INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS TORTS AS THE BEST LEGAL OPTION FOR VICTIMS: WHEN CYBERBULLYING CONDUCT FALLS THROUGH THE CRACKS OF THE U.S. CRIMINAL LAW SYSTEM

ARTICLE

JUAN M. ACEVEDO GARCÍA*

---

* Member, State and Federal Bar of Puerto Rico. B.A., 2005, Science, Interamerican University of Puerto Rico; J.D., 2010, cum laude, University of Puerto Rico School of Law; LL.M., 2014, Law and Technology, University of Ottawa. The author is grateful to Professor Jane Bailey of the University of Ottawa for her guidance and support during the research and writing of this paper, and to the staff members of the University of Puerto Rico Law Review for their suggestions and editing of a draft of this article.

Introduction

Cyberbullying is a form of social aggression that has arisen with the advent of new internet and digital communication technologies. At times this conduct, which mainly results in psychological injuries, could be more harmful than physical bullying. A few severe cyberbullying cases in the United States have also been linked to the victims committing suicide. Although in-person bullying can also have the same detrimental impact on victims, the media attention has particularly focused on recent bullying cases carried out through electronic means.

Many of these extreme cases were highly publicized by the mainstream media, and the press seemed to highlight the fact that some law enforcement authorities were having trouble finding criminal laws that could apply to the specific circumstances. Thus, legislators in the United States and in many other jurisdictions around the world quickly responded by proposing and enacting cyberbullying laws, which seek to address the conduct. Particularly, much of the recent cyberbullying legislation has focused on criminalizing the conduct.

This paper contends that although there are already some existing criminal statutes that could apply to the problem, they do not cover all of the various forms and behaviors that could be involved in cyberbullying. Moreover, cyberbullying may sometimes present evidentiary challenges for prosecutors who may want to bring charges for violations of existing statutes, such as harassment and threats, especially when the online bullying is carried out indirectly.

Furthermore, because cyberbullying involves speech, much of the recent United States legislation raises constitutional concerns involving the First Amendment. Specifically, many of the recent cyberbullying criminal legislation has been drafted in a way that is prone to constitutional challenges for vagueness or overbroadness. Moreover, at the moment, only a few of the recognized categories of unprotected speech could adequately serve as basis for cyberbullying regulation and in a very limited way. Thus, the lack of applicability of the current criminal statutes, the evidentiary problems that arise with some forms of cyberbullying, and the potential constitutional limitations mentioned above might sometimes leave victims without redress against their perpetrator.

Nonetheless, civil remedies, like defamation and invasion of privacy lawsuits, are other possible legal actions that could be used against the perpetrators of cyberbullying. The Intentional Infliction of Emotional Distress ("IIED") Tort stands out from all other civil or even much of the criminal remedies because it would apply in most cyberbullying instances. Moreover, the high burdens of proof and the constitutional concerns that arise with criminal laws that address cyberbullying are not particularly present in IIED claims.

Finally, this paper contends that although the IIED tort suffers from its own deficiencies, it will generally be the best remedy for the victims, considering that

some cyberbullying conduct may ultimately fall through the cracks of the United States criminal law system.

The discussion will proceed in five parts. The first part discusses: (1) the definition of cyberbullying with its characteristics and consequences; (2) the categories of direct and indirect cyberbullying; (3) three of the most notorious cyberbullying cases in the United States, and (4) a brief discussion of some recent comprehensive criminal regulation enacted with the purpose of tackling cyberbullying. In the latter, particular constitutional concerns that arise as a consequence of the statutory language used in such regulation will be discussed.

The second part examines various types of existing criminal statutes that could possibly be used against perpetrators of cyberbullying, such as: threats, criminal invasion of privacy, criminal defamation, identity theft/imposture, and harassment/stalking laws. The discussion here provides some history of these long-standing criminal statutes, and then focuses on the evidentiary and applicability problems that arise when prosecutors attempt to use them to deal with the various types of forms and behaviors that cyberbullying may entail. In this part it is argued that although these statutes may sometimes cover cyberbullying conduct, in many cases they are inapplicable or cannot be used because of evidentiary issues. Thus, at times the victims would be left without redress from the criminal system.

The third part centers its discussion upon some of the First Amendment doctrines that act as major constitutional hurdles for much of the existing criminal regulation designed to curb or eradicate cyberbullying. This section briefly explores some of the unprotected categories of speech, the void-for-vagueness and the overbreadth doctrines to examine their applicability to criminal cyberbullying statutes. It also suggests that the statutory language in many of the recent comprehensive criminal cyberbullying laws may be impermissibly vague or overbroad. Thus, this creates another problem for victims who might want to find redress against their perpetrators through these statutes.

The fourth part discusses some of the civil remedies available that could be used by cyberbullying victims to find redress against the perpetrators. Particularly, this part will briefly explore civil defamation and invasion of privacy, but will focus on the applicability of the IIED tort to cyberbullying.

Finally, the fifth part explores the pros and cons of utilizing the IIED tort as a legal remedy for cyberbullying. It discusses the biggest problem for IIED torts, which is that there is no guarantee that cyberbullying victims will actually be able to recover money damages from their perpetrators. However, this part argues that the lack of applicability and evidentiary problems that arise with the current criminal laws that could address cyberbullying, coupled with the potential constitutional problems of some recent cyberbullying regulation, in many instances will leave victims without any remedy. Thus, the IIED tort, even with its deficiencies, will be in the end the best option for victims who are not able to find redress against their perpetrators through the criminal system.

I. CYBERBULLYING

A. Definition, Characteristics & Consequences

Cyberbullying has been generally defined as the "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[1] It has also being defined as "cruel[ty] to others by sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies."[2] Although cyberbullying and other forms of bullying "involve a power imbalance between [the] bully and [the] victim," the main difference between them is that online bullying is solely "predicated on the infliction of non-physical harm."[3]

The above-mentioned definitions are sufficiently broad to incorporate many different forms of conduct. For example, cyberbullies may impersonate their victims by creating fake online profiles and pretending to be their victim. They may also sign the victim up for junk email lists in pornographic websites or perform "illegal or immoral acts in the name of the victim."[4] Additionally, online bullies may spread untrue rumors or simply publish intimate or private information about their victims without their consent.[5] Furthermore, although cyberbullying may involve what is generally believed to be trivial conduct such as taunting or name-calling, it may also encompass more harmful behavior such as threatening communications.

Cyberbullying has been characterized as an "emerging public health problem."[6] In the case of young students, "the negative effects of cyberbullying are often more serious and long-lasting than those of traditional forms of bullying for several reasons."[7] Firstly, it has been argued that the supposed artificial "veil of

---

1 Sameer Hinduja & Justin W. Patchin, *Cyberbullying Identification, Prevention, & Response*, CYBERBULLYING RESEARCH CENTER (2010) (citation omitted), http://cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.

2 Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 849 (2010) (quoting NANCY WILLARD, EDUCATOR'S GUIDE TO CYBERBULLYING AND CYBERTHREATS (2007), https://education.ohio.gov/getattachment/Topics/Other-Resources/School-Safety/Safe-and-Supportive-Learning/Anti-Harassment-Intimidation-and-Bullying-Resource/Educator-s-Guide-Cyber-Safety.pdf.aspx (last visited Oct. 16, 2015)).

3 Susan W. Brenner & Megan Rehberg, *"Kiddie Crime"? The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 4 (2010).

4 Andrew S. Kaufman & Betsy D. Baydala, *Cyberbullying and Intentional Infliction of Emotional Distress*, 245 N.Y.L.J., Feb. 9, 2011.

5 *See id.*

6 Virginia, *supra* note 2, at 849 (quoting Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media, Violence and Adolescents: An Emerging Public Health Problem*, 41 J. Adolescent Health S1, S5 (2007)).

7 *Id.* at 850.

anonymity"[8] provided by the internet "encourages users to say things they might not otherwise say in person."[9] Secondly, because the internet serves as a platform for people to easily communicate with others all over the world, cyberbullies can take advantage to massively enhance the breath of harm to their victims.[10] Thirdly, the ubiquitous nature of new technologies and the growing dependence society has on them (for example, the use of mobile phones with internet access) can make it seem that cyberbullies are following their victims anywhere at any time. Finally, the harm caused to cyberbullying victims may linger or be perpetuated because of the difficulty of removing the hurtful communications from the internet once they have spread.[11]

Consequently, it has been stated that this conduct "can cause serious psychological harm, including depression, low self-esteem, anxiety, alienation and suicidal intentions."[12] Few victims have actually committed suicide while others have had to go through years of professional counseling.[13] Although most of these serious cases involve children or young adults, cyberbullying can affect and involve people of all ages.[14] Further, it has been stated that the perpetrators and victims of cyberbullying "are more likely to engage in criminal conduct in the future."[15] Thus, all of these consequences demonstrate that this type of behavior is a problem with serious consequences that demands a societal response.

Ideally, such response should include meaningful educational approaches which would promote equality, respect and tolerance towards others, as well as for the appropriate use of communication technologies. Other responses to the problem could also involve the regulation of online platform providers to improve privacy controls and make it easier on its users to remove or prevent cyberbullying content. However, this paper explores the possibilities for responding legally against the perpetrator and leaves elaboration of other approaches to cyberbullying for further research.[16]

---

8 *Id.* Anonymity in the internet is artificial because there are ways to discover the identities of people who may try to hide it.

9 *Id.*

10 *Id.*

11 *Id.* at 850–851.

12 *Id.* at 851.

13 *Id.*

14 *Id.*

15 *Id.* at 852.

16 *See* Jane Bailey, *A Perfect Storm: How the Online Environment, Social Norms, and Law Shape Girls' Lives* 21, *in* EGIRLS, ECITIZENS (Jane Bailey & Valerie Steeves eds., 2015); Gillian Angrove, *"She's Such a Slut!": The Sexualized Cyberbullying of Teen Girls and the Education Law Response* 307, *in* EGIRLS, ECITIZENS (Jane Bailey & Valerie Steeves eds., 2015).

B. Direct and Indirect Cyberbullying

There are two ways in which a perpetrator can carry out online bullying: direct cyberbullying and indirect cyberbullying. The former involves situations in which the cyberbully "directs electronic communications directly at the victim,"[17] while the latter encompasses instances in which the communications are posted in a "reasonably public area of cyberspace."[18] Thus, it is clear that direct cyberbullying is "intended to have a direct, immediate effect on the victim."[19] On the contrary, the bully's intent, and the speed with which a victim is affected in cases involving indirect cyberbullying, may be somewhat unclear.[20]

For example, in instances of direct cyberbullying the perpetrator may use social networking websites like Facebook to send harassing or threatening messages to its victim's private inbox or simply post them on the victim's wall. Similarly, the cyberbully might also send the hostile communications through text messages or instant messaging apps directly to the victim's phone. In contrast, instances of indirect cyberbullying might involve the same types of communications, but instead may be posted in places such as the perpetrator's own Facebook wall, in an online blog, sent by email to third persons or placed in an area of cyberspace that is not readily accessible to the victim.

As it will be discussed below, the distinction between the two categories is an important consideration, because the effectiveness and applicability of the current criminal statutes and other legal remedies that may address cyberbullying will often depend on whether the attack is direct or indirect. Particularly, instances of indirect cyberbullying are the most problematic for the majority of the existing legal approaches.

C. Notorious Cyberbullying Cases

In recent years various extreme cyberbullying cases have been widely publicized in the United States and internationally by the mainstream media. The majority of the covered cases involve instances of young teenagers engaging in online bullying that have resulted in the victim's suicide. For instance, in 2003 a teenage boy named Ryan Halligan took his own life after withstanding intense cyberbullying by his classmates.[21] Ryan was an eighth grade student in Vermont, when a classmate spread a rumor that he was gay. Afterwards, a popular female classmate who pretended to like him ridiculed him by distributing online their instant message exchanges to the rest of the school.[22] Not too long after these events, Ryan

---

17 Brenner & Rehberg, *supra* note 3, at 24.

18 *Id.* at 31.

19 *Id.* at 24.

20 *Id.* at 31.

21 RYAN'S STORY, http://www.ryanpatrickhalligan.org (last visited Oct. 16, 2015).

22 Brenner & Rehberg, *supra* note 3, at 24-25.

killed himself. After Ryan's death, no charges were filed against the bullies because it was found that "no criminal law applied to the circumstances."[23]

Other cases of cyberbullying extensively covered by the media have also involved adults. Megan Meier and Tyler Clementi's suicides are two examples of such cases. Megan Meier was a thirteen-year-old student from O'Fallon, Missouri. In 2006, she had established an online relationship through MySpace with someone she thought to be a sixteen-year-old boy named Josh Evans.[24] Although initially the relationship started "as a friendly and flirtatious exchange of messages [, it later] escalated into a barrage of cruel and insulting attacks that drove" the already depressed Megan to commit suicide.[25] Not long before she took her own life, she had read messages from Josh that read: "Everybody in O'Fallon knows how you are. You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you."[26]

Following Megan's death it was discovered that Josh never existed. It was found that Lori Drew, the adult neighbor and mother of a friend of Megan, had created the fake profile with the initial purpose of learning "Megan's opinion of her daughter."[27] Because at the moment of the incident the state of Missouri had no law that would apply to the circumstances, the federal authorities attempted to convict Lori Drew for violating section 1030 of the Fraud and Abuse Act (C.F.A.A.).[28] However, after being convicted of three misdemeanor offenses under the Act, a federal judge reversed Lori Drew's conviction noting "there is nothing in the legislative history of the CFAA which suggests that Congress ever envisioned . . . application of the statute [to cyberbullying]."[29]

Another highly publicized case that has been labeled as cyberbullying is the one of Tyler Clementi's suicide in 2010. Clementi, an eighteen-year-old student from New Jersey's Rutgers University, jumped from the George Washington Bridge after discovering that his roommate, Dahrum Ravi, had secretly video streamed through the internet his intimate encounters with a male friend.[30] Ravi had specifically set up a camera in the room and posted links to the live broadcast

---

23 *The Top Six Unforgettable CyberBullying Cases Ever*, NOBULLYING, http://nobullying.com/six-unforgettable-cyber-bullying-cases/ (last visited Oct. 16, 2015).

24 United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009).

25 Virginia, *supra* note 2, at 847.

26 *The Megan Meier Story*, NOBULLYING, http://nobullying.com/the-megan-meier-story/ (last visited Oct. 16, 2015).

27 Virginia, *supra* note 2, at 847.

28 *Id.* at 856 (explaining that fraud and related activity in connection with computers might apply to very low number of Cyberbullying instances, but it was originally designed to prevent computer hacking); *see* Computer Fraud and Abuse Act ("C.F.A.A."), 18 U.S.C. § 1030 (2012).

29 *Id.* at 857 (quoting *Drew*, 259 F.R.D. at 451 n.2).

30 Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to his Death*, ABC NEWS (Sept. 29, 2010), http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716 (last visited Oct. 16, 2015).

in his Twitter account.[31] Ravi had tweeted: "Roommate asked for the room till midnight. I went into [M]olly's room and turned on my webcam. I saw him making out with a dude. Yay."[32]

After the incident, Ravi and Molly Wei, "the [hall mate] whose computer Ravi used to spy on Clementi, were charged with [criminal] invasion of privacy."[33] Wei's criminal charges would be dropped "in exchange for her testimony against Ravi, her successful completion of 300 community service hours, cyberbullying counseling, and further education on alternative lifestyles."[34] On the other hand, Ravi was convicted on fifteen criminal charges, but was released from prison twenty days after beginning his sentence by earning early release.[35]

The cases discussed above highlight both the serious consequences that cyberbullying can sometimes have on its victims, as well as the difficulty for victims to find some type of redress against the bully through the criminal legal system. Although at the time these cases occurred most jurisdictions in the United States had no penal laws designed specifically for cyberbullying, in recent years a growing number of laws have been adopted for such purpose.

D. Recent Legislation: Comprehensive Cyberbullying Criminal Laws

After the wide media coverage of cases similar to the ones outlined above, "public officials have called for the 'elimination' or 'eradication' of cyberbullying, and legislators [of several states] have proposed and enacted a variety of new laws to curb it."[36] The majority of the legislation is directed at schools; requiring them to establish preventive, as well as disciplinary policies.[37] However, a growing number of legislative proposals focus on criminalizing cyberbullying.[38] While some of the criminal legislation involves the modernization of already existing harassment, threat or stalking statutes so that it covers electronic communications, other legislation establishes comprehensive definitions of cyberbullying and adopts them as standalone offenses.

---

31 Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps*, 57 WAYNE L. REV. 473, 491 (2011).

32 Friedman, *supra* note 30.

33 *The Top Six Unforgettable CyberBullying Cases Ever*, *supra* note 23.

34 Jaffe, *supra* note 31, at 495 n.135.

35 *The Top Six Unforgettable CyberBullying Cases Ever*, *supra* note 23.

36 Lyrissa Lidsky & Andrea Pinzon García, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 695 (2012) (footnote omitted).

37 *Id.*

38 *Id.*

A good example of this last type of cyberbullying statute is the one adopted in 2010 by the Albany County legislature in the state of New York.[39] The law criminalized cyberbullying and defined it 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.[40]

It is clear that this broad definition of cyberbullying could be applicable to any of the cases discussed above. However, it just so happened that as recent as the month of June of 2014, this law was held to be invalid by New York's highest court. Specifically, the New York State Court of Appeals held Albany County's cyberbullying law to be "-as drafted- overbroad and facially invalid under the Free Speech Clause of the First Amendment."[41]

This particular decision does not mean that all cyberbullying criminal statutes are unconstitutional per se. However, it does demonstrate that comprehensive cyberbullying definitions that are vaguely and/or broadly drafted are prone to violate long established First Amendment doctrines, thus running the risk of being declared unconstitutionally invalid. Therefore, in this type of instances, victims may be left without a remedy against their cyberbullies through the criminal system. Particularly, some of the sections below will further discuss the doctrines of vagueness and overbreadth, and examine their possible application to some of the criminal cyberbullying regulation.

II. Criminal Statutes that already Address Cyberbullying

First Amendment issues are not the only concerns involving cyberbullying criminal statutes. Although new laws similar to the Albany County statute -which specifically target cyberbullying- have been recently enacted in various jurisdictions, these may overlap with already existing criminal provisions.[42] This section will particularly focus the discussion on some of the existing criminal statutes that

---

39 Albany County, N.Y., Local Law no. 11 (July 12, 2010).

40 *Id.* at § 2.

41 People v. Marquan M., 19 N.E.3d 480, 488 (N.Y. 2014) (suggesting that words, such as embarrassing and hate mail were impermissibly vague and thus unenforceable. The majority decision suggested that it could be possible to draft a law criminalizing cyberbullying. However, the way the Albany County law was drafted violated the First Amendment. On the other hand, the dissent argued that a limited construction of the statute could be applied to children and some possible vague terms, such as "hate mail" could be deleted, to avoid declaring the law unconstitutional).

42 Lidsky & Pinzon, *supra* note 36, at 697.

could address cyberbullying and the evidentiary challenges that may arise for state attorneys when dealing with the different variations of this form of conduct.

Threats, invasion of privacy, identity theft, defamation, harassment, and stalking statutes are just some of the long standing criminal provisions that could already be used to deal with the problem. Thus, it has been argued that over-criminalization problems may arise with the creation of new criminal cyberbullying statutes, "creating the prospect that 'cyberbullies,' many of whom are likely to be adolescents, will be punished disproportionately to their crimes when [overzealous] prosecutors deploy the multiple charges at their disposal."[43] However, this section emphasizes on how cyberbullying victims will at times be unable to find redress through these criminal statutes.

A. Threats

Most, if not all of the states, in one way or another, treat threats as a criminal offense.[44] "A 'threat' is similar to a promise: When A threatens B, he articulates an intention to do something harmful to B or to someone or something B cares about."[45] For example, in the Commonwealth of Puerto Rico it is a criminal offense for a person "to threaten [others] with the infliction of a determined harm to [their] person or his family's corporal integrity, rights, honor or patrimony."[46] Similarly, in the state of Connecticut a person is guilty of violating its general threatening statute when:

> (1) By physical threat, such person intentionally places or attempts to place another . . . in fear of imminent serious physical injury, (2) such person threatens to commit any crime of violence with the intent to terrorize another person, or (3) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror.[47]

---

43 *Id.* at 698. Overlapping crimes often are produced when:

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

Id. at 697 n.26 (quoting DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 36-37 (2008)).

44 Brenner & Rehberg, *supra* note 3, at 60-67.

45 *Id.* at 59.

46 P.R. PENAL CODE, art. 177, P.R. LAWS ANN. tit. 33, § 5243 (2010 & Suppl. 2014) (translation by the author).

47 Brenner & Rehberg, *supra* note 3, at 63 (quoting CONN. GEN. STAT. ANN. § 53a-62(a) (West 2007)).

At the federal level, a much narrower threatening statue criminalizes the transmission "in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another."[48] This federal statute has been interpreted by courts as covering threats made through electronic communications.[49]

With the enactment of these criminal threat statutes, governments intend to "prevent 'serious alarm for personal safety,'" as well as the infliction of the emotional distress that may affect the threatened victims.[50] The Supreme Court of the United States has also added that criminal threat statutes protect people "from the possibility that the threatened violence will occur."[51] Thus, in part, threats can be understood as inchoate crimes, which are designed to prevent a more serious harm. In other words, threats are "a step toward the consummation of a proscribed act."[52]

Furthermore, unlike stalking and harassment statutes, which require persistent hostile or disturbing communications (psychological harm) for the commission of the criminal offense, "[a] single message is enough to warrant prosecution" for threats.[53] This demonstrates that the primary purpose of threat statutes is to prevent a future crime of a physical nature, and the prevention of infliction of emotional harm is collateral.[54]

Threats are not protected by the First Amendment if they can be categorized as *true threats*. The United States Supreme Court in *Virginia v. Black* held that "'[t]rue 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."[55] While the "[t]hreats need not be explicit; they can be inferred from conduct, but the conduct must still [directly target] the prospective victim."[56] The Court also added that "*intimidation* in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[57]

---

48 *Id.* at 66 (quoting 18 U.S.C. § 875(c) (2006)).

49 *Id.* at 66-67; *see* Irizarry v. United States, 553 U.S. 708 (2008).

50 *Id.* at 60.

51 *Id.* (quoting

52 *Id.* at 61.

53 *Id.* at 68.

54 *Id.* at 69.

55 John B. Major, *Cyberstalking, Twitter, and The Captive Audience: A First Amendment Analysis of 18 U.S.C. § 2261A(2)*, 86 S. CAL. L. REV. 117, 141 (2012) (quoting *Virginia*, 538 U.S. at 359).

56 Brenner & Rehberg, *supra* note 3, at 67.

57 Virginia v. Black, 538 U.S. 343, 360 (2003) (emphasis added).

Although the Court never specified "what type of intent a speaker must have if his speech is to be punishable as a 'true threat,'"[58] some courts have held that "'true threats' require that the speaker demonstrate an 'unequivocal, unconditional' intent 'to inflict injury.'"[59] Therefore, intent is an important factor when determining if a threat statute is applicable to a particular circumstance involving cyberbullying.

Criminal threat statutes are likely to be useful to prosecute cyberbullies who directly target the victim through email, text and social networking site messages like Twitter or Facebook, with a threat of physical injury. The medium used should be irrelevant as long as the threshold required for a threat is satisfied.[60] Thus, when direct cyberbullying is involved, and "the sender says [he or she] intends to harm the victim and/or someone or something [he or she] cares about,"[61] the communication qualifies as a criminal threat.

In cases where indirect cyberbullying is involved, prosecution for criminal threat tends to be more challenging because "indirect cyberbullying distorts—if it does not eliminate—the essential threat dynamic, i.e., the perpetrator's directly targeting the victim."[62] The case that best illustrates the problems that may arise when prosecutors try to bring charges for threats against an indirect cyberbully is *United States v. Alkhabaz*.[63]

Abraham Alkhabaz was criminally charged for violating the federal threat statute 18 U.S. Code § 875(c).[64] Alkhabaz was a university student in Michigan when he posted a fictional story in an online news group called *alt.sex.stories*. There, he "described 'the abduction, rape, torture, and murder' of a woman with the same name as one of Alkhabaz's classmates."[65] A person who visited the online news group and read the story notified the university. This triggered the investigation that resulted in criminal charges against Alkhabaz. Nevertheless, instead of being based on the original story posted in *alt.sex.stories*, the charges were based on private emails exchanged between Alkhabaz and Arthur Gonda, another *alt.sex.stories* user who shared with Alkhabaz a "mutual interest in 'violence against women and girls.'"[66]

The United States Court of Appeals for the Sixth Circuit found that the emails between Alkhabaz and Gonda did not constitute *true threats* because they were not sent directly to the victim (Alkhabaz's female classmate), and neither Alkhabaz nor Gonda had any "reason to believe the victim would see what they

---

58 Lidsky & Pinzon, *supra* note 36, at 706.

59 Brenner & Rehberg, *supra* note 3, at 61; United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

60 *Id.* at 67.

61 *Id.*at 67-68.

62 *Id.* at 69.

63 *Id.*; United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1977).

64 *Id.*

65 *Id.*

66 *Id.* (quoting *Alkhabaz*, 104 F.3d at 1496).

wrote."[67] Furthermore, the Court added that no reasonable person would interpret the email messages as a serious expression to inflict bodily harm, or that they were sent for the purpose of intimidating the victim.[68] The Court finally determined that the messages were actually sent "in an attempt to foster a friendship based on shared sexual fantasies."[69]

Therefore, if a cyberbully, for example, sends an email to a person other than the victim, describing or threatening with the infliction of physical injury of a person other than the recipient of the message, and such recipient does not feel threatened nor believes the communication is a serious expression to inflict bodily harm, it will be very difficult for prosecutors to bring charges against the sender. Particularly, if the recipient does not, or was not likely to share the message with the victim, prosecutors will have trouble proving specific intent to threat the victim.

Considering the evidentiary challenges that arise in instances of indirect cyberbullying, threats statutes will not always be an appropriate way to legally deal with the issue. However, in the future, courts might determine that some instances of indirect threats constitute *true threats*. For example, when the threats are believed to be a serious expression of intention to inflict bodily harm, and are posted for the purpose of intimidating or affecting the victim through online public forums. As such, it may be easier to prove that the defendant had the intent of reaching the victim or knew that the victim was likely to see it.

Nonetheless, it is highly unlikely that a court will uphold threat charges if they are made in an online forum with restricted access or through private email.[70] Thus, threats will only apply in a limited number of cyberbullying circumstances, even if eventually the message reaches the victim and the harm that threat statutes intend to prevent is actually inflicted.

Other factors that a court might take into consideration when deciding to uphold indirect threat charges are the poster's age, his or her capacity to commit the threatened harm, and the context in which the posted expression was made.[71] These factors, in some instances, may also represent limitations on cyberbullying victims' ability to find redress against their perpetrators.

---

67 *Id.* at 70.

68 *Id.*

69 *Id.* (quoting *Alkhabaz*, 104 F.3d at 1496). Brenner and Rehberg wrote:

> The Sixth Circuit held that to constitute a 'true threat,' a communication must (i) be such that a reasonable person would interpret it as a serious expression of an intent to inflict bodily harm on the victim and (ii) be communicated for the purpose of intimidating the victim in order to "effect some change or achieve some goal."

Id.

70 *Id.* at 70-73.

71 *Id.* at 72.

B. Criminal Invasion of Privacy

Criminal invasion of privacy statutes may also be a way of dealing with some types of cyberbullying. They might be particularly apt for cases like Tyler Clementi's, in which his roommate secretly filmed and video streamed his intimate encounter with another man for the whole internet world to see.[72] Nevertheless, criminal invasion of privacy statutes may be inadequate to address many other forms of conduct that cyberbullying can entail.[73]

There are only a few states that have criminal invasion of privacy statutes, and most of them are provisions against unconsented voyeurism.[74] "That is, they criminalize the act of 'spying on' another, usually for the purpose of gaining 'sexual pleasure.'"[75] For example, the state of "Iowa defines invasion of privacy as viewing, photographing or filming someone without [his or her] consent while [he or she] is in a state of full or partial nudity."[76] Puerto Rico criminally prohibits any "person that without legal justification or a legitimate investigative purpose uses an electronic or digital video device, with or without audio, to carry out secret surveillance in private places, or in any other place where a reasonable expectation of privacy is [recognized]."[77]

Few other states have criminal invasion of privacy statutes, "derive[d] from the common law crime of eavesdropping, which targeted the 'harm' of violating the privacy of someone's home."[78] An example of this type of statute is article 171 of Puerto Rico's Penal Code, which prohibits anyone from seizing any type of document or effect of another person, including email messages, without his or her authorization, with the purpose of finding out or letting anyone else find out about its contents.[79]

The problem with these types of statutes is that they do not encompass many types of conduct regularly involved in cyberbullying. Often, cyberbullies disseminate information about another person acquired by authorized means or without violating his or her privacy.[80] For example, a cyberbully might publish or disseminate embarrassing pictures legally obtained from the victim's own Facebook ac-

---

72 Friedman, *supra* note 30.

73 *See* Brenner & Rehberg, *supra* note 3.

74 *Id.* at 57 n.232.

75 *Id.*

76 *Id.* at 56, n.232 ("Idaho, Indiana, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia and Wisconsin have similar provisions.").

77 P.R. PENAL CODE, art. 168, P.R. LAWS ANN. tit. 33, § 5234 (2010 & Suppl. 2014) (translation by the author).

78 Brenner & Rehberg, *supra* note 3, at 57 n.232.

79 P.R. LAWS ANN. tit. 33, § 5237.

80 Brenner & Rehberg, *supra* note 3, at 57 n.232.

count. Similarly, a cyberbully might have published information or intimate pictures received directly from the victim, or from persons who legitimately received them from the victim. Consequently, a court might find that the victim implicitly authorized its dissemination and/or does not have any reasonable expectation of privacy. In this type of scenario, it is highly unlikely that a court would uphold criminal charges for invasion of privacy, at least not without a statute specifically prohibiting such conduct.[81] Therefore, this adds to the problem of victims (especially women and girls) sometimes not having a criminal remedy available against their cyberbullies, particularly in cases in which this type of privacy invasion is committed.[82]

C. Criminal Defamation

Criminal defamation statutes may overlap with cyberbullying statutes "to the extent [they involve] speech that harms reputation."[83] Specifically, criminal defamation laws can be categorized as those that center on "'breach[es] of the peace'[,] and those that focus on publishing a 'statement or object tending to . . . impeach the honesty, integrity, virtue, or reputation or expose the natural defects of someone and thereby expose him to public hatred, contempt, or ridicule.'"[84]

Around twenty-two states criminalize some type of libel, some of which "recognize truth as a defense."[85] "However, defamation is a tort in most states rather [than] a crime."[86] Thus, only around half of the population in the United States will have criminal defamation statutes available as a legal remedy against cyberbullies. Unlike civil defamation, which requires that the defamatory material be communicated to at least another person other than the victim, its criminal counterpart "only requires that it have been communicated to 'a person other than the publisher of the' material."[87] Therefore, if a cyberbully posts or sends libelous material that exclusively reaches the victim, he or she may be held liable for criminal defamation, but not necessarily for civil defamation.

---

81 This is a currently debated issue, which also pertains to conducts, such as revenge porn and sexting. *See* Danielle K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Brenner & Rehberg explain that: "A few states [do] make it a crime to 'publish' images obtained in violation of a voyeurism statute, but these provisions do not apply unless the image was obtained without the 'victim's' permission." Brenner & Rehberg, *supra* note 3, at 57 n.232.

82 Citron & Franks, *supra* note 81, at 348. Citron and Franks convincingly suggest that just because someone sends an intimate photo to one person, it should not mean they consent to its dissemination on the internet. They further argue that privacy is a contextual concept. Thus, "consent within a trusted relationship does not equal consent outside of that relationship." *Id.*

83 Lidsky & Pinzon, *supra* note 36, at 719.

84 Brenner & Rehberg, *supra* note 3, at 48 (quoting ALA. CODE § 13A-11-160 (1975); COLO. REV. STAT. ANN. § 18-13-105(1) (West 2008)).

85 *Id.* at 49.

86 Lidsky & Pinzon, *supra* note 36, at 719. At the federal level there is no criminal defamation law; Brenner & Rehberg, *supra* note 3, at 49.

87 Brenner & Rehberg, *supra* note 3, at 49 (quoting N.D. CENT. CODE § 12.1-15-01(3)(c)).

It is irrelevant that the defamation involved is made through indirect or direct cyberbullying because "[u]nlike stalking, harassment and threats, criminal defamation can, but does not necessarily, involve inflicting harm by directly targeting the victim."[88] Hence, it would be enough for cyberbullies to be charged with criminal defamation if they simply: "(i) published information to one or more persons (ii) that was false and (iii) had the capacity to provoke a breach of the peace [and/]or expose the person it concerned to public hatred, contempt or ridicule."[89]

In addition, "the Supreme Court has crafted a complex body of First Amendment doctrines that vary the level of protection [defamatory speech receives] based on" factors like the identity of the people involved and the subject matter of the speech.[90] Mainly, the primary challenge for prosecutors might be to determine if a "cyberbully acted with 'actual malice'" as laid out in the cases of *New York Times v. Sullivan* and *Garrison v. Louisiana*.[91]

In *Sullivan*, the United States Supreme Court held that defamatory speech about public officials must be false and made with *actual malice* for civil liability to exist.[92] The Court "defined actual malice as making a statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[93] In *Garrison*, the United States Supreme Court applied the doctrine established in *Sullivan* to criminal defamation prosecutions and added that truth is a defense.[94] However, in both cases the defamatory speech involved statements about "public official[s] and/or matters of public concern."[95]

Although not yet determined by the Supreme Court, some lower courts have held that the *actual malice* requirement does not apply when the defamatory speech involved is made by private persons about other private individuals in their community.[96] Other courts have also held that *actual malice* is not required when the defamatory speech involved is between private persons and does not encompass matters of public concern, because the First Amendment offers less protection on speech of private concern.[97] Thus, it seems unlikely that the actual malice requirement would be applied to most perpetrators of cyberbullying. This in turn,

---

88 *Id.*

89 *Id.* at 50.

90 Lidsky & Pinzon, *supra* note 36, at 719-20.

91 Brenner & Rehberg, *supra* note 3, at 50 (quoting Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times v. Sullivan, 376 U.S. 254 (1964)).

92 *Id.*

93 *Id.* (quoting *Sullivan*, 376 U.S. at 280).

94 *Id.*; *see Sullivan*, 376 U.S. at 256-58 (stating that the newspaper published comments concerning Sullivan's actions as a City Commissioner); *Garrison*, 379 U.S. at 64-66 (recording that a district attorney criticized the local judiciary).

95 Brenner & Rehberg, *supra* note 3, at 50.

96 *Id.* at 52.

97 *Id.* at 53.

would make prosecutors' jobs easier, in regards to the quantity of proof they would have to present in instances of libelous cyberbullying.

Nonetheless, a cyberbully might still be able to evade prosecution for defamation if the "'libelous statements . . . amount to 'no more than rhetorical hyperbole,' or . . . amount to opinion, satire, or parody that could not reasonably be interpreted as making a factual statement.'"[98] Although this exception has also only been applied by the United States Supreme Court to cases involving public figures, some lower courts have held that it also applies to purely private figures.[99]

Moreover, it could be argued that certain cyberbullying victims might have acquired a public figure status if it could be proven that by publishing their lives on the internet they injected themselves into the public domain and intentionally pursued celebrity status. Thus, if a court determines that a cyberbullying victim has a public figure status in these circumstances, and the statements fall within the hyperbole/satire/opinion/parody exception, such victim would be unable to find redress against the perpetrator through a criminal defamation statute. However, it has been suggested that this is not generally the case.[100]Hence, it may be that most cyberbullying victims "have not sought out public attention" and are not involved in situations where they are "[figures] of interest to the general population of the United States" and thus, should not be covered by such exception.[101]

In sum, criminal defamation statutes at least provide cyberbullying victims with an avenue of redress in specific circumstances. However, the judicial doctrines on defamation highlight plausible limitations that some victims might face when looking to use these criminal statutes as a remedy against their perpetrators. Moreover, most states treat defamation as a civil issue and not a criminal offense, thus, criminal defamation statutes will not always be available for victims. Finally, although "the Supreme Court has not rejected the prospect of criminal libel laws entirely, it suggested over forty years ago that [defamation] may be 'inappropriate for penal control.'"[102]

D. Identity Theft

There are various ways in, and distinct purposes for, which cyberbullies assume the online identity of other people. For example, cyberbullies may create false social media profiles pretending to be their victims "to portray [them] in a bad light" or just to get them in trouble.[103] Cyberbullies might also assume the identity of a person other than their victim for the purpose of hiding their real identity or to magnify the effects of their abusive behavior (for example, when the

---

98 *Id.* (quoting Mink v. Knox, 566 F. Supp. 2d 1217, 1224 (D. Colo. 2008)).

99 *Id.*

100 *Id.* at 54.

101 *Id.* at 55.

102 Lidsky & Pinzon, *supra* note 36, at 720 (quoting Garrison v. Louisiana, 379 U.S. 64, 70 (1964)).

103 Brenner & Rehberg, *supra* note 3, at 73.

person whose identity was assumed is of importance to the victim and the bully makes it appear as if that person is making hateful remarks about the victim). Although some of the current United States identity theft statutes apply to some cyberbullying behaviors, many are not capable of dealing with the type of identity theft usually involved in cyberbullying.

All states, as well as the federal jurisdiction, criminalize identity theft.[104] The federal identity theft statute criminalizes the use of "'means of identification' of another to commit or to aid and abet the commission of a federal crime or a felony under state law."[105] Other state statutes also make it a crime to use the personal identifying information of another "to commit or to aid and abet the commission of other crimes."[106] Meanwhile, the majority of states criminalize the action of assuming another's identity or the use of their personal information to obtain some type of monetary benefit or service in that person's name.[107]

However, most perpetrators carry out cyberbullying for the sole purpose of tormenting their victims, not to obtain any type of monetary benefit. Therefore, most of the identity theft statutes are unlikely to be applicable to cyberbullying. Nonetheless, there are other types of statutes that might be used for cyberbullying: (1) "identity-theft-for-the-purpose-of-harassment statutes" and (2) "general statutes making it a crime to use someone's identity to commit another crime if the conduct involved in the bullying constituted the commission of a crime within the scope of the statute[s]."[108]

Only a few states, like Arkansas and Massachusetts, criminalize the "use [of] another person's personal identifying information to 'harass another person.'"[109] It has been suggested that the problem with this last type of statute is its possible inapplicability in cases where cyberbullies assume the identity of their victim to harass that same victim, because he or she is not *another person*. In other words, if the purpose of the statute is to protect an individual from having their identity *stolen* to harass that same individual, "the prohibition should be phrased in terms of 'harassing that person' or 'harassing the person whose information is being used without authorization.'"[110] Nonetheless, this is a matter of legal interpretation that the courts will have to determine in the future. In the meantime, these types of statutes will surely impose criminal liability on cyberbullies that assume the identity of a third person to harass their victim.

---

104 *Id.*

105 *Id.* at 74 (quoting 18 U.S.C. § 1028(a)(7) (2006)). The *Federal Identity Theft Statute* defines "'means of identification'" as "'any name or number that may be used . . . to identify a specific individual.'" *Id.* (quoting 18 U.S.C. § 1028(d)(7)). Considering this definition, Lori Drew could not have been charged a violation against this statute, because the picture used to portray "Josh Evans" does not fall within *means of identification*.

106 *Id.* at 75.

107 *Id.* at 74-75.

108 *Id.* at 77.

109 *Id.* at 76. However, this type of law might as well be categorized as another harassment statute.

110 *Id.*

Considering the circumstances mentioned above, there might be a residual category of identity-theft cyberbullying that could be carried out without fear of criminal liability; instances in which the cyberbully does not assume another's "identity to harass [the victim] or to commit other crimes."[111] For example, if a cyberbully assumes their victim's identity to make defamatory comments about third persons, they might get their victim in legal trouble and/or damage their reputation. This conduct might not be categorized as identity-theft cyberbullying because it does not fall under harassment, nor would it fall under criminal defamation in a state where such a law does not exist. In these particular circumstances cyberbullying victims might be left without any (identity theft) criminal remedy against their perpetrators.

In reality, this type of conduct looks less like identity theft behavior and more like imposture.[112] Only the State of Wisconsin criminalizes the impersonation of someone for the "purpose of damaging [the victim's] reputation."[113] Therefore, the adoption in other jurisdictions of this "identity-theft-for-the-purpose-of-committing [a] defamation statute" should be able to help fill the void that makes up the residual category.[114] However, until that happens, redress through this type of statute will be unavailable for the majority of identity-theft cyberbullying victims in the United States.

E. Harassment/Stalking

Most states use stalking and harassment statutes to deal with cyberbullying on a criminal level when the conduct does not encompass other types of crimes, such as threats, invasion of privacy, defamation or identity theft.[115] Harassment statutes started to be adopted by states around a century ago with the advent of a new technology: the telephone. The enactment of these statutes was a response to the growing problem of callers using the telephone to proffer "vulgar, profane, obscene or indecent language" against other individuals.[116] Although much of the initial statutes focused only "on obscene or threatening phone calls, some states

---

111 *Id.* at 77.

112 *Id.*

113 *Id.* at 78 (citing WIS. STAT. ANN. § 943.201(2) (2005) (which criminalizes the unauthorized use of an individual's personal identifying information or documents)). This statute withstood a First Amendment challenge in the Wisconsin Court of Appeals. *Id.* at 78 n.314.

114 *Id.* at 78. Puerto Rico has a broader imposture statute that makes it a crime for any person with deceiving intent to impersonate or represent another, and under this circumstance carries out any act without the authorization of the falsely represented person. P.R. PENAL CODE, art. 208, P.R. LAWS ANN. tit. 33, § 5278 (2010 & Suppl. 2014). Puerto Rico's imposture statute might be able to cover more effectively identity-theft cyberbullying instances because of its broader language.

115 Brenner & Rehberg, *supra* note 3, at 15-16.

116 *Id.* at 16 (quoting Darnell v. State, 161 S.W. 971, 971 (Tex. Crim. App. 1913)).

broadened their harassment statutes to encompass more general conduct, such as 'anonymous or repeated telephone calls that are intended to harass or annoy.'"[117]

Various decades after the first harassment statutes were enacted, states started to recognize that harassing conduct could escalate to more serious harms not covered by the original harassment provisions, such as "touching someone, insulting them or following them."[118] It was not until the stalking and subsequent murder of the famous actress Rebecca Schaeffer by a fanatic that, in 1990, the first stalking statute was enacted by the State of California.[119] Currently, all the states in the United States criminalize stalking behavior in one way or another.

The majority of the state stalking statutes make it a crime for "[a]ny person who willfully, maliciously, and repeatedly follows or maliciously harasses another person and . . . makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family."[120] Although it may seem that stalking statutes are intended to prevent a future physical harm to victims, some courts have also noted that such laws are designed to protect them from emotional harm.[121]

Stalking and harassing behaviors have taken new forms with the advent of the internet and social media technologies. Although it might have been unnecessary, some states have included language addressing electronic communications in their general stalking and harassment statutes to make it clear they apply to these new mediums.[122] Other states have simply created stand-alone statutes dealing with electronic harassment and stalking.[123]

---

117 *Id.* (quoting Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 524 (1984)).

118 *Id.*

119 *Id.* at 16-17.

120 *Id.* at 17 (quoting CAL. PENAL CODE § 646.9(a) (West 1999) (California does not make simple harassment a crime).

121 *Id.* at 20.

122 *Id. See State Cyberstalking and Cyberharassment Laws*, NATIONAL CONFERENCE OF STATES LEGISLATURES, http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx (last visited Oct. 16, 2015).

123 *State Cyberstalking and Cyberharassment Laws*, *supra* note 122. According to the National Conference of State Legislatures:

> Cyberstalking is the use of the Internet, email or other electronic communications to stalk, and generally refers to a pattern of threatening or malicious behaviors. Cyberstalking may be considered the most dangerous of the three types of Internet harassment, based on a posing credible threat of harm. Sanctions range from misdemeanors to felonies.

Id. The N.C.S.L. also explains that:

> Cyberharassment differs from cyberstalking in that it may generally be defined as not involving a credible threat. Cyberharassment usually pertains to threatening or harassing email messages, instant messages, or to blog entries or websites dedicated solely to tormenting an individual. Some states approach cyberharassment by including language addressing

At the federal level, a law known as the *Cyberstalking Statute* makes it a crime for any person:

> 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.[124]

The possibility that stalking and harassing statutes may be used against cyberbullies might primarily depend on whether the conduct involves direct or indirect cyberbullying. As discussed above, direct cyberbullying encompasses conduct in which the bully targets or "directs electronic communications directly at the victim,"[125] whereas in indirect cyberbullying the bully posts the messages in a "reasonably public area of cyberspace."[126]

i. Harassment and Stalking: Direct Cyberbullying

Harassment and stalking statutes require the state to prove a high level of intention or *mens rea* from the perpetrator because they are, "at least to some extent, evolved inchoate crimes."[127] In order to show this intention, a prosecutor "would have to prove beyond a reasonable doubt that the cyberbully engaged in conduct that was directed at the victim and was intended to cause the proscribed harm."[128] Furthermore, evidence of the perpetrator's capacity to inflict the harm, as well as proof of existence of the harm itself, is also required beyond reasonable

---

electronic communications in general harassment statutes, while others have created stand-alone cyberharassment statutes.

Id.

124 18 U.S.C. § 2261A(2) (2012); *see* Edward J. McAndrew, *Say Hello to My Little Friend: The New and Improved Cyberstalking Statute*, 62 THE U.S. ATT'YS' BULL., no. 1. 2014, at 30, http://www.justice.gov/sites/default/files/usao/legacy/2014/02/07/usab6201.pdf. It has been suggested by federal prosecutors that this statute could and should be used for cyberbullying.

125 Brenner & Rehberg, *supra* note 3, at 24.

126 *Id.* at 31.

127 *Id.* at 25.

128 *Id.*

doubt.[129] Thus, only in the "most egregious cases," it will be possible for a prosecutor to satisfy this high threshold.[130]

Another element that harassment or stalking statutes may require is evidence that the perpetrator intentionally "engaged in a 'course of conduct' directed at a victim."[131] In other words, a prosecutor must prove that the harassing behavior was persistent. Hence, unlike threat statutes, a single message sent to the victim would be insufficient proof to bring harassment or stalking charges against a cyberbully.[132]

In sum, although in theory it is possible to bring charges against a direct cyberbully for harassment or stalking, it will be difficult for the state to satisfy the high thresholds required, except in the most flagrant and serious cases. Direct cyberbullying presents fewer challenges because when the perpetrator directly targets the victim, the intent can be more easily inferred. However, a prosecution for cases that involve direct cyberbullying will still need to satisfy the requirements of the crimes of harassment and stalking. It will mostly depend on the evidence regarding the level of intention, the capacity of the perpetrator, the persistence with which the conduct was carried out and the maliciousness of the conduct itself. The ability to prove the emotional harm caused to the victim will be an important factor as well.[133]

ii. Harassment and Stalking: Indirect Cyberbullying

On the other hand, since indirect cyberbullying does not directly target the victim it is even more difficult for states to prosecute for harassment or stalking. Unlike direct cyberbullying, indirect cyberbullying gives rise to questions regarding the extent to which the perpetrators intentionally directed the harassing communications to a victim, and to the extent to which they intended that such communications be seen by third persons for the purpose of reaching and harming the victim.[134]

In a case related to indirect cyberbullying, a state court held that when crimes such as harassment and stalking "require[] specific intent, it is not enough to show

---

129 *Id.*

130 *Id.* at 26. In showing the capacity to commit the harm, the age of the perpetrator will be a factor to be considered. For example it is easier to prove intent from an adult, who can assess the consequences of his actions, whereas a child does not possess that level of maturity. Thus, it is more difficult for a state attorney to prove intent. In the case of proof of the harm, a decision maker (jury or judge) might weigh in the type of behavior involved to make an inference if any harm is likely to exist. In cases where the statute requires an emotional distress harm, which is intangible, it is hard to prove unlike physical harm.

131 *Id.* (citing ARIZ. REV. STAT. ANN. § 13-2923(A) (2001 & Supp. 2008) & S.D. CODIFIED LAWS § 22-11-32 (2006)).

132 *Id.* at 27. The authors add that: "The alleged bully could argue that the message was the result of a transient fit of temper or pique, not an intent to cause emotional distress." *Id.*

133 *Id.* at 26.

134 *Id.* at 31.

that the defendant knew or should have known her conduct could constitute harassment."[135] However, another court has stated that for someone "to commit an act with the intent to harass, annoy, or alarm another person, common sense informs that the person must have a subjective expectation that the offending conduct will likely come to the attention of the person targeted for the harassment, annoyance, or alarm."[136]

Although it may be possible to prosecute individuals who carry out indirect cyberbullying for harassment or stalking, it is highly improbable. This is because it would be difficult to prove beyond reasonable doubt that cyberbullies who post online harassing communications in places not readily accessible to their victims, had the specific intent to harass or stalk such victims. One of the possible ways in which prosecutors could prove such intent is if they had evidence of the cyberbullies having knowledge that the communications would eventually reach the victim and cause the proscribed harm.[137]

However, that type of evidence will not be available in most cases. Moreover, if the electronic communications are posted on a website where the victim's access is restricted, it will be almost impossible for the government to prove that the bully's intention was to stalk or harass such victim.[138] It is true that if the bully's communications eventually reach his or her victim, "they may well inflict the type[s] of harm"[139] that harassment and stalking statutes are designed to prevent. Nonetheless, the current legal framework creates uncertainty and poses serious challenges for prosecutors trying to deal with indirect cyberbullying. Particularly, the greatest challenge will ultimately be the proof of specific intent. Therefore, instances of indirect cyberbullying also have the potential of leaving victims who are harassed or stalked without a criminal legal remedy against their perpetrators.

III. First Amendment Doctrines

The First Amendment of the United States Constitution at times presents one of the biggest constitutional hurdles for the criminal regulation of cyberbullying.

---

135 *Id.* at 35. Brenner and Rehberg discuss *State v. Ellison*, 900 N.E. 2d 228 (Ohio 2008), and according to them the court added that "the facts do not establish that [the defendant] made an intentional, focused effort to get the information out to the broadest audience possible, they do not negate the inference that her purpose was informational." *Id.*

136 *Id.* at 36 (quoting A.B. v. State, 885 N.E.2d 1223, 1226 (Ind. 2008)).

137 *Id.* at 25. Examples of evidence that could be used to uphold charges of harassment or stalking carried out through indirect cyberbullying could be: conversations between the perpetrator and other people detailing the plans to harass or stalk a particular victim; prior knowledge that the victim frequents the online place to which the messages were posted, thus, an inference could be made that cyberbully knew that the messages would eventually be seen by the victim; independent proof of a pattern or prior history of harassment or stalking against the victim. This type of evidence, however, could be very hard for prosecutors to gather.

138 *Id.* at 73.

139 *Id.* at 40.

The Amendment, also known as the Freedom of Speech Clause, reads: "Congress shall make no law . . . abridging the freedom of speech."[140]

The following subsections briefly explore some of the different categories of unprotected speech as applied to cyberbullying and discuss the void-for-vagueness and overbreadth doctrines. As discussed below, most of the established categories of unprotected speech fail to address all of the various behaviors cyberbullying can entail. Furthermore, although indirect cyberbullying can be very problematic, the vagueness and the overbreadth doctrines pose the biggest challenges for criminal cyberbullying statutes.

Because cyberbullying entails various types of online conduct and it primarily involves speech,[141] it might be very difficult for legislators to draft comprehensive and constitutionally sound criminal prohibitions and for courts to uphold them. Moreover, the major constitutional defect at least in some of the recently enacted comprehensive criminal cyberbullying statutes is that they may be too ambitious.[142] It has been argued that with the intent of covering all types of conducts involved, some legislators have drafted statutory language which "conflates the definition of cyberbullying as a social problem with the legal definition of cyberbullying as a crime, violating prohibitions against vagueness and overbreadth in the process."[143] These particular cyberbullying statutes also add to the problems of victims being unable to find remedies against their perpetrators through the criminal legal system.

A. Unprotected Categories of Speech

The United States Supreme Court has established various categories of speech, which are not protected by the Freedom of Speech Clause. Thus, governments may be able to enact statutes that regulate these types of unprotected

---

140 U.S. CONST. amend. I.

141 *See What Does Free Speech Mean?*, U.S. COURTS, http://www.uscourts.gov/educational-resources/get-involved/constitution-activities/first-amendment/free-speech.aspx (last visited Oct. 16, 2015) ("Among other cherished values, the First Amendment protects freedom of speech. The U.S. Supreme Court often has struggled to determine what exactly constitutes protected speech."); see also *What is "Speech" within the Meaning of the First Amendment?*, UMKC, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/whatisspeech.html (last visited Oct. 16, 2015), which states that:

> The First Amendment protects against abridgements of the "freedom of speech." Although in many cases the question of whether speech has been regulated is not in doubt, as with most restrictions on oral or written communication, in some it is an important threshold issue for courts to consider. If the regulated activity is not "speech," then it is not protected by the First Amendment and there is no need to extend the constitutional analysis further.

Id.

142 Lidsky & Pinzon, *supra* note 36, at 698.

143 *Id.* It has been contended that: "Cyberbullying as a social problem is broad in scope . . . . These definitions are useful in devising broad policy response [or even] establishing response plans for public schools. First Amendment principles, however, demand that law-makers use narrower, perhaps less politically satisfying, definitions." *Id.* at 698-99.

speech without violating the First Amendment. Some of these categories involve: true threats, incitement, fighting words, defamation and invasion of privacy. However, generally these doctrines do not adequately cover all the types of speech that cyberbullying can entail.

As discussed above, some communications that could constitute cyberbullying might be able to be criminally punished under *threat* statutes. However, "many others would, probably not meet the Supreme Court's properly rigorous definition of [true] 'threat.'"[144] Similarly, *incitement*, which was held to be "a permissible limit on free speech [,]" requires that "the targeted speech . . . pose a direct threat of 'imminent lawless action with a high probability such action would promptly ensue.'"[145] Thus, it has been argued that this strict requirement makes the application of the incitement doctrine to cyberbullying "virtually impossible."[146] Nonetheless, arguments to the contrary can be made. For example, incitement could apply in cases where the cyberbully might be able to remotely incite people who are in physical proximity to the victim to cause a direct threat of imminent lawless action with a high probability such action would promptly ensue.

In regards to the *fighting words* exception, the United States Supreme Court has held that the doctrine requires "language so provocative that it would (almost) certainly trigger immediate violence from the person whom it is directed [at]."[147] Nonetheless, cyberbullying is usually carried out remotely through the use of digital technologies, whereas the fighting words doctrine is limited to "fac[e]-to-face situation[s]."[148] Therefore, the fighting words exception would likely be inapplicable to most instances of cyberbullying.

In the case of the *defamation* exception, the doctrine "yields no greater promise" either.[149] While a victim would most likely be considered as a non-public figure and thus free from the exceptions and high burden of proof held to be required in *New York Times v. Sullivan*,[150] as discussed above, not all states have criminal defamation statutes. Furthermore, as it has also been discussed, the United States Supreme Court has hinted that defamation may be inappropriate for penal control.[151]

Finally, the *invasion of privacy* category may be thought to be useful for the purpose of criminally regulating some types of cyberbullying. However, it would

---

144 Anthony S. Montagna, *When Words Harm: Cyber Bullying: What Should the Legal Consequences Be for Abusive Speech? Is it Protected? Should it Be a Crime or Sanctioned Under Civil Liability Law?* 4, n.22 (June 9, 2011) (citation omitted), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1861565_code1466213.pdf?abstractid=1861565&mirid=1&type=2 (last visited Oct. 16, 2015).

145 *Id.* at 5 n.23 (citation omitted).

146 *Id.*

147 *Id.* at 5 n.24.

148 *Id.*

149 *Id.* at 5 n.25.

150 New York Times v. Sullivan, 376 U.S. 254 (1964).

151 Lidsky & Pinzon, *supra* note 36, at 720.

not apply to all of the various conducts that cyberbullying can entail. Moreover, it has been contended that the invasion of privacy exception's "constitutional status is less clear than defamation and [its] applicability [to cyberbullying] is doubtful."[152] However, it has been also argued that the First Amendment does not bar criminal regulation of non-consensual pornography such as instances of revenge porn, as long as the statute is narrowly drafted.[153]

In sum, the current judicial interpretations of the current unprotected speech doctrines might not be able to serve criminal cyberbullying regulation well. It will eventually require modification of the courts' approach to these doctrines in order for them to be adequately used in cyberbullying situations.

B. Void-for-Vagueness Doctrine

It has been judicially interpreted that the due process Clauses of the United States Constitution, [154] forbid the state to convict individuals under a statute that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[155] This principle is known as the *void-for-vagueness* doctrine. The vagueness rule, which presents a facial challenge to a criminal statute, "rests on settled principles."[156] Although it applies to statutes that deal with criminal conduct in general, the United States Supreme Court has developed a modified version of the original two-part test for resolving challenges involving laws that affect protected speech.[157]

The first part of the analysis examines whether the law "provides proper notice or fair warning of the prohibited conduct."[158] This requirement derives from the principles of due process, which protect persons from being unfairly convicted. Similarly, the second part of the test "requires that the statute provide clear standards of enforcement for officials tasked with its implementation."[159] This second part is designed to protect against "arbitrary and discriminatory enforcement" of a particular statute.[160] Furthermore, if the degree of vagueness in a law is such, that

---

152 Montagna, *supra* note 144, at 5 n.26.

153 Citron & Franks, *supra* note 81, at 377. Revenge porn could be labeled as cyberbullying, and could lead to more cyberbullying.

154 U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

155 Brian Hodgkinson, *Don't Feed the Deer: Misapplications of Statutory Vagueness and the First Amendment Overbreadth Doctrine*, 29 TOURO L. REV 949, 951 (2013) (quoting People v. Gabriel, 950 N.Y.S.2d 874, 881 (Co. Ct. 2012)).

156 *Id.* at 954.

157 *Id.* (citing Smith v. Goguen, 415 U.S. 566, 573 (1974)).

158 *Id.* "Whether a statute provides proper notice is an inherently flexible and often unclear determination." *Id.* at 955.

159 *Id.* (citing *Goguen*, 415 U.S. at 573).

160 *Id.* (quoting *Goguen*, 415 U.S. at 573; Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

it "dissuad[es] people from engaging in such speech, courts have required a heightened degree of specificity" in the statutory language.[161]

Criminal laws drafted to cover all of the online conduct that cyberbullying can entail are particularly prone to vagueness challenges. It is hard for legislators to draft these statutes with enough specificity without leaving victims unprotected from other types of cyberbullying. Much of the enacted legislation that is drafted to be comprehensive is likely to contain vague statutory language. For example, the Arkansas cyberbullying law makes it a misdemeanor "when a person 'transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, harass, or alarm another person; and [t]he transmission was in furtherance of severe, repeated, or hostile behavior towards the other person.'"[162]

As outlined above, the Arkansas cyberbullying law makes it a crime for a person to *frighten* or *alarm* another individual, which are words very similar to *annoy*. However, United States Supreme Court jurisprudence indicates that the use of this type of wording might make the Arkansas law void for vagueness. For example, in *Coates v. Cincinnati*, the Court declared unconstitutional a city ordinance that made it a crime for three or more persons to assemble on a sidewalk and "conduct themselves in a manner annoying to persons passing by."[163] It determined that the ordinance was void for vagueness because "[c]onduct that annoys some people does not annoy others."[164] The same could be applicable to laws that proscribe *frightening* conduct.

Similarly, some courts have also held that statutes that make a person criminally liable for merely *annoying* another are also void for vagueness.[165] Thus, it has been suggested that statutes like the Arkansas cyberbullying law may be vague because they "fail[] to put the defendant on notice of [the] types of electronic communications he [or she] can engage in without violating the statute and [give] law enforcement too much leeway to prosecute mere bad manners."[166]

However, it is possible that some criminal cyberbullying laws, depending on how they are drafted, could avoid vagueness challenges and pass constitutional

---

161 *Id.* (citing *Goguen,* 415 U.S. at 573). Hodgkinson adds that:

> "[V]ague", [must be understood,] 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Such deficiencies preclude cognizant inclusion in and exclusion from prohibited conduct, wherein lies the Due Process offense.

Id. at 956 (citations omitted). One of the primary concerns is that a vague law would "allow[] policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (quoting *Goguen,* 415 U.S. at 575).

162 Lidsky & Pinzon, *supra* note 36, at 713-14 (quoting ARK. CODE ANN. § 5-71-217 (West 2012)).

163 Brenner & Rehberg, *supra* note 3, at 28 (quoting Coates v. Cincinnati, 402 U.S. 611, 611 (1971)).

164 *Id.* (quoting *Coates*, 402 U.S. at 614).

165 *Id.* (citing Karenev v. State, 258 S.W.3d 210, 216-217 (Tex. 2009)).

166 Lidsky & Pinzon, *supra* note 36, at 714.

muster. Some courts have upheld harassment laws that include limiting conditions, "such as a requirement that the conduct have 'no legitimate purpose' or harm requirements that go beyond merely annoying or alarming the victims."[167] Other courts have also upheld laws that include "a specific intent to harass the victim"[168] as another limiting condition that could prevent rendering similar statutes void for vagueness.

The United States Supreme Court has indicated that "'the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*,' and 'a scienter requirement [that] may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.'"[169] Thus, a specific intent requirement should put people of ordinary intelligence on notice of the prohibited conduct. Furthermore, in the past, courts have found that the 2000 version of the Federal Cyberstalking Statute[170] was not void for vagueness because the terms utilized in the law "may be defined with reference to their dictionary meaning or the meaning they are given in other judicial decisions."[171]

It has also been argued that statutes like the Federal Cyberstalking one, pose "little danger of a standardless sweep" by police or prosecutors.[172] First, the statute requires intent and harm of substantial emotional distress to the victim, "both of which provide standards for enforcement."[173] Secondly, because "a victim must first come forward"; law enforcement authorities cannot "spontaneously" enforce the law.[174] Therefore, the risk of police discriminatorily enforcing the statute and arbitrarily depriving the public of liberty interests may be diminished.[175] If cyberbullying statutes are drafted in this type of way, there is at least, a plausible argument that a cyberbullying law similar to the Federal Cyberstalking Statute would not be vague. However, a federal district court recently held that the current version of the Federal Cyberstalking Statute was unconstitutional as applied to the defendant.[176]

---

167 Brenner & Rehberg, *supra* note 3, at 29 (quoting Commonwealth v. Welch, 825 N.E.2d 1005, 1018-19 (Mass. 2005)).

168 *Id.* at 19.

169 Major, *supra* note 55, at 137 (footnote omitted) (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

170 18 U.S.C. § 1028 (2012).

171 Major, *supra* note 55, at 138 (citing United States v. Bowker, 372 F.3d 365, 381 (6th Cir. 2004)).

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *See* United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011). Major writes: "The court held that the statute was content based and failed strict scrutiny in part because it assumed [the victim, who the court determined to be a public figure,] could have simply averted her eyes to avoid the offensive speech." Major, *supra* note 55, at 120. On the other hand, Timothy Allsup writes:

C. Overbroadness Doctrine

Like the *void-for-vagueness* doctrine, the *overbroadness* doctrine concerns a facial challenge to determine if a statute is unconstitutional. Both doctrines are closely related and often implicate each other because "[t]he broad sweeping language of [a] regulation [may] chill[] constitutionally protected conduct [while] leav[ing] law enforcement in a position to arbitrarily enforce the law."[177] Furthermore, a vague statute may have consequences that go beyond the ones envisioned by legislators or allowed by the Constitution, thus making the law overbroad.

When dealing with an overbroadness challenge, the courts analyze the statute to see if "its aggregate rather than in single conceived applications, prohibits a substantial amount of protected conduct."[178] If this is the case, the challenged statute is overbroad. Furthermore, when dealing with a statute that regulates protected speech, it is required that the law "be narrowly tailored to serve the government's legitimate interest."[179] In other words, the restrictions on speech cannot be "substantially broader than necessary to achieve that []interest."[180]

The United States Supreme Court has also added that, in order for the doctrine to apply, the overbreadth must be "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[181] Thus, the presumptively impermissible applications of a law which regulates speech cannot outnumber the permissible ones.

However, there are various limitations to this doctrine. First, the overbreadth doctrine has been held to be "strong medicine" that should be applied "sparingly and only as a last resort . . . [and not] when a limiting construction has been or

---

> Despite the great protections provided by the First Amendment, not every law that impacts speech is necessarily unconstitutional. The scrutiny that laws must meet differs with the restrictions they place on speech. If a law provides a content-based restriction, a restriction that singles out certain speech and is concerned with its effect on an audience, the law must pass strict scrutiny under the First Amendment.

Timothy L. Allsup, *United States v. Cassidy: The Federal Interstate Stalking Statute and Freedom of Speech*, 13 N.C. J.L. & TECH. 227, 242 (2012) (citing United States v. Playboy Entm'tGrp., Inc., 529 U.S. 803, 813 (2000)). Although this is not the focus of this paper, if courts like in *Cassidy*, determine that criminal cyberbullying laws contain content-based restrictions on speech as applied to a particular defendant, it will be very difficult for the law to pass strict scrutiny. In this scenario the court could simply hold the statute facially unconstitutional without having to address any vagueness or overbroadness challenges. The possibility of unconstitutionality under this challenge is, however, another possible problem that criminal cyberbullying laws may face.

177 Hodgkinson, *supra* note 155, at 954 (quoting People v. Gabriel, 950 N.Y.S.2d 874, 886 (Co. Ct. 2012)).

178 *Id.* at 953 (citing *Gabriel*, 950 N.Y.S.2d at 884).

179 *Id.* (quoting *Gabriel*, 950 N.Y.S.2d at 885).

180 *Id.* Major writes that: "The overbreadth doctrine acknowledges that 'the First Amendment needs breathing space' and therefore, statutes restricting First Amendment rights must be 'narrowly drawn.'" Major, *supra* note 55, at 133 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973)).

181 Hodgkinson, *supra* note 155, at 957 (quoting *Broadrick*, 413 U.S. at 615); Virginia v. Hicks, 539 U.S. 113 (2003).

could be placed on the challenged statute."[182] Second, it has been held that invalidating a statute on its face "may vitiate the benefits sought by narrowing its expansive scope."[183] Particularly, the United States Supreme Court, in the case of *Broadrick v. Oklahoma*,[184] suggested that "there are substantial social costs created by the overbreadth doctrine when it blocks [the] application of a law[,] . . . especially to constitutionally unprotected conduct."[185] Finally, statutes that regulate "in 'an even-handed and neutral manner' are subject to 'less exacting overbreadth scrutiny.'"[186]

Some legal scholars have argued that many cyberbullying laws might be impermissibly overbroad. For example, it has been claimed that the above mentioned Arkansas law, which makes it a crime to intentionally alarm and frighten a person by electronic means, is not only vague, but also "overbroad because it sweeps a large swatch of clearly protected speech into its purview along with the unprotected."[187]

Most of these concerns are based on the possibility that cyberbullying statutes might create a chilling effect on, or criminalize constitutionally protected speech. For example: "Would emailing a homophobic, racist, or religiously intolerant cartoon or joke to a known 'liberal' trigger the statute? How about posting a picture of two men kissing on the Facebook page of a fundamentalist preacher?"[188] It is because of such uncertainties that it has been contended that the First Amendment impedes states from imposing criminal liability on speech merely because it discomforts, alarms or annoys its target audience.[189] Furthermore, it is also argued that speakers have the freedom to choose this type of speech "because of its emotive impact; . . . [because it is a] powerful means of conveying one's message."[190]

However, other scholars have proposed arguments against declaring certain criminal cyberbullying statutes unconstitutionally overbroad. For example, it could be contended that the Federal Cyberstalking Statute and similarly drafted cyberbullying laws, are not overbroad.[191] First, it could be argued that because they do not target "speech of particular groups or viewpoints", they are "'even-handed

---

182 Hodgkinson, *supra* note 155, at 957 (quoting *Broadrick,* 413 U.S. at 613). Major nonetheless adds that: "the court may decline to construe [a] statute to avoid constitutional doubts, as it would not 'rewrite a . . . law to conform it to constitutional requirements.'" Major, *supra* note 55, at 134 (quoting United States v. Stevens, 559 U.S. 460, 481 (2010)).

183 Hodgkinson, *supra* note 155, at 957 (citing Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

184 Broadrick v. Oklahoma, 413 U.S. 601 (1973).

185 Hodgkinson, *supra* note 155, at 957–58 (quoting *Hicks*, 539 U.S. at 119).

186 Major, *supra* note 55, at 133 (quoting *Broadrick,* 413 U.S. at 616).

187 Lidsky & Pinzon, *supra* note 36, at 714.

188 *Id.*

189 *Id.* at 715.

190 *Id.* (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992)).

191 18 U.S.C. § 2261A(2) (2012).

and neutral' in such a way as to justify less exacting overbreadth scrutiny."[192] Furthermore, it has been contended that as long as the speech causes harm (substantial emotional distress) and the perpetrator acts with the intent required by the statute, even indirect or overt communications could legitimately fall within the scope of the law.[193]

Secondly, if courts follow the doctrine's "generally preferred procedure" and apply it "only as a last resort," they could construe the law to avoid constitutional issues.[194] By doing this, "overbreadth concerns [may] dissipate in light of what speech would actually be covered by the statute."[195] Thus, it is plausible that if courts carry out a limited construction of the comprehensive criminal cyberbullying statutes, they could lessen First Amendment concerns.[196] But at least one court has already declared the Federal Cyberstalking Statute unconstitutional.[197]

IV. Civil Remedies and the Intentional Infliction of Emotional Distress Tort

There are various civil remedies that could be used to address cyberbullying in the United States. Depending on the type of cyberbullying situation involved, a victim could bring a civil suit against his or her cyberbully or cyberbullies for civil defamation, invasion of privacy, or IIED.[198] Currently, the IIED tort appears to be the most promising legal action to address this toxic behavior.

A. Civil Defamation

Civil defamation, similar to its criminal counterpart, pertains to communications that harm the reputation of individuals. There are two types of defamation

---

192 Major, *supra* note 55, at 135 (quoting *Broadrick*, 413 U.S. at 616).

193 *Id.*

194 *Id.* at 134 (quoting United States v. Stevens, 559 U.S. 460, 4815 (2010) (Alito, J., dissenting)).

195 *Id.* at 135

196 *Id.* at 136. Major notes that:

> Looking to the drafters' intent, here are two plausible limiting constructions that could mitigate First Amendment concerns [about the federal stalking statute]: First, the statute could be interpreted to apply only to speech with the sole intent of causing substantial emotional distress. This stronger intent requirement, if applied strictly, would prevent the statute from capturing much of the political speech that it may otherwise chill. . . .
>
> Second, the statute could be interpreted to require an objective standard for substantial emotional distress. Thus, rather than relying on the particular victim's subjective reaction to the speech, the statute would only apply when a reasonable person would experience substantial emotional distress.

Id. at 136-37 (footnote omitted).

197 United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011).

198 Scott D. Camassar, *Cyberbullying and the Law: An Overview of Civil Remedies*, 22 ALB. L.J. SCI. & TECH. 567, 580 (2012).

torts: libel, which involves written defamatory statements, and slander, which involves oral defamation.[199] Usually, for plaintiffs to succeed in a civil action for defamation, courts require that they prove that: "(1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff[s] to a third person; (3) the defamatory statement was published to a third person; and (4) the [plaintiffs'] reputation suffered injury as a result of the statement."[200]

Therefore, it is clear that a victim of cyberbullying could bring a defamation lawsuit against his or her cyberbully only if these requirements are met. This type of action might be particularly useful in cases where cyberbullies spread false rumors of their victim on the internet. However, if the online bullying does not "involve[] harmful words that are published to others beyond the victim, and damages the victim's reputation,"[201] they must find an alternative legal remedy that fits into the specific circumstances.

As discussed above, the United States Supreme Court has drafted a complex body of jurisprudential requirements for defamation lawsuits. The possibility of using this type of civil action against cyberbullies will also largely depend on the interpretation that courts give to that longstanding jurisprudence in light of this new form of defamation.

B. Invasion of Privacy Tort

Invasion of privacy is another tort that could be used against cyberbullies. It is possible to bring this type of action when there is an: "(a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; or (d) publicity that places the other in a false light before the public."[202] Thus, this tort would be very suitable for cyberbullying cases similar to Tyler Clementi's, in which the bully surreptitiously acquires or broadcasts intimate images of the victim over the internet without his or her consent.

The invasion of privacy tort contains a more expansive definition than the ones encompassed in criminal invasion of privacy statutes. Nevertheless, the tort might not apply, for example, in cyberbullying cases in which the victim willingly sends private or intimate information about himself or herself to another person and said person redistributes it. This could predominantly take place in instances where people engage in the act of sexting and later become victims of revenge porn.[203]

---

199 *Id.*

200 *Id.* (quoting Gambardella v. Apple Health Care, Inc., 863 A.2d. 735, 740 (Conn. App. Ct. 2005)).

201 *Id.*

202 *Id.* at 582 (quoting Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1329 (Conn. 1982)).

203 Elizabeth Hartney explains that:

However, it is important to note that legal scholars have called for a change in the interpretation of invasion of privacy jurisprudence that deals with these types of circumstances.[204] Citron and Franks recognize that this type of tort ineffectively protects people's privacy, especially that of women and girls. They suggest that the lack of privacy protection in cases of non-consensual pornography is due to several factors, such as: "lack of understanding about the gravity, scope, and dynamics of the problem; historical indifference and hostility to women's autonomy; inconsistent conceptions of contextual privacy; and misunderstandings of First Amendment doctrine."[205]

Furthermore, they argue that consent is "context-specific" and that the "consent within a trusted relationship does not equal consent outside of that relationship."[206] This particular interpretation would also help give cyberbullying victims more protection from their perpetrators, especially female victims. However, until a change in our legal framework occurs, victims of cyberbullying might not be able to find redress under invasion of privacy torts in these situations.

Under different circumstances, the Alabama Supreme Court has held that a school did not violate the privacy of various students who had emailed nude pictures of themselves to another student, when the administration requested the recipient to submit the photographs.[207] The court added that "the matter was no longer private, and the students could no longer have had an expectation of privacy regarding the photographs because there is 'no privacy in that which is already public.'"[208] Thus, under this argument cyberbullying victims might be unable to find redress under the invasion of privacy tort when courts find that the information used by the perpetrator was in some form already public.

In sum, considering the poor protection established by the courts in cases of invasion of privacy and the fact that it will not cover other types of cyberbullying

---

> Sexting is the act of sending sexually explicit material using text messaging. It is often done using mobile phones. Sexts can include sexually explicit text messages, or they can include sexually explicit photographs, images or videos.
>
> Sexting is typically carried out deliberately, with people sending sexts about themselves. But sometimes, sext messages can be sent which contain sexually explicit material about someone else, who may or may not consent to the sext.
>
> Sexts can also be sent to someone who does not wish to receive sexually explicit material.

Elizabeth Hartney, *What is Sexting?*, ABOUT (May 21, 2014), http://addictions.about.com/od/lesserknownaddictions/g/What-Is-Sexting.htm (last visited Oct. 16, 2015); *see also* Sherri Gordon, *What is Sexting and How it Leads to Bullying*, ABOUT (Aug. 4, 2015), http://bullying.about.com/od/Cyberbullying/a/What-Is-Sexting-And-How-It-Leads-To-Bullying.htm (last visited Oct. 16, 2015).

204 *See* Citron & Franks, *supra* note 81.

205 *Id.* at 347.

206 *Id.* at 348.

207 S.B. v. Saint James School, 959 So.2d 72 (Ala. 2006).

208 *Id.* at 92 (quoting Abernathy v. Thornton, 83 So.2d. 235, 237 (Ala. 1955)).

behaviors, this tort might sometimes be an inadequate remedy for many cyberbullying victims.

C. Intentional Infliction of Emotional Distress Tort

The Intentional Infliction of Emotional Distress tort might be the most promising option for victims to find redress from the perpetrators of cyberbullying attacks. As suggested above, cyberbullying can encompass a great variety of conducts that are not always easily analyzed using traditional negligence or defamation theories.[209] However, this tort has been described "as limitless as the human capacity for cruelty."[210] Thus, unlike defamation and invasion of privacy law suits, a "claim for intentional infliction of emotional distress will probably apply in most cyberbullying situations."[211]

Generally, for plaintiffs to succeed in an IIED claim, they must establish *prima facie* four elements:

> (1) [T]hat the defendant intended to inflict emotional distress, or knew or should have known that emotional distress was a likely result of [their] actions; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress, and (4) that the emotional distress sustained by the plaintiff was severe.[212]

It has generally been ruled that behavior is "extreme and outrageous" where it exceeds "all bounds usually tolerated by decent society, [and is] of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind."[213] Similarly, it has also been mentioned that the test to determine

---

209 Kaufman & Baydala, *supra* note 4.

210 *Id.* (quoting Howell v. New York Post Co, 81 N.Y.2d 115, 122 (1993)).

211 Camassar, *supra* note 198, at 581 (citing Kaufman & Baydala, *supra* note 4).

212 *Id.* at 580-81 (citing DeLaurentis v. New Haven, 597 A.2d 807 (Conn. 1991)). Similarly,

> In order to impose liability for intentional infliction of emotional distress, four elements must be satisfied.
>
> First, the conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Second, there must be intent to cause or disregard of a substantial probability of causing severe emotional distress. Third, there must be a causal connection between the conduct and the injury. Fourth, the plaintiff must actually suffer severe emotional distress.

Kaufman & Baydala, *supra* note 4 (footnotes omitted).

213 Camassar, *supra* note 198, at 580-81 (quoting Bell v. Bd. of Educ., 739 A.2d 321, 327 (Conn. App. Ct. 1999)).

outrageous conduct requires a case in "which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and leave him to exclaim 'Outrageous!'"[214]

The IIED tort has not always been recognized as a legitimate civil remedy. "Liability for pure emotional harm alone was neither a favorable cause of action under English common law, nor in existence at the time the First Amendment protections for speech became a reality."[215] The first time that an English court accepted a claim solely based on emotional harm was in *Wilkinson v. Downtown* in 1897.[216] In the United States, this type of action was not available until 1948, the year in which the Restatement (Second) of Torts changed its initial position,[217] which held that there was no recovery solely for emotional injury.[218]

Currently, all the states and territories in the United States recognize IIED as a civil cause of action in one way or another.[219] However, it has been contended that generally courts deny recovery when the emotional harm is not accompanied by some type of physical injury.[220] Notwithstanding the rigorousness or difficulty of satisfying the requirements of an IIED claim, victims of cases similar to Megan Meier's or Tyler Clementi's would surely be able to find redress under this tort.[221]

Although evidence of a drastic outcome such as suicide should not be imperative, proof of a harmful consequence such as mental illness or time lost from work or school should be sufficient to satisfy the claim's requirements. Moreover, "[n]euroscientific evidence supports the conclusion that verbal assaults can manifest themselves in physical pain."[222] Therefore, when an instance of cyberbullying involves outrageous verbal attacks against a victim, they "might ultimately experience physical pain,"[223] which would in turn strengthen a claim for IIED against the perpetrator.

---

214 Jaffe, *supra* note 31, at 481 (quoting Yarbray v. S. Bell Tel. & Tel. Co., 409 S.E.2d 835, 837 (Ga. 1991)).

215 *Id.* at 476; *see* Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 140 (1992).

216 Wilkinson v. Downton, 2 Q.B. 57 (1897); *see* Jaffe, *supra* note 31, at 476.

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

218 *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1983).

219 Jaffe, *supra* note 31, at 479.

220 Leslie Yalof Garfield, *The Case of a Criminal Law Theory of Intentional Infliction of Emotional Distress*, 5 CRIM. L. BRIEF 33, 42 (2009); *see* Jaffe, *supra* note 31.

221 *See* Kaufman & Baydala, *supra* note 4.

222 Garfield, *supra* note 220, at 40.

223 *Id.*; Garfield also states:

> Neuroscientific studies show that verbal abuse can bring about physical symptoms, which in turn cause physical pain. Actual measurable neurochemical changes can occur in the amygdala—the part of the brain that performs a primary role in processing emotional reactions—when an individual is verbally assaulted or experiences some other type of emotional trauma. The amygdala instantly responds by inducing a series of physiologic reactions including rapid heart rate, palpitations, sweating and increased blood flow to large muscle

Although the United States Supreme Court has not determined if "speech alone [is] sufficient to sustain a claim for IIED, it is generally accepted that extreme or outrageous speech can justify [such claim]."[224] However, it has been argued that the Court's recent decision in *Snyder v. Phelps*,[225] has made IIED claims "all but obsolete."[226] This argument is primarily based on the Court's decision which held that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[227]

In *Snyder v. Phelps*, the Court had to determine if the First Amendment protected the members of the Westboro Baptist Church from liability from an IIED claim related to their speech.[228] The plaintiff, who was the father of a deceased United States marine, was claiming damages that resulted from the church members' picketing in his son's funeral. The church members purpose to protest was to "demonstrate their view that 'the United States is overly tolerant of sin and that God kills American soldiers as punishment.'"[229] The protestors had solicited prior permission from the local authorities and stayed "within the area set aside for the group's demonstration, [holding] signs stating: 'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' . . . 'God Hates Fags,'" among other statements.[230]

In determining if the First Amendment shielded the church members from liability for their speech, the Court pointed out that it would primarily depend "on

---

groups. These physiological changes in the brain, which occur congruently with emotional harm, become a form of physical pain, from which the victim clearly suffers.

> . . . A person suffering from depression may also suffer from "persistent aches or pains, headaches, cramps or digestive problems . . ." according to the National Institute of Mental Health. Exacerbating this disease through a verbal assault can result in more severe physical symptoms that often accompany anxiety disorders include "fatigue, headaches, muscle tension, muscle aches, difficulty swallowing, trembling, twitching, irritability, sweating, nausea, lightheadedness, having to go to the bathroom frequently, feeling out of breath, and hot flashes."
>
> In other instances, while the outrageous conduct of IIED might not immediately cause physical pain, specific studies confirm that, despite the non-physical nature of verbal abuse, abuse from IED can be as damaging as physical harm. In 1990, Psychologists Nicole M. Capezza and Ximena B. Arriaga conducted a study, in which they found that seventy-two percent of 234 female victims of both physical and psychological abuse indicated that they were more negatively impacted by the psychological abuse than the physical abuse.

Id. at 41 (footnotes omitted).

224 Jaffe, *supra* note 31, at 475.

225 Snyder v. Phelps, 562 U.S. 443 (2011).

226 Jaffe, *supra* note 31, at 475.

227 *Id.* (quoting *Snyder*, 562 U.S. at 451).

228 *Snyder*, 562 U.S. at 475.

229 Jaffe, *supra* note 31, at 483 (quoting *Snyder*, 562 U.S. at 447).

230 *Id.* (quoting *Snyder*, 562 U.S. at 448). The Court considered as a factor that the church had asked for prior permission.

whether that speech is of public or private concern, as determined by all the circumstances of the case."[231] The Court also suggested that:

> "[N]ot all speech is of equal First Amendment importance,'" however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.[232]

Finally, the Court explained that in determining whether certain speech pertains to a matter of public concern, the "inappropriate or controversial character of a statement" is beside the point.[233] The Court examined the "content, form and context" of the statements, and "concluded [that] the content [in] Westboro's signs related to issues of interest to society at large."[234] In other words, the Court held that the First Amendment shielded the Westboro Church Members from liability from the IIED claim because their statements were predominantly of public concern.[235]

Elizabeth M. Jaffe has argued that this decision could give a "free pass" to bullies.[236] Particularly, Jaffe fears that bullies, by merely following the precedent in *Snyder*, could intentionally inflict emotional distress on victims with outrageous speech without fearing any type of liability.[237] However, many (if not most) cyberbullying cases could be distinguished from the type of speech and circumstances

---

231 *Id.* at 484 (quoting *Snyder*, 562 U.S. at 444).

232 *Id.* (citations omitted) (quoting *Snyder*, 562 U.S. at 452).

233 *Id.* at 485 (quoting *Snyder*, 562 U.S. at 453).

234 *Id.* (citing *Snyder*, 562 U.S. at 454).

235 *Id.* Jaffe notes that the Court considered that:

> "Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street." Moreover, a public space adjacent to a public street is afforded a "special position" for First Amendment protection as public streets and sidewalks have historically been used for public assembly and debate.

Id. at 486 (quoting *Snyder*, 562 U.S. at 456); Jaffe also adds that: "[Furthermore], the Court reasoned that even if some of the signs specifically contained messages directed at Matthew Snyder or his family, that 'would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.'" *Id.* at 485 (quoting *Snyder*, 562 U.S. at 454).

236 *Id.* at 488. Jaffe asks:

> What did *Snyder* do to the claim of IIED? Does a bully now have a free pass to inflict pain upon the victim so long as the bully provides notice of his or her intent to harm and complies with any instructions affixed by regulatory individuals? Even worse, is a bully now safe—and essentially free from liability—so long as an established pattern of previous activity exists, the harm is limited in time, the manner of delivery is restricted, and the harm to another does not disturb many others?

Id. (footnotes omitted).

237 *Id.* at 493. Jaffe, discussing how a bully might be able to circumvent IIED liability mentions:

> The Supreme Court's holding in *Snyder* essentially gives the bully a free pass so long as the bully's extreme and outrageous conduct both occurs in a public place where the bully is

involved in *Snyder* because, for example, often online bullying occurs between private people and involves matters of private concern. Furthermore, the Court specifically noted that its holding was a narrow one.[238]

More importantly, if a bully tries to circumvent any liability from an IIED claim by masking an attack on the victim by using speech on public matters, a "pre-existing relationship or conflict between [the bully] and [the victim],"[239] might reveal the collusive nature of his actions. Thus, in this scenario "redress for the victim under a claim for IIED may not be completely shielded."[240]

However, *Snyder* may complicate application of IIED in cases of indirect cyberbullying. In instances in which a cyberbully intentionally publishes emotionally distressing communications to the public at large instead of directly to the victim, a court might find the speech as having acquired a much more public quality; the type of public quality speech that the Supreme Court in *Snyder* interpreted to be worthy of First Amendment protection. But again, if a pre-existing relationship between the perpetrator and the victim exists (as it is often the case in cyberbullying), a court should dismiss a First Amendment challenge.

Some may argue that a cyberbully who writes on his or her victim's Facebook wall "God hates fags" would be shielded from IIED liability according to *Snyder*. But the *Snyder* Court also suggests that, in order to be shielded from liability, the speaker would have to establish that: (1) a pattern of previous protest activity existed; (2) a prior notice was given to the authorities of an intent to protest, and (3) the place where the statements were made is a place where the speaker has a legal right to be, among other elements. These requirements would largely limit the instances where a cyberbully could be shielded from IIED liability by the First Amendment. Mainly, the private Facebook wall, the mobile phone or the email

---

lawfully entitled to be, and the conduct "relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'" Using the First Amendment as a shield, a bully can become the all-powerful "constitutional bully" by merely following the High Court's precedent set forth in *Snyder*.

> First, the "constitutional bully" may choose a victim that is not a public figure. . . . Second, providing the victim notice, directly or indirectly, of the constitutional bully's intention to invoke the harmful conduct ensures that the victim is aware of what is to come. . . . Then, the constitutional bully can ensure the extreme and outrageous conduct directed toward the victim is couched in some matter of "public concern" and can calculate the message "to reach as broad a public audience as possible."
>
> Next, the constitutional bully can craft the conduct and messages directed toward the victim in general phrases that avoid proper names or references directly to the victim. . . . Then, the constitutional bully need only place his or her soap box at a strategic location and convey the message from a place where the bully has the legal right to be.

Id. 493-94 (footnotes omitted).

238 *Id.* at 487.

239 *Id.* at 494 (quoting *Snyder*, 562 U.S. at 455).

240 *Id*.

inbox of a victim should not be places where an *outrageous speaker* has a legal right to be, even if the matter is of *public concern*.[241]

However, as discussed above, the analysis may be more problematic in instances of indirect cyberbullying. If, for example, a cyberbully posts a similar message to "God hates fags," linking the victim with the message, but in a website with public access, it might appear as if the bully is trying "'to reach as broad a public audience as possible' . . . . [or in] a place where the bully has the legal right to be."[242] Nevertheless, the holding in *Snyder* was a narrow one, and was not decided in a "cyber" context. For now, this is an undecided issue and a matter of judicial interpretation that will eventually be determined by the courts.

V. The Pros and Cons of IIED as a Legal Remedy for Cyberbullying

As discussed above, the IIED tort might be an ideal approach for victims to find redress against their cyberbullies because of its ability to cover most, if not all, types of online bullying as long as it is outrageous and causes severe emotional distress. However, the main disadvantage IIED torts have, much like civil claims in general, is the difficulty of actually recovering money damages.[243] It is possible that a substantial amount of defendants in civil cyberbullying cases will not have the means to pay the damages ordered by the court.

Moreover, this problem is also aggravated because many of the IIED or invasion of privacy claims "will not be covered by liability insurance."[244] This is due to the fact that "[t]here is no coverage for intentional acts -'only accidents,' mishaps resulting from negligence, are covered by liability insurance."[245] Thus, because emotional distress claims involve intentional acts, the lack of insurance availability will make it even harder for victims to find redress from their cyberbullies.

In this type of scenario, "victims stand a slim chance of recovering damages even if they can prove their claims."[246] Thus, some cyberbullies will be judgment-proof because the awards may often be unenforceable. As some have argued, victims in the end may be "waging [their] own war on behalf of [their] reputation and

---

241 Furthermore, a court would have to examine the "content, form and context" of the statements as well as other circumstances. *Id.* at 485.

242 *Id.* at 494 (quoting *Snyder*, 562 U.S. at 444, 457).

243 Camassar, *supra* note 198, at 581.

244 *Id.*

245 *Id.*

246 *Id.* at 582.

. . . will probably bear the financial costs [themselves]."[247] Therefore, in some cases, "a long, drawn-out legal case might seem like more trouble than it is worth."[248]

Nevertheless, because of the current lack of applicability, evidentiary and constitutional problems that sometimes arise with criminal laws that address cyberbullying, IIED torts will in the end be the best option for victims left without any criminal redress against their perpetrators.

Unlike current criminal laws and even other civil causes of action, that only sometimes address cyberbullying conduct, IIED torts will apply in most, if not all, cyberbullying instances. Thus, victims who cannot find redress through criminal law or through other civil torts because of inapplicability problems are more likely to find redress through an IIED action.

Furthermore, unlike criminal laws that address cyberbullying, the burden of proof in an IIED action is much lower than the beyond reasonable doubt standard. Even in instances of indirect cyberbullying, IIED torts do not require the same kind of proof of intention involved in criminal laws. Thus, the evidentiary hurdles that arise with criminal cyberbullying laws are not particularly present in IIED torts.

Additionally, unlike in some of the comprehensively drafted criminal statutes mentioned above, constitutional issues are not particularly present in IIED claims. Some scholars have even proposed that the IIED tort should become a criminal offense.[249] One of the main arguments for such proposal is that because other intentional torts, such as assault, battery, and false imprisonment have criminal counterparts, so should IIED.[250] However, this is what is already being attempted with the adoption of the recent comprehensive criminal cyberbullying laws. Specifically, many of the proponents of a theory of IIED as a criminal offense essentially discard practical or constitutional concerns in their analysis.[251] As Daniel Givelber correctly points out:

> There would be grave constitutional problems with a law that made outrageous behavior criminal. It would suffer from the twin defects of leaving the citizen to guess at what conduct is criminal while permitting the state (both police and courts) to enforce the law in an arbitrary and discriminatory fashion. One danger of such laws is that they are enforced against people because of who they are rather than what they have done. While the threat of discrimination may also be present to some extent when torts are vaguely defined, the criteria for selecting defendants are likely to be different—whereas criminal laws may be enforced against people based on race or lifestyle or political beliefs, the decisive criterion

---

247 Montagna, *supra* note 144, at 9 (quoting Steve Kolowich, *Untouchable Cyberbullies,* INSIDE HIGHER ED. (Nov. 29, 2010), https://www.insidehighered.com/news/2010/11/29/cyberbullying (last visited Oct. 16, 2015)).

248 *Id.*

249 Garfield, *supra* note 220.

250 *Id.* at 33.

251 *Id.*

> for a tort suit is probably the defendant's ability to pay damages, and that criterion is paramount for all torts, not simply the vague ones.[252]

In sum, until there is a substantial change in First Amendment jurisprudence, or legislators enact criminal cyberbullying laws with enough specificity in the statutory language and limiting conditions, that could withstand constitutional challenges, the IIED tort may generally be the best option of redress for victims of cyberbullying against their perpetrators. Furthermore, with the increase of new technologies and their consequent use for cyberbullying, "we may witness a dramatic increase in claims utilizing this theory of recovery as well as the development of a substantial gloss based on increased usage."[253]

CONCLUSION

As this paper has demonstrated, cyberbullying involves harmful forms of conduct that at times may have very dangerous consequences. The fact that it sometimes may result in serious psychological injury and suicide, highlights the need for remedies through the legal system.

However, although long-standing criminal statutes, such as threats, invasion of privacy, criminal defamation, identity theft and harassment can sometimes be used against cyberbullies, often they do not fully cover or adequately attend to all of the various forms of cyberbullying. Moreover, the laws that could cover some types of cyberbullying situations in some states are not always available in other states, leaving a substantial amount of victims without a legal remedy against the perpetrators. Furthermore, the particular nature of some types of cyberbullying instances creates evidentiary challenges for prosecutors who might want to use the existing statutes to bring charges against the perpetrators, thus aggravating the problem for victims.

This is particularly true in cases where threats or harassment statutes are applied to instances of indirect cyberbullying. Indirect cyberbullying virtually eliminates the essential threat dynamic (the perpetrator targeting the victim). Similarly, when harassment or stalking statutes are applied to indirect cyberbullying, prosecutors and courts have a hard time finding proof -beyond a reasonable doubt- of specific intent to harass, stalk or threaten the victim.

Although recent legislation has attempted to make cyberbullying a one-size-fits-all criminal offense, many of these laws may contain impermissibly vague and overbroad statutory language. Several of these statutes criminally prohibit, for example, alarming, frightening, or annoying speech. Consequently, this type of language may fail to provide persons of ordinary intelligence fair notice of what is prohibited, or could encourage seriously discriminatory enforcement. Similarly, such language could also prohibit a substantial amount of clearly protected speech

---

252 Givelber, *supra* note 218, at 52 (footnotes omitted).

253 Kaufman & Baydala, *supra* note 4.

when compared to the unprotected. Therefore, some of the recent criminal cyberbullying statutes in the United States could well be held unconstitutional by courts in light of the First Amendment, leaving victims without a criminal venue to find redress. However, it is plausible that courts could lessen First Amendment concerns if they carry out a limited construction of such laws.

Seeking civil remedies, especially the IIED tort, may be a more promising option for victims who cannot find redress against their perpetrators under the criminal legal system. The IIED tort, unlike any other civil or criminal remedy, is "as limitless as the human capacity for cruelty."[254] Therefore, it will probably apply in the majority of cyberbullying instances.

The main deficiency of the IIED tort, as well as of all other civil remedies, is the limited capability of plaintiffs to actually recover damages. However, many cyberbullying victims may be able to find more redress under the IIED tort than many of the criminal statutes because of the problems discussed above. In the end, the IIED tort may be the preferable option for those victimized by behaviors that fall outside of specific criminal prohibitions, and where a comprehensively drafted statute might well fall afoul of the First Amendment. This is because, unlike the criminal prohibitions, the IIED tort is not prone to vagueness or overbreadth challenges, and requires a lower burden of proof.

In sum, until the United States Supreme Court updates its long-standing First Amendment jurisprudence to the new challenges that arise with cyberbullying, criminal law will continue its struggle in addressing this toxic behavior. As Justice Alito stated in his dissent in *Snyder v. Phelps*: "'[i]n order to have a society in which public issues can be openly and vigorously debated, it is *not* necessary to allow the brutalization of innocent victims.' Moreover, 'when grave injury is intentionally inflicted by means of an attack . . . the First Amendment should not interfere with recovery.'"[255] In the meantime, legislators will have to draft narrow and limited criminal cyberbullying laws with enough specificity for them to pass constitutional muster, and victims of many forms of cyberbullying may have to resort to civil legal remedies.

---

254 Kaufman & Baydala, *supra* note 4.

255 Jaffe, *supra* note 31, at 495 (quoting Snyder v. Phelps, 562 U.S. 443, 465-66, 475 (2011) (Alito, J., dissenting)).