequently, if the individual is found to not have such specific intent, he or she would be unjustly prevented from freedom of speech rights. \textit{Id.} at 231 (Painter, J., concurring). As stated in the concurring opinion by Justice Painter:

\begin{quote}
[Posting an annoying—but nonthreatening—comment on a website is not a crime under [the Ohio telecommunications harassment statute]. . . . The First Amendment would not allow punishment for making a nonthreatening comment on the Internet, just as it would not for writing a newspaper article, posting a sign, or speaking on the radio.]
\end{quote}

\begin{quote}
\textit{Id.}
\end{quote}

\textsuperscript{102} \textit{See Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976)} (“\textit{[W]ords must do more than offend, cause indignation or anger the addressee to lose the protection of the First Amendment.}”).

\textsuperscript{103} \textit{Id.} at 237.

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

\textsuperscript{105} \textit{See id.} at 239-40 (noting protection for dispute speech distinguished from “fighting words”). Words even determined to be explicit may not be words that would be “likely to incite the addressee to a violent reaction under the circumstances of the case.” \textit{Id.}
statutory prohibitions of harassment. Otherwise, by extending our harassment statutes to prohibit merely offensive comments, free speech will become a privilege and be greatly controlled by expansive legislation.

As the issue in *Bell v. Itawamba Cnty. Sch. Bd.* demonstrates, our education system has undergone an increase in the level of control of the right to free speech in school environments. The dissent of *Bell* recognized this problem and held that students are entitled to specific First Amendment protection, including the right to engage in free speech regarding violence and matters of public concern. Here, the dissent criticized the majority for overlooking Supreme Court precedents that restrict the government’s ability to regulate Internet speech, particularly speech involving topics of public concern. Without these established precedents, students would be limited in expressing their opinion concerning issues of public concern and, therefore, would be forced to agree with the speech of another. Additionally, the dissent argues that the majority ignores the most prevalent interpretation of the First Amendment, which requires the government to show “more than mere negligence before imposing penalties for so-called ‘threatening’ speech.” Moreover, the video posted by Bell did not lead to a “substantial disruption” of school activities; the burden of proof needed to prohibit off-campus speech as declared in *Tinker*. As a result, by approving of free speech limitations in its cyberbullying policy, this court upheld a

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106 See King, supra note 1, at 846 (discussing need for balance regarding constitutional restrictions).
107 See Tucker, supra note 7 (noting First Amendment concerns in cyber laws).
108 799 F.3d 379 (5th Cir. 2015).
109 See id. at 389-91 (demonstrating school’s control over their students’ freedom of speech).
110 See id. at 404 (Dennis, J., dissenting) (stating that matters of public concern occupy First Amendment values); United States v. Eckhardt, 466 F.3d 938, 944 (11th Cir. 2006) (holding speech did not involve public concern). Because the speech did not involve a matter of public concern and, in fact, was laced with sexuality, Eckhardt was guilty of violating the Harassing Telephone Law. *Eckhardt*, 466 F.3d at 944. See generally Rosario v. Clark County Sch. Dist., No 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, at *11-12 (D. Nev. July 3, 2013) (explaining difference between public and private speech).
111 See Bell, 799 F.3d at 403-04 (Dennis, J., dissenting) (reviewing important protections of public concern speech). “First and foremost, the majority opinion erroneously fails to acknowledge that Bell’s rap song constitutes speech on ‘a matter of public concern’ and therefore ‘occupies the highest rung of the hierarchy of First Amendment values.’” Id. at 404 (citing Snyder v. Phelps, 562 U.S. 443, 452 (2011)).
112 See Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976) (stating importance of ability to voice one’s opinions).
113 See Bell, 799 F.3d at 405 (Dennis, J., dissenting) (citing Virginia v. Black, 538 U.S. 343, 359 (2003)) (explaining negative effects of imposing negligence penalties).
cyberbullying provision that potentially violated a student’s right to free speech. Again, Bell’s speech arguably may have been protected as a matter of public safety and, further, may represent a ruling that modifies the meaning of our Freedom to Speech under the First Amendment.

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

However, strong public policy justifications exist to encourage the passage of harassment telephone laws and cyberbullying legislation. First, harassment telephone laws protect others from receiving attacks from callers via the telephone, as seen in United States v. Lampley. These

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

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

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


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


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

122 See Lampley, 573 F.3d at 783; sources cited supra note 14 and accompanying text (explaining types of calls at issue).
attacks can include the caller screaming obscenities during the call, calling the victim multiple times throughout the day, and calling the victim’s relatives and friends without permission. Therefore, if a repetitive telephone call reaches a requisite level that would bring about a threat of peace, and the caller’s purpose is to harass the victim, then there is no protection afforded under the First Amendment; and in that instance, the harasser may be charged under the Harassment Telephone Law to protect the victim from additional harm or fear.

Further, with the increased use of the Internet amongst teenagers and young adults, which leads to more cyberbullying attacks, there are strong policy reasons for implementing cyberbullying laws. In 2006, forty-three percent of children reported that they had been victims of cyberbullying; and with the increased use of cell phones and social media in 2016, this percentage has most likely increased. While legislatures could be inactive in this area and could allow parents to be wholly responsible for their children, cyberbully legislation is meant to more effectively combat cyberbullying for children to feel more comfortable in the school setting. The deaths of victims such as Megan Meier and Phoebe Prince have raised awareness that cyberbullying leads to a significant increase in incidents of depression among teenagers, subsequently leading to suicide. In response to this growing epidemic of suicides because of cyberbullying, legislation was passed to define the crime of cyberbullying, allowing injured parties to charge the harasser. Without legislation, victims would not be afforded the opportunity to seek

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123 See United States v. Eckhardt, 466 F.3d 938, 942 (11th Cir. 2006) (describing frequency and context of call to be harassing).
124 See sources cited supra note 15 and accompanying text (noting protection for victim under statute); see also Royall, supra note 12, at 1403 (noting telephone can be instrument for bringing about fear).
125 See Patchin, supra note 3 (finding dramatic increase in frequency of cyberbullying incidents); see also sources cited supra notes 19-20 and accompanying text (explaining heightened need for statutes addressing cyberbullying).
126 See Rose, supra note 21, at 1004 (reviewing data of reported cyber incidents).
127 See Tucker, supra note 7 (arguing parents should control cyberbullying not legislators). Additionally, legislators should not be involved in controlling cyberbullying; rather, parents should bear responsibility in resolving this problem by monitoring their child’s internet usage. Id.; Stop Cyberbullying Before it Starts, supra note 21 (highlighting parents’ role in monitoring children’s online activity). Parents’ role in preventing cyberbullying are critical, not only to protect their children from cyberbullying attacks, but also to ensure their children are not cyberbullying others. Stop Cyberbullying Before it Starts, supra note 21. But see King, supra note 1, at 846 and accompanying text (arguing both parents and legislators must work together to find solution to cyberbullying).
128 See St. George, supra note 19 (explaining cyberbullying’s effect of depression on victims).
129 See sources cited supra note 24 (defining acts of cyberbullying in Massachusetts).
criminal penalties against their harasser. For example, in Massachusetts after the death of Prince, local legislators created a law for public schools to include an anti-bullying curriculum to combat cyber harassment. Although certain cyberbullying statutes, such as the Albany County statute in New York, failed to pass constitutional requirements, many of these statutes have been upheld because they prohibit specific conduct of intentionally or tormenting minors rather than prohibiting speech. However, even if a statute included an incidental limitation on speech, this limitation may be valid when speech combines with conduct because an important governmental interest exists to regulate the non-speech element, particularly when the non-speech element threatens harm to another.

However, one simply cannot disregard potential incidental limitations on the First Amendment when implementing cyberbullying laws. The line between such limitations and protected First Amendment rights is extremely thin; again, this could lead to a more refined First Amendment where freedom of speech becomes a privilege that we must earn rather than a right automatically retained. Although passage of these laws can be beneficial for individuals facing cyberbullying, we cannot choose to ignore how this limitation could change our outlook and meaning of the First Amendment. In particular, courts are now balancing the line between preventing cyberbullying and protecting First Amendment rights, as exemplified in the recent reversal of Bishop, where the court held that the State’s cyberbullying law is unconstitutional because it does not pass the strict scrutiny standard of review. Nonetheless, if these limits will decrease harassment and promote more peace among citizens, then such limitation on freedom of speech may be a positive step.

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130 See Maag, supra note 20 and accompanying text (explaining in greater detail).
131 See Goldman, supra note 23 (explaining death of Prince due to cyberbullying); sources cited supra note 24 (defining Massachusetts cyberbullying and anti-bullying required conduct).
132 See sources cited supra note 5 (noting Rhode Island statute prohibiting cyberbullying).
133 See United States v. O'Brien 391 U.S. 367, 376 (1968) (ruling nonspeech elements combined with speech elements, government needs important reason to regulate nonspeech).
134 See sources cited supra note 33 (describing first amendment limitations leading to transformed interpretation of free speech).
135 See The State of the First Amendment, supra note 33 (explaining new perspective where Americans believe First Amendment overextends in protecting rights). Ultimately, this new perspective involves the idea of a refined First Amendment where our freedom of speech is no longer seen as a right, but a privilege that we must earn. Id.; AJ Oatsvall, supra note 33 (defining differences between privileges and rights).
136 See supra note 24 and accompanying text (noting various cyberbullying statutes passed throughout country). The many suicides that have occurred because of cyberbullying, and the lack of statutory authority to charge the alleged perpetrators, demonstrates that cyberbullying statutes are beneficial and crucial. King, supra note 1, at 846–47. But see sources cited supra note 33 (altering meaning of First Amendment with cyberbullying legislation).
in our nation’s understanding of the First Amendment. Overall, the American people must decide whether to change our historical interpretation of the First Amendment; and, consequently, if the people decide to choose the interpretation allowing further control, leading to the implementation of the ‘privilege status’ for the First Amendment, citizens must be wary not to allow local and state governments to control more elements of protected freedoms. Hypothetically, if such scenario were to develop, a slippery slope may lead the government to control more retained freedoms than envisioned by America’s Founding Fathers.

V. CONCLUSION

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

An increase in legislation has ultimately defined the crime of cyberbullying and harassing telephone calls, and sought to criminalize the perpetrators of these harassment actions. However, such legislative actions may not be the most effective solution to handle these problems. Besides the risk that perpetrators may not be fully punished under this legislation, cyberbullying and harassing telephone statutes threaten to obscure the fine line between the right of freedom of speech and the privilege of freedom of

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138 See Cyberbullying: A Report on Bullying in a Digital Age, supra note 33 (explaining threat of cyberbullying should be stopped through legislative enactments).
139 See Kalman, supra note 28 (noting limitations will usurp freedom of speech).
140 See sources cited supra note 33 (noting complex nature of how to interpret constitutional amendments).
141 *This paper was drafted before Michelle Carter was found guilty of involuntary manslaughter on June 16, 2016 at Bristol County Juvenile Court in Massachusetts. Ray Sanchez & Natisha Lance, Judge Finds Michele Carter Guilty of Manslaughter in Texting Suicide Case, CNN (June 16, 2017, 3:08 PM), http://www.cnn.com/2017/06/16/us/michelle-carter-texting-case/index.html (discussing case and text messages influencing Roy to commit suicide). This judgment may signify a transformation of the legal landscape regarding cyberbullying and the repercussions for sending threatening messages via text or social media to another. See id. (explaining spark by lawmakers to pass legislation in future that would criminalize Carter’s behavior). Nevertheless, the argument above discussing the Carter case still holds true, as various organizations, such as the ACLU of Massachusetts, commented that the judgment against Carter “exceeds the limits of our criminal laws and violates free speech protections guaranteed by the Massachusetts and U.S. Constitutions.” Michelle Carter Text Suicide Trial Verdict: Guilty, CBS NEWS (June 16, 2017, 11:16 AM), http://www.cbsnews.com/news/michelle-carter-text-suicide-trial-verdict-guilty/.
speech. Furthermore, these indirect harassment statutes may prohibit the speech of individuals rather than mere conduct, thus threatening our First Amendment right to free speech.

Nonetheless, due to the dramatic effects of cyberbullying which has led to multiple suicides, depression, and mental illness amongst teenagers, our society may be willing to embrace increased legislation on this issue: even if said legislation transforms our freedom of speech into more of a privilege than a right. Irrespective of our opinion on this recent legislation’s aim to curb cyberbullying and harassment telephone calls, we must realize such legislation is inherently close to controlling our protected right to speech. If there are necessary measures to eliminate the problem of cyberbullying, harassing telephone calls, and other forms of indirect harassment, then society may have no viable option but to pass this speech legislation, which will forever change the historically rooted idea of the right to freedom of speech.

Brian S. Brazeau