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THE BEST INTENTIONS: A CONSTITUTIONAL ANALYSIS OF NORTH CAROLINA'S NEW ANTI-CYBERBULLYING STATUTE

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Cyberbullying, which is bullying using technology and/or the Internet, is a new phenomenon that has devastating effects as demonstrated by the suicide of Megan Meier as a result of cyberbullying over MySpace. To address the problem, the 2009 North Carolina General Assembly passed and the governor signed HB 1261, "Protect Our Kids/Cyber Bullying Misdemeanor," which criminalizes a large set of behaviors. This Recent Development analyzes the constitutionality based on existing First Amendment jurisprudence, including the Brandenburg v. Ohio *imminent lawlessness test and the* Watts v. United States *true threat test. Most of the provisions of the new law fall short of these tests and are thus likely unconstitutional. As a result of vagueness as well as undefined and confusing terms in the law, it also may have a chilling effect on the exercise of free speech.*

I. INTRODUCTION

In its 2009 session, the North Carolina General Assembly tackled the issue of cyberbullying. While the term "cyberbullying" has many definitions,[2] it is most commonly thought of as the

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[1] J.D. Candidate, University of North Carolina School of Law, 2011. The author would like to thank Sarah Preston, Legislative Counsel for the American Civil Liberties Union of North Carolina, for her inspiration and assistance with this Recent Development, as well as Judge Lawrence J. Fine and Professor Michael Gerhardt, both of whom provided invaluable assistance and guidance on the issues discussed.

[2] *See, e.g.*, Colleen Barnett, *Cyberbullying: A New Frontier and a New Standard, A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPIAC L. REV. 579, 580 (2009); MARCI FELDMAN HERTZ & CORINNE DAVID-FERNDON, ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS 4 (Centers for Disease Control, 2008), *available at* http://www.cdc.gov/ncipc/dvp/YVP/electronic_agression_brief_for_parents.pdf.

Internet analog to the bullying that takes place in schools and playgrounds.[3] However, because cyberbullying extends to locations outside the school, including anywhere that a child has access to a computer or cell phone, it has a much wider reach than old-fashioned bullying.[4] To address the effects of cyberbullying, the North Carolina General Assembly passed an Act,[5] House Bill 1261 ("HB 1261"), the short title of which is "Protect Our Kids/Cyber Bullying Misdemeanor," which criminalizes certain types of behavior that it classifies as cyberbullying.[6] In the same legislative session, the General Assembly also passed the School Violence Prevention Act[7] to cut down on traditional bullying in public schools.[8] The passage of these two laws in the same legislative session demonstrates a clear intent on the part of the General Assembly to protect North Carolina's children.

This Recent Development will demonstrate that, unfortunately, HB 1261 has a severe danger of chilling free expression for minors and adults alike. If traditional First Amendment jurisprudence is applied to the Internet and state law, HB 1261 is likely to be found an unconstitutional restriction on free speech. Part II of this Recent Development defines the term "cyberbullying," explains why the issue is so problematic from a social and political aspect, shows the widespread effects of cyberbullying, and gives real-life

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[3] Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 328 (2008).

[4] *Id.*

[5] Protect Our Kids/Cyber Bullying Misdemeanor, 2009-5 N.C. Adv. Legis Serv. 336–37 (LexisNexis) (to be codified at N.C. GEN. STAT. §§ 14-458.1 and 14-453) [hereinafter Protect Our Kids Law].

[6] *Id.*

[7] 2009-2 N.C. Adv. Legis. Serv. 115–17 (LexisNexis) (to be codified at N.C. GEN. STAT. §§ 115C-407.5 to -407.8).

[8] Lynn Bonner, Jennifer Klahre & Luci Chavez, *Students Say They Need a Law to Stop the Bullies*, THE NEWS & OBSERVER (Raleigh, N.C.), Jun. 24, 2009, at A1. The School Violence Prevention Act was not without controversy, as the bill specifically protects a number of groups of students, including homosexual students. *See* Mark Johnson, *House Votes to Protect Gay Kids*, THE NEWS & OBSERVER (Raleigh, N.C.), Jun. 23, 2009, at A1 (describing the opposition to the bill). The reason that cyberbullying needed to be addressed by the legislature will be discussed in Part II, *infra*.

examples of cyberbullying. Part III describes HB 1261 as it was passed by the North Carolina General Assembly and some of the changes that were made throughout the legislative process. Finally, Part IV of this Recent Development attempts to answer the constitutional questions posed by the new law.

II. WHAT IS CYBERBULLYING?

The American public became aware of cyberbullying due to an incident in Missouri involving an adult, Lori Drew, who pretended to be a male peer of a middle school student, Megan Meier.[9] Drew's false identity[10] pursued a relationship with Meier, then abruptly broke off the relationship, stating that "the world would be a better place without" her.[11] That same day, Meier committed suicide.[12] The local community and the nation as a whole was angered that Drew's behavior was not criminal.[13] Interestingly, despite the fact that this case is constantly cited as a prime example of cyberbullying, Drew's behavior does not qualify as cyberbullying under most definitions because the person bullying was an adult.[14] This is a critical example of why any law or policy

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[9] Ruedy, *supra* note 3, at 323–25.

[10] Her false identity was named "Josh Evans." *Id.* at 324.

[11] *Id.* at 324 (citing Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23).

[12] *Id.*

[13] *Id.* (citing Maag, *supra* note 11). Drew was later convicted of accessing computers without authorization. *See* Greg Risling, *'Cyberbully' Guilty of Minor Offenses*, THE NEWS & OBSERVER (Raleigh, N.C.), Nov. 27, 2008, at 6A. Ultimately, this conviction was reversed, because "if any conscious breach of a website's terms of service is held to be sufficient by itself to constitute intentionally accessing a computer without authorization or in excess of authorization," the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C) (2006), which was the basis of the conviction, would give an unconstitutional amount of discretion to the police. United States v. Drew, No. CR 08-0582-GW, 2009 WL 2872855, at *17 (C.D. Cal.). Thus, Drew's behavior could not be held to be criminal under federal law. As noted in Ruedy, *supra* note 3, her behavior was also not criminal under Missouri law.

[14] Posting of Justin Patchin to Cyberbullying.us, http://cyberbullying.us/blog/defining-cyberbullying.html (Sep. 22, 2008, 10:53 A.M.) (on file with the North Carolina Journal of Law & Technology) [hereinafter Patchin, *Defining*

attempting to deal with the problem of cyberbullying needs a clear definition of the term to avoid being under-inclusive and over-inclusive.

Unfortunately, defining the term "cyberbullying" is difficult as there is no single definition for cyberbullying.[15] The Centers for Disease Control and Prevention ("CDC"), the government agency tasked with "protecting health and promoting quality of life,"[16] provides one potential definition of cyberbullying. The CDC defines "electronic aggression," which includes cyberbullying, as "[a]ny type of harassment or bullying (teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through email, a chat room, instant messaging, a website (including blogs), or text messaging."[17] The director of the Center for Safe and Responsible Internet Use provides a similar second definition of cyberbullying, which is "the use of electronic technologies to engage in repeated and/or extensively disseminated acts of cruelty towards others."[18] In contrast, a third definition of cyberbullying, provided by the website Stopcyberbullying.org,

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Cyberbullying]. Patchin, an Associate Professor of Criminal Justice at the University of Wisconsin—Eau Claire, has commented extensively on the Meier/Drew case on his blog, stopcyberbullying.us, perhaps suggesting he considers it cyberbullying despite this apparent disconnect. *See, e.g.*, Posting of Justin Patchin to Cyberbullying.us, http://cyberbullying.us/blog/lori-drew-officially-acquitted.html (Sep. 1, 2009, 7:53 P.M.) (on file with the North Carolina Journal of Law & Technology).

[15] Consider the multitude of definitions discussed *infra*.

[16] Centers for Disease Control and Prevention, About CDC, http://www.cdc.gov/about/ (last visited Oct. 11, 2009) (on file with the North Carolina Journal of Law & Technology).

[17] HERTZ & DAVID-FERNDON, *supra* note 2, at 3. This definition is not limited to minors, as it includes "*any* type of harassment." *Id.* (emphasis added). It therefore includes an analog of what occurs on school playgrounds, but can also include other types of harassment.

[18] Nancy Williard, *Effectively Addressing Youth Risk Online: An Overview*, U.S. DEPT. OF EDUC. OFF. OF SAFE AND DRUG FREE SCHOOLS 2009 NAT'L CONF., http://www.osdfsnationalconference.com/Presentations/93.%20yrobrief%28nancy%20willard%29.pdf (on file with the North Carolina Journal of Law and Technology).

defines cyberbullying as "a child, preteen, or teen [being] tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen, or teen using the Internet, interactive and digital technologies or mobile phones."[19] What is notable about this definition is that it limits cyberbullying to acts committed by children against children; it does not include, for example, students creating websites to harass teachers or administrators.[20]

A more useful definition of cyberbullying has been suggested by one researcher, who has broken down the definition of cyberbullying into four distinct elements: "(1) the behavior is deliberate, not accidental; (2) the behavior is repeated, not just a one-time incident; (3) harm occurs—from the perspective of the target; and, (4) it is executed using the benefit of technology."[21]

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[19] Barnett, *supra* note 2, at 580 (citing Stopcyberbullying.org, What is Cyberbullying, Exactly?, http://www.stopcyberbullying.org/what_is_cyber bullying_exactly.html (last visited Sept. 13, 2009) (on file with the North Carolina Journal of Law & Technology)). Stopcyberbullying.org was created by Parry Aftab, the author of PARRY AFTAB, THE PARENT'S GUIDE TO PROTECTING YOUR CHILDREN IN CYBERSPACE (2000). His organization, WiredSafety, organized the International Stop Cyberbullying Conference in June 2008. *See generally* WiredSafety.org, The World's Largest Internet Safety, Help and Education Resource, http://www.wiredsafety.org (last visited Oct. 12, 2009) (on file with the North Carolina Journal of Law & Technology).

[20] *See, e.g.*, Renee L. Servance, *Cyberbullying, Cyber-Harassment and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1219–21 (discussing various student attacks on teachers and administrators); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002) (describing a student-created Website with "derogatory, profane, offensive and threatening statements" about teachers and administrators)).

[21] Patchin, *Defining Cyberbullying*, *supra* note 14. The definition came from Patchin's research with Dr. Sameer Hinduja of Florida Atlantic University. Together they have done extensive research on cyberbullying. They first performed a small "online pilot survey in 2003," and followed that up with a slightly larger "survey in the spring of 2004." SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 45 (2009). Hinjuda and Patchin then performed a third online survey "in the spring of 2005" with "a larger and more diverse adolescent population." *Id.* "Over 7,000 individuals completed the survey . . . . [The researchers] focused [their] analysis on the approximately 4,000 respondents who reported they were under the age of 18." *Id.* To account

This framework gives helpful guidelines for determining if certain behavior is cyberbullying. One can easily apply the definition to any behavior to determine if it falls into a category that can be considered cyberbullying without much subjectivity.[22] It appears, therefore, that the fourth and final definition is the best definition of cyberbullying because of its ease of application.

Cyberbullying has shown itself to be a serious problem in schools. Despite the fact that cyberbullying tends to occur outside of school,[23] the effects spread to the school.[24] Victims of cyberbullying are more likely to have behavioral problems in schools.[25] They are "significantly more likely to also report feeling unsafe at school."[26] Two studies published in the *Journal of Adolescent Health* in 2007 estimated that between 9% and 35% of

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for gender biases in survey returns, they "constructed a subsample of approximately 1,500 youth that was evenly distributed across gender." *Id.* In their final survey, Sameer and Hinduja surveyed "approximately 2,000 [randomly selected] middle school [sixth through eighth grade] students from one of the largest school districts in the United States." *Id.* at 46. Their research also discovered that the most harmful incidents of cyberbullying are those perpetrated by someone they know "in the real world," such as a peer. Patchin, *Defining Cyberbullying*, *supra* note 14. However, the CDC refutes the claim that cyberbullying is solely an extension of standard bullying since "the rates of internet harassment for young people who are home-schooled and the rates for those who attend public and private schools are fairly similar." HERTZ & DAVID-FERNDON, *supra* note 2, at 10 (citing Michelle L. Ybarra, Marie Diener-West & Philip J. Leaf, *Examining the Overlap in Internet Harassment and School Bullying: Implications for School Intervention*, J. OF ADOLESCENT HEALTH, Dec. 2007, Supp. 1, at S42–S50).

[22] There is some subjectivity in the third element but it is far more limited than the definitions discussed above.

[23] HERTZ & DAVID-FERNDON, *supra* note 2, at 10 (citing Patricia W. Agatston, Robin Kowalski & Susan Limber, *Students' Perspectives on Cyber Bullying*, J. OF ADOLESCENT HEALTH, Dec. 2007, Supp. 1, at S59–S60).

[24] HERTZ & DAVID-FERNDON, *supra* note 2, at 10 (citing Ybarra, Diener-West & Leaf, *supra* note 21).

[25] *Id.*

[26] *Id.*

children have been harassed online.[27] A 2006 study by the Pew Internet and American Life Project found that number to be 32%.[28]

Despite the apparent conflict in precisely defining cyberbullying, numerous jurisdictions have enacted laws to combat the practice. One of the first laws enacted was a city ordinance in Dardenne Prairie, Missouri, the hometown of both Lori Drew and Megan Meier.[29] Also in response to the same case, Missouri amended its harassment statute to criminalize "recklessly frighten[ing], intimidat[ing], or caus[ing] emotional distress" to a minor.[30] Previously, the statute required that the conduct be purposeful.[31] The revised harassment statute would make Lori Drew's conduct illegal.[32] A bill has been introduced in the U.S. Congress to criminalize cyberbullying behavior as well.[33] As of November 2008, fourteen states had passed laws regarding

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[27] HERTZ & DAVID-FERNDON, *supra* note 2, at 5 (citing Ybarra, Diener-West & Leaf, *supra* note 21 and Robin M. Kowalski & Susan P. Limber, *Electronic Bullying Among Middle School Students*, J. OF ADOLESCENT HEALTH, Dec. 2007 Supp. 1, at S22–S30). "Harassment" was defined by the researchers as "repetitive messages sent to a target that cause emotional distress to that target." Kowalski & Limber, *Electronic Bullying* at S22.

[28] Barnett, *supra* note 2, at 582 (citing Amanda Lenhart, Pew Internet and American Life Project, *Data Memo: Cyberbullying and On-Line Teens* 1 (2007), *available at* http://www.pewinternet.org/~/media/Files/Reports/2007/PIP%20Cyberbullying%20Memo.pdf.pdf (on file with the North Carolina Journal of Law & Technology)).

[29] DARDENNE PRAIRIE, MO., MUNICIPAL CODE § 210.030 (2007). The Dardenne Prairie Board of Aldermen enacted an ordinance forbidding "cyber-harassment."

[30] MO. ANN. STAT. § 565.090 (West 1999 & Supp. 2009). *See also Missouri Proposes Web Harassment Law*, CBS NEWS, Jan. 8, 2008, http://www.cbsnews.com/stories/2008/01/08/tech/main3689775.shtml (discussing the background and legislative intent of the Missouri harassment law) (on file with the North Carolina Journal of Law & Technology).

[31] MO. ANN. STAT. § 565.090 (West 1999).

[32] MO. ANN. STAT. § 565.090 (West 1999 & Supp. 2009). Compare the behavior outlawed by the statute to Lori Drew's behavior discussed at the beginning of Part II, *supra*.

[33] Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009). The federal bill is outside the scope of this Recent Development.

cyberbullying.[34] All of these states required schools to address cyberbullying rather than criminalizing it.[35]

III. NORTH CAROLINA'S RESPONSE TO CYBERBULLYING

Possibly as a result of the jurisdictional and enforcement problems encountered with school-based anti-cyberbullying laws in other states, discussed in Part IV(E), *infra*, the North Carolina General Assembly took a different tactic in its most recent session.[36] The legislature enacted House Bill 1261, entitled in full as "an act protecting children of this state by making cyber-bullying a criminal offense punishable as a misdemeanor," or, in short, "Protect Our Kids/Cyber Bullying Misdemeanor."[37]

The bill adds a section to Chapter 14 of the North Carolina General Statutes, Section 14-458.1,[38] implying that it is related to § 14-458,[39] which defines the offense of computer trespass.[40] The bill makes it a crime to:

> [b]uild a fake profile or Web site[,] [p]ose as a minor in an Internet chat room[,] [a]n electronic mail message[,] or [a]n instant message[,] [f]ollow a minor online or into an Internet chat room[,] or [p]ost or

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[34] Barnett, *supra* note 2, at 579. The states are Arkansas, California, Delaware, Florida, Idaho, Iowa, Maryland, Minnesota, New Jersey, Oklahoma, Oregon, Rhode Island, South Carolina, and Washington. *Id.* at nn.1–2.

[35] *Id.* at 579. Some states also have cyber*stalking* statutes that criminalize certain cyberstalking behavior. *See id.* at 579, n.9. This paper will not address cyberstalking as it is a distinct crime and a separate cyberstalking statute exists in North Carolina, N.C. GEN. STAT. § 14-196.3 (2007). For a description of the crime of cyberstalking, *see generally* Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125 (2007).

[36] *See* Protect Our Kids Law, *supra* note 5.

[37] *Id.*

[38] *Id.*

[39] The structure of the North Carolina General Statutes is such that the chapter number is before the dash and the section number is after the dash. The decimal point is used, at least in the criminal statutes, to demonstrate relation to the remainder of the section with or without the decimal point. *See, e.g.*, N.C. GEN. STAT. §§ 14-12 to -12.15 (2006) (criminalizing certain subversive activities and secret societies that perform these activities).

[40] N.C. GEN. STAT. § 14-458 (2007).

> encourage others to post on the Internet private, personal, or sexual information pertaining to a minor[41]

if these actions are taken "[w]ith the intent to intimidate or torment a minor."[42] Only two of the terms used in this first section, "Internet chat room" and "profile," are defined, and "profile" appears to be defined incorrectly.[43] The bill amends the definitions section of Article 60 of Chapter 14 of the North Carolina General Statutes[44] to define the terms "Internet chat room" and "profile."[45] An "Internet chat room" is defined in such a way as to properly encompass all chat rooms and instant messages as well as services like Facebook and FriendFeed.[46] The statutory definition of "profile," however, as "a configuration of user data required by a computer so that the user may access programs or services and have the desired functionality of that computer," seems to be incorrect for the intent of the law.[47] Most likely, the legislature intended to target and outlaw the creation of fake MySpace or Facebook profiles as a result of the Megan Meier case.[48] The law, as written, however, does not include those types of profiles.

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[41] Protect Our Kids Law, *supra* note 5, at § 1(a)(1) (numbering and line breaks omitted). These actions are made either a Class 1 or Class 2 misdemeanor. *Id.* at § 1(b).

[42] *Id.* § 1(a).

[43] Protect Our Kids Law, *supra* note 5, at §§ 2(7b) and 2(7c).

[44] N.C. GEN. STAT. § 14-453 (2007).

[45] Protect Our Kids Law, *supra* note 5, at § 2(7b).

[46] *Id.* (defining an "Internet chat room" as "a computer service allowing two or more users to communicate with each other in real time). Both Facebook and FriendFeed permit real-time communication between two or more users. While readers are likely familiar with Facebook, they may not be familiar with FriendFeed, which allows the aggregation of a user's activity on multiple sites, combined with the ability to comment on that activity and conduct real-time conversation with other users. *See* FriendFeed, About Us, http://friendfeed.com/about/ (last visited Sept. 14, 2009) (on file with the North Carolina Journal of Law & Technology).

[47] Protect Our Kids Law, *supra* note 5, at § 2(7c).

[48] The legislature's intentions were likely a result of the fake MySpace profile created by Lori Drew. *See* Ruedy, *supra* note 3, at 323–25.

Instead, the law refers to, for example, an account of a corporate or business network and the files that go along with that account.[49]

The second subsection of section 1 of the Protect Our Kids law makes it illegal to, "[w]ith the intent to intimidate or torment a minor or the minor's parent or guardian[,] . . . use a computer . . . [to] [p]ost a real or doctored image of a minor on the Internet," hack into any computer system, steal passwords, or send "repeated, continuing, or sustained electronic communications . . . to a minor."[50] The remainder of the subsection prohibits:

> [p]lant[ing] any statement . . . tending to provoke or that actually provokes any third party to stalk or harass a minor[,] . . . [c]opy[ing] and disseminat[ing] . . . an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor[,] . . . sign[ing] up a minor for a pornographic Internet site[, and] sign[ing] up a minor for electronic mailing lists . . . resulting in intimidation or torment of the minor.[51]

Despite being in the cyberbullying law, pornographic Internet sites have no discernable connection to cyberbullying and it is unclear why this portion of the subsection is even in the law.[52] This subsection would appear to criminalize the minor's parents signing up the child "for a pornographic Internet site."[53] Interestingly, if a parent were to give pornography to his or her child under current North Carolina law, the parent would not be criminally liable, as being the parent or guardian of the child to whom the pornography is distributed is an absolute defense.[54]

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[49] *See, e.g.,* Indiana University Information Technology Services, In Windows, What is a User Profile, and How Do I Copy One User Profile to Another?, http://kb.iu.edu/data/aidk.html (last visited Sept. 14, 2009) (on file with the North Carolina Journal of Law & Technology).

[50] Protect Our Kids Law, *supra* note 5, at § 1(a).

[51] *Id.* § 1(a)(4).

[52] Distributing pornography to a minor does not fit into any of the definitions of cyberbullying discussed in Part II, *supra*, except perhaps the final definition if one accepts that the recipient of pornography has been "harmed" from his/her own perspective. *See* Patchin, *Defining Cyberbullying*, *supra* note 14.

[53] Protect Our Kids Law, *supra* note 5, at § 1(a)(5).

[54] N.C. GEN. STAT. § 14-190.15(c)(1) (2007).

Much like Missouri's harassment law,[55] the bill states that if the perpetrator is an adult, there are enhanced punishments.[56] The crime of adult-on-minor cyberbullying is a Class 1 misdemeanor, while minor-on-minor cyberbullying is a Class 2 misdemeanor.[57] This clause signals a clear legislative intent that minors are to be charged and punished under this law. In essence, it is not to be left up to parents or schools to determine the appropriate punishment, but instead it is to become the province of the criminal justice system.[58] Because one is treated as an adult in the criminal justice system from the age of sixteen in North Carolina,[59] a high school student could be faced with a criminal record from cyberbullying. To remedy this concern, the Senate Judiciary II committee added a provision to permit a single offense committed by someone under eighteen years old to be expunged.[60]

IV. CONSTITUTIONAL QUESTIONS

There are a number of questions regarding the constitutionality of HB 1261 under the First Amendment. As a content-based restriction on speech, there are two main tests used by the Supreme Court to determine if a restriction on free speech is constitutional.[61] The first of these tests that will be used to evaluate HB 1261 looks for the inciting of imminent lawless action,[62] which means that

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[55] MO. ANN. STAT. § 565.090 (West 1999 & Supp. 2009). Under Missouri law, harassment is usually a Class A misdemeanor, but if an adult over 21 years old harasses a minor or has previously been convicted of harassment, it is a Class D felony.

[56] Protect Our Kids Law, *supra* note 5, at § 1(b).

[57] *Id.* Missouri's harassment law makes an adult's harassment of a minor a Class D felony, while other harassment charges are Class A misdemeanors. MO. REV. STAT. § 565.090(2).

[58] While parents and schools could still punish a child who commits cyberbullying as defined by the law, the criminal justice system may also punish the child. *See* Protect Our Kids Law, *supra* note 5, at § 1(b).

[59] N.C. GEN. STAT. § 7B-1501(7) (2007).

[60] Protect Our Kids Law, *supra* note 5, at § 1(c); H.R. 1261, 2009 General Assembly (N.C. 2009) (as passed by House, May 14, 2009).

[61] *See* Ruedy, *supra* note 3, at 339.

[62] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

speech caused or is likely to cause another to commit a crime.[63] The second test is whether there was the creation of a true threat,[64] which is a serious intent to harm an individual.[65] This Recent Development will apply the existing law on "real world" expression to Internet expression,[66] and will consider other problems with the criminal justice approach to addressing cyberbullying.

A. *The Standard of Review*

Because HB 1261 is constructed in such a way as to concern speech and expression like "[p]ost[ing] . . . information [or] . . . image[s]," it lends itself to First Amendment issues.[67] Since the restriction is on the content of the speech, such as what the perpetrator said, rather than the "time, place, and manner," the U.S. Supreme Court requires "the most exacting scrutiny."[68] This does not mean that the law is necessarily invalid, but it does require that HB 1261 pass the strict scrutiny test, meaning that it must be "narrowly tailored to serve an overriding state interest."[69]

Prevention of cyberbullying and harm to minors is a compelling state interest, since compelling state interests include

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[63] Ruedy, *supra* note 3, at 339.

[64] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

[65] Barnett, *supra* note 2, at 595 (citing Andrew P. Stanner, Note, *Towards an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385 (2006)).

[66] There is precedent for doing so. *See* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) (discussing a Website that was determined to be a "true threat").

[67] Protect Our Kids Law, *supra* note 5, at § 1(a).

[68] Widmar v. Vincent, 454 U.S. 263, 276 (1981). Restrictions on the time, place, and manner of speech are evaluated by an intermediate scrutiny test. Deegan v. City of Ithaca 444 F.3d 135, 142 (2d Cir. 2006). The restrictions must: (1) be content-neutral; (2) narrowly tailored, and (3) "leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[69] 16A AM. JUR. 2D *Constitutional Law* § 460 (1998).

"the physical health and safety of its citizens,"[70] and, as described in Part II, *supra*, cyberbullying led to the suicide of Megan Meier and also causes other harmful effects inside and outside of schools.[71] Sexually-explicit e-mail lists with personal details have been sent.[72] Video recordings of teens being beaten have been posted on the Internet.[73] It also appears from the title of HB 1261, "Protect Our Kids," that stopping these harmful effects is the purpose of the legislation.[74] The only question that remains, therefore, is whether the law is narrowly tailored to achieve the ends of protecting children.

There are very few cases on regulation of cyberbullying to lead us to a clear conclusion as to where courts draw the line between narrowly tailored and overreaching.[75] Most of the cases concerning student speech online have dealt with the jurisdictional issues of schools punishing online speech created outside of schools.[76] Even that question is left unanswered.[77] It is true that most forms of student expression is protected in schools under *Tinker v. Des Moines Independent Community School District*,[78] in which the Supreme Court stated that students do not "shed their

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[70] Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 948 (1988). *See also* In re Tessier, 190 B.R. 396, 405 (Bankr. D. Mont. 1995) ("compelling governmental interests include only those interests pertaining to the survival of the republic or the physical safety of its citizens").

[71] *See, e.g.*, Thomas J. Billitteri, *How Can Cyberbullies Be Stopped?*, THE NEWS & OBSERVER (Raleigh, N.C.), Jul. 20, 2008, at E1; HERTZ & DAVID-FERNDON, *supra* note 2, at 10 (citing Ybarra, Diener-West & Leaf, *supra* note 21).

[72] Billitteri, *supra* note 71, at E1.

[73] *Id.*

[74] Protect Our Kids Law, *supra* note 5.

[75] Most cases have dealt with the jurisdictional issues surrounding school enforcing anti-cyberbullying rules against off-campus speech. *See* Barnett, *supra* note 2, at 587–88.

[76] For a thorough examination of such cases, *see* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 226–48 (2009).

[77] Calvert, *supra* note 76, at 218–19.

[78] 393 U.S. 503 (1969).

constitutional rights to freedom of speech or expression at the schoolhouse gate."[79] This would imply that minors inherently "have the ordinary complement of First Amendment rights outside those gates."[80] Therefore, even though HB 1261 is likely to be applied chiefly to minors,[81] the rights of the children to free speech must still be evaluated in order for the law to pass constitutional muster.[82]

B. *The* Brandenburg *Test—Inciting Imminent Lawless Action*

There are two major tests developed by the U.S. Supreme Court in evaluating laws that may violate the freedom of expression: the imminent lawless action test and the true threat test.[83] The first is from *Brandenburg v. Ohio*.[84] There, the Supreme Court stated that speech is protected unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[85] This test "focuses not on the reasonable foreseeability of an act occurring, but rather on whether the actor actually directed or intended for the act to occur."[86] Simply advocating a type of action that posed a "clear and present danger" was not enough for the Supreme Court.[87]

Thus, we must examine whether or not HB 1261 is targeted toward preventing people from knowingly "inciting . . . imminent

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[79] *Id.* at 506.

[80] Aaron A. Caplan, *Public School Discipline For Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 140 (2003).

[81] HERTZ & DAVID-FERNDON, *supra* note 2, at 6.

[82] *Tinker*, 393 U.S. at 506–07; Caplan, *supra* note 80, at 140.

[83] Ruedy, *supra* note 3, at 339.

[84] 395 U.S. 444 (1969).

[85] *Id.* at 447.

[86] Calvert, *supra* note 77, at 233. The issue in *Brandenburg* was a Ku Klux Klan leader making derogatory statements toward Jews and African Americans. *Brandenburg*, 395 U.S. at 445. He was charged and convicted under an Ohio statute prohibiting "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing political reform." *Id.* at 444–45 (citing Ohio Rev. Code Ann. § 2923.13 (1969)).

[87] *Brandenburg*, 395 U.S. at 451 (Douglas, J., concurring).

lawless action."[88] Most of the law is not targeted toward stopping one from inciting lawless action, as it defines entirely new categories of lawless action.[89] However, N.C. Gen. Stat. § 14-458.1(a)(3) as added by HB 1261 does meet this standard.[90] This subsection makes it criminal to "[p]lant any statement, whether true or false, tending to provoke or that actually provokes any third party to stalk or harass a minor."[91] If one were to provoke another into stalking a minor, one would be inciting that person to violate North Carolina's stalking statute.[92] The Supreme Court has accepted state courts' limiting interpretations of statutes to save them from First Amendment challenges.[93] Therefore, if North Carolina courts limited this provision so as to make "provocation" mean provocation to *imminent* stalking, that is, stalking that starts very soon after the person reads the planted statement, the statute would be permissible under *Brandenburg.*

C. *The* Watts *Test—"True Threat"*

A second test developed by the Supreme Court for allowing certain limited restrictions on free speech was devised in *Watts v. United States.*[94] There, the Supreme Court determined that "true threats" can be classified as low- or no-value speech that is thus unprotected.[95] A "true threat" occurs when a person seriously expresses his or her intent to cause harm to an individual.[96]

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[88] *Id.* at 447.
[89] Protect Our Kids Law, *supra* note 5, § 1.
[90] *Id.* § 1(a)(3).
[91] *Id.*
[92] N.C. Gen. Stat. § 14-277.3A (2007).
[93] *See, e.g.,* Osborne v. Ohio, 495 U.S. 103, 105 (1990).
[94] 394 U.S. 705 (1969) (per curiam). There, a person was convicted for threatening "to take the life of or inflict bodily harm on the President of the United States" for saying in protest of the Vietnam War-era military draft, that "[i]f they ever ma[d]e [him] carry a rifle the first man [he] want[ed] to get in [his] sights is [President] L[yndon] B[aines] J[ohnson]."
[95] *Watts*, 394 U.S. at 708 (per curiam).
[96] Barnett, *supra* note 2, at 595 (citing Stanner, *supra* note 65).

However, the person making the threat need not be physically able to or intend to carry out the threat.[97]

Certainly, some behavior prohibited by HB 1261, such as a threat to beat up a child, is a true threat. Beating up a child is causing harm, and if one expresses an intent to do so, that person has expressed a true threat.[98] Most of the speech targeted by the bill, however, does not rise to the level of a true threat. For example, it is possible or even likely that one could perform each of the actions enumerated in §§ 1(a)(1) and 1(a)(2) without seriously expressing an intent to harm the minor.[99] In fact, it has been argued that, in the benchmark case discussed in Part II, *supra*, Lori Drew's actions were similarly not true threats because she did not intend, nor could she have foreseen, Megan Meier interpreting her statements as "intent to cause future harm."[100] Additionally, while the Ninth Circuit has interpreted the requirement of intimidation as saving statutes from First Amendment challenges,[101] HB 1261 is put back into the danger zone by the addition of the term "torment," especially because it is so poorly defined in the statutes and North Carolina law.[102] The Ninth Circuit's view has not been adopted by the Fourth Circuit directly, so it is not binding precedent in North Carolina.[103] Therefore, the

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[97] Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002) (holding that the creation of Internet "Wanted" posters with the names and addresses of abortion providers constituted a true threat).

[98] Barnett, *supra* note 2, at 595 (citing Stanner, *supra* note 65).

[99] Protect Our Kids Law, *supra* note 5, at §§ 1(a)(1) and 1(a)(2).

[100] Ruedy, *supra* note 3, at 343.

[101] *See, e.g.*, *Planned Parenthood*, 290 F.3d at 1076; United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1987).

[102] If the General Assembly had enacted the law with the definition of torment, as evidence from the Senate Judiciary II committee indicates, this situation would be different. E-mail from Sarah Preston, Legislative Counsel, Amer. Civil Liberties Union of N.C., author (Aug. 19, 2009 16:25 EDT) (on file with the North Carolina Journal of Law & Technology).

[103] North Carolina is in the Fourth Circuit, and therefore cases decided by the Ninth Circuit are not binding on courts in the North Carolina. *See, e.g.*, McMellon v. United States, 387 F.3d 329, 351 (4th Cir. 2004) (Wilkinson, Cir. J. concurring) (noting an instance in which the 4th Circuit interpretation matches

Ninth Circuit's view of the term "intimidate" may not save this law if the Fourth Circuit does not also take the same view.[104] However, the General Assembly did improve HB 1261 from the first version by striking the term "embarrass,"[105] as that has been found by the Supreme Court to be too low of a standard to abridge the freedom of speech.[106] Certainly, "[s]ign[ing] up a minor for a pornographic Internet site,"[107] the only subsection of the new law that does not require intent to intimidate or torment, is extraordinarily unlikely to be construed as an expression of an intent to harm another person and therefore is similarly unlikely to pass the *Watts* test.

One suggestion made by other scholars is to amend existing stalking laws to include cyberstalking behavior or to add a cyberstalking statute because cyberstalking poses a "true threat."[108] Cyberstalking is generally defined as using the Internet or related technologies to stalk, or repeatedly threaten or harass, an individual.[109] North Carolina was one of the first states to pass a cyberstalking law.[110] This law makes it criminal to electronically "threaten[ ] to inflict bodily harm to any person" or to that person's family members.[111] It would seem that any behavior covered by HB 1261 that passes the *Watts* test is also covered by the cyberstalking law, as it is constructed to cover electronic threats broadly and is very similar to the language accepted by the

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that of sister circuits); Kofa v. United States Immigration & Naturalization Service, 60 F.3d 1084, 1089 (4th Cir. 1995) (noting that the court may "reject the views of our five sister circuits").

[104] *See* American Life League v. Reno, 47 F.3d 642 (4th Cir. 1995); United States v. Roberts, 915 F.2d 889 (4th Cir. 1990).

[105] *See* H.R. 1261, 2009 General Assembly (N.C. 2009) (as passed by House, May 14, 2009).

[106] Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 909–10 (1982).

[107] Protect Our Kids Law, *supra* note 5, at § 1(a)(5). The curiousness of the inclusion of the "pornographic Internet site" portion of HB 1261 is discussed briefly in Part III, *infra*.

[108] Ruedy, *supra* note 3, at 345.

[109] Goodno, *supra* note 35, at 126, 144.

[110] Barnett, *supra* note 2, at 581 n. 9.

[111] N.C. GEN. STAT. § 14-196.3 (2007).

Supreme Court in *Watts*.[112] The main difference is in the criminal penalty as the cyberbullying law has an enhanced Class 1 misdemeanor penalty for adults committing cyberbullying against minors,[113] while cyberstalking is always a Class 2 misdemeanor.[114]

The North Carolina General Assembly noted the First Amendment problems under the "true threat" test through its changes to a targeted picketing law, HB885.[115] The bill was designed to stop someone from picketing outside a person's residence.[116] The initial draft of the bill added a subsection to the existing law banning the obstruction of health care facilities[117] to ban "assembl[ing] with another person for the purpose of engaging in picketing directed at or focused on a single residence in a manner that disrupts the tranquility of that residence."[118] From the later legislative developments, it appears that the General Assembly recognized that "disrupt[ing] the tranquility of [a] residence"[119] is likely too low a standard to be constitutionally regulated. As a result, the bill was greatly revised to require that a person "know[ ] or should know[ ] that the manner in which they are picketing would cause in a reasonable person" fear for their safety or their family's safety or "substantial emotional distress."[120] This change places the newly-passed law into the realm of a true threat as a reasonable person would perceive it and is thus constitutional. The General Assembly, through its changes to the targeted picketing bill, demonstrated that it was aware of First Amendment issues and was willing to change bills so that they met

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[112] Watts v. United States, 394 U.S. 705, 706 (1969).

[113] Protect Our Kids Law, *supra* note 5, at § 1(b).

[114] N.C. GEN. STAT. § 14-196.3(d) (2007).

[115] Targeted Picketing, 2009-3 N.C. Adv. Legis. Serv. 12–13 (to be codified at N.C. GEN. STAT. § 14-277.4A).

[116] *Id.*

[117] N.C. GEN. STAT. § 14-277.4 (2007).

[118] H.R. 885, 2009 General Assembly (N.C. 2009) (as introduced in House, Mar. 31, 2009).

[119] *Id.*

[120] Targeted Picketing, § 1(b), 2009-3 N.C. Adv. Legis. Serv. 12 (to be codified at N.C. GEN. STAT. § 14-277.4A(b)).

the Supreme Court's tests. The legislative record for HB 1261 reveals no such changes.[121]

D. *Vagueness and "Chilling Effects"*

Neither "intimidate" nor "torment" are defined in the law, and, as such, the law may be overly vague.[122] In a subcommittee of the North Carolina Senate Judiciary II committee,[123] language that amounts to a definition of "torment" was considered.[124] Instead of using the word "torment," it was suggested that the bill use the phrase "[u]sing repeated, continuing, or sustained electronic communications, mail, or transmissions to threaten or otherwise cause severe emotional distress or fear to a minor" in § 1(a)(2)(c) of the bill.[125] Because the dictionary definition of "torment" includes a very wide range of activities,[126] it is difficult to determine what activities within that range constitute "torment[ing]." In the end, however, this definition of "torment" was never adopted by the subcommittee.[127]

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[121] *Compare* Protect Our Kids Law, *supra* note 5 with H.R. 1261, 2009 General Assembly (N.C. 2009) (as passed by House, May 14, 2009). It may also be interesting to consider the Proposed Senate Committee Substitute (PCS) H1261-CSRV-58 [v.5]. Minutes of the S. Judiciary II Comm., July 14, 2009 (N.C. 2009). Note that this PCS was never adopted by the Senate Judiciary II committee except for the purposes of discussion. *Id.*

[122] The terms are used elsewhere in the North Carolina General Statutes. As to "intimidate," *see, e.g.,* N.C. GEN. STAT. § 14-226 (2007) (defining witness intimidation). "Torment" is used in N.C. GEN. STAT. § 14-360 (2007) (creating the offense of cruelty to animals) and in N.C. GEN. STAT. § 14-277.3A (2007) (anti-stalking law).

[123] This subcommittee, consisting of Senators Vaughan (chair), Berger, Goodall, Allran, and Queen, was created solely to work on HB 1261. Minutes of the S. Judiciary II Comm., June 9, 2009 (N.C. 2009).

[124] E-mail from Sarah Preston, Legislative Counsel, Amer. Civil Liberties Union of N.C., to author (Aug. 19, 2009 16:25 EDT) (on file with the North Carolina Journal of Law & Technology).

[125] Amer. Civil Liberties Union of N.C., Analysis of Proposed Senate Committee Substitute H 1261-CSRV-59 [v.2] (on file with the North Carolina Journal of Law & Technology).

[126] J. A. SIMPSON & E. S. C. WEINER, THE OXFORD ENGLISH DICTIONARY VOLUME XVIII, 267–68 (2d ed. 1989).

[127] Protect Our Kids Law, *supra* note 5.

Because the term "torment" is not defined in the law, it is difficult to discern what would be included under "build[ing] a . . . Website" with the intent to torment a minor.[128] Would a list of "sexually explicit rankings of twenty-five female students, names and photos included" be prohibited?[129] Is "trash talk" during video games criminal under this law?[130] In essence, the lack of a definition for "torment" results in vagueness within the statute. Generally, a statute is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[131] The standard required for a law to pass a First Amendment vagueness challenge is that there must be "a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed.' "[132] It appears that, without the definition of "torment," this statute fails to meet this standard.

It is also unclear what "follow[ing] a minor online" entails.[133] Dictionaries give a definition of following as "to go, proceed, or come after" or "to watch steadily," but this cannot be easily applied to the Internet world.[134] For example, does "following" as used in the statute include Internet monitoring software designed to allow parents to observe the behavior of their children?[135] If so, then parents installing such software to "intimidate" their children into behaving appropriately on the Internet would be committing a crime. It is highly unlikely that the General Assembly intended to

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[128] *Id.* at § 1(a)(1)(a).

[129] Billitteri, *supra* note 72, at E1.

[130] *See* Ruedy, *supra* note 3, at 339 (questioning whether innocent trash talk in this context should even be considered harassment).

[131] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[132] Grayned v. Rockford, 408 U.S. 104, 109 n.5 (1972) (quoting Edwards v. South Carolina, 372 U.S. 229, 236 (1963)).

[133] Protect Our Kids Law, *supra* note 5, at § 1(a)(1)(c).

[134] MERRIAM-WEBSTER, INC., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 486 (11th ed. 2003).

[135] An example of such software is SpectorSoft's eBlaster, which advertises itself as allowing you to see if "your children [are] visiting inappropriate Websites[,] chatting with child molesters online[,] or spending too much time on MySpace[.]" SpectorSoft, eBlaster for Windows, http://www.spectorsoft.com/products/eBlaster_Windows/ (last visited Sept. 14, 2009) (on file with the North Carolina Journal of Law & Technology).

outlaw the use of the tools that parents can use to make sure their children are behaving appropriately online and to verify that their children are not being bullied or being bullies themselves.[136]

As a result of such a vague law, "inevitably . . . citizens . . . 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[137] Such a result is called a "chilling effect," as it "chills" the exercise of free speech, or makes it less likely that citizens will exercise their rights to free speech because of the fear of criminal punishment.[138] Combining the vagueness of the law with the fact that some police search social networks like Facebook and MySpace for materials that violate the law,[139] what may have been designed by the sender as and perceived by the recipient as innocent speech might be interpreted by a law enforcement official as "tormenting." The end result may be that both children and adults will be afraid to communicate electronically with a minor because they will be unsure if their speech could be interpreted to be intended to intimidate or torment. This is precisely what the void-for-vagueness doctrine seeks to prevent.

Again, where the General Assembly failed with HB 1261, it succeeded with the targeted picketing bill, HB885. In the final version of HB885, the unique terms, such as "residence," "targeted picketing," and "substantial emotional distress," are clearly defined.[140] The objective "reasonable person" is used to state what

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[136] Consider that the title of the bill is "Protect Our Kids." Protect Our Kids Law, *supra* note 5. It is unlikely that the General Assembly intended to outlaw precisely the methods used to protect the children of North Carolina from cyberbullying in creating an anti-cyberbullying statute.

[137] *Grayned*, 408 U.S. at 109 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

[138] GEOFFREY R. STONE, ET AL., THE FIRST AMENDMENT 117–18 (3d ed. 2008).

[139] *See* Erica Perez, *Getting Booked By Facebook: Police Are Finding, With Help of Networking Sites, That Students Are Incriminating Themselves Online*, MILWAUKEE JOURNAL SENTINEL, Oct. 3, 2007, at A1.

[140] Targeted Picketing, § 1, 2009-3 N.C. Adv. Legis. Serv. 12–13 (to be codified at N.C. GEN. STAT. § 14-277.4A).

behavior is banned.[141] The "certain specific conduct [that is] proscribed"[142] is clearly delineated, as people know that they cannot picket a residence in a way that would cause the people who live there to be afraid for their safety or suffer "substantial emotional distress."[143] HB885, therefore, is an example of a narrowly-tailored, constitutional restriction on expression passed in the same session of the General Assembly as the likely unconstitutionally vague or overbroad HB 1261. The General Assembly that passed HB 1261 was therefore likely to have understood the First Amendment issues that could arise from the bill but did not address them.

E. *Remaining Problems with the Criminal Justice Approach to Addressing Cyberbullying*

One remaining problem with the criminal justice approach is the ability to enforce HB 1261. Many children may be afraid to report instances of cyberbullying. For example, in previous school-based approaches, students have been afraid to report cyberbullying because "they would have to disclose that they violated school policies that often prohibit specific types of technology use . . . during the school day."[144] In essence, there is no reason to believe that children will be more likely to report cyberbullying to the police than to school administrators, since students are hesitant to report cyberbullying to school officials or to their parents.[145] Thus, unless the police go trolling for publicly-posted speech, this law may go entirely unenforced.[146]

If the General Assembly instead mandated that schools address cyberbullying, school policies would likely suffer from a

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[141] *Id.*, § 1(b).

[142] *Grayned*, 408 U.S. at 109 n.5 (1972) (quoting Edwards v. South Carolina, 372 U.S. 229, 236 (1963)).

[143] Targeted Picketing, § 1(b)(2).

[144] HERTZ & DAVID-FERNDON, *supra* note 2, at 10.

[145] Agatston, Kowalski & Limber, *supra* note 23, at S60.

[146] *See* Perez, *supra* note 139, at A1 (noting that crimes would likely have gone unnoticed or undiscovered if not for police searching Facebook for evidence).

jurisdictional problem. While it is clear that a school policy can prevent cyberbullying that occurs on school grounds through school resources, it is not at all clear that it can reach the off-campus behaviors that cause most of the incidents of cyberbullying.[147] Some courts have decided that outside of school, parents, not school officials have disciplinary authority,[148] while others have found that "[i]f it is reasonably foreseeable that student speech created off-campus will come to the attention of school authorities, then school authorities may exert disciplinary authority over it."[149] Despite courts having limited jurisdiction on cyberbullying outside of schools, some scholars have suggested that schools are *required* to assert authority over cyberbullying on the basis of sex due to Title IX.[150] Since cyberbullying can create a hostile school environment which will have a detrimental effect on the educational opportunities available to students on the basis of gender, a school could be subject to civil liability for failing to stop cyberbullying.[151] In general, though, policies that attempt to regulate off-campus behavior end up either being too vague[152] or result in content-based censorship.[153]

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[147] Barnett, *supra* note 2, at 593.

[148] Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979) (discussing a student newspaper written, copied, and distributed away from school ground in a situation in which "any activity within the school itself was *de minimis*").

[149] Calvert, *supra* note 77, at 228 (discussing Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 128 S.Ct. 1741 (2008)).

[150] *See* Servance, *supra* note 20, at 1222–24. Title IX of the Education Amendments of 1972 prohibits discrimination or being denied the benefits of education on the basis of sex by any institution receiving federal funding. 20 U.S.C. § 1681(a) (2006). The argument advanced by Servance is that if someone is subjected to cyberbullying on the basis of sex, they may be adversely affected and unable to continue their education at that school. Thus, that student would have been denied the benefit of their education on the basis of their sex.

[151] *See id.*

[152] Barnett, *supra* note 2, at 607–08.

[153] Calvert, *supra* note 77, at 219.

V. CONCLUSION AND SUGGESTIONS

HB 1261 is likely unconstitutional if traditional First Amendment analysis is applied to the Internet. The law also poses a serious danger of chilling free speech on the Internet. This is not to say that cyberbullying is not a serious problem that should not or cannot be addressed by the North Carolina General Assembly. To the contrary, cyberbullying has been demonstrated to have terrible, wide-reaching effects. Unfortunately, a vague, likely unconstitutional law does little to address the problem other than to allow legislators to say that they have tried to address cyberbullying. Any part of HB 1261 that is likely to pass constitutional muster is likely already covered in the cyberstalking statute, as discussed in Part IV(C), *supra*, and most parts of the new law pass neither the *Brandenburg* test for inciting imminent lawless action or the *Watts* test for true threats as discussed in Parts IV(B) and (C), *supra*, respectively. The best way to deal with cyberbullying is through education of school administrators, students, and parents,[154] not a criminal law like the one that this paper demonstrates to be almost certainly unconstitutional.

[154] HERTZ & DAVID-FERNDON, *supra* note 2, at 11–16.