CYBERBULLYING: ARE YOU PROTECTED? AN ANALYSIS AND GUIDE TO EFFECTIVE AND CONSTITUTIONAL CYBERBULLYING PROTECTIONS♦

INTRODUCTION

With the arrival of the Internet Age came a plethora of benefits, such as communicating with people worldwide, access to vast research tools, and opportunities to cultivate social connections for adolescents who have difficulty making friends.[1] Part of these benefits is due to the ease with which adolescents can regularly access and engage with the internet.[2] Along with the emergence of such technology arrived new risks, including online harassment of adolescents who are increasingly becoming victims of their peers' aggression.[3] Such harassment has been given a name: *cyberbullying*.[4] Cyberbullying covers a range of online activities, such as posting pictures and videos, posting mean-spirited content targeting a person or groups of people, or even sending text messages, as in the case of the tragic death of a young man named Conrad Roy.[5] There seems to be no limit to the extent of such activity; it even permeates the residue of sexual relationships, such as *revenge porn*, wherein ex-lovers post explicit pictures and videos of their previous romantic partner without the person's consent.[6]

This Note will explore some of the more well-known cyberbullying incidents and judicial treatment of legislation aimed at cyberbullying from North Carolina and Albany County in New York, both of which were ultimately struck down as unconstitutional. In doing so, this Note will provide an in-depth analysis of what courts have said about some current legislation. Lastly, this Note will offer (i)

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

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

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

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

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

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

suggestions to some of the constitutional issues that cyberbullying legislation may run afoul of, and (ii) propositions for statutory construction for future cyberbullying legislation based on previous courts' findings and comments.

A. *The Tragic Death of Conrad Roy*

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

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

Commonwealth v. Carter has clear First Amendment implications, as Carter's speech was at issue, namely though phone calls and text messaging.[14] However, some see this Massachusetts Supreme Judicial Court decision as saying that the use of words in this manner was the weapon that killed Conrad Roy.[15] Nancy Gertner, a former federal judge

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[7] *Carter*, 52 N.E.3d at 1056.
[8] *Id.*
[9] *Id.* at 1065.
[10] *Id.* at 1056.
[11] *Id.* at 1064.
[12] *Id.* at 1057–58 ("[T]he defendant encouraged the victim to kill himself, instructed him as to when and how he should kill himself, assuaged his concerns over killing himself, and chastised him when he delayed doing so.").
[13] *Id.* at 1059.
[14] *Id.*
[15] Katharine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html?mcubz=1 (quoting Matthew Segal of the ACLU) ("[W]hat she did is killing him, that her words literally killed him, that the murder weapon here

and Harvard law professor, asked, "[w]ill the next case be a Facebook posting in which someone is encouraged to commit a crime? . . . This puts all the things that you say in the mix of criminal responsibility."[16] These are just a couple of the comments on this case, but the stage for the question is set: at what point do virtual words stop being merely words and begin to carry criminal responsibility?

B. *The Particular Vulnerabilities of Children*

This is not the first time a cyberbullying case has directed national attention. Thirteen-year-old Megan Meir engaged in an online relationship, via MySpace, with who she thought was a teenage male named Josh Evans; in reality, however, this person was Megan's classmate's mother.[17] Megan hanged herself shortly after receiving an email from Evans saying that the "world would be a better place without you."[18] This case was hailed the "country's first cyberbullying verdict,"[19] but is hardly the only case. Ryan Halligan,[20] Jessica Logan,[21] and Tyler Clementi[22] are just a few of the more well-known victims of cyberbullying. However, according to NoBullying.com, an online forum comprised of mental health professionals, educators, and parents,[23] as many as fifty-two percent of young people reported being cyberbullied in 2014.[24]

Children, in their particular vulnerability, need protection from this sort of threat; however, "regulation of online speech treads on delicate constitutional territory."[25] Online speech is still speech,[26] and as such it

was her words.").

16 *Id.*

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

18 *Id.*

19 *Id.*

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

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

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

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

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

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

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

must be afforded a robust protection under the First Amendment. It is tempting to lay blanket restrictions on online activity such as cyberbullying; however, doing so would implicate free speech rights, which may compromise a basic founding principle of this country: freedom of speech.[27] Legislators should not jump to drastic measures when crafting legislation to deal with this issue, as the First Amendment is imposing, and unless dealt with judiciously, such legislation will unavoidably be struck down as unconstitutional.

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

I. VARIOUS APPROACHES TO CYBERBULLYING AND THEIR CONSTITUTIONALITY

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

Most states have some sort of cyberbullying laws in place;[35]

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

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

[29] Citron, *supra* note 26.

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

[31] 18 U.S.C. § 875 (2012).

[32] 47 U.S.C. § 223 (2012).

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

[34] *Federal Laws*, *supra* note 28.

[35] *Bullying Laws Across America*, CYBERBULLYING RES. CTR.,

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

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

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

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

37 *Id.*

38 *Id.*

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

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

41 *Id.*

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

43 *Id.* at § 1006.147(2).

44 *Id.*

45 Bollag, *supra* note 36.

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

results can be just as devastating.[47]

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

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

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

The variations in approach to cyberbullying attest to the novelty of the issue and display the uncertainty of how to deal with this growing concern. While the criminalization of cyberbullying seems to be a popular and effective approach, it invariably brings with it the hefty weight of the Constitution, as such laws necessarily implicate free speech rights.[55] The challenge facing those who adopt a criminalization

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[47] *Id.*

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

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

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

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

[52] *Id.*

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

[54] *Id.*

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

approach is drafting legislation that serves as adequate protection from the dangers of cyberbullying, while simultaneously respecting delicate free speech rights.

B. *Judicial Treatment*

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

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

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

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

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

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

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

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

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

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

called "vulgar and offensive,"[63] elicited responses that threatened the creator of the page with physical harm.[64] A police investigation found Marquan M. was the creator of the page and the one behind the postings.[65] Marquan M. admitted to his involvement and was subsequently charged with cyberbullying under the Albany law.[66]

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

a. The Albany Cyberbullying Law Restricts Free Speech

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

other types of personal information.").

[63] *Id.*

[64] *Id.*

[65] *Id.*

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

[67] *Id.*

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

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

[70] *Id.*

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

narrowly drawn to serve that interest.[72]

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

b. The Cyberbullying Law Is Overbroad

The overbreadth of the Albany statute comes in two forms. The first, as mentioned previously, is the word "person" in Section 3 of the statute.[79] The court found this overbroad, as it covers communications aimed at more than just minors and can cover adults and corporate entities.[80] This language steps beyond the protection of children, which was the Legislature's stated intent,[81] and serves to provide a blanket restriction on cyberbullying against *anyone*. Because the language

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

[73] *Marquan M.*, 19 N.E.3d at 486–87.

[74] *Id.* at 487.

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

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

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

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

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

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

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

providing protection spans far beyond the intended protection of minors, the second prong of strict scrutiny, "narrowly tailored," is offended by this overbreadth, fostering what the court poetically titled a "constitutional ill."[82]

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

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

c. The Dissent

The dissent mentioned other portions of the statute which the majority also found problematic as unconstitutionally vague: words such as "annoy" and "humiliate" used to reference acts that fall under the definition of cyberbullying.[90] In doing so, the dissent agreed that

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

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

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

[85] The scope of people and types of acts covered.

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

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

[88] *Id.*

[89] *Id.*

[90] *Id.*

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

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

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

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

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91 *Id.*

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

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

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

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

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

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

98 *Id.*

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

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

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

a. The North Carolina Cyberbullying Statute Restricts Free Speech

The court began its analysis by determining whether the First Amendment is actually implicated; in doing so, the court asked if the cyberbullying statute restricts free speech and expressive conduct, or whether it merely affects non-expressive conduct.[107] This determination is central to the constitutional question raised by the statute, as the Supreme Court stated that "we have extended First Amendment protection only to conduct that is inherently expressive."[108] Thus, if the statute is seen as merely regulating non-expressive conduct, there would be no implication of the First Amendment and Bishop's argument that the statute abridges his First Amendment rights would fail. The question of expressive or non-expressive conduct arises here, because the

99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 816.
108 Rumsfeld v. Forum for Acad. & Inst'l Rights, 547 U.S. 47, 66 (2006).

"speech" in question is not traditional speech, but is expression via posting online. This distinction did not sway the court, which found that "we are satisfied that N.C.G.S. § 14–458.1(a)(1)(d) applies to speech and not solely, or even predominantly, to nonexpressive conduct."[109]

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

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

The court then turns to the restriction itself to ascertain whether it is content-based or content-neutral.[114] This inquiry serves to determine the level of scrutiny that the court should apply when ascertaining the constitutionality of the statute.[115] A content-based restriction must satisfy *strict scrutiny*,[116] whereas a content-neutral restriction need only meet the lesser *intermediate scrutiny*.[117] To meet constitutional muster under strict scrutiny, the government must demonstrate that the restriction (1) furthers a compelling government interest, and (2) does so via the least restrictive means possible.[118] On the other hand, an intermediate scrutiny analysis requires a showing that the restriction (1)

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

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

111 *Id.* at 439.

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

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

114 *Id.*

115 *Id.*

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

117 *Id.*

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

furthers an important government interest, and (2) does so by means that are substantially related to that interest.[119]

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

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

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

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

121 *Id.* at 2227.

122 *Id.*

123 *Id.*

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

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

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

the requirements of strict scrutiny.[127]

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

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

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

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

The court does not expound on its objections to the statutory language based on lack of injury or awareness of the posting by the victim. However, it falls in line with the rest of the court's findings of overbreadth, which take issue with every aspect of the statute that goes to the protection of children from cyberbullying. It seems as if the court sees the object of the statute to punish for the offense of cyberbullying, as opposed to deter such action from the outset. If the court felt the object was to deter cyberbullying, then any action that could manifest as

127 *Id.*
128 *Id.*
129 *Id.* (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013)).
130 Sable Commc'ns. of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).
131 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 798 (2011).
132 McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 196 (2014).
133 *Bishop*, 787 S.E.2d at 821.
134 *Id.*

cyberbullying would be covered as prohibitive measure. However, where fundamental rights are at issue, such as here, the court sheds the deterring aspect, finding that only an offense resulting in injury, or at the very least, when the victim is actually aware of the posting, can be upheld as the least restrictive means.

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

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

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

The court similarly dismissed the State's interpretation of the word "intimidate," when it found that it does not need to address what it dubs a "hypothetical statute."[140] However, the court did mention that such a definition would present a closer constitutional question, as there is jurisprudence that unprotected true threats, such as "those statements

135 N.C. GEN. STAT. ANN. § 14–458.1(a)(1)(d) (2012).
136 *Bishop*, 787 S.E.2d at 819.
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*

where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,"[141] are not protected free speech.[142] The threat need not be truthful in its intent of violence; however, if it is such that it would engender fear, there is protection from it.[143] In the instant case, however, the cyberbullying statute offered no definition on the word "intimidate"; as such, there is an overbreadth issue that falls short of strict scrutiny.

The other definitions that the court found to be overly broad are those that deal with the subject matter of the restricted activity itself. The relevant part of the statue reads, "[p]ost or encourage others to post on the internet private, personal, or sexual information pertaining to a minor."[144] The court similarly objected, stating that the statute criminalizes posting certain information pertaining to a minor, such as private, personal, or sexual information, but does not offer definitions for these terms.[145] While colloquially such words as "private" and "personal" have meaning, in the context of a statute subjected to strict scrutiny, every term must be defined precisely to avoid overbreadth. The State again offered an explanation for each of the terms that the court should read into the language of the statute. The State proposed that (i) "private" be defined as "secluded from the sight, presence, or intrusion of others," or "of or confined to the individual";[146] (ii) "personal" be defined as "of or relating to a particular person," or "concerning a particular person and his or her private business, interests, or activities";[147] and (iii) "sexual" be defined as "of, relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions," or "implying or symbolizing erotic desires or activity."[148] In a manner as sweeping as the statute itself, the court dismissed all of these definitions as broad.[149] In particular, the court took issue with the State's proposed definition of the word "personal." In a strongly worded statement, the court said:

> The State's proposed definition of "personal" as "[o]f or relating to a particular person" is especially sweeping. Were we to adopt the State's position, it could be unlawful to post on the Internet *any information "relating to a particular [minor]*." Such an

141 Virginia v. Black, 538 U.S. 343, 359 (2003).
142 *Id.*
143 *Id.*
144 N.C. GEN. STAT. ANN. § 14–458.1(a)(1)(d) (2012).
145 *Bishop*, 787 S.E.2d at 821 ("The statute criminalizes posting online 'private, personal, or sexual information pertaining to a minor.' Again, these terms are not defined by the statute.").
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*

> interpretation would essentially criminalize posting any information about any specific minor if done with the requisite intent.[150]

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

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

II. DISCUSSION

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

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

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150 *Id.*
151 *Id.* at 819.
152 *Id.* at 821.
153 *Id.*
154 *Id.*
155 People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014) (Smith, J., dissenting) ("It seems to me that those provisions can be readily severed from the rest of the legislation and that what remains can, without any strain on its language, be interpreted in a way that renders it constitutionally valid.").
156 Reed v. Town of Gilbert, 135 S.Ct. 2218, 2227 (2015).
157 If an instance of cyberbullying occurred, there would have to be an examination to determine

be strict scrutiny, and legislatures have some difficult work cut out for them.

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

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

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

The second part, who shall be protected, is also somewhat straightforward. The Albany law was broader than the North Carolina one in this regard, reading, "no person shall engage in cyber-bullying against any minor or *person* in the County of Albany."[160] Not only were minors protected from cyberbullying, but virtually everyone else was as well, as the statute's definition of *person* went far beyond minors.[161] This kind of broad and unnecessary protection is exactly the kind of behavior the North Carolina Supreme Court stated a "robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior."[162] The compelling government interest of this legislation is to protect *minors* from cyberbullying. The court in *Bishop* found this governmental interest

whether the language is such that it falls within the statuary language. This constant examination is sufficient to render the statute a content-based restriction.

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

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

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

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

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

"undisputed,"[163] and only a law that effectuates that compelling government interest can meet constitutional muster under strict scrutiny, due to the narrowly tailored requirement of the analysis. The Albany law stated its purpose was "to ban the [c]yber-bullying in the County of Albany,"[164] and it failed as overly broad. The government does not seem to have a compelling government interest in protecting *everyone* from cyberbullying so as to abridge First Amendment rights; thus, the legislative proposal to address cyberbullying must only serve to protect minors.

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

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

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

163 *Id.* at 819.

164 § 1.

165 *Id.* at § 2 ("CYBER-BULLYING shall mean any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.").

beyond instances of cyberbullying.[166] Therefore, while it is tempting to draft a statute that is somewhat broad so as to not require delving into the variety of media through which cyberbullying can occur, it is ill advised, as there is a risk of constitutional invalidity, considering the standard by which the statute will be analyzed.

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

> (1) a. Build a fake profile or Web site; b. Pose as a minor in: 1. An Internet chat room; 2. An electronic mail message; or 3. An instant message; c. Follow a minor online or into an Internet chat room; or d. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor . . . (2) a. Post a real or doctored image of a minor on the Internet; b. Access, alter, or erase any computer network, computer data, computer program, or computer software . . . or c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor. (3) Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor. (4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network). (5) Sign up a minor for a pornographic Internet site . . . (6) Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages.[167]

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

166 People v. Marquan M., 19 N.E.3d 480, 486 (N.Y. 2014).
167 N.C. GEN. STAT. ANN. § 14–458.1(a) (2012).
168 *Id.* at § 14–458.1(a)(5).
169 Albany County, N.Y., Local Law No. 11 § 1 (Nov. 8, 2010) ("[P]erpetrators of cyber-bullying are often more extreme in the *threats* and *taunts* they inflict on their victims . . . .").

acts prohibited, it might be prudent to include language that is aimed at the compelling government interest, such as "taunting" or "threatening."

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

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

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

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

However, there is some language that might be narrower than what was proposed in either of the statutes. The Albany statute went in the right direction by including a portion of such language "with no legitimate private, personal, or public purpose."[176] However, the statute went awry by then including language such as "harass, annoy, threaten, [and] abuse."[177] The statute should not have included such broad

170 N.C. GEN. STAT. ANN. §14–458.1(a)(1) (2012).
171 State v. Bishop, 787 S.E.2d 814, 821 (N.C. 2016).
172 *Id.* (mentioning the terms "annoy, pester, or harass").
173 *Id.*
174 People v. Marquan M., 19 N.E.3d 480, 486 (N.Y. 2014) (citing Albany County, N.Y., Local Law No. 11 § 2 (Nov. 8, 2010)).
175 *Bishop*, 787 S.E.2d at 819.
176 § 2.
177 *Id.*

undefined language; instead, it should have read something like, "no legitimate private, personal, or public purpose, with the intent to cause significant mental anguish or inflict significant emotional harm." This narrows the statute to address only those acts aimed at causing a specific kind of harm that has been associated with cyberbullying.[178] In doing so, there may be slight losses in the protection provided, as the intent for the act must be (1) with no legitimate private, personal, or public purpose, and (2) with the intent to cause significant mental anguish or inflict significant emotional harm. Because these are very specific intent aspects, there will likely be instances of cyberbullying that could be covered by legislation, but will not rise to the prohibition of this statute because of these stringent intent requirements.[179] However, such a sacrifice in protection must be made, as the abridgement of First Amendment rights cannot be "strict in theory but feeble in fact."[180]

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

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

178 *Id.* at § 1 ("This Legislature further finds that victims of cyber-bullying suffer very real and serious harm as a result of these incidents, often showing signs of depression, anxiety, social isolation, nervousness when interacting with technology, and low self esteem.").
179 E.g., an instance of intimidation or taunting that does not cause significant mental anguish or emotional harm.
180 *Bishop*, 787 S.E.2d at 819 (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 308 (2013)).
181 § 2.
182 N.C. GEN. STAT. ANN. §14–458.1(a)(1)(d) (2012).
183 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
184 *Bishop*, 787 S.E.2d at 821.

of sexual information might look something like, "relating to or involving the victim's sexual proclivities, identity, tendencies, experiences true or false, or sex organs."

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

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

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

The last element a cyberbullying statute would require is some sort of injury or awareness on the part of the victim. This, however, is not a

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

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

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

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

given. Only the North Carolina Supreme Court found this to be an issue,[189] leaving the possibility that such an element may not be absolutely necessary, depending on the jurisdiction. As mentioned previously, it is possible the *Bishop* court only required injury to narrow the scope of the statute to serve as a penal device as opposed to an instrument of deterrence.

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

III. MODEL CYBERBULLYING STATUTE

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

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

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

"PERSON" shall mean any natural person, individual, corporation,

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

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

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

unincorporated association, proprietorship, firm, partnership, joint venture, joint-stock association, or other entity or business organization of any kind.

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

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

CONCLUSION

Cyberbullying is a travesty that ails the youth of our generation.[192] Education, while a great tool with the hope to prevent, arguably does not rise to the necessity of creating consequences that can punish and deter such heinous acts and the results that inevitably follow. While there has been limited judicial treatment on such legislation, there has been enough to realize that drafting cyberbullying legislation will be no simple task, and there will be no guarantee of success. However, considering the language that we now have from the courts, legislatures can draft legislation that can meet the requirements of strict scrutiny, and thus attempt to curb this kind of action, so that minors may flourish in an Internet Age and engage in the benefits of it, while limiting the exposure to risk and harmful interactions through it. The fact that such legislation may not be effortlessly constitutional should not deter the legislative process. Even if there are forms of communication that are not includable due to their current non-existence, amendments can be made; regardless, some legislative protection should be put in place to effectuate this compelling government interest of protecting minors from the dangers of cyberbullying.

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