Online Bullying and the First Amendment: State Cyberbullying Statutes After *People v. Marquan M.*[*]

INTRODUCTION

When fourteen-year-old Sarah[1] first signed up for ask.fm, an anonymous, question-based social media site, the questions and answers were simple and fun.[2] But soon she started getting more sinister messages.[3] Anonymous posters began to tease Sarah about the boy she had a crush on at school.[4] Her mother was sure Sarah's classmates were sending the messages, but there was no way to prove their identity.[5] Soon, the messages became more violent, telling Sarah to "slit [her] throat," commit "suicide," and "eat sleeping pills and die."[6] The bullying hurt, and Sarah began to cut herself.[7] Soon, she began thinking seriously about suicide.[8]

This story has a happy ending: Sarah did not commit suicide. However, there are many cyberbullying stories that have more tragic endings. Cyberbullying, bullying using electronic means like Facebook, texting, and email,[9] is a growing problem among young people.[10] One in four middle and high school students in the United States has experienced cyberbullying.[11] In several high-profile cases, cyberbullying has led children and teens to commit suicide.[12] Online

1. For purposes of confidentiality, her name has been changed.

2. Courtney Bryant, *Cyber Bullying Victim Didn't Know What to Do Besides Kill Herself*, BAKERSFIELDNOW.COM (Jan. 30, 2014, 7:47 PM), http://www.bakersfieldnow.com/news/investigations/Cyber-bullying-victim-lost-at-what-to-do-besides-kill-myself-242865501.html.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *What Is Cyberbullying?*, STOPBULLYING.GOV, http://www.stopbullying.gov/cyberbullying/what-is-it/ (last visited Jan. 15, 2015). "Bullying" is defined as "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance." *Bullying Definition*, STOPBULLYING.GOV, http://www.stopbullying.gov/what-is-bullying/definition/index.html (last visited Mar. 20, 2015).

10. *See infra* notes 36–37 and accompanying text.

11. Justin W. Patchin, *Summary of Our Research (2004-2014)*, CYBERBULLYING RES. CENTER (Apr. 9, 2014), http://cyberbullying.us/summary-of-our-research/.

12. *See, e.g.*, Stephanie Allen, *Lakeland Girl Commits Suicide After 1½ Years of Being Bullied*, THELEDGER.COM (Sept. 10, 2013), http://www.theledger.com/article/20130910/

bullying produces many of the same harmful effects as traditional bullying: it causes low self-esteem, depression, and feelings of powerlessness.[13] Unlike traditional bullying, however, cyberbullying does not stop when a child leaves school—it pervades every aspect of the victim's life through social media.[14] In response to these dangers, several states have passed legislation making cyberbullying a crime.[15]

Such criminalization of online speech, however, raises significant First Amendment concerns.[16] Under the First Amendment, the government may not restrict speech based on its content unless it falls into an exception or is narrowly tailored to serve a compelling state interest.[17] States also may not pass laws that criminalize a substantial amount of protected speech or that do not clearly define what types of speech are forbidden.[18] As many commentators have pointed out, cyberbullying laws often violate these principles by criminalizing broad swaths of online speech based only on writers' intent or the effect of the speech on victims.[19]

These arguments got their first day in court in *People v. Marquan M.*,[20] which marked the first time a court has struck down a

news/130919963?p=1&tc=pg; Aaron Martinez, *Cyberbullying: El Paso Girl's Suicide Puts Spotlight on Social Media Dangers*, EL PASO TIMES (Jan. 12, 2014), http://www.elpasotimes.com/news/ci_24895008/activist-lawmakers-battle-increasing-threat-cyber-bullying; Verity Sayles, *Ryan's Story a Lesson in Bullying . . . and Prevention*, THE ITEM (Mar. 7, 2014), http://www.telegram.com/article/20140307/COULTER01/303079958.

13. Jenn Anderson, Mary Bresnahan & Catherine Musatics, *Combating Weight-Based Cyberbullying on Facebook with the Dissenter Effect*, 17 CYBERPSYCHOL., BEHAV. & SOC. NETWORKING 281, 281 (2014).

14. *Id.*

15. *See, e.g.*, ARK. CODE ANN. § 5-71-217 (2005 & Supp. 2013); LA. REV. STAT. ANN. § 14:40.7 (2007 & Supp. 2013); N.C. GEN. STAT § 14-458.1 (2013). For a comprehensive list of cyberbullying laws by state, see generally Sameer Hinduja & Justin Patchin, *A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENTER, http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf (last updated Jan., 2015).

16. *See, e.g.*, John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 118–22 (2011); Lyrissa Lindsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 698 (2012).

17. *See* U.S. CONST. amend. I; *infra* Part I.C.

18. *See infra* Part I.C.

19. *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 Wake Forest L. Rev. 641, 656–66 (2011); Hayward, *supra* note 16, at 118–22; Lindsky & Garcia, *supra* note 16, at 713–17.

20. 19 N.E.3d 480 (N.Y. 2014).

cyberbullying provision on constitutional grounds.[21] In *Marquan M.*, the New York Court of Appeals struck down an Albany County law criminalizing cyberbullying on the grounds that the statutory language was overbroad and vague.[22] The court declined merely to sever the offending portions of the law because it found that the statutory language as written was not "fairly susceptible to an interpretation that satisfies applicable First Amendment requirements."[23] Therefore, it was beyond the court's power to rewrite the statute.[24]

If the reasoning used in *Marquan M.* is applied to other criminal cyberbullying statutes,[25] several statutes that currently exist are likely to be found unconstitutional, including North Carolina's.[26] Because these statutes criminalize online speech in very general ways, like Albany County's did, it will be difficult for courts and legislators to rewrite them in a way that is both constitutional and comprehensive in addressing bullying. When the offending speech is removed from the statutes, much of the deterrence the statutes are meant to create goes with it. This Recent Development argues that if states choose to pass criminal cyberbullying statutes after *Marquan M.*, the legislation should be narrow and carefully drafted. It further argues that instead of passing laws criminalizing cyberbullying in all contexts, states should enact laws codifying a specific definition of cyberbullying and then require public schools to adopt policies in line with that definition. While this solution also has problems, such as enforcement difficulties and the question of to what extent schools can regulate out-of-school behavior, such laws are much less likely to violate the First Amendment because they usually fall within the student-speech exception to the Amendment.

This Recent Development proceeds in four parts. Part I gives background about the problem of cyberbullying, possible legislative solutions, and relevant First Amendment jurisprudence. Part II explains the facts, holding, and reasoning of the case at issue, *People v. Marquan M.* Part III analyzes the court's decision in *Marquan M.* and argues that although the court was right to strike down the statute, its reasoning, if widely applied, would likely invalidate most criminal

21. *Id.* at 488; Daniel Wiessner, *N.Y. Top Court Says Cyberbullying Law Violates Free Speech*, REUTERS (Jul. 1, 2014), http://www.reuters.com/article/2014/07/01/us-new-york-cyberbully-idUSKBN0F64N420140701.

22. *Marquan M.*, 19 N.E.3d at 487.

23. *Id.* (internal quotation marks omitted).

24. *Id.* at 487.

25. *See infra* Part II.D.

26. *See, e.g.*, ARK. CODE ANN. § 5-71-217 (2005 & Supp. 2013); LA. REV. STAT. ANN. § 14:40.7 (2007 & Supp. 2013); N.C. GEN. STAT. § 14-458.1 (2013).

sanctions outlawing cyberbullying. Using North Carolina's statute as a representative example, Part III argues that many of these statutes are unconstitutional and proposes narrowing statutory language so that such statutes are less likely to be struck down. Finally, Part IV concludes that, in light of the court's analysis in *Marquan M.*, state legislatures that wish to attack the problem of cyberbullying should refrain from enacting broad criminal sanctions but instead should focus on narrowly drafted statutes, school policy laws, and specific definitions.

I. BACKGROUND: THE CYBERBULLYING PROBLEM AND POSSIBLE SOLUTIONS

Teenagers have always been bullies, but cyberbullying is a problem unique to the Internet age. The vast majority of teens are now online,[27] and more than three-fourths of them own cell phones.[28] The average eight- to eighteen-year-old spends more than seven hours a day using media, including computers and cell phones.[29] The Internet allows teen bullies to reach their victims in a pervasive and public manner that can be far more harmful than traditional bullying,[30] and Internet-based bullying has played a role in several well-publicized teen suicides.[31]

In the past decade, as the magnitude of the cyberbullying problem has become apparent, state legislatures have passed several different kinds of laws attempting to grapple with the problem,[32] some of which are more likely to implicate First Amendment concerns than others.[33] This Part begins by giving a comprehensive definition of cyberbullying and explaining why it is often more harmful than traditional bullying. It then details state and local legislative responses to cyberbullying and lays out the First Amendment law potentially implicated by cyberbullying legislation.

27. *Teens Fact Sheet*, PEW RES. INTERNET PROJECT, http://www.pewinternet.org/fact-sheets/teens-fact-sheet/ (last visited Nov. 16, 2014) (finding that ninety-five percent of teens twelve to seventeen were online as of September 2012).

28. Mary Madden et al., *Teens and Technology 2013*, PEW RES. INTERNET PROJECT (March 13, 2013), http://www.pewinternet.org/2013/03/13/teens-and-technology-2013/# (finding that seventy-eight percent of teens have a cell phone).

29. VICTORIA J. RIDEOUT, ULLA G. FOEHR & DONALD F. ROBERTS, GENERATION M²: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 2 (2010), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8010.pdf (finding that the average eight- to eighteen-year-old uses media, including computers, video games, and TV, for seven hours and thirty-eight minutes every day).

30. *See infra* Part I.A.

31. *See supra* note 12 and accompanying text.

32. *See infra* Part I.B.

33. *See infra* Part I.B.

A. The Problem

Because it can take many different forms, cyberbullying is difficult to define. Representative definitions include "bullying that takes place using electronic technology"[34] and "an aggressive, intentional act using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself."[35] Online bullying is increasingly common among teenagers, as "[a]bout one out of every four teens has experienced cyberbullying, and about one out of every six teens has done it to others."[36] In 2011, studies estimated that about 2.2 million students experienced cyberbullying—a significant increase from 1.5 million only two years earlier.[37]

Such high rates of cyberbullying are worrisome because cyberbullies can cause harm to their victims that often goes beyond the harm caused by traditional bullies. Children and teens who experience online bullying are more likely than their peers to feel depressed and powerless,[38] use drugs and alcohol, and have health problems.[39] In the most severe cases, cyberbullying has led the bullied child to commit suicide.[40] Research suggests cyberbullying is more hurtful than traditional bullying for three reasons.[41] First, it is easier for bullies because of the anonymity provided by the Internet; instead of teasing other students at school where they are likely to be caught by the teachers, cyberbullying allows teens to attack each other facelessly.[42] Second, cyberbullying is more pervasive than traditional bullying because it can be done on a wide variety of platforms, including Facebook, other social media, texting, and email. As a result, bullies can attack victims over multiple mediums at one time.[43] Because so many teenagers are using social media, it is socially difficult for them to disengage from these platforms.[44] Finally, the effects of cyberbullying can last longer than those of traditional bullying because mean

34. *What Is Cyberbullying?*, *supra* note 9.

35. Peter K. Smith et al., *Cyberbullying: Its Nature and Impact in Secondary School Pupils*, 49 J. CHILD PSYCHOL. & PSYCHIATRY 376, 376 (2008).

36. *Cyberbullying Facts*, CYBERBULLYING RES. CENTER, http://cyberbullying.us/facts/ (last visited Jan. 15, 2015).

37. *Id.*

38. Anderson et al., *supra* note 13, at 281.

39. *What Is Cyberbullying?*, *supra* note 9.

40. *See supra* note 12 and accompanying text.

41. Anderson et al., *supra* note 13, at 281.

42. *Id.*

43. *Id.*

44. *See* DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 19–22 (2014), *available at* http://www.danah.org/books/ItsComplicated.pdf.

comments are often permanently available for classmates and other peers to view online.[45]

The prevalence of cyberbullying thus creates a serious public safety issue for teenagers. Far more of teens' time is spent online now than ever before, and bullying can come from all directions on social media, with disastrous consequences. In response to this situation, states have begun to enact statutes meant to curb cyberbullying. For example, Maryland and Missouri both recently passed anti-cyberbullying statutes in response to victim suicides.[46] These laws are known as Grace's Law and Megan's Law, respectively, in honor of the victims.[47]

B. Legislative Responses

States have enacted many different types of legislation in response to cyberbullying. There are two main types of statutes directly addressing the issue: statutes that direct all public schools to implement anti-bullying policies and statutes that punish all cyberbullying on and off campus by criminal sanction.[48] Some states have also used harassment statutes or tort remedies to address the problem.[49] However, each of these approaches has some disadvantages, and none of the approaches do a perfect job of addressing the issue.

Statutes regulating school board policy are the most common type of anti-cyberbullying laws.[50] Every state except Montana has a law requiring public school districts to implement anti-bullying policies,

45. *Id.*

46. *See, e.g.*, MARYLAND GENERAL ASSEMBLY DEPARTMENT OF LEGISLATIVE SERVICES, FISCAL AND POLICY NOTE (2013), *available at* http://mgaleg.maryland.gov/2013RS/fnotes/bil_0002/sb1052.pdf (examining the fiscal and policy implications of the anti-cyberbullying statute "Grace's Law"); Melinda Deslatte, *Bill to Ban "Cyberbullying" in Louisiana Advances*, NBC NEWS (Apr. 20, 2010, 5:58PM), http://www.nbcnews.com/id/36673448/ns/technology_and_science-security/t/bill-ban-cyberbullying-louisiana-advances/#.VOuPPLDF_W4; *Missouri Begins Prosecuting Under Cyberbullying Law*, FOX NEWS (Dec. 20, 2008), http://www.foxnews.com/story/2008/12/20/missouri-begins-prosecuting-under-cyberbullying-law/.

47. *See* Grace's Law, ch. 369, § 1, 2013 Md. Laws 3334, 3335 (codified at MD. CODE ANN., CRIM. LAW § 3-805 (West 2013)); Act of Jun. 30, 2008, sec. A, 2008 Mo. Laws 812, 816–17 (codified at MO. REV. STAT. § 565.090 (2008)); Lance Whitney, *Cyberbullying Case to Test Megan's Law*, CNET (Aug. 28, 2009, 10:00 AM), http://www.cnet.com/news/cyberbullying-case-to-test-megans-law/ (noting that Missouri's cyberbullying legislation is "[u]nofficially known as Megan's Law").

48. *See* Hinduja & Patchin, *supra* note 15, at 1.

49. Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 852 (2010).

50. *See* Hinduja & Patchin, *supra* note 15, at 1.

and twenty of those laws specifically include cyberbullying.[51] These policies usually do not involve criminal sanctions.[52] The Maine statute is representative of the statutes that broadly regulate school board policy.[53] It prohibits bullying, including cyberbullying, on school campuses.[54] It further requires all school boards to adopt a policy that includes, among other features, procedures for enforcing and anonymously reporting bullying, a statement of disciplinary action to be taken against those who engage in bullying, and a procedure for referring bullies to counseling or other supportive services as needed.[55]

While they are certainly helpful in addressing the cyberbullying problem, school-based policy statutes like Maine's have some drawbacks as regulatory tools. The policies are effective at addressing cyberbullying that takes place on school grounds but do not reach cyberbullying that occurs outside of school.[56] They also do not address bullying perpetrated by adults or other individuals outside the school system.[57] In addition, while some states' school policy statutes apply to private schools,[58] not all states extend protections to private school students.[59]

As a complement to school policy requirements, a handful of states have recently begun promulgating statutes that impose criminal sanctions on all cyberbullying.[60] Several cities and counties also have ordinances outlawing cyberbullying.[61] Most of these statutes were

51. *Id.*
52. *Id.*
53. ME. REV. STAT. ANN. tit. 20-A, § 6554 (2012).
54. *Id.*
55. *Id.* § 5 (c), (e), (g), (i), § 9.
56. *See* King, *supra* note 49, at 860.
57. *Id.*
58. Massachusetts and Illinois, for example, require all schools, public and private, to implement anti-cyberbullying policies. *See* MASS. GEN. LAWS ANN. ch. 71, § 37O (West 2014); 105 ILL. COMP. STAT. ANN. 5/27–23.7(d) (West 2015).
59. *See, e.g.*, N.H. REV. STAT. ANN. § 193-F:4 (2011) (requiring only public school districts and chartered public schools to implement anti-cyberbullying policies); OHIO REV. CODE ANN. § 3313.666 (LexisNexis 2010) (requiring only public schools to implement anti-bullying policies); N.J. ADMIN. CODE § 6A:16-7.7 (2015) (same).
60. Hinduja & Patchin, *supra* note 15, at 1 (finding that forty-nine states have school policy requirements, while only fourteen have criminal sanctions). States that have a specific criminal sanction for cyberbullying include Arkansas, *see* ARK. CODE ANN. § 5-71-217 (2005 & Supp. 2013), Louisiana, LA. REV. STAT. ANN. § 14:40.7 (2007 & Supp. 2013), and North Carolina, N.C. GEN. STAT. § 14-458.1 (2013).
61. For examples of city ordinances outlawing cyberbullying and punishing the prohibited behavior with a fine, see, for example, Candace Romano, *Franklin Makes Cyberbullying a Crime*, FRANKLIN NOW (Apr. 25, 2012), http://www.franklinnow.com/news/148874525.html (discussing cyberbullying ordinances in Franklin, WI); *Megan Meier*

implemented within the past five years.[62] These statutes have a wider reach and generally apply to anyone who harasses a minor online, instead of applying to just public school students.[63] A representative example is the North Carolina statute entitled "Cyber-bullying,"[64] which makes it a misdemeanor for "any person" to use a computer to engage in a laundry list of online harassment behaviors "with the intent to intimidate or torment a minor," including creating a fake profile, accessing a computer network, or copying data.[65] Several other states and localities share North Carolina's ban on harassment with intent to "intimidate" or "torment" another person, including Albany County, New York, where the law at issue in *Marquan M.* originated.[66] Other popular features in state cyberbullying statutes include a broad definition of "electronic communication"[67] and require "malicious" intent.[68]

Although criminal sanctions like North Carolina's cover a larger population than school-based policy requirements, they are, however, difficult to enforce and to draft effectively. Enforcement of criminal cyberbullying statutes is challenging for several reasons. First, many children and teens do not feel comfortable reporting online bullying to

Case Prompts Cyberbullying Ordinance in Small Missouri Town, KSDK.COM (Mar. 5, 2008), http://archive.ksdk.com/news/story.aspx?storyid=141601 (discussing cyberbullying ordinances in LaGrange, MO).

62. For example, North Carolina passed its original statute criminalizing cyberbullying in 2009, Act of Aug. 28, 2009, ch. 551, 2009 N.C. Sess. Laws 1510, and amended it in 2012, School Violence Prevention Act of 2012, ch. 149, 2012 N.C. Sess. Laws 715 (codified as amended at N.C. GEN. STAT. § 14-458.1 (2013)). Missouri first attempted to combat the practice in 2008 through amendment of its criminal harassment statute. Act of Jun. 30, 2008, sec. A, 2008 Mo. Laws 812, 816–17 (codified at MO. REV. STAT. § 565.090 (2008)), *invalidated in part by* State v. Vaughn, 366 S.W.3d 513 (Mo. 2012) (severing subsection (5) from the act as unconstitutionally overbroad). In 2013, Maryland passed a similar law criminalizing cyberbullying. Grace's Law, ch. 369, § 1, 2013 Md. Laws 3334, 3335 (codified at MD. CODE ANN., CRIM. LAW § 3-805 (West 2013)).

63. *See, e.g.*, N.C. GEN. STAT. § 14-458.1 (2013).

64. *Id.*

65. *Id.* § 14-458.1(a)(1)–(6). For full statutory text and analysis, see *infra* notes 181–89 and accompanying text.

66. *See, e.g.*, ARK. CODE ANN. § 5-71-217 (2005 & Supp. 2013); LA. REV. STAT. ANN. § 14:40.7 (2007 & Supp. 2013); MD. CODE ANN., CRIM. LAW § 3-805 (2013); NEV. REV. STAT. ANN. § 392.915 (2010); ALBANY, N.Y., LOCAL LAW NO. 11 § 2 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by* People v. Marquan M., 19 N.E.3d 480 (N.Y. 2014).

67. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 3-805 (West 2013); WASH. REV. CODE ANN. § 9.61.260(5) (West 2012).

68. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 3-805 (West 2013); LA. REV. STAT. ANN. § 14:40.7 (2007 & Supp. 2013).

authorities.[69] Second, law enforcement resources and knowledge are limited.[70] Most local police departments do not have specialized knowledge of cybercrime.[71] As a result, the relatively few officers who do have experience prosecuting online crimes are likely to prioritize more serious crimes like child pornography and fraud, leaving little time to investigate misdemeanors like cyberbullying.[72] Furthermore, because officers are often intimidated by new technology,[73] they are likely to miss bullying that takes place on new platforms that are unknown to them. In addition to enforcement challenges, as this Recent Development will show, criminal cyberbullying statutes are difficult to draft in a way that does not violate the First Amendment.

Other possible responses are also not well suited to provide relief. Students could sue for intentional infliction of emotional distress or defamation, but civil damages often do not provide an adequate remedy for such severe emotional harm inflicted on victims at a pivotal point in their development.[74] States could also theoretically use preexisting criminal harassment statutes to prosecute for cyberbullying.[75] These statutes traditionally restrict harassment

69. Daniel M. Stewart & Eric J. Fritsch, *School and Law Enforcement Efforts to Combat Cyberbullying*, 55 PREVENTING SCH. FAILURE 79, 84 (2011).

70. *Id.*

71. *Id.*

72. *Id.*

73. Ken Thaxter, *Cyber Bullying: Challenges and Strategies Faced by Juvenile Police Officers*, 6 J. SOC. SCI. 529, 529–31 (2010).

74. King, *supra* note 49, at 853.

75. *E.g.*, TENN. CODE ANN. § 39-17-308 (2014). The statute states in part:

> (a) A person commits an offense who intentionally:
>
> (1) Threatens, by telephone, in writing or by electronic communication, including, but not limited to, text messaging, facsimile transmissions, electronic mail or Internet services, to take action known to be unlawful against any person and by this action knowingly annoys or alarms the recipient;
>
> (2) Places one (1) or more telephone calls anonymously, or at an hour or hours known to be inconvenient to the victim, or in an offensively repetitious manner, or without a legitimate purpose of communication, and by this action knowingly annoys or alarms the recipient;
>
> (3) Communicates by telephone to another that a relative or other person has been injured, killed or is ill when the communication is known to be false; or
>
> (4) Communicates with another person or transmits or displays an image without legitimate purpose with the intent that the image is viewed by the victim by any method described in subdivision (a)(1) and the person:
>
> (A) Maliciously intends the communication to be a threat of harm to the victim; and

through non-Internet means, such as telephone, mail, and personal contact, and have generally been upheld by courts against First Amendment and void-for-vagueness challenges.[76] However, convicting a cyberbullying defendant using these statutes is likely to be difficult, both because satisfying mens rea requirements is challenging[77] and because online bullying often does not rise to the level of threats or harassment.[78]

As the problem grows, legislatures are increasingly focused on passing cyberbullying statutes in an effort to find a comprehensive and effective legislative solution.[79] Because no legislative response provides a one-size-fits-all solution to the cyberbullying problem, it is important for legislatures to consider the advantages and drawbacks of each possible response. One key consideration in this analysis is whether the proposed statutes violate the First Amendment.

C. First Amendment Jurisprudence

Many criminal cyberbullying statutes implicate the First Amendment because the Amendment prohibits the passage of any law that abridges freedom of speech.[80] Courts have interpreted this as a general ban of content-based government restrictions on speech.[81] If the government does restrict protected speech based on its content, the restriction must be narrowly tailored to meet a compelling state interest.[82] However, there are several categories of expression that are unprotected by the First Amendment and therefore may constitutionally be restricted without narrow tailoring.[83] Such

> (B) A reasonable person would perceive the communication to be a threat of harm. . . ."
> Violation of this statute constitutes a misdemeanor.

Id. § 39-17-308(c).

76. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking*," 107 NW. U. L. REV. 731, 740–41 (2013).

77. *See* Susan W. Brenner and Megan Rehberg, *"Kiddie Crime?" The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 26 (2009).

78. King, *supra* note 49, at 855–56.

79. Most cyberbullying statutes were passed in the last five years. *See* Hinduja and Patchin, *supra* note 15, at 2–19. As of January 2015, proposed legislation was pending in four more states. *Id.* at 1.

80. U.S. CONST. amend. I.

81. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011); Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).

82. *See, e.g.*, *Brown*, 131 S. Ct. at 2738; Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985).

83. *See infra* notes 87–92 and accompanying text.

restrictions may nevertheless be struck down if they are overly broad[84] or vague.[85] Furthermore, because elementary and secondary school students have limited First Amendment rights, schools may restrict student speech in several additional contexts where it would otherwise be protected.[86]

Generally, the First Amendment bars the government from restricting speech "because of its message, its ideas, its subject matter, or its content."[87] Under the well-known exceptions to this rule, the government can restrict, inter alia, speech intended and likely to incite imminent lawless action,[88] true threats,[89] fighting words,[90] and obscenity.[91] These types of speech are not protected by the First Amendment.[92] The government may also restrict protected speech if the restriction passes the strict scrutiny test, meaning that it is "justified by a compelling government interest and is narrowly drawn to serve that interest."[93] Because the strict scrutiny standard requires that the speech restriction is necessary to solving the problem at hand,[94] courts rarely find content-based restrictions on protected speech permissible.[95]

A First Amendment challenge to a statute can also be based on the overbreadth and vagueness doctrines, which ban statutes that cover too much speech[96] or that do not sufficiently explain the type of speech that is prohibited.[97] A statute is overbroad if it criminalizes a substantial amount of protected speech.[98] The test for overbreadth is whether "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate

84. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

85. Winters v. New York, 333 U.S. 507, 509 (1948).

86. *See infra* notes 102–12 and accompanying text.

87. United States v. Stevens, 559 U.S. 460, 468 (2010) (internal quotation marks omitted); *see infra* notes 102–12 and accompanying text.

88. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

89. Virginia v. Black, 538 U.S. 343, 344 (2003); Watts v. United States, 394 U.S. 705, 707 (1969).

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

91. Miller v. California, 413 U.S. 15, 23–24 (1973).

92. Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 733 (2007).

93. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

94. *Id.*

95. United States v. Playboy Entm't Grp., 529 U.S. 803, 818 (2000).

96. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

97. Winters v. New York, 333 U.S. 507, 509 (1948).

98. United States v. Stevens, 559 U.S. 460, 473 (2010).

sweep,"[99] meaning that it covers too much protected speech to be permissible. Similarly, a criminal statute is unconstitutionally vague if it does not explicitly define the forbidden conduct in a way that gives citizens adequate notice of what they are forbidden to do.[100] If "men of common intelligence must necessarily guess at [a statute's] meaning," courts will strike down the statute as void for vagueness.[101]

The government can also restrict otherwise protected student speech in public schools under certain circumstances.[102] Although students do not "shed their constitutional right to freedom of speech at the schoolhouse gate,"[103] schools' roles as educators require that they have the capacity to discipline students for speech that does not comport with their "basic educational mission."[104] The seminal case, *Tinker v. Des Moines Independent Community School District*,[105] held that schools may regulate student speech only when officials have a concrete reason to believe that the speech will substantially and materially disrupt the school's operation or the rights of other students.[106] In addition, schools may restrict on-campus speech that is lewd and vulgar[107] or that promotes drug use.[108] These limitations extend to speech that takes place at school-sponsored off-campus activities.[109] Courts are split on whether schools may regulate online speech that originates off campus, such as social media postings.[110]

99. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted).

100. Coates v. Cincinnati, 402 U.S. 611, 614 (1971); United States v. Harriss, 347 U.S. 612, 617 (1954).

101. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

102. *See* Morse v. Frederick, 551 U.S. 393, 397 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

103. *Tinker*, 393 U.S. at 506.

104. *Bethel*, 478 U.S. at 682.

105. 393 U.S. 503 (1969).

106. *Id.* at 509.

107. *Bethel*, 478 U.S. at 685.

108. Morse v. Frederick, 551 U.S. 393, 397 (2007).

109. *Id.* at 400–01.

110. *See* Layshock v. Hermitage, 650 F.3d 205, 216–17 (3rd Cir. 2011) (holding that a school could not punish a student for creating, on a home computer, a vulgar and fake MySpace page for the principal, even though it was accessed at school); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3rd Cir. 2011) (holding the same, except that the profile was not accessed at school); Evans v. Bayer, 684 F. Supp. 2d 1365, 1371–72 (S.D. Fla. 2010) (holding that the school could not discipline the student for off-campus creation of a Facebook page mocking the principal). *But see* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574–75 (4th Cir. 2011) (upholding a school's punishment of a student for creating a MySpace page mocking another student when the page was accessed on a school computer); Doninger v. Niehoff, 642 F.3d 334, 345–47 (2d Cir. 2011) (upholding

Some courts require a "sufficient nexus" between the speech and the campus,[111] while others do not explicitly require such a link.[112]

These First Amendment principles must be considered every time a legislature passes a cyberbullying law. Because school policy statutes deal only with student behavior in public schools, they are often justifiable under the government's heightened ability to restrict speech in those schools, at least to the extent that the speech has a "sufficient nexus" to the school, if required under the law.[113] However, broad criminal statutes are not limited to in-school behavior, but generally restrict speech based on content, and thus implicate the First Amendment principles of overbreadth and vagueness, as well as the strict scrutiny test.[114]

D. Summary

Cyberbullying is growing quickly as a threat to the nation's teenagers.[115] In response to its increasing prevalence, many state legislatures and local governments have made an effort to address the problem.[116] Most did so either by updating their school policies or bullying laws to include online bullying or by passing statutes that specifically made cyberbullying a crime. However, both approaches pose problems. States that limit cyberbullying penalties to the school policy context have wider latitude to proscribe speech but often fail to reach bullying that takes place outside of school, while broad criminal sanctions pose considerable First Amendment challenges. These problems are typified in the case at issue, *People v. Marquan M.*

punishment of a student who wrote an off-campus blog post insulting administrators and encouraging students to call the superintendent).

111. *See, e.g.*, *Evans*, 684 F. Supp. 2d at 1372; J.S. v Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (holding that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech").

112. *See* Goodno, *supra* note 19, at 658–62.

113. *Cf.* Sameer Hinduja & Justin W. Patchin, *Cyberbullying Legislation and Case Law: Implications for School Policy and Practice*, CYBERBULLYING RES. CENTER 2–3 (Jan. 2015), http://www.cyberbullying.us/cyberbullying-legal-issues.pdf (discussing limits on school's ability to regulate off-campus conduct).

114. Hayward, *supra* note 16, at 118–121.

115. *See supra* note 36–37 and accompanying text.

116. *See supra* notes 46–47 and accompanying text.

II. THE CASE: *PEOPLE V. MARQUAN M.*

One local government that resolved to do something about cyberbullying was that of Albany County, New York.[117] In 2010, it passed a local law criminalizing cyberbullying.[118] When one student was prosecuted under the law, however, he argued that the law was unconstitutional under the First Amendment.[119] The state's highest court agreed with his argument and struck down the statute as unconstitutionally overbroad.[120] The dissenting judges disagreed with this interpretation and argued the county's action was permissible.[121]

A. The Statute

Before proceeding to an analysis of the court's opinion, some relevant background on the Albany County statute is in order. Believing that the state of New York had failed to sufficiently deter cyberbullying through its statute[122]—which imposed educational penalties on perpetrators of electronic bullying but did not make it a crime[123]—the Albany County Legislature decided to address the problem itself.[124] In 2010, the county passed a law criminalizing cyberbullying, which the county defined as:

> any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.[125]

The law forbade cyberbullying against "any minor or person," with "person" defined to include all individuals, corporations, and business

117. ALBANY, N.Y., LOCAL LAW NO. 11 § 1 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by* People v. Marquan M., 19 N.E.3d 480 (N.Y. 2014).

118. *Id.* §§ 3–4.

119. People v. Marquan M., 19 N.E.3d 480, 484 (N.Y. 2014).

120. *Id.* at 488.

121. *Id.* at 488–90.

122. *Id.* at 483–84.

123. N.Y. EDUC. LAW § 13 (McKinney Supp. 2015).

124. *Marquan M.*, 19 N.E.3d at 483–84.

125. *Id.* at 484.

partnerships—an extremely broad definition.[126] This behavior constituted a misdemeanor and was punishable with up to one year in jail and a $1,000 fine.[127]

The county explicitly stated that its intent in passing the law was to address the transformation of bullying "from a predominantly school-based issue to a broader societal problem."[128] It found that cyberbullying was "rampant" and noted that Internet bullying is "more extreme" than traditional bullying and "follows its victims everywhere they go" due to its online nature.[129] The legislature listed several specific harms caused by cyberbullying that the law was intended to address, including anxiety and depression, social isolation, fear of technology, poor grades, low self-esteem, and suicide.[130]

B. Facts of the Case

The case at issue here grew out of one of the first applications of the Albany County statute. A month after the statute was passed, the defendant, Marquan M., a high school student at Cohoes High School in Albany County, created a Facebook page under a false name, "Cohoes Flame."[131] He used this page to anonymously post pictures of his classmates, along with detailed and vulgar captions alleging that they had engaged in specific types of sexual activity.[132] The county charged Marquan M. with cyberbullying.[133] He moved to dismiss on the grounds that the statute was an unconstitutional restriction of speech under the First Amendment.[134] The motion was denied, and the denial was affirmed by the county court on the grounds that the cyberbullying law was constitutional as applied to minors.[135] The defendant appealed to the New York Court of Appeals.[136]

126. *Id.*
127. *Id.*
128. ALBANY, N.Y., LOCAL LAW NO. 11 § 1 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by Marquan M.*, 19 N.E.3d 480.
129. *Id.*
130. *Id.*
131. *Marquan M.*, 19 N.E.3d at 484.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

C. Court's Holding

The New York Court of Appeals held that the statute was overbroad and therefore violated the First Amendment.[137] Furthermore, the court could not make the law constitutional by severing the offending portions because the statutory language as written was not "fairly susceptible to an interpretation that satisfies applicable First Amendment requirements," and therefore it was beyond the court's power to rewrite the statute.[138] This marked the first time a court struck down a criminal cyberbullying statute on First Amendment grounds.[139]

The court pointed to several specific parts of the statute that were too broad. First, the statute criminalized any communication by electronic means "with no legitimate purpose . . . with the intent to harass or annoy another person."[140] Since the statute's definition of "person" included all individuals and corporations,[141] this language on its face forbade not only harassment aimed at children but also at adults and businesses. The court found that this language could apply to "an email disclosing private information about a corporation or a telephone call meant to annoy an adult."[142] Because this kind of behavior is "outside the popular understanding of cyberbullying"[143] and far from the concerns about child welfare that motivated the passage of the statute, the court held that the law must be struck down.[144]

The court also struck down as overbroad much of the statutory language defining cyberbullying.[145] The statute applied to all kinds of electronic communication and extended to communications intending to "annoy," "harass," or "humiliate," not just to those intended to "threaten" or "torment."[146] It also criminalized, but did not define, "hate mail," which is also very broad.[147] Although the statute did list specific kinds of behavior that it prohibited, including "disseminating

137. *Id.* at 488.
138. *Id.* at 487.
139. Wiessner, *supra* note 21.
140. *Marquan M.*, 19 N.E.3d at 484.
141. ALBANY, N.Y., LOCAL LAW NO. 11 § 2 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by Marquan M.*, 19 N.E.3d 480.
142. *Marquan M.*, 19 N.E.3d at 486.
143. *Id.*
144. *Id.* at 488.
145. *Id.* at 486–87.
146. *Id.*
147. *Id.*

embarrassing or sexually explicit photographs" and "disseminating private, personal, or false sexual information," the list was not exhaustive.[148] As written, therefore, the law applied to every conceivable form of electronic communication, including, as the court pointed out, those as unlikely as "a ham radio transmission" or "a telegram."[149]

The county conceded that its statute was overly broad as written because it encroached on protected areas of speech without narrow tailoring to a specific government interest, which violates strict scrutiny.[150] To retain the statute, the county offered to cut out all the unconstitutional sections.[151] This would leave Albany County with a law criminalizing three specific kinds of electronic messages sent with the intent to inflict emotional harm on a child: (1) sexually explicit photos; (2) private sexual information; and (3) false sexual information with no legitimate purpose.[152] However, the court rejected the county's attempt, reasoning that the original language was not susceptible to that interpretation.[153] According to the court, rewriting the statute in this way would be impermissible because doing so would violate separation of powers by usurping the legislative function.[154] It could also lead to vagueness problems if the original legislative intent was so different from the revised text that it became difficult for citizens to determine the statute's meaning.[155] Therefore, the court held, the statute must be struck down entirely due to its breadth and inseverability.[156]

D. Dissent

The dissent agreed that the portions of the statute at issue were unconstitutionally vague but argued that they could be stricken from the statute without violating the Constitution.[157] In the dissent's view, the statute would be permissible if it removed the reference to adults, the ban on "embarrassing" communications, and the criminalization of

148. *Id.*
149. *Id.* A ham radio transmission is a type of AM radio communication made by amateur hobbyists. *What Is Ham Radio*, AM. RADIO RELAY LEAGUE, http://www.arrl.org/what-is-ham-radio (last visited March 30, 2015).
150. *Marquan M.*, 19 N.E.3d at 486–87.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 488 (Smith, J., dissenting).

"hate mail," because the ban on "annoy[ing]," "humiliat[ing]," "harass[ing]" and so forth applies only to such behavior when done with an intention to "inflict significant emotional harm" on the victim.[158] Essentially, the dissenting judges argued that the majority was too concerned with perceived "flaws in the draftsmanship" of the law to focus on the key question of whether the county could constitutionally ban electronic communication intended to harm children.[159] When considering only this issue, the dissent said, precedent makes it clear that "speech designed to inflict serious emotional injury is protected only when . . . [it] is directed at a matter of public concern."[160] Since the cyberbullying in this case (and most cyberbullying) did not address any public matter, the dissenting judges reasoned, it was not protected speech and could permissibly be banned.[161]

The court in *Marquan M.* struck down an obviously flawed statute because it was overbroad and vague. Although *Marquan M.* only has binding authority in New York, citizens of states with similar cyberbullying statutes should nevertheless pay attention to it for several reasons. First, this is the country's first decision on a key question regarding how the Constitution should be applied to efforts to regulate bullying using new technology. Because technology is quickly changing, the number of cases directly addressing this topic is limited. Therefore, *Marquan M.* is currently the only case that can be directly analogized to when courts consider the constitutionality of a cyberbullying statute. Second, probably because of the lack of cases available, courts in cyberbullying cases often use cases from other jurisdictions as strong persuasive authority. For example, *J.S. v. Bethlehem Area School District*,[162] a Pennsylvania Supreme Court case about the constitutionality of cyberbullying restrictions in schools, has been cited in several cases from unrelated jurisdictions, even though it is a case from a different state's highest court.[163] Third, because North Carolina and several other states have statutes that share features with Albany County's,[164] and the underlying constitutional principles are obviously the same, the analysis will likely be similar even if a court does not cite directly to *Marquan M.*

158. *Id.* at 488–89.
159. *Id.* at 490.
160. *Id.* (citing Snyder v. Phelps, 131 S. Ct 1207, 1215 (2011)).
161. *Id.*
162. 807 A.2d 847 (Pa. 2002).
163. *See, e.g.*, Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007); Evans v. Bayer, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010).
164. *See infra* Part III.B.

III. ANALYSIS

The *Marquan M.* court was correct to strike down the Albany County statute, which was impermissibly broad. Furthermore, the court applied First Amendment principles in such a way that, if the New York court's analysis is applied to other states' criminal cyberbullying sanctions, they will likely either be struck down or be rendered largely useless. In light of this, legislatures should retreat from the use of criminal statutes to address cyberbullying and, instead, update their school policy laws and expand teacher and parent cyberbullying education.

A. The Court Got it Right in Marquan M.

The New York Court of Appeals made the right decision in striking down Albany County's poorly drafted cyberbullying law. Every party involved in *Marquan M.*, including the county itself, agreed that Albany County's criminal sanction on cyberbullying was unconstitutionally vague as written.[165] There was no dispute that it was impermissible for the statute to (1) criminalize communications directed at adults and business entities; (2) prohibit behavior using terms as vague as "annoy," "harass," and "hate mail" without providing any specific definitions; and (3) apply to "every conceivable form of electronic communication" such that the law could be interpreted to cover, for example, calling an adult to bother them.[166] The only thing the parties disagreed on was whether it could be made constitutional, and the court ruled that it could not judicially amend the statute in a way that would allow it to survive.[167] On this point, the court's analysis was correct for several reasons.

First, the revised, allegedly constitutional version of the statute offered by Albany County did not provide the comprehensive protection from cyberbullying that its drafters intended to enact. The edited version of the statute, which was supported by the county and the two dissenting judges, criminalized only cyberbullying related to sexual activity (specifically outlawing communication involving sexually explicit photos, private sexual information, and false sexual information).[168] But the text and legislative history of the Albany statute suggests that it was intended to address *all* cyberbullying, not

165. *Marquan M.*, 19 N.E.3d at 488.
166. *Id.* at 490.
167. *Id.*
168. *Id.*

just cyberbullying related to sexual activity.[169] The legislative intent section of the law refers to "extreme . . . taunts and threats" and resulting negative effects like depression and even suicide, but it does not specify any particular intent to prohibit only bullying related to sexual activity.[170] Indeed, studies show that teens are bullied about a wide range of things, including weight,[171] sexual orientation,[172] disabilities,[173] and appearance.[174] Furthermore, the legislature defined cyberbullying very broadly, as any "non-physical bullying behaviors transmitted by electronic means."[175] This suggests a desire to enact a wide-ranging law, not one limited to sexually charged harassment.

Second, the dissent's arguments for upholding the law failed to take into account the complexity of the underlying First Amendment jurisprudence. The dissent's argument that "the majority makes too much of what it sees as flaws in the draftsmanship of the Cyber-Bullying law"[176] misses the point of the majority's First Amendment analysis. According to the dissent, the key question in the case is not whether the text of the statute comports with the First Amendment but "whether Albany County constitutionally may do what it is trying to do"—prohibit speech intended to cause emotional harm to minors.[177] But the majority throughout specifically declines to rule on whether or not cyberbullying legislation is permissible in general.[178] It focuses only

169. *See supra* notes 121–29 and accompanying text; *infra* note 175 and accompanying text.

170. ALBANY, N.Y., LOCAL LAW NO. 11 § 1 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by Marquan M.*, 19 N.E.3d 480.

171. *See generally* Anderson et al, *supra* note 13 (providing a discussion of measures to combat weight-based cyberbullying).

172. Victoria Clarke, Celia Kitzinger & Jonathan Potter, *Kids Are Just Cruel Anyway: Lesbian and Gay Parents Talk About Homophobic Bullying*, 43 BRIT. J. SOC. PSYCHOL. 531, 531 (2004) (explaining that up to half of all gay men and women have experienced school bullying).

173. Robin M. Kowalski & Cristin Fedina, *Cyber Bullying in ADHD and Asperger Syndrome Populations*, 5 RES. AUTISM SPECTRUM DISORDERS 1201, 1201–02 (2011) (noting that children with disabilities and special needs are more likely to be bullied than their peers and finding that more than half of children with ADHD and Asperger Syndrome in study had been bullied within the past two months).

174. Parker Magin, *Appearance-Related Bullying and Skin Disorders*, 31 CLINICS DERMATOLOGY 66, 67 (2013).

175. ALBANY, N.Y., LOCAL LAW NO. 11 § 2 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by* People v. Marquan M., 19 N.E.3d 480 (N.Y. 2014).

176. People v. Marquan M., 19 N.E.3d 480, 490 (N.Y. 2014) (Smith, J., dissenting).

177. *Id.*

178. *See, e.g.*, *id.* at 485 (majority opinion) ("Cyberbullying is not conceptually immune from government regulation"); *id.* at 488 ("Even if the First Amendment allows a

on whether the legislature's prohibition of the specific conduct mentioned in *this* statute is permissible because that is what the First Amendment analysis requires. The constitutionality of cyberbullying statutes in general was not at issue in this case, and the dissent misses the point when it focuses on such a broad issue.

Although the court struck down the specific statute at issue here, it did suggest several times that it is likely possible to write a cyberbullying statute that does pass constitutional muster.[179] The court noted that "[c]yberbullying is not conceptually immune from government regulation" and implied several times throughout its analysis that the Albany County statute would be constitutional if it had been drafted differently.[180] However, the court did not provide any suggestions as to what such a law would look like or how it would work.

On the whole, then, the New York Court of Appeals was correct in its approach to the Albany County statute. Both parties agreed that the law was unconstitutional, and the court was correct not to sever it because doing so would render it largely useless. The dissent's arguments for why the statute should be upheld do not directly address the majority's strong points on the topic. If the majority's reasoning were to be applied to other state statutes criminalizing cyberbullying, it would likely strike down many of them as well.

B. Effect on Other Existing Statutes Criminalizing Cyberbullying

If adopted by other courts, the New York Court of Appeals's analysis does not bode well for the future of criminal sanctions outlawing cyberbullying. The limited nature of the Albany County statute after the concededly unconstitutional sections were removed suggests that it will be difficult for legislators in other states to write laws that are both constitutional and effective.[181] Furthermore, the court's insistence that the statutes cannot be severed but must be struck down entirely, if considered in other states' constitutional analyses, will make it less likely that other courts will uphold challenged statutes. North Carolina's statute, for example, shares many of the features that were found unconstitutional in the Albany County statute.

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cyberbullying statute of the limited nature proposed by Albany County, the local law here was not drafted in that manner.").

179. *See id.* at 485; *id.* at 490 (Smith, J., dissenting).

180. *Id.* at 485 (majority opinion); *see id.* at 490 (Smith, J., dissenting).

181. For a discussion of the applicability of *Marquan M.*'s principles to other jurisdictions' statutes, see *supra* Part II.D.

Several states throughout the country have cyberbullying statutes that share features with Albany County's.[182] The North Carolina statute is representative of these statutes. North Carolina's cyberbullying statute, which was passed in 2009 and amended in 2012, makes it illegal for anyone to "use a computer or computer network" to engage in six different listed behaviors "with the intent to intimidate or torture a minor."[183] The prohibited behaviors under North Carolina's statute include:

(1) With the intent to intimidate or torment a minor:
    a. Build a fake profile or Web site;
    b. Pose as a minor in:
        1. An Internet chat room;
        2. An electronic mail message; or
        3. An instant message;
    c. Follow a minor online or into an Internet chat room; or
    d. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor.
(2) With the intent to intimidate or torment a minor or the minor's parent or guardian:
    a. Post a real or doctored image of a minor on the Internet;
    b. Access, alter, or erase any computer network, computer data, computer program, or computer software, including breaking into a password protected account or stealing or otherwise accessing passwords; or
    c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor.
(3) Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor.
(4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network).

182. *See* Hinduja & Patchin, *supra* note 15, at 1 (finding that twenty-one states, including North Carolina, have criminal cyberbullying statutes as of 2015).

183. N.C. GEN. STAT. § 14-458.1 (2013).

> (5) Sign up a minor for a pornographic Internet site with the intent to intimidate or torment the minor.
> (6) Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages, with the intent to intimidate or torment the minor."[184]

This language is more specific about behaviors than Albany County's, but it shares several of the features that the court found objectionable in *Marquan M*.[185] As a result, it would probably be found unconstitutional if subjected to an analysis similar to that of the New York Court of Appeals in *Marquan M.* Although the North Carolina statute is certainly less egregious than the Albany County statute—its prohibitions apply largely to bullying behavior towards minors, not adults, and it limits its coverage to communications made using a "computer or computer network" (which includes a smartphone)—it nevertheless is unconstitutional on two grounds used in *Marquan M.*: it uses vague words and it applies to a wide range of behaviors outside the traditional understanding of cyberbullying.

First, like Albany County's, the North Carolina statute is impermissibly vague because it lacks crucial definitions. It bans performing several online actions with the intent to "intimidate" or "torment," but neither term is defined.[186] This prohibition is arguably just as vague as the Albany County statute's criminalization of "embarrassing" statements or "hate mail," which even the county conceded was unconstitutional because it shares a lack of definition.[187] Just like speech that is likely to embarrass, the kind of speech that is likely to intimidate any given person is entirely subjective. If a person is extremely timid or sheltered, for example, merely using swear words or mentioning sexual activity might intimidate them. Similarly, if a person has been robbed or abused, they might be tormented by mention of those activities where the average person would not. Like the Albany County statute, therefore, the use of this language would likely render the statute unconstitutionally broad.

Second, much like the Albany County statute, the North Carolina statute as written is overbroad because it encompasses an extremely wide range of online actions, some of which fall "outside the popular

184. *Id.*

185. *See infra* notes 186–91 and accompanying text.

186. N.C. GEN. STAT. § 14-453 (listing definitions for purpose of statute with neither "intimidate" nor "torment" being listed).

187. People v. Marquan M., 19 N.E.3d 480, 486–87 (N.Y. 2014).

understanding of cyberbullying."[188] It covers both a wide range of behaviors and the entire spectrum of online communication. For example, the statute could arguably criminalize accessing any computer program with intent to intimidate a child's parent[189] or signing up a high school student for a spam listserv.[190] This kind of activity exceeds the generally accepted definitions of cyberbullying laid out in Part I.A. It also goes beyond the type of behavior that the North Carolina law intended to combat, which was limited to protecting children from bullying and harassment in order to ensure a safe climate in schools and allow the state to educate its children in a safe environment.[191] Therefore, if it were analyzed under the reasoning in *Marquan M.*, it would likely be found unconstitutional because it covers too much ground.

Several other states have similar statutes that would also likely be found unconstitutional if subjected to the analysis used in *Marquan M.*[192] This kind of limitation on the content of statutes has the potential to throw a wrench into the anti-cyberbullying legislative trend. The court's takedown of the Albany County statute may deter legislators in other states from passing similarly broad criminal sanctions addressing cyberbullying for fear that they too will be struck down.

If states do choose to enact criminal cyberbullying provisions, however, they should be carefully drafted. Legislators should be wary of blanket bans of undefined categories like Albany County's prohibition of "hate mail."[193] They should carefully consider whether their law, as drafted, would cover large amounts of speech that does not fall within the traditional definition of cyberbullying, particularly speech directed at adults. Finally, they should consider whether their definition of "electronic communication"[194] is overbroad. Legislators should then consider whether a bill fitting these qualifications is well equipped to deter cyberbullying to the extent that they intend. If not, they should consider an alternative provision. Albany County itself has

188. *Id.*

189. *See* N.C. GEN. STAT. § 14-458.1(a)(2)(b).

190. *See id.* § 14-458.1(a)(6).

191. School Violence Prevention Act of 2012, ch. 149, 2012 N.C. Sess. Laws 715 (codified as amended at N.C. GEN. STAT. § 14-458.1 (2013)).

192. *See generally* ARK. CODE ANN. § 5-71-217 (2005 & Supp. 2013) (prohibiting cyberbullying with broad language); IOWA CODE § 280.28 (2012) (doing the same).

193. ALBANY, N.Y., LOCAL LAW NO. 11 § 2 (2010), *available at* http://www.albanycounty.com/Libraries/Crime_Victims_and_Sexual_Violence_Center/LocalLaw_No_11_for_2010_CyberBullying.sflb.ashx, *invalidated by Marquan M.*, 19 N.E.3d. 480.

194. *Id.*

chosen this route, having passed a new, more tightly drafted law to replace the one that was struck down.[195]

In light of the constitutional issues, the case for specific criminal cyberbullying statutes becomes weak. If they are to be constitutional, the existing statutes likely must cut out a significant part of the activity that they originally meant to criminalize. Furthermore, it is possible that other courts may decide to follow the New York Court of Appeals's lead and find such statutes unconstitutional, or the Supreme Court of the United States may take up the issue. If legislatures continue to pass anti-cyberbullying statutes, they will be creating a network of unstable and uncertain laws. Prosecutors may be wary of actually using the laws because they fear they will be struck down. After *Marquan M.*, then, states hopefully will be less likely to—and should not—pass laws making cyberbullying a crime.

C. Lessons and Solutions: Careful Definitions and School Policy

In light of the court's decision in *Marquan M.* and its message that cyberbullying statutes must be carefully drafted, legislatures may pause before they pass blanket criminalizations of cyberbullying in the future. This is a good thing. Instead of passing widely applicable laws with a high chance of being struck down on constitutional grounds, states should instead focus on updating and clarifying existing laws that fight cyberbullying through requiring the implementation of school policies. This will hopefully lead to locally based approaches as well as the development of a clear jurisprudence that is not divided between criminal and civil laws.

Although school policy statutes are often limited in scope to public schools and do not have the ability to deter adults who engage in cyberbullying, they are still a better solution than constitutionally flawed and unstable criminal statutes because they offer stable protection to the majority of the affected population.[196] It is settled law that schools have the authority to make cyberbullying policies pertaining to bullying that takes place in school.[197] While courts are still divided on schools' authority to regulate bullying that takes place

195. Jordan Carleo-Evangelist, *Sharpened Albany County Cyberbullying Law Heads to Monday Vote*, TIMES UNION (Sept. 5, 2014), http://www.timesunion.com/local/article/Albany-County-s-cyberbullying-law-crafted-for-5736875.php.

196. Although not every state has cyberbullying policy requirements for private school students, only ten percent of students in the United States attend private schools. *Facts and Studies*, COUNCIL FOR AM. PRIVATE EDUC., http://www.capenet.org/facts.html (last visited Mar. 22, 2015).

197. *See supra* notes 102–12 and accompanying text.

entirely off campus, several circuit courts have ruled that off-campus speech that enters the school building may be regulated.[198] Therefore, school policy sanctions are available to many affected students.

Furthermore, school policies are not as restricted by proof and enforcement difficulties as criminal statutes. States should take advantage of this flexibility to update their policy requirements with a clear definition of cyberbullying based on the *Marquan M.* court's analysis. They should make it clear that schools should avoid vague definitions and not restrict their policy to only certain kinds of offenses. One definition of bullying used by the California public school system is that of researcher Ken Rigby. Rigby defines bullying as "a desire to hurt + a hurtful action + a power imbalance + repetition (typically) + an unjust use of power + evident enjoyment by the aggressor + a sense of being oppressed on the part of the target."[199] This definition is useful because it incorporates key characteristics of bullying and cyberbullying, including intent to harm, actual harmful action, and power imbalance.

Another example of a state that has been successful in creating a relatively comprehensive definition of cyberbullying is Maine.[200] Under that state's statute, cyberbullying is defined as "bullying through the use of technology or any electronic communication."[201] Bullying, in turn, has an expansive definition:

> "Bullying" includes, but is not limited to, a written, oral or electronic expression or a physical act or gesture or any combination thereof directed at a student or students that:
>
> (1) Has, or a reasonable person would expect it to have, the effect of:
>
> (a) Physically harming a student or damaging a student's property; or
>
> (b) Placing a student in reasonable fear of physical harm or damage to the student's property;
>
> (2) Interferes with the rights of a student by:
>
> (a) Creating an intimidating or hostile educational environment for the student; or

198. *See, e.g.*, Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574–75 (4th Cir. 2011); Doninger v. Niehoff, 642 F.3d 334, 345–47 (2d. Cir. 2011) (upholding the punishment of a student who wrote an off-campus blog post insulting administrators and encouraging students to call the superintendent).

199. CAL. DEP'T OF EDUC., BULLYING AT SCHOOL 7 (2003), *available at* http://www.cde.ca.gov/ls/ss/se/documents/bullyingatschool.pdf.

200. ME. REV. STAT. ANN. tit. 20-A, § 6554 (Supp. 2012); *see supra* Part I.B.

201. ME. REV. STAT. ANN. tit. 20-A, § 6554.

> (b) Interfering with the student's academic performance or ability to participate in or benefit from the services, activities or privileges provided by a school; or
>
> (3) Is based on a student's actual or perceived characteristics or is based on a student's association with [someone with those characteristics].[202]

Because this definition is closely tethered to the traditional school-based understanding of bullying, it is much less likely to cover unrelated behavior. The specific mention of students' characteristics and the explanation of how bullying could interfere with a student's rights provides a crisp definition of what is covered. While the coverage is less comprehensive, the statute does not run the risk of being struck down as unconstitutional and thus will likely be more effective. Like the California definition, Maine uses a level of detail that is not found in the North Carolina or Albany County anti-cyberbullying statutes.[203] Such detail will help schools to determine exactly what bullying is so they can most effectively combat it.

If a state decides to write a statute addressing cyberbullying after *Marquan M.*, the legislature should be very careful with the language it uses. As the court suggested, a successful statute would apply only to minors; incorporate a very specific definition of bullying that is not based on general, undefined terms like "annoy" or "intimidate"; and not be easily read to encompass other types of behavior outside of the traditional definition of cyberbullying.[204] This language would have a better chance of being upheld than more vague language.

The best solution, however, would be to use criminal statutes in conjunction with school policy statutes. As *Marquan M.* demonstrates, it will be difficult for a state to write a statute that uses specific language while also providing comprehensive coverage of bullying. Because of this balance, if states wish to use criminal sanctions, they should do so sparingly and in conjunction with school-policy-based laws that can more comprehensively cover cyberbullying on school grounds. One possibility would be for states to criminalize only the very worst kinds of cyberbullying, like the sexually related behavior that the county wanted to criminalize in *Marquan M.*, and rely on school policies to deter the remaining types of cyberbullying. Because

202. *Id.*
203. *See id.*
204. People v. Marquan M., 19 N.E.3d 480, 486–88 (N.Y. 2014).

of the constitutional problems with criminal sanctions, an effective deterrence regime should be based mostly on school policies.

On the whole, then, going forward, legislatures should focus on two things: strengthening their school policy rules and making sure that all their cyberbullying definitions, criminal and non-criminal, are very specific. The best approach may be to criminalize only very particular and problematic types of cyberbullying, like harmful sex-related threats, and leave the rest to the schools.

CONCLUSION

The court in *Marquan M.* correctly found Albany County's statute to be unconstitutional. This holding suggests that future criminal cyberbullying statutes, if drafted, should be narrowly tailored. It does not bode well for broad criminal cyberbullying statutes around the country. Many cyberbullying statutes currently in force, including North Carolina's, would probably be found to be unconstitutional if they were subjected to the analysis put forth in *Marquan M*. Furthermore, if this analysis is taken up by other state courts or the Supreme Court of the United States, such a ruling may deter state legislatures from implementing similar provisions going forward. This would be a positive development, because it paves the way for wider use of statutes that require schools to create anti-bullying policies and incorporate a definition of cyberbullying into their overarching anti-bullying statute. If other courts analyze the issue in a way similar to the *Marquan M.* court, school-policy-based cyberbullying statutes may be the only ones that can constitutionally survive. Therefore, as legislatures continue to address the cyberbullying problem, they should focus their efforts at the school level.

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