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Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape

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I. Executive Summary

- Although online harassment and hateful speech is a significant problem, there are few legal remedies for victims.
- Section 230 of the Communications Decency Act provides internet service providers (including social media sites, blog hosting companies, etc.) with broad immunity from liability for user-generated content.
- Given limited resources, law enforcement personnel prioritize other cases over prosecuting internet-related issues.
- Similarly, there are often state jurisdictional issues which make successful prosecution difficult, as victim and perpetrator are often in different states, if not different countries.
- Internet speech is protected under the First Amendment. Thus, state laws regarding online speech are written to comply with First Amendment protections, requiring fighting words, true threats, or obscene speech (which are not protected). This generally means that most offensive or obnoxious online comments are protected speech.
- For an online statement to be defamatory, it must be provably false rather than a matter of opinion. This means that the specifics of language used in the case are extremely important.
- While there are state laws for harassment and defamation, few cases have resulted in successful prosecution. The most successful legal tactic from a practical standpoint has been using a defamation or harassment lawsuit to reveal the identities of anonymous perpetrators through a subpoena to ISPs then settling. During the course of our research, we were unable to find many published opinions in which perpetrators have faced criminal penalties, which suggests that the cases are not prosecuted, they are not appealed when they are prosecuted, or that the victim settles out of court with the perpetrator and stops pressing charges. As such, our case law research was effectively limited to civil cases.
- In offline contexts, hate speech laws seem to only be applied by courts as penalty enhancements; we could locate no online-specific hate speech laws.
- Given this landscape, the problem of online harassment and hateful speech is unlikely to be solved solely by victims using existing laws; law should be utilized in combination with other practical solutions.

II. Introduction

Background

Lori Stewart is a middle-aged Midwestern woman and personal blogger. Her blog, *This Just In*, shares gentle stories of gardening, her military family, vacation snapshots, and other aspects of her life. In 2006, Stewart founded Toys for Troops, a non-profit organization which sends Beanie Babies and soccer balls to soldiers stationed overseas, so they can distribute them to local children. Shortly after, she attracted the attention of a troll. “JoeBob” left comments like the following:

So you enabled comments again, eh?

Good! You liberal fuc#\$!* cun@.¹

Hope your inbred half-retarded son takes a bayonet to the gut by a Palestinian warrior. I love to see useful idiots serving the jew get disemboweled!

For seven years, JoeBob left profane, aggressive comments on Stewart’s weekly blog. In response, she disabled comments and instead used a private Facebook account to communicate with readers. JoeBob escalated. He created a fake email address, purporting to be Stewart, and sent emails to her friends and family full of homophobic slurs and anti-Semitic remarks. He signed Stewart up for hundreds of newsletters and commented on other blogs using her name. Frustrated, Stewart went to the police, who told her “there’s really not going to be much you can do about this. You have a public blog, there is such a thing as freedom of speech.”² She persuaded the officer to file a report anyway, so at least she could have a case number to work with.

Luckily for Stewart, a local police investigator became interested in her case. He subpoenaed JoeBob’s ISP, and was able to reveal the troll’s identity—including his name, workplace, and location. Stewart decided not to publicize JoeBob’s real identity, but opened her blog up to comments, hoping that the mere threat of exposure would keep the harasser at bay. This seemed to be the best she could hope for. Unfortunately, JoeBob continued to harass Stewart, and she revealed his name. Robin B. King was arrested by the county sheriff on four

¹ While we have chosen to obscure profanity throughout this document, we hope to convey the harsh realities of online harassment. In addition, the precise wording and context of such comments may substantially affect the treatment of these comments under the law.

² Lori Stewart, “This Just In: Blog Troll Reveal, Part I,” *This Just In*, July 23, 2013, <http://www.gnightgirl.blogspot.com/2013/07/blog-troll-reveal-part-i.html>.

counts of harassment by electronic communication.³ He has pled not guilty and a jury trial is set for this year.⁴

Online harassment is a significant online problem, particularly for women. In the last decade, several high-profile incidents, including the online harassment of tech blogger Kathy Sierra, the backlash against Anita Sarkeesian's *Feminist Frequency* Kickstarter project examining sexism in video games, and the targeted harassment of several female Yale Law students on the AutoAdmit message boards have raised questions around the limits of online free speech and the prevalence of explicitly sexist commentary on the internet.⁵ Several feminist legal scholars have systemically analyzed the content and prevalence of such speech, particularly the long-term and individual impacts.⁶ Obviously, online harassment is not limited to gender.⁷ Recent studies have investigated people who deliberately engage in provocative, aggressive internet behavior, primarily with regard to cyberbullying and "trolling."⁸ However, research suggests that those most likely to be the victims of hateful online speech are women, sexual minorities, and people of color—in other words, harassment breaks down along traditional lines of power.⁹

While there are many descriptive studies of online hate speech, harassment, defamation, and so forth, we decided to research these issues from a legal perspective.¹⁰ We were primarily interested in (i) what legal remedies, if any, are available for victims of such acts, and (ii) if such legal remedies and procedures exist, whether practical hurdles stand in the way of victims' abilities to stop harassing or defamatory behavior and obtain legal relief. Every US state and the District of Columbia has a law covering cyberstalking or cyberharassment, and a majority of states have laws covering both.¹¹ Defamation law has been used to pursue offensive online speech in a few well-documented cases;¹² and, in some instances, laws around hate speech may be germane. However, prosecuting such cases is very difficult. Not only are there issues with

³ Mary Schenk, "Missouri Man Arrested over Online Comments," *The News-Gazette*, September 24, 2013, <http://www.news-gazette.com/news/local/2013-09-24/missouri-man-arrested-over-online-comments.html>.

⁴ *People v. King*, No. 13CF001563 (Ill. Cir. Ct. filed Sept. 20, 2013).

⁵ Ellen Nakashima, "Harsh Words Die Hard on the Web," *The Washington Post*, March 7, 2007, sec. Education, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030602705.html>; Amy O'Leary, "Sexual Harassment in Online Gaming Stirs Anger," *The New York Times*, August 1, 2012, sec. U.S., <http://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html>.

⁶ Mary Anne Franks, "Unwilling Avatars: Idealism and Discrimination in Cyberspace," *Columbia Journal of Gender and Law* 20 (2011): 224; Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge, MA: Harvard University Press, 2014).

⁷ See Abraham H. Foxman and Christopher Wolf, *Viral Hate: Containing its Spread on the Internet* (New York, NY: Palgrave MacMillan, 2013)

⁸ Whitney Phillips, "LOLing at Tragedy: Facebook Trolls, Memorial Pages and Resistance to Grief Online," *First Monday* 16, no. 12 (December 5, 2011), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3168/3115>; Michele L Ybarra and Kimberly J Mitchell, "Youth Engaging in Online Harassment: Associations with Caregiver-child Relationships, Internet Use, and Personal Characteristics," *Journal of Adolescence* 27, no. 3 (June 2004): 319–336.

⁹ Citron, *Hate Crimes in Cyberspace*.

¹⁰ However, this document is non-exhaustive and covers only United States law.

¹¹ A total of 37 states have cyberstalking laws, while 41 have cyberharassment laws. There is also a federal stalking statute which covers cyberstalking. See Appendix B, State Laws on CyberHarassment for more details.

¹² See, for example, *Matter of Cohen v. Google*, 25 Misc. 3d 945, 946, n. 1 (N.Y. Sup. Ct. 2009).

jurisdiction, local police are often too busy, unwilling or not technically savvy enough to target perpetrators, making criminal proceedings impractical. And as Stewart's case suggests, internet speech is protected under the First Amendment, making the ability to regulate hateful, defaming, or harassing speech problematic.¹³ In many cases, the best victims can hope for is that, in unmasking the perpetrator, a loss of anonymity will be enough to stop online harassment.

Project Scope

The goal of this research project is to better understand the legal remedies available to victims of online harassment, hate speech, and defamation, as well as the current legal protections afforded to this type of speech under the First Amendment within the US. The project examines long-standing and new treatments for online harassment, and seeks to provide a resource for victims of offensive comments online, practitioners, academics and the public at-large. For context, we begin with an introductory summary of Section 230 of the Communications Decency Act, which provides broad immunity to internet service providers, and is thus crucial to the current legal landscape.¹⁴ Given that online speech may be protected under the First Amendment, understanding legal remedies requires examining the limits of First Amendment protections, specifically the unprotected categories of fighting words, defamation, obscenity, and true threats. Thus, legal remedies can be placed into three categories: (1) cyberharassment and cyberstalking; (2) defamation; and (3) hate speech and hate crime laws.¹⁵ In each section, we summarize state laws, examine significant case law, and discuss complications and drawbacks to each potential remedy. Again, we hope that this document can serve as a resource for researchers, legal practitioners, internet community moderators, and victims of harassment and hateful speech.

¹³ Paul Ohm, "How to Regulate? - Breaking Felten's Third Law: How Not to Fix the Internet," *DURL Online: The Online Supplement to the Denver Law Review*, Cyber Civil Rights, 2010, <http://www.denverlawreview.org/how-to-regulate/2010/2/22/breaking-feltens-third-law-how-not-to-fix-the-internet.html>; Danielle Citron, "Cyber Civil Rights," *Boston University Law Review* 89 (2009): 61–125.

¹⁴ For a more extensive review, see CLIP's report devoted to Section 230, which surveys the legal literature in great more depth. Joel Reidenberg et al., *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals* (Fordham Law School, New York: Center on Law and Information Policy, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046230. The protection afforded under Section 230 is important because it essentially limits the ability of victims to recover damages from only the original author of the defaming, harassing, or hateful comments, blog posts, messages, or other online content.

¹⁵ As discussed in Section VII, cyberharassment and cyberstalking laws are almost exclusively criminal remedies, meaning the enforcement of these laws requires the cooperation of law enforcement and the prosecutor. In contrast, defamation is a civil remedy, as discussed in Section VI, which allows any private citizen that has been defamed to sue the defamer to enforce the law. Additionally, hate speech laws, as discussed in Section V, are limited by the First Amendment and generally are only relevant in that they may enhance the prison sentence for a person convicted of a crime where the victim was chosen because he or she belonged to a protected class.

III. Summary

While online harassment and hateful speech is a significant problem online, the current legal landscape is, generally, of little help to victims. Section 230 of the Communications Decency Act provides internet service providers (including social media sites, blog hosting companies, and so forth) with broad immunity from liability for user-generated content. Since hosting sites are not legally liable for user content, and although victims can appeal to site proprietors under Terms of Service or community standards, there is no obligation on the part of the host to remove content, delete user accounts, or discipline harassers.

When victims contact local law enforcement for help, it seems that they are rarely taken seriously. Many law enforcement personnel face limited resources and lack technical expertise. Issues with state jurisdiction also make successful prosecution difficult, as victim and perpetrator are often in different states, if not different countries.¹⁶ While there are state laws for harassment and defamation, few cases have resulted in successful prosecution. The most successful legal tactic from a practical standpoint has been using a defamation or harassment lawsuit to reveal the identities of anonymous perpetrators by subpoenaing ISPs then settling. (During the course of our research, we were unable to find many published opinions in which perpetrators have faced criminal penalties, which suggests that the cases are not prosecuted, they are not appealed when they are prosecuted, or that the victim settles out of court with the perpetrator and stops pressing charges. As such, our case law research was effectively limited to civil cases.) Victims may hope that the fear of unmasking will cause online harassers to stop their activities, but this is by no means guaranteed.

Complicating matters further, internet speech is protected under the First Amendment. Thus, state laws regarding online speech will be held unconstitutional if they interfere with speech protected by the First Amendment. While the First Amendment's guarantee of freedom of speech covers most situations, there do exist several categories of speech are not protected, including fighting words, threats, and obscene speech. In other words, unless an offensive or obnoxious online comment falls into one of these three categories, it is generally protected speech. For instance, for a statement to be defamatory, it must be a false statement of fact rather than a matter of opinion. This means that the specifics of language used in the case are extremely important—calling someone a “rapist” is a verifiable statement (has the person been convicted of rape?),¹⁷ but calling someone a “bitch” is a matter of opinion, and therefore protected speech.¹⁸

We also investigated hate speech laws. However, we found that hate speech and hate crime laws are limited by the First Amendment and are generally only applied by courts as

¹⁶ Joel Reidenberg et al., *Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law*, Fordham Law Legal Studies Research Paper (New York, NY, USA: Center on Law and Information Policy at Fordham Law School, June 30, 2013), <http://papers.ssrn.com/abstract=2309526>.

¹⁷ See *Restatement (Second) of Torts* §571 and comments (1971).

¹⁸ *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 55-56 (2002) (en banc); see also *Restatement (Second) of Torts* § 566 and comment e (1997) (noting “some statements ... cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse”).

penalty enhancements for other crimes; there are no hate speech laws specific to the online context.

The only cases in which online speech seems to be aggressively prosecuted is when it involves minors. If minors are public school students defaming school personnel, or “cyberbullying” their classmates, they may administered disciplinary action *from the school*, and may not be protected by the First Amendment. However, the landscape around this area is a moving target and laws seem to be changing very rapidly.

Given this landscape, the problem of online harassment and hateful speech is unlikely to be solved solely using existing laws. These laws may be augmented with other solutions, such as community moderation or enforcing terms of service. However, this report focuses only on existing laws and available legal remedies, and does not advocate for or review any proposals for new laws.

This document covers three areas: hate speech, defamation, and online or “cyber” harassment. To assist in understanding the US legal landscape in these areas, we provide an overview of current US laws, key cases, and their relevance to online harassment and hateful speech.

IV. The First Amendment, Unprotected Speech, and the Right to Anonymity

Since the First Amendment provides for the right to free speech, it places limits on laws that attempt to govern online speech. In order to access most information online, a person must take several affirmative steps—sitting at a computer, opening a web browser, typing terms into a search engine, and so forth.¹⁹ Because of these affirmative steps required to access information online and the availability of parental control software, the Supreme Court has ruled that protecting minors from indecent online materials is not an adequate justification for limiting most online content, as such limits risk suppressing adult speech as well.²⁰ As a result, laws that regulate online harassment, defamation and so on face a delicate balancing act. They must be written narrowly to avoid encroaching on speech protected by the First Amendment while still restricting the undesirable conduct in practice. As a result, several states have very narrow cyberharassment laws that exclusively target the categories of speech that have been held by the Supreme Court to be unprotected under the First Amendment.²¹ These categories include “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” such as obscenity, defamation, and fighting words.²²

¹⁹ *Reno v. ACLU*, 521 U.S. 844 (1997) (quoting *Reno v. ACLU*, 929 F. Supp. 824 (E.D. Pa 1996)).

²⁰ *Ibid.*, 875

²¹ See Section VII for a discussion of states that have such limited definitions.

²² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Note that this list of categories of unprotected speech is not exhaustive and there remain other categories of unprotected speech, including child pornography.

Obscenity

To determine whether content qualifies as obscene, and is therefore constitutionally unprotected, the Supreme Court created the *Miller* test.²³ Under the *Miller* test, speech is obscene if it meets three conditions: (1) "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁴ Several states have cyberharassment laws that criminalize certain obscene speech using this definition (discussed in Section VII). In practice, there is a high threshold for obscenity.²⁵

Defamation

Defamation is the communication of a false statement of fact that harms the reputation of a victim, and includes libel, which covers written published statements, and slander, which covers spoken statements.²⁶ Since the ratification of the First Amendment, the Supreme Court has consistently ruled that laws against defamation are not unconstitutional.²⁷ However, the First Amendment does limit how defamation laws may be applied.²⁸ For example, if someone makes a defamatory statement about the official conduct of a public figure, the figure can only prevail in a lawsuit if the speaker knew that his or her statement was false.²⁹ Defamatory statements which are labeled as opinion are not protected by the First Amendment if they serve only to harm the victim's reputation.³⁰ (Defamation will be discussed in more detail in Section VI.)

Fighting Words

A state cannot pass laws that "forbid or proscribe advocacy of the use of force" or make it illegal to advocate breaking the law, except where the speech is "directed to inciting imminent lawless action and is likely to incite or produce such action."³¹ This is called the "fighting words" doctrine. Fighting words, such as calling a police officer a "white racist motherf@#ker"

²³ See *Miller v. California*, 413 U.S. 15 (1973).

²⁴ *Ibid.*, 24.

²⁵ See discussion in Section VII.

²⁶ It is unclear at this time as to whether or not courts will treat internet speech as libel or slander. However, the differences between the two subcategories do not substantively affect the analysis in this document.

²⁷ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *Beauharnais v. Illinois*, 343 U.S. 250, 254–255 (1952)).

²⁸ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990).

²⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–284 (1964).

³⁰ See *Milkovich*, 497 U.S. at 20–21.

³¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

and telling him that you wish his mother would die,³² are exempted from First Amendment protections because “their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey” and not because of the content of the message.³³ There is, however, inconsistency and disagreement among various courts as to what qualifies as fighting words.³⁴ In the online context, it is difficult for speech to meet the “imminent lawless action” requirement.³⁵ As such, most online speech, even if it promotes violence against an individual, will be protected and the victim will not have legal recourse.

True Threats

Another category of unprotected speech is “true threats.” A statement is considered a true threat if the speaker “means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³⁶ The speaker need not actually intend to carry out the threat.³⁷ The U.S. Supreme Court has determined that true threats are not protected under the U.S. Constitution for three reasons: preventing fear, preventing the disruption that follows from that fear, and diminishing the likelihood that the threatened violence will occur.³⁸

In practice, it can be quite difficult for internet speech to pass the “true threat” test. For example, in *United States v. Alkhabaz*, the defendant, who went by the name Jake Baker, had posted several stories to the Usenet group alt.sex.stories which involved the rape, torture, and murder of young women.³⁹ One such story involved one of his classmates at the University of Michigan; he described in detail the acts of violence he would perform, and the enjoyment he would gain from such acts.⁴⁰ These stories were brought to the attention of the university, who, with Baker’s consent, searched Baker’s dormitory room, personal papers, e-mail account and computer files.⁴¹ Upon seizing Baker’s computer, the investigators discovered a series of emails in which Baker and a Canadian man outlined a plan to kidnap the young woman and carry out the fantasies detailed in Baker’s stories.⁴² The police believed Baker and his correspondent represented a threat to their potential victims, and so referred Baker to the FBI, who arrested him pursuant to a warrant from a U.S. magistrate judge for violating 18 U.S.C. § 875(c), which

³² See *State v. Clay*, 1999 Minn. App. LEXIS 1059 (Minn. Ct. App. Sept. 14, 1999).

³³ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

³⁴ See Stephen W. Gard, “Fighting Words as Free Speech,” *Washington University Law Review* 58 (1980): 531;.

³⁵ See discussion in Section V.

³⁶ *Virginia v. Black*, 538 U.S. 343, 360 (2000).

³⁷ *Ibid.*, 359-60.

³⁸ *Ibid.*, 360 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

³⁹ *United States v. Alkhabaz*, 104 F.3d 1492 (1997).

⁴⁰ *Ibid.*, 1493.

⁴¹ *Ibid.*, 1498.

⁴² Susan Brenner, “CYB3RCRIM3: Fantasy,” *CYB3RCRIM3*, March 15, 2006, http://cyb3rcrim3.blogspot.com/2006/03/fantasy_15.html; Philip Tortorich, “E-Mail Stories Detailing the Rape and Murder of a Young Woman Do Not Constitute a True Threat,” *Loyola Consumer Law Review* 9 (1997): 227.

prohibits interstate communications containing threats to kidnap or injure another person.⁴³ Baker was indicted in a jury trial, and appealed to the district court, which dismissed the charges; the government appealed to the Sixth Circuit Court of Appeals.⁴⁴ The Sixth Circuit upheld the dismissal and found that Baker's stories did not constitute a true threat, and were therefore protected speech.⁴⁵ Baker apparently never intended his classmate to see the emails, and he was not emailing his correspondent to threaten his classmate or to attempt to intimidate her. As a result, Baker's emails and stories did not, to the Sixth Circuit, constitute a threat.⁴⁶ *Alkhabaz* demonstrates that the burden to determine a "true threat" is quite high, and presumably most hostile online speech would fail to meet the standard determined by the Sixth Circuit.

Despite this high standard, it is still possible for online speech to meet the true threat criteria. In *State v. Locke*, a man appealed his conviction for threatening the then-governor of Washington State, Christine Gregoire.⁴⁷ Locke sent a series of threatening messages to Gregoire via her website.⁴⁸ His first email, which read, "I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia,"⁴⁹ was determined to be hyperbolic political speech rather than a true threat.⁵⁰ While the second called Gregoire a "c#nt" and said "you should be burned at the stake like any heretic,"⁵¹ the court determined that this was also not a true threat, as "the ancient political or religious pedigree of burning at the stake" is not realistically threatening.⁵² However, Locke's third correspondence was an event request, titled "Gregoire's public execution," to be held at the Governor's mansion.⁵³ These messages constituted a practical threat, especially as they were sent only 17 days after Arizona congresswoman Gabrielle Giffords was shot in the head by a disgruntled constituent.⁵⁴ For the threat contained in the third email, Locke's conviction was upheld by the appeals court.⁵⁵

⁴³ *Alkhabaz*, 104 F.3rd at 1493.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 1496.

⁴⁶ Jared C. Schroeder, "Electronically Transmitted Threats and Higher Education: Oppression, Free Speech, and Jake Baker," *The Review of Higher Education* 36, no. 3 (2013): 295–313, doi:10.1353/rhe.2013.0017.

⁴⁷ *State v. Locke*, 307 P.3d 771 (Wash. Ct. App. 2013). See also Susan Brenner, "The Governor, the Emails and True Threats," *CYB3RCRIM3*, August 19, 2013, <http://cyb3rcrim3.blogspot.com/2013/08/the-governor-emails-and-true-threats.html>.

⁴⁸ *Ibid.*, 785.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 791.

⁵¹ *Ibid.*, 785.

⁵² *Ibid.*, 791-92.

⁵³ *Ibid.*, 786.

⁵⁴ *Ibid.*, 792.

⁵⁵ *Ibid.*

Unmasking

Many obnoxious and hateful online comments are posted anonymously or pseudonymously, meaning that one of the first steps in prosecuting such comments is often identifying the perpetrator.⁵⁶ To identify the perpetrator, the plaintiff will generally need as much information as possible about the poster of these comments, such as the IP addresses which were used to post the messages and any personal information associated with the account used to post the messages. However, this information may not be publicly available, and if so the poster will have to get the information from the ISP. But most ISPs will not voluntarily disclose a user's confidential information, whether to protect the user or to comply with data privacy laws,⁵⁷ so the plaintiff (the party bringing the complaint) will generally need a court order forcing the ISP to disclose such information.⁵⁸ However, there is a well-documented First Amendment right to anonymous speech that the court must consider before issuing a court order.⁵⁹ As a result, federal and state courts use different court-created tests to determine if the court will order the unmasking of the anonymous speaker, as discussed below. These tests balance the speaker's right to anonymity against the rights of the victim.⁶⁰

While various tests exist, most of them include the same elements. First, the court may require that the plaintiff take reasonable steps to alert the defendant that he or she may be subject to a court order.⁶¹ These might include sending a private message to the poster's account, and publicly posting notices to the internet service where the allegedly defaming comments were made. For example, if the allegedly defamatory statements were originally posted to a message board, the plaintiff may need to post a public notice to the same message board alerting the defendant to the potential lawsuit.⁶² Afterwards, the court may require that the defendant be

⁵⁶ Victoria Smith Ekstrand, "Unmasking Jane and John Doe: Online Anonymity and the First Amendment," *Communication Law and Policy* 8, no. 4 (2003): 405–27; Matthew Mazzotta, "Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers," *Boston College Law Review* 51, no. 3 (2010): 833.

⁵⁷ See 47 U.S.C. § 551(c), which requires a cable service provider, which includes several ISPs, to "not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned" and to "take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator" unless the disclosure of the information is, *inter alia*, "made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed . . ." In addition, the Electronic Privacy Communications Act, 18 U.S.C. § 2703 provides users protection against disclosure to the government of wire or electronic communications held in electronic storage. See also David L. Sobel, "The Process That 'John Doe' Is Due: Addressing the Legal Challenge to Internet Anonymity," *Va. JL & Tech.* 5 (2000): 3–15.

⁵⁸ Some ISPs will not substantially oppose a motion that would compel them to identify a user but still refuse to identify the user without a court order. See, e.g., *Matter of Cohen v. Google*, 25 Misc. 3d 945, 946, n. 1 (N.Y. Sup. Ct. 2009), 25:946, n. 1 (noting that Google did not have a "substantive opposition" to revealing the anonymous blogger's identity). In contrast, others may more aggressively oppose such an action to unmask a user.

⁵⁹ *McIntyre v. Ohio Elections Committee*, 514 U.S. 334 (1995).

⁶⁰ Jason M. Shepard and Genelle Belmas, "Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech," *Yale Journal of Law & Technology* 15 (2012): 92–139.

⁶¹ *Doe. v. Cahill*, 884 A.2d 451, 461 (Del. 2005); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456–457 (Md. 2009).

⁶² See, e.g., *Doe. V. Cahill*, 884 A.2d 451, 461 (Del. 2005).

given a reasonable amount of time to respond.⁶³ This step allows the defendant time to hire counsel and take the necessary steps to formally oppose the motion in court.⁶⁴

Courts will then consider whether the plaintiff has provided enough evidence to support each of the individual elements of a defamation claim.⁶⁵ In doing so, the court will consider how strong the plaintiff's claim is, typically by comparing it to existing procedural standards, such as whether the case would be strong enough to survive a motion for summary judgment or a motion to dismiss.⁶⁶ (A motion for summary judgment is a procedure where one party requests that the court decide a case without a full trial, while a motion to dismiss is a procedure where one party requests that the court dismiss a lawsuit because the claim has no legal remedy.)⁶⁷ A motion for summary judgment will only be granted, meaning the court will only decide the case without a trial, if the significant facts of the case are undisputed and the only issues involve interpreting or applying the law to the facts.⁶⁸ In other words, during an unmasking proceeding the court will apply the law to the facts that the plaintiff has presented and determine whether or not the alleged statements are or may be considered defamatory.⁶⁹

For example, in *Doe v. Cahill*, the court examined each of the elements of a libel claim under Delaware law: 1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published; and 4) a third party would understand the character of the communication as defamatory.⁷⁰ The court began by considering whether the allegedly defamatory statements are assertions of fact or opinion.⁷¹ In reviewing these statements, the court determined that all of the statements at issue were purely statements of opinion or otherwise not defamatory, so the court found that the case would not survive a motion for summary judgment.⁷² However, if the court had determined that the statements at issue are capable of being defamatory, the court would have proceeded to examine the remaining elements of a defamation claim in turn.⁷³ If, after reviewing each element of the claim, the court had determined that the case was strong enough to survive a motion for summary judgment, the court would have granted the unmasking order.⁷⁴

⁶³ *Ibid.*; *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009), 966:457; *Solers, Inc. v. John Doe*, 977 A.2d 941, 954 (D.C. 2009).

⁶⁴ The defendant, through counsel, may appear anonymously in such a proceeding and thereby not risk revealing his or her identity yet.

⁶⁵ *Dendrite International, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Supr. Ct. App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451, 463 (Del. 2005); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009), 966:457; *Solers, Inc. v. John Doe*, 977 A.2d 941, 954 (D.C. 2009), 977:954.

⁶⁶ *Cahill*, 884 A.2d at 463 (motion for summary judgment standard); *Dendrite*, 775 A.2d at 760 (motion to dismiss standard); see also *Brodie*, 966 A.2d at 449-457 (discussing various standards adopted by various courts and the implications of adopting too low or too high of a standard); .

⁶⁷ Motions for summary judgment are only available in civil trials.

⁶⁸ See Fed. R. Civ. P. 56(a).

⁶⁹ See, e.g., *Dendrite*, 775 A.2d at 769-72 (“[T]he discovery of [the poster’s] identity largely turns on whether his statements were defamatory or not.”); *Cahill*, 884 A.2d at 466..

⁷⁰ *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005), 884:461.

⁷¹ *Ibid.*, 463.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

Finally, some courts may also consider the First Amendment implications in unmasking the defendant.⁷⁵ For example, the Ninth Circuit Court of Appeals suggested that “the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.”⁷⁶ Under this standard, the type of speech is relevant to the level of protection that such speech receives, with anonymous political, religious, or literary speech receiving more protection than certain other types of speech.⁷⁷ Other courts, however, hold that the summary judgment test, as discussed above, is the only balancing required in determining if the speaker should be unmasked.⁷⁸ Some courts take a middle ground approach and try to balance the anonymous poster’s First Amendment right of free speech against the strength of the plaintiff’s defamation claim and the necessity for disclosure of the anonymous defendant’s identity, prior to ordering disclosure.⁷⁹

CDA 230

Section 230 of the Communications Decency Act⁸⁰ (“CDA”) provides broad immunity to any “interactive computer service” for third party content that is posted onto its service, as long as the service did not provide substantive or editorial contributions. “Interactive computer service” is defined broadly in the statute to include websites, message boards, instant messenger services, blog hosting services, and other internet based services including Facebook, MySpace, YouTube, Google, Yahoo, Tumblr, Flickr, Twitter, and even Revenge Porn. Section 230 immunizes these services from lawsuits for defamation, negligence, gross negligence, unfair competition and false advertising.⁸¹ However, Section 230 expressly states that it has no impact on certain other areas of law, including federal criminal law,⁸² federal intellectual property law,⁸³ communications privacy law,⁸⁴ and certain other state claims.⁸⁵ As such, interactive computer

⁷⁵ *Anonymous Online Speakers v. United States Dist. Court (In re Anonymous Online Speakers)*, 661 F.3d 1168, 1177 (9th Cir. 2011).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Solers, Inc. v. John Doe*, 977 A.2d 941, 954 (D.C. 2009).

⁷⁹ *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 457 (Md. 2009).

⁸⁰ Codified at 47 USC § 230.

⁸¹ See *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008) (negligence and gross negligence); *Perfect 10 v. CCBill*, 448 F.3d 1102 (9th Cir. 2007) (unfair competition and false advertising).

⁸² 47 U.S.C. § 230(e)(1) states “Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.”

⁸³ 47 U.S.C. § 230(e)(2) states “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” Note that there is currently a split of authority as to whether or not interactive computer services may be liable for state intellectual property claims such as the right to publicity. Compare *Perfect 10* (they are immune from state IP claims) and *Doe v. Friendfinder*, 540 F.Supp.2d 288 (D. New Hamp. 2008) (they are not immune from state IP claims).

⁸⁴ 47 USC § 230(e)(4) states “Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.”

⁸⁵ 47 USC § 230(e)(3) states “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed

services may still be sued for hosting copyrighted materials under the DMCA and may be prosecuted for violating federal criminal laws.

Given CDA 230, victims of online harassment or hateful speech most often cannot hold the ISP liable,⁸⁶ whether the ISP is a blog hosting service, a web forum, a social media site like Facebook or Twitter, or an email provider such as Hotmail or Gmail. (These providers can, however, be subpoenaed to reveal the identity of an anonymous harasser, as shown in the cases discussed in Section VI, Defamation). Service providers do not have a *legal* responsibility to moderate or take down content that is harassing or offensive, even if such content violates the site's terms of service.⁸⁷ For example, Facebook encountered protests from feminist groups who objected to a number of user-created Facebook pages in which rape and domestic violence were treated humorously.⁸⁸ More than 40 women's groups wrote an open letter to Facebook arguing that pages like "Fly Kicking Sluts in the Uterus" should be considered hate speech and threatening content, and as such, violated Facebook's own terms of service.⁸⁹ While Facebook has been quick to remove homophobic and Islamophobic content from the sites, feminist activists criticized Facebook for failing to take sexism seriously. In response, Facebook promised to remove the offending pages, and take affirmative steps to screen the site for sexist and violent content in the future.⁹⁰ In this case, Facebook was under no legal obligation to remove the offending pages. They chose to do so for public relations and business reasons due to the large and successful activist campaign, which also targeted Facebook's advertisers. In such cases, the site in question may decide that removing content is appropriate; however, this is by no means guaranteed.

V. Hate Speech and Hate Crimes

While obnoxious and offensive comments of all kind are in abundance on the internet, sexist, racist, and homophobic speech seems to be particularly prevalent.⁹¹ Studies of YouTube, for instance, have found that words like "n*****" and "f*****" are common, and that women

under any State or local law that is inconsistent with this section." As discussed in Note 37, there is a split of authority as to whether or not this state intellectual property claims, such as right to publicity, are exempted from Section 230.

⁸⁶ As a result of CDA 230 protections, a victim is generally limited to seeking redress from the individual user responsible for posting the content at issue.

⁸⁷ It is still possible for service providers to be contractually liable to customers for promises they have made. See *Barnes v. Yahoo*, 570 F.2d 1096 (9th Cir. 2009).

⁸⁸ Meredith Bennett-Smith, "Facebook Vows To Crack Down On Rape Joke Pages After Successful Protest, Boycott," *Huffington Post*, accessed August 21, 2013, http://www.huffingtonpost.com/2013/05/29/facebook-rape-jokes-protest_n_3349319.html.

⁸⁹ "Sexism Protests Target Facebook," *BBC*, May 28, 2013, sec. Technology, <http://www.bbc.co.uk/news/technology-22689522>.

⁹⁰ Bennett-Smith, "Facebook Vows To Crack Down On Rape Joke Pages After Successful Protest, Boycott."

⁹¹ Citron, *Hate Crimes in Cyberspace*; Ann Bartow, "Internet Defamation as Profit Center: The Monetization of Online Harassment," *Harvard Journal of Law and Gender* 32, no. 2 (August 11, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1447472; Ann Bartow, "Portrait of the Internet as a Young Man," *Michigan Law Review* 108, no. 6 (2008): 1079–1106.

are disproportionately subject to negative comments.⁹² Statistics gathered by the nonprofit organization Working to Halt Online Abuse shows that of almost 4000 cyberharassment and cyberstalking cases, 72% of the victims were female and 48% of the perpetrators male.⁹³ Danielle Citron, in her study of internet speech, suggests that while women are often subjected to hateful comments, this is more likely for women of color or women who identify as sexual minorities.⁹⁴ Moreover, in the last few years there have been a plethora of cases where women were subject to internet harassment, particularly those involved in activism or male-dominated fields such as technology.⁹⁵ Together, these statistics and anecdotal evidence suggest that some online harassment may be motivated by bias, particularly along lines of gender, race, sexual orientation, and the like. Given this possibility, we investigated laws around hate speech and hate crimes to see if victims of such online comments could use these laws to prosecute perpetrators.

Defining Hate Speech

Hate speech is a difficult concept to define, but it may be broadly defined as speech that carries no meaning other than hatred towards a particular minority, typically a historically disadvantaged minority.⁹⁶ After reviewing legal literature and statutes relating to hate crimes and hate speech laws, there appear to be three distinct elements that legislatures and commentators use to identify or define hate speech: a content-based element, an intent-based element, and a harms-based element. It is important to understand that hate speech may be defined by an author or legislature to require one, two, or all three elements to qualify.

The content-based element involves the use of certain symbols and iconography, such as the noose, swastika or burning cross, or words or phrases generally considered to be offensive to a particular minority and objectively offensive to society.⁹⁷ For example, the Bias Motivated Crimes Ordinance at issue in *R.A.V. v. City of St. Paul* stated "[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."⁹⁸ In *R.A.V.*, the Supreme Court determined that the ordinance was unconstitutional under the First Amendment

⁹² Michael Nycyk, "Tensions in Enforcing YouTube Community Guidelines: The Challenge of Regulating Users' Flaming Comments," 2012, http://www.academia.edu/download/30187109/Thesis_2012_YouTube_Flaming.pdf; Jean Elizabeth Burgess and Joshua Benjamin Green, *YouTube: Online Video and Participatory Culture*, Digital Media and Society (Malden, MA: Polity, 2009).

⁹³ Working to Halt Online Abuse, *WHOA (Haltabuse.org) Comparison Statistics 2000-2012*, 2013, <http://www.haltabuse.org/resources/stats/Cumulative2000-2012.pdf>.

⁹⁴ Citron, *Hate Crimes in Cyberspace*.

⁹⁵ Geek Feminism Wiki, "Timeline of Incidents," *Geek Feminism Wiki*, 2013, http://geekfeminism.wikia.com/wiki/Timeline_of_incidents.

⁹⁶ See Mayo Moran, "Talking About Hate Speech," *Wisconsin Law Review* 1994: 1425.

⁹⁷ See Charlotte H. Taylor, "Hate Speech and Government Speech," *University of Pennsylvania Journal of Constitutional Law* 12 (2010): 1115–1479 for a discussion on the use of the noose as a type of hate speech.

⁹⁸ St. Paul, Minn., Legis. Code § 292.02 (1990).

because it “it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.”⁹⁹ (Note that the Court did not explicitly rule that the act of burning a cross was legal, but only that punishing a person for expressing their views on a disfavored subject, rather than their actions, was unconstitutional.¹⁰⁰)

The intent-based element of a hate speech definition requires the speaker’s message to intend only to promote hatred, violence or resentment against a particular minority, member of a minority, or person associated with a minority, without communicating any legitimate message.¹⁰¹ This requires subjective intent on the part of the speaker to target an individual, group, or person associating with a minority merely because of the status of the minority.

Harms-based hate speech is speech which causes the victim harm, such as “loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim, and effective exclusion from the political arena.”¹⁰² This element requires that the target of the hate speech be subjectively harmed by the hate speech in any of the ways described above. This element may generally be easier to prove on behalf of an individual than a larger group.

Significant Cases

In *Brandenburg v. Ohio*, the Supreme Court considered an Ohio statute that criminalized "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The statute was not limited in scope to only imminent lawless action. The Supreme Court noted that this statute punished the mere advocacy of violence, and forbade the assembly of individuals which promoted this type of criminal, violent, and otherwise subversive advocacy. As a result, the Court ruled that the statute unconstitutionally violated the First Amendment rights of citizens to advocate for the use of force or violence. Freedom of speech does not allow a state to forbid these activities, unless this speech is aimed at inciting or producing imminent lawless action, and is likely to do so. As such, the Court distinguished between “fighting words,” which are not protected by the First Amendment, and subversive advocacy, which is protected. Under this distinction, websites, blog posts, and comments to social networks that support violence and promote hate speech are afforded constitutional protection as long as they do not constitute fighting words or true threats. Because subversive advocacy is protected, laws that attempt to prohibit acts which some might consider hate crimes, such as the burning of crosses, must be limited in scope to either target specific harmful actions or the incitement to imminent lawless action. For example, the city ordinance from *R.A.V.*, as

⁹⁹ *R.A.V.*, 505 U.S. at 381.

¹⁰⁰ *Ibid.*, 391.

¹⁰¹ See Kenneth D. Ward, “Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech,” *University of Miami Law Review* 52 (1998): 765.

¹⁰² Calvin R. Massey, “Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression,” *UCLA Law Review* 40 (1992): 104 n.2.

discussed above, criminalized all use of the burning cross rather than just uses that fall outside First Amendment protections.

Despite the First Amendment limitations of hate crime laws targeting specific speech or conduct, in *Wisconsin v. Mitchell*, the Supreme Court reviewed the constitutionality of a state law that allowed the court to consider during sentencing whether the perpetrators of a crime targeted a victim due to his membership in a protected class.¹⁰³ The Court held that hate motivations, which include perpetrating a crime against an individual based on the individual's membership in a particular minority group, can be considered when sentencing a perpetrator for a crime.¹⁰⁴ While we were unable to find any cases where a sentence enhancement for hate motivation was applied to an online crime, it appears to remain a possibility in the future.

VI. Defamation

A great deal of attention has been paid to online reputation in the last decade.¹⁰⁵ Sites like Yelp, TripAdvisor, and Angie's List, which aggregate reviews of restaurants, hotels, and services, can have enormous impacts on business profitability. The same logic applies to individuals. Google is used by employers, landlords, and romantic interests to gather data about potential employees, tenants, or partners. (Companies like RapLeaf and Spokeo will do this search for you, for a fee.) ReputationDefender offers individuals the chance to scrub negative online commentary about them. Given this landscape, harsh online comments can have deep impact. Since defamatory speech is not protected by the First Amendment, defamation law offers some solace to victims of hateful online comments.

Defamation is both a criminal and a civil, or private, action, but for the purposes of this document we are exclusively focusing on defamation as a civil action.¹⁰⁶ Civil actions, as opposed to criminal actions, have both advantages and disadvantages. First, an individual may bring a civil action at any time within the statute of limitations.¹⁰⁷ In contrast, a criminal action would require the cooperation of law enforcement, who may not be interested in taking the case, and could take several years before an arrest is made.¹⁰⁸ Civil actions are also likely to be

¹⁰³ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

¹⁰⁴ *Ibid.*

¹⁰⁵ D. J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007); Mary Madden and Aaron Smith, *Reputation Management and Social Media* (Washington, DC: Pew Internet & American Life Project, May 26, 2010), <http://pewinternet.org/Reports/2010/Reputation-Management.aspx?r=1>; P. Resnick et al., "Reputation Systems," *Communications of the ACM* 43, no. 12 (2000): 45–48.

¹⁰⁶ Many states have repealed their criminal defamation laws and most others have stopped prosecuting them; however there has been a recent revival of using criminal defamation laws to prosecute people for their conduct online. See Edward L. Carter, "Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions," *Santa Clara High Technology Law Journal* 21 (2004): 289.

¹⁰⁷ A statute of limitations is a time limit that the government sets for bringing a lawsuit, after which the victim may no longer bring a lawsuit. The statute of limitations may be waived or extended in certain circumstances.

¹⁰⁸ For example, Lori Stewart was cyberstalked for about six years before her stalker was arrested. See Mary Schenk, "Warrant Issued Over Online Comments," *News-Gazette*, September 21, 2013, <http://www.news-gazette.com/news/local/2013-09-21/warrant-issued-over-online-comments.html>.

significantly more expensive, as the plaintiffs will need to pay for both the court fees and any legal counsel they hire.

Defamation is an issue of state law, so the definition varies from state to state. However, most states define defamation in a similar manner. The Restatement (Second) of Torts has defined defamation as requiring the following elements: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.¹⁰⁹ In addition to these requirements, the plaintiff will also need to show that the defendant acted with actual malice if the plaintiff is a public figure.¹¹⁰ Public figures are those who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”¹¹¹ An individual may become a limited public figure if he or she “voluntarily injects himself [sic] or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” Given this, statements that relate to this limited range of issues for which the subject is a public figure require actual malice in addition to the other elements to be defamatory.¹¹²

To establish the publication element, the plaintiff would merely need to show that the defendant’s online statement was accessible to others. For example, a private email sent only to the plaintiff would not meet this criterion, but a posting on a blog, comment on a message board, or YouTube video would satisfy this element.

To satisfy all elements of a defamation claim, the plaintiff would need to show that the statement is false, which means it cannot just be an opinion—it must be capable of being proven false. A statement which expresses purely opinion, such as a comment claiming that someone is a “dumb ass,”¹¹³ is not defamation. A statement which claims another person has an infectious disease is a classic example of a defamatory statement which may be proven true or false.¹¹⁴ Publishing a statement of fact and claiming that it is an opinion is not a defense to an action for defamation, so a defendant may be found liable even if he or she does this.¹¹⁵ Whether or not a specific claim is provable may be a judgment by the court, which may consider all of the definitions of a word or phrase.¹¹⁶ If a plaintiff brings a defamation lawsuit, the defendant may make a motion for summary judgment to dismiss the lawsuit. If this happens, the court will

¹⁰⁹ Restatement (Second) of Torts § 558.

¹¹⁰ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1987).

¹¹¹ *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result).

¹¹² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

¹¹³ See *Vogel v. Felice*, 127 Cal. App. 4th 1006 (2005).

¹¹⁴ See *Matheson v. Stork*, 239 Neb. 547, 553 (1991).

¹¹⁵ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990).

¹¹⁶ See *Matter of Cohen v. Google*, 25 Misc. 3d 945 (N.Y. Sup. Ct. 2009). In this case, the court considered the use of the word “skank” and determined it referred to a person with poor hygiene, and also examined the use of the words “ho” and “whoring” and determined that they referred to a promiscuous person or one who exchanges of sex for money. Here, the court found that all of these terms were falsifiable and therefore grounds for a defamation action.

review each element of the plaintiff's claims as discussed in Section IV, and will rule as a matter of law that the statement is not falsifiable and thereby grant that plaintiff may not recover.

To establish the fourth element, the plaintiff would have to both prove that he or she was at the center of the statements and that the statements harmed his or her reputation. To prove that he or she was at the center of a statement does not require that the plaintiff be identified by name, only that he or she could be reasonably identified through context or other information provided. For example, a comment on a blog post directed at the author would almost always satisfy this element. In order for the plaintiff to show that his or her reputation was damaged by the comments, he or she would need to prove to the fact finder that the statements cast him or her in a bad light.

The additional requirement for public figures and limited public figures to show "actual malice," requires the plaintiff to show that the defendant posted the statement knowing that it was false, or making the claim with reckless disregard for the truth.¹¹⁷ A person may be a limited public figure if he or she has "voluntarily inject[ed] himself or [was] draw[n] into a particular public controversy."¹¹⁸ As such, comments relating to the work of a blogger which relate to his or her work will require this element. However, comments about a blogger that are completely unrelated to the blogging may not require this element.

After the enactment of Section 230 of the CDA, websites, social networking sites, blog hosting services, or other internet service providers that hosts defamatory comment will generally have no legal responsibility to victims. As previously discussed, this limits the ability of the victim to seek redress, as the victim can generally only sue the original creator of the defamatory statement for statements made online.

Significant Cases

Arguably, the two most widely publicized cases dealing with online defamation have been *Cohen v. Google* and *Doe v. Ciolli*. In *Matter of Cohen v. Google*, Cohen, a fashion model, was suing Google and Google's subsidiary blog-hosting platform Blogger.com to unmask a user who had anonymously created a blog called "Skanks in NYC."¹¹⁹ The "Skanks in NYC" blog featured pictures of Cohen, captions, and text, which referred to Cohen as a "skank bitch" and accused her of being a "psychotic, lying, whoring . . . skank."¹²⁰ Google did not have any substantive objections to the motion, but "refused to provide Petitioner with any information or documents with respect to the Blog unless it is required to do so pursuant to applicable law, regulation, legal process or enforceable governmental request."¹²¹ In reviewing the case for unmasking, the court determined that the use of the word "skank" was actionable, as skank refers

¹¹⁷ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1987).

¹¹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

¹¹⁹ *Matter of Cohen v. Google*, 25 Misc. 3d 945 (N.Y. Sup. Ct. 2009).

¹²⁰ *Ibid.*, 950.

¹²¹ *Ibid.*, 946 n1.

to a person with poor hygiene, as well as the use of “ho” and “whoring,” which refer to a person exchanging sex for money.¹²² The court decided that these phrases, in the context of the blog where they were used as captions to photos of Cohen, conveyed facts which were capable of being proven true or false.¹²³ In this manner, the court applied a New York procedural test which reflects the common law summary judgment test described in Section IV of this report. As a result, the court ordered Google to provide the plaintiff with the identity of the anonymous blogger, and Google provided Cohen with the anonymous blogger’s email address, among other identifying information. Cohen recognized the anonymous blogger as Rosemary Port, whom Cohen knew socially. After learning Port was the anonymous blogger, Cohen decided to drop her defamation lawsuit.¹²⁴

In *Doe v. Ciolli*, Brittan Heller and Heidi Iravani, two law students from Yale, sued the online forum AutoAdmit,¹²⁵ Anthony Ciolli, an AutoAdmit administrator, and several pseudonymous defendants under their AutoAdmit usernames, including “The Ayatollah of Rock-n-Rollah,” “pauliewalnuts,” and “hitlerhitlerhitler.”¹²⁶ Heller and Iravani had each been the subject of numerous defamatory posts on the AutoAdmit message boards. These posts included a variety of claims and statements about the plaintiffs, such as accusations that they had herpes or gonorrhea.¹²⁷ After starting the lawsuit, the plaintiffs successfully won orders to unmask the defendants. However, several of the defendants could not be identified after the unmasking order was placed. For those defendants that were identified, the majority settled “somewhere in the low to mid four figures in exchange for promises from the plaintiffs not to publicize who they were.”¹²⁸ One notable exception was Ryan Mariner, a law student, who revealed his identity to allegedly remove the leverage that the plaintiffs were trying to use to force a settlement.¹²⁹

VII. Cyberharassment

State Statutes

Cyberharassment law provides specific protections to victims of hateful online speech. Thirty-seven states have laws governing cyberharassment in various ways, and forty-one states

¹²² *Ibid.*, 950.

¹²³ *Ibid.*, 951–2.

¹²⁴ George Rush, “Outed Blogger Rosemary Port Blames Model Liskula Cohen for ‘Skank’ Stink,” *New York Daily News*, August 23, 2009, <http://www.nydailynews.com/entertainment/gossip/outed-blogger-rosemary-port-blames-model-liskula-cohen-skank-stink-article-1.400409>.

¹²⁵ AutoAdmit was found to be protected by Section 230 of the Communications Decency Act and therefore dropped from the suit.

¹²⁶ *Doe v. Ciolli*, 611 F. Supp. 2d 216 (D. Conn. 2009).

¹²⁷ Complaint, *Doe v. Ciolli*, 2007 WL 1988159, ¶¶ 27, 58 (D.Conn.).

¹²⁸ David Margolick, “Slimed Online,” *Upstart Business Journal*, February 11, 2009, <http://upstart.bizjournals.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying.html?page=all>.

¹²⁹ *Ibid.*

have laws governing cyberstalking.¹³⁰ Cyberstalking laws generally require that the victim fear for his or her personal safety, the safety of a family member, or the destruction of property.¹³¹ Cyberharassment laws are generally broader in scope and cover a range of behavior, which does not necessarily include a credible threat against another person.¹³² These behaviors may include threats that may be credible, profane and lewd acts, and other actions which may seriously alarm, annoy, torment, or terrorize someone, and that serve no legitimate purpose. Given that cyberharassment law is specific to internet speech, and that there are several significant cases where harassers have been convicted, it may be one of the more successful strategies for prosecuting hateful or aggressive online speech, presuming that speech meets the definition of cyberharassment according to the controlling state law. However, many of the cyberharassment laws are new and it is unclear at this time when and how some states will enforce them.

While there is significant variation in the language and conduct covered by cyberharassment laws, there are several recurring themes throughout the various statutes. First, fourteen state statutes in whole or in part require that the communication have no legitimate purpose.¹³³ (This language attempts to avoid unconstitutionally limiting protected speech.) Other states avoided infringing on protected speech with other language, such as “[t]his section does not apply to constitutionally protected speech or activity or to any other activity authorized by law.”¹³⁴ Several other states have also avoided creating unconstitutional limits on free speech by limiting their cyberharassment laws to only apply to speech that falls within defined categories of unprotected speech, such as obscenity or true threats.

Most states require that the target of harassment must feel harassed, annoyed, alarmed or otherwise be harmed for the conduct to qualify as cyberharassment. In this way, the government is attempting to protect those who are actually victims by requiring that the victim is subjectively harmed. For example, Rhode Island’s statute is limited to conduct “which seriously alarms, annoys, or bothers” the target of the communication.¹³⁵ Several states added an objective element to their cyberharassment definitions by requiring that the harassing conduct cause a reasonable person to feel emotional distress or be harmed. Rhode Island requires that the conduct “would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily

¹³⁰ See National Conference of State Legislatures, “State Cyberstalking and Cyberharassment Laws,” *NCSL.org*, 2013, <http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-laws.aspx>.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ These states are California (Cal. Penal Code § 653.2(c)(1)-(2)), Delaware (Del. Code Ann. Tit. 11, § 1311(a)(1)), Florida (Fla. Stat. § 784.048(1)(a), (d)), Hawaii (Haw. Rev. Stat. § 711-1106(1)(c), § 711-1106.5(1)), Indiana (Ind. Code § 35-45-2-2(a)), Iowa (Iowa Code § 708.7(1)(a)(1)), Nebraska (Neb. Rev. Stat. § 28-311.02(2)(a)), New Hampshire (N.H. Rev. Stat. Ann. § 644:4(I)(a)), North Dakota (N.D. Cent. Code § 12.1-17-07(1)(c), (4)(a)), Pennsylvania (18 Pa. Cons. Stat. § 2709(a)(3), (f)), Rhode Island (R.I. Gen. Laws § 11-52-4.2(a)), South Carolina (S.C. Code Ann. § 16-3-1700(B)), Tennessee (Tenn. Code Ann. § 39-17-308(a)(4)), and Washington (Wash. Rev. Code § 10.14.020(2)).

¹³⁴ See the cyberharassment statutes from Arizona (Ariz. Rev. Stat. Ann. § 13-2916(C)), Florida (Fla. Stat. § 784.048(1)(b)), Michigan (Mich. Comp. Laws § 750.411s(6)), New Hampshire (N.H. Rev. Stat. Ann. § 644:4(I)(f)), Pennsylvania (18 Pa. Cons. Stat. § 2709(e)), Rhode Island (R.I. Gen. Laws § 11-52-4.2(a)), South Carolina (S.C. Code Ann. § 16-3-1700(G)), and Washington (Wash. Rev. Code § 10.14.020(1)).

¹³⁵ R.I. Gen. Laws § 11-52-4.2.

injury.”¹³⁶ In addition, 30 state statutes require that the harassing communication be made with intent, such as intent to harass, alarm, annoy, or threaten the victim.¹³⁷

Several states require conduct or communication to be repeated for it to constitute cyberharassment. For example, Nebraska’s course of conduct is defined as “pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.”¹³⁸ Such requirements limit the scope of these laws and protect speakers from being prosecuted for a single or few communications that otherwise violate the statute.

Additionally, several statutes determine where a person may be prosecuted for violating the statute. Michigan provides a representative example of such a provision, which allows a person to be prosecuted in Michigan:

“for violating or attempting to violate this section only if 1 of the following applies: (a) The person posts the message while in this state. (b) Conduct arising from posting the message occurs in this state. (c) The victim is present in this state at the time the offense or any element of the offense occurs. (d) The person posting the message knows that the victim resides in this state.”¹³⁹

Of this type of provision, Mississippi has the most defined, as follows:

Any person violating this section may be prosecuted in the county where the telephone call, conversation or language originates in case such call, conversation or language originates in the State of Mississippi. In case the call, conversation or language originates outside of the State of

¹³⁶ Ibid.

¹³⁷ These states are Alabama (Ala. Code § 13A-11-8), Alaska (Alaska Stat. § 11.61.120(a)), Arizona (Ariz. Rev. Stat. Ann. § 13-2916(A), § 13-2921(A)), California (Cal. Penal Code § 422(a), § 653.2(a), § 653m(a)-(d)), Colorado (Colo. Rev. Stat. § 18-9-111(1), (2)), Connecticut (Conn. Gen. Stat. § 53a-182b(a), § 53a-183(a)), Delaware (Del. Code Ann. tit. 11, § 1311(a)), Hawaii (Haw. Rev. Stat. § 711-1106(1), § 711-1106.5(1)), Illinois (720 Ill. Comp. Stat. 5/26.5-1(a), 5/26.5-3(a)(1)-(3)), Indiana (Ind. Code § 35-45-2-2(a)), Iowa (Iowa Code § 708.7(a)), Kansas (Kan. Stat. Ann. § 21-6206(a)(1)(B)-(D)), Maine (Me. Rev. Stat. tit. 17-A § 506(1)(B)-(D)), Maryland (Md. Code Ann., Crim. Law § 3-805(b)(1)(i)), Minnesota (Minn. Stat. § 609.795 subdiv. 1(3)), Mississippi (Miss. Code Ann. § 97-29-45(1)(a)-(d)), New York (N.Y. Penal Law § 240.30), North Dakota (N.D. Cent. Code § 12.1-17-07(1)), Oklahoma (Okla. Stat. tit. 21, § 1172(A)(2)-(4)), Oregon (Or. Rev. Stat. § 166.065(1)), Pennsylvania (18 Pa. Cons. Stat. § 2709(a)), South Carolina (S.C. Code Ann. § 16-3-1700(B), § 16-17-430(A)(2),(5)), South Dakota (S.D. Codified Laws § 49-31-31(1)-(4)), Tennessee (Tenn. Code Ann. § 39-17-308(a)), Texas (Tex. Penal Code Ann. § 33.07(a)-(c)), Utah (Utah Code Ann. § 76-9-201(2)), Vermont (Vt. Stat. Ann. tit. 13, § 1027(a),(b)), Virginia (Va. Code Ann. § 18.2-152.7:1), West Virginia (W. Va. Code § 61-3C-14a(a)), and Wisconsin (Wis. Stat. § 947.0125(2)(a)-(f)).

¹³⁸ Neb. Rev. Stat. § 28-311.02.

¹³⁹ Mich. Comp. Laws § 750.411s.

Mississippi then such person shall be prosecuted in the county to which it is transmitted.¹⁴⁰

Despite the common themes in state cyberharassment statutes, they vary substantially when it comes to the conduct in question. For example, Virginia limits its cyber-harassment law to the use of “obscene or lewd language” or the suggestion of “a lewd or lascivious act.”¹⁴¹ In *Barson v. Commonwealth*,¹⁴² the Virginia Supreme Court reviewed a cyberharassment conviction of Barson for a series of emails he sent to his estranged wife and her friends and family. These emails contained statements calling his wife a “coke whore baby killing prostitute” and claiming that she has “risky gutter sex” and “sex with anonymous strangers” from Craigslist.¹⁴³ On appeal, the Supreme Court determined that the emails, “as offensive, vulgar, and disgusting as their language may have been,” did not meet the statutory definition of obscenity, which the court interpreted to follow the definition of obscenity from the *Miller* test, as the emails did not appeal to the prurient interest in sex.¹⁴⁴ In contrast, an appeals court interpreted the word obscene, as used in the Illinois statute, under a broader dictionary definition to mean “disgusting to the senses” or “abhorrent to morality or virtue.”¹⁴⁵ As such, the full breadth of these cyberharassment laws may not be clear until they have been interpreted by their state’s highest court.

In *Polito v. AOL Time Warner, Inc.*, Polito was suing AOL to unmask several users who were responsible for sending her “harassing... pornographic, embarrassing, insulting, annoying and... confidential” emails and instant messages from a frequently changing set of user names that she was unable to identify.¹⁴⁶ Polito even changed her user name, but she continued to receive such communications afterwards. The court found that the conduct of the anonymous users was proscribed by the Pennsylvania cyberharassment statute, which covers communications including “lewd, lascivious, threatening or obscene words, language, drawings or caricatures” and repeated anonymous communications. The court thereafter ordered that AOL unmask the users.

Online Harassment: The Case of Minors

Minors are a special case when it comes to online harassment. First, students in public schools are frequently disciplined for speech acts that are considered protected under the First

¹⁴⁰ Miss. Code § 97-29-45.

¹⁴¹ Va. Code Ann. § 18.2-152.7:1.

¹⁴² 284 Va. 67 (2012).

¹⁴³ *Ibid.*, 70.

¹⁴⁴ *Ibid.*, 72, 77, 79; *Miller v. California*, 413 U.S. 15 (1973). See Section IV for additional information regarding the *Miller* test.

¹⁴⁵ *People v. Kucharski*, 987 N.E.2d 906 (Ill. App. Ct. 2013).

¹⁴⁶ *Polito v. Time Warner*, 78 Pa.D. & C.4th 328 (Lackawanna Ct. 2004). Note that Polito also sued the defendants for Intentional Infliction of Emotional Distress.

Amendment. Courts have inconsistently included online speech in this category. Second, new “cyberbullying” laws may criminalize peer-to-peer harassment, but many of the laws are quite recent, and as a result, there is little consensus in this area. Given these two differences, minors may be subject to penalties and disciplinary actions by both courts and schools that would not apply to the same speech if done by adults.

While First Amendment protections typically limit how harassment law can be used to limit online speech, this does not apply in the public school context. Although the law is often inconsistently applied, courts have generally supported the efforts of administrators to discipline public school students when they use social media to satirize, defame, or harass school personnel. While the Supreme Court determined in *Tinker v. Des Moines Independent Community School District* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” the court also argued that this must be balanced against schools’ ability to educate without disruption.¹⁴⁷ As a result, the courts apply three separate tests to determine whether student speech, whether on or offline, is constitutionally protected.

First, the on-campus/off-campus test asks whether the speech took place on school grounds.¹⁴⁸ This becomes quite convoluted when considering postings on social networking sites. If the speech was created using school computers, accessed using school computers, or even accessed on a student’s personal computer or mobile phone while the student is at school, courts have generally determined that this constitutes on-campus speech. For example, in *J.S. v. Bethlehem School District*, a student created a website called “Teacher Sux,” which included lewd commentary about two teachers at his school. One page called “Why Should She Die?[,]” aimed at an algebra teacher, included the statement “F@#k You Mrs. Fulmer, You are a B@#ch. You Are A Stupid B@#ch” repeated 136 times, along with a drawing of the decapitated teacher with blood running from her neck.¹⁴⁹ The student had created the website at home, but used a school computer to access it at school; news of the website quickly traveled through the school. The court concluded that even if the student had *not* accessed the website while at school, a “sufficient nexus” existed between the school campus and the website for it to be considered on-campus speech.¹⁵⁰ Subsequent cases have used this “nexus test,” which holds that if speech is “reasonably likely to reach the school and cause a substantial disturbance there,” it can be considered on-campus speech even if it is never viewed by the student on school grounds.¹⁵¹

¹⁴⁷ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

¹⁴⁸ Jessica Moy, “Beyond the Schoolhouse Gates and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment after *Morse v. Frederick*,” *Hastings Constitutional Law Quarterly* 37 (2009): 577.

¹⁴⁹ *J.S. v. Bethlehem School District*, 807 A.2d 847 (Pa. 2002); Emily Gold Waldman, “Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions,” *William & Mary Bill of Rights Journal* 19 (2010): 620–621.

¹⁵⁰ Waldman, “Badmouthing Authority,” 621.

¹⁵¹ Matthew Pagett, “Sticks, Stones, and Cyberspace: On Cyberbullying and the Limits of Student Speech,” *UNC School of Government-School Law Bulletin* 2 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2191141; Waldman, “Badmouthing Authority,” 623.

Speech is considered reasonably foreseeable that it will come to the attention of the school if it pertains to school events, and school community members are likely to read it.¹⁵²

If the court decides that the speech is considered “on-campus,” then the courts usually attempt to determine whether the speech in question “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”¹⁵³ This disruption must be more than “mild distraction or curiosity,” but does not need to be sheer chaos; it can include the reaction of students/teachers, time taken from school activities, and administrative response.

However, sometimes this test is applied even in cases that fail the on/off-campus test. For example, in *Wisniewski vs. Board of Education*, a student was disciplined for having an Instant Messenger icon that depicted a person being shot in the head with the label “Kill Mr. VanderMolen.”¹⁵⁴ For three weeks, this icon appeared in all the messages that the student sent to his friends, all of which were private, accessed only at home, and sent from the student’s personal home computer.¹⁵⁵ One of the student’s friends became concerned, and showed the icon to the local police, the student’s parents, and the district superintendent.¹⁵⁶ While the speech clearly took place off-campus, the court determined that if the speech “poses a reasonably foreseeable risk of coming to the attention of school authorities and materially and substantially disrupting the work and discipline of the school,” then disciplinary action is justified.¹⁵⁷ There is clear confusion over how and why schools can regulate online speech that does not occur on-campus; cases with strikingly similar details have had quite different outcomes depending on the court.¹⁵⁸ The lack of consensus around such issues demonstrates the difficulty in applying standards that were created in offline contexts to face-to-face speech.

Cyberbullying is another area in which the courts are actively involved in determining the limits of online speech for minors. As of January 2012, 48 states had passed anti-bullying laws, 38 of which include definitions of cyberbullying or include electronic speech in the definition of bullying.¹⁵⁹ While most of these laws involve school responsibilities for preventing bullying, reporting bullying, and so forth, a few criminalize student behavior (for example, Idaho’s law creates the crime of student harassment, intimidation, or bullying, while Louisiana and North Carolina’s law create the crime of cyberbullying).¹⁶⁰ As of yet, there is no consensus on whether or not speech that constitutes “cyberbullying” is protected by the First Amendment.¹⁶¹ Given the

¹⁵² Moy, “Beyond the Schoolhouse Gates and into the Virtual Playground,” 580–581.

¹⁵³ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), 393:513.

¹⁵⁴ *Wisniewski v. Board of Education*, 494 F.3d 34, 36 (2d Cir. 2007).

¹⁵⁵ Moy, “Beyond the Schoolhouse Gates and into the Virtual Playground,” 580.

¹⁵⁶ Pagett, “Sticks, Stones, and Cyberspace,” 9.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, 13; Waldman, “Badmouthing Authority,” 627–629.

¹⁵⁹ Dena Sacco et al., *An Overview of State Anti-Bullying Legislation and Other Related Laws*, The Kinder & Braver World Project: Research Series (Cambridge, MA: Berkman Center for Internet and Society at Harvard University, February 2012),

http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf.

¹⁶⁰ *Ibid.*

¹⁶¹ Kim Zetter, “Court: Cyberbullying Threats Are Not Protected Speech,” *Threat Level*, March 18, 2010, <http://www.wired.com/threatlevel/2010/03/cyberbullying-not-protected/>; Sruli Yellin, “Resetting One of the Longest

rapidly-changing nature of these laws, it remains to be seen whether or not minors who engage in harassing or offensive speech against their peers can be criminally prosecuted, as opposed to school disciplinary action.

VIII. Conclusion

A significant number of people deal with hateful and aggressive messages sent to them via the internet. While most of these instances are most likely one-off comments or emails, there are situations where victims are targeted by perpetrators repeatedly, across platforms, which may wreak havoc on their peace of mind, online reputation, or ability to participate in social media. This primer suggests that while legal remedies may be appropriate in very specific cases—such as defamatory speech or harassment that constitutes a “true threat”—the laws are written specifically to take into account First Amendment protection of most online speech. Moreover, online anonymity can make it quite difficult to identify a perpetrator, and issues of jurisdiction complicate which police department, court, or state is most appropriate to handle the complaint. Add to this limited resources and computer literacy, and legal remedies begin to look like a last resort.

While victims may want to explore other remedies, such as appealing to content hosting platforms, there is no *legal* requirement for sites like Facebook or Twitter to aggressively monitor their content, remove offending messages, suspend the accounts of perpetrators, or enforce terms of service. Some sites may choose to do so, but others, such as the AutoAdmit board proprietors or the hosts of so-called “revenge porn” sites, may actively resist such efforts. However, community moderation, collective norm-setting, aggressive algorithmic filtering of online comments, or other social or technical efforts may help to quell these problems.

Although this landscape may seem dismal, it is important for the First Amendment protections of internet speech to continue. New laws around “cyberbullying” demonstrate the dangers of creating new criminal behaviors online; we do not yet know how such laws will hold up to First Amendment challenges, or how they will be used in practice. It may also be unclear who is “wrong” or “right” in such disputes; while some cases of online harassment or hateful speech seem obvious, others are far less black and white. People from all sides of the political, social, and economic spectrum use “internet vigilantism” to target and shame those they disagree with, from Men’s Rights activists shaming feminist filmmakers to feminists shaming writers they believe to be sexist. Criminalizing such behaviors is a tricky task, and laws that inhibit free expression on the internet are likely to be used in ways that even the most well-intentioned individuals would balk at.

It seems clear that more information and research should be available to potential victims at this time given the rapidly changing legal landscape and the increasing use of online

technologies to target and harass individuals. We hope that this report provides a good start toward this objective.

Appendix A: Methodology

Methodology

Our research into the remedies for victims of online harassment, hate speech, and defamation began with a review of the legal literature surrounding Section 230 of the Communications Decency Act of 1996.¹⁶² We undertook this review to understand the protections afforded to websites, social networks, blog hosts, and other internet services, and the limits these protections place on the ability of victims to act. We began with a reading of the statute¹⁶³ and the Fordham CLIP report *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals*, which summarizes the major case law interpreting Section 230, as well as a review of other legal literature discussing Section 230.

We then reviewed legal literature related to online hate speech and harassment. We conducted a search of legal databases for articles using the following search term:

“hate speech” and (internet or online)

The results of this search included a significant number of articles discussing the constitutionality of efforts by state and federal governments to regulate online hate speech,¹⁶⁴ as well as the potential global impact of hate websites created in the United States.¹⁶⁵ Some articles focused on the limitations of technological and legal means of regulating online hate speech.¹⁶⁶ Much of this literature proposed that a unilateral effort by the government, without help from ISPs or the public, would be insufficient.¹⁶⁷

To understand the limitations of the First Amendment and what categories of speech fall outside its protection, we reviewed the cases discussed in the “hate speech and internet or online” search results, and ran a search of U.S. Supreme Court and federal circuit court cases using the following search terms:

“First Amendment” and “Unprotected Speech”

“First Amendment” and “Hate Speech” or “Hate Crime”

“First Amendment” and “Fighting Words”

“First Amendment” and Defamation

“First Amendment” and “True Threats”

Turning to hate speech, as described in Sections I and IV, we searched for internet hate speech and the First Amendment, hate speech, and hate crimes. Next, we ran searches in legal

¹⁶² Communications Decency Act §230, 47 U.S.C. § 230.

¹⁶³ *Ibid.*

¹⁶⁴ Julian Baumrin, “Internet Hate Speech and the First Amendment, Revisited,” *Rutgers Computer & Technology Law Journal* 37 (2011): 223.

¹⁶⁵ Alexander Tsesis, “Hate in Cyberspace: Regulating Hate Speech on the Internet,” *San Diego Law Review* 38 (2001): 817. James Banks, “Regulating Hate Speech Online,” *International Review of Law, Computers & Technology* 24, no. 3 (2010): 236–237.

¹⁶⁶ Banks, “Regulating Hate Speech Online,” 233-39.

¹⁶⁷ See, for example, *ibid.*; Tsesis, “Hate in Cyberspace: Regulating Hate Speech on the Internet,” 863-74.

literature and case law to identify definitions of hate speech used by organizations by using the following search term on Lexis Advance:

“Hate Speech” /p defin*¹⁶⁸

We reviewed results from this search as well as articles, statutes, treaties, and other text referenced or cited by the relevant resulting cases and legal literature. After running these initial searches, we also reviewed a LexisNexis 50-state survey on hate crime statutes.

To review state cyberstalking and cyberharassment laws, we began with “State Cyberstalking and Cyberharassment Laws,” a survey of all states with cyberharassment and cyberstalking laws, by the National Conference of State Legislatures.¹⁶⁹ Every cyberharassment statute from this list was examined and has been included in relevant part in Appendix B. Next, searches were conducted for each state for the statute number of each cyberharassment statute, with results limited to the highest court of the particular state for the statute number. For example, the Arkansas cyberharassment law is Ark. Code Ann. § 5-41-108, so we searched for all cases including “5-41-108” in the Arkansas Supreme Court. If no relevant cases were found from a state’s highest court, the search was then expanded to include the state’s appellate level courts.

In addition, many of these statutes include both online and offline harassment, so to understand how the online component of these statutes have been treated in court and how often they are reviewed by appellate courts, a search was run with the jurisdiction limited to each state and the overlying federal trial and appeals courts using the following search query:

atl2(computer or internet or online or cybe* or myspace or facebook or twitter or digital or electronic or message board or web* or blog or computer or smartphone or “social network” or “Social media” or email or 4chan or reddit or craigslist or newsgroup* or ISP).

The results were then narrowed to cases citing the relevant state statute. The search required multiple mentions of any one of the terms above in order to remove cases that mentioned online harassment, but did not discuss it in depth. The word “forum” was originally included to account for “web forums”, a synonym for “message boards”, but was removed from the search terms to omit the significant number of cases that concerned the correct legal forum for a lawsuit.

Our review of online defamation cases began with a review of secondary materials that appeared using the following search on Lexis Advance:

atl2(computer or internet or online or cybe* or myspace or facebook or twitter or digital or electronic or message board or web* or blog or computer or smartphone or “social network” or “Social media” or email or 4chan or reddit or craigslist or newsgroup* or ISP) and defamation.

¹⁶⁸ As used in this section, the asterisk is a root expander that searches for all version of a word containing the connected letters. Here this would include definition, defining, defined, define, definitions, etc.

¹⁶⁹ National Conference of State Legislatures, “State Cyberstalking and Cyberharassment Laws.”

As discussed above, 'forum' was excluded from this search as it resulted in a significant number of unrelated cases. After reviewing these secondary materials, we conducted additional searches for the following search terms on Lexis Advance:

"anonymous speech" and unmasking.

In addition, we examined the dockets, including motions, for the *Matter of Cohen v. Google*¹⁷⁰ and *Doe v. Ciolli*¹⁷¹ cases. We also conducted general internet searches for news media sources about these cases.

¹⁷⁰ 25 Misc. 3d 945 (N.Y. Sup. Ct. 2009).

¹⁷¹ Doe v. Ciolli, 307CV00909 CFD (D. Conn. June 11, 2007).

Appendix B: State Laws on Online Harassment

Alabama

Ala. Code § 13A-11-8 Harassment – Harassing Communications

(a) Harassment. --

(1) A person commits the crime of harassment if, with intent to harass, annoy, or alarm another person, he or she either:

a. Strikes, shoves, kicks, or otherwise touches a person or subjects him or her to physical contact.

b. Directs abusive or obscene language or makes an obscene gesture towards another person.

(2) For purposes of this section, harassment shall include a threat, verbal or nonverbal, made with the intent to carry out the threat, that would cause a reasonable person who is the target of the threat to fear for his or her safety.

(3) Harassment is a Class C misdemeanor.

(b) Harassing communications. --

(1) A person commits the crime of harassing communications if, with intent to harass or alarm another person, he or she does any of the following:

* * *

Nothing in this section shall apply to legitimate business telephone communications.

(2) Harassing communications is a Class C misdemeanor.

Alaska

Alaska Stat. § 11.61.120 Harassment in the Second Degree

(a) A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person

* * *

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact;

* * *

(6) except as provided in AS 11.61.116, publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act.

(b) Harassment in the second degree is a class B misdemeanor.

Arizona

Ariz. Rev. Stat. Ann. § 13-2916 Use of an Electronic Communication to Terrify, Intimidate, Threaten or Harass; Applicability; Classification; Definition

A. It is unlawful for any person, with intent to terrify, intimidate, threaten or harass a specific person or persons, to do any of the following:

1. Direct any obscene, lewd or profane language or suggest any lewd or lascivious act to the person in an electronic communication.

2. Threaten to inflict physical harm to any person or property in any electronic communication.

3. Otherwise disturb by repeated anonymous, unwanted or unsolicited electronic communications the peace, quiet or right of privacy of the person at the place where the communications were received.

B. Any offense committed by use of an electronic communication as set forth in this section is deemed to have been committed at either the place where the communications originated or at the place where the communications were received.

C. This section does not apply to constitutionally protected speech or activity or to any other activity authorized by law.

D. Any person who violates this section is guilty of a class 1 misdemeanor.

E. For the purposes of this section, "electronic communication" means a wire line, cable, wireless or cellular telephone call, a text message, an instant message or electronic mail.

Ariz. Rev. Stat. Ann. § 13-2921 Harassment; Classification; Definition

A. A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person:

1. Anonymously or otherwise contacts, communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses.

* * *

3. Repeatedly commits an act or acts that harass another person.

* * *

C. Harassment under subsection A is a class 1 misdemeanor. Harassment under subsection B is a class 5 felony.

D. This section does not apply to an otherwise lawful demonstration, assembly or picketing.

E. For the purposes of this section, "harassment" means conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.

Arkansas

Ark. Code Ann. § 5-41-108 Unlawful Computerized Communications

(a) A person commits the offense of unlawful computerized communications if, with the purpose to frighten, intimidate, threaten, abuse, or harass another person, the person sends a message:

(1) To the other person on an electronic mail or other computerized communication system and in that message threatens to cause physical injury to any person or damage to the property of any person;

(2) On an electronic mail or other computerized communication system with the reasonable expectation that the other person will receive the message and in that message threatens to cause physical injury to any person or damage to the property of any person;

(3) To another person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd, or profane language; or

(4) On an electronic mail or other computerized communication system with the reasonable expectation that the other person will receive the message and in that message uses any obscene, lewd, or profane language.

(b) Unlawful computerized communications is a Class A misdemeanor.

(c)

(1) The judicial officer in a court of competent jurisdiction shall upon pretrial release of the defendant enter an order consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(2) A protective order under subdivision (c)(1) of this section remains in effect during the pendency of any appeal of a conviction under this section.

California

Cal. Penal Code § 422 Punishment for Threats

(a) Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(b) For purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

(c) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

Cal. Penal Code § 653.2 Use of Electronic Communication to Instill Fear or to Harass; Misdemeanor

(a) Every person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, which would be likely to incite or produce that unlawful action, is guilty of a misdemeanor punishable by up to one year in a county jail, by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment.

(b) For purposes of this section, "electronic communication device" includes, but is not limited to, telephones, cell phones, computers, Internet Web pages or sites, Internet phones, hybrid cellular/Internet/wireless devices, personal digital assistants (PDAs), video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term is defined in Section 2510(12) of Title 18 of the United States Code.

(c) For purposes of this section, the following terms apply:

(1) "Harassment" means a knowing and willful course of conduct directed at a specific person that a reasonable person would consider as seriously alarming, seriously

annoying, seriously tormenting, or seriously terrorizing the person and that serves no legitimate purpose.

(2) "Of a harassing nature" means of a nature that a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing of the person and that serves no legitimate purpose.

Cal. Penal Code § 653m Telephone Calls or Contact by Electronic Communication Device with Intent to Annoy

(a) Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.

(b) Every person who, with intent to annoy or harass, makes repeated telephone calls or makes repeated contact by means of an electronic communication device, or makes any combination of calls or contact, to another person is, whether or not conversation ensues from making the telephone call or contact by means of an electronic communication device, guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith or during the ordinary course and scope of business.

(c) Any offense committed by use of a telephone may be deemed to have been committed when and where the telephone call or calls were made or received. Any offense committed by use of an electronic communication device or medium, including the Internet, may be deemed to have been committed when and where the electronic communication or communications were originally sent or first viewed by the recipient.

(d) Subdivision (a) or (b) is violated when the person acting with intent to annoy makes a telephone call or contact by means of an electronic communication device requesting a return call and performs the acts prohibited under subdivision (a) or (b) upon receiving the return call.

(e) Subdivision (a) or (b) is violated when a person knowingly permits any telephone or electronic communication under the person's control to be used for the purposes prohibited by those subdivisions.

(f) If probation is granted, or the execution or imposition of sentence is suspended, for any person convicted under this section, the court may order as a condition of probation that the person participate in counseling.

(g) For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, facsimile machines, pagers, personal digital assistants, smartphones, and any other device that transfers signs, signals, writing, images, sounds, or data. "Electronic communication device" also includes, but is not limited to, videophones, TTY/TDD devices, and all other devices used to aid or assist communication to or from deaf or disabled persons. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

Colorado

Colo. Rev. Stat. § 18-9-111 Harassment

(1) A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she:

* * *

(e) Initiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene; or

* * *

(h) Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to, another in a manner likely to provoke a violent or disorderly response.

(1.5) As used in this section, unless the context otherwise requires, "obscene" means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus, fellatio, anilingus, or excretory functions.

(2) Harassment pursuant to subsection (1) of this section is a class 3 misdemeanor; except that harassment is a class 1 misdemeanor if the offender commits harassment pursuant to subsection (1) of this section with the intent to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, or national origin.

(3) Any act prohibited by paragraph (e) of subsection (1) of this section may be deemed to have occurred or to have been committed at the place at which the telephone call, electronic mail, or other electronic communication was either made or received.

(4) to (6) Repealed.

Connecticut

Conn. Gen. Stat. § 53a-182b Harassment in the First Degree: Class D Felony

(a) A person is guilty of harassment in the first degree when, with the intent to harass, annoy, alarm or terrorize another person, he threatens to kill or physically injure that person or any other person, and communicates such threat by telephone, or by telegraph, mail, computer network, as defined in section 53a-250, or any other form of written communication, in a manner likely to cause annoyance or alarm and has been convicted of a capital felony under the provisions of section 53a-54b in effect prior to April 25, 2012, a class A felony, a class B felony, except a conviction under section 53a-86 or 53a-122, a class C felony, except a conviction under section 53a-87, 53a-152 or 53a-153, or a class D felony under sections 53a-60 to 53a-60c, inclusive, 53a-72a, 53a-72b, 53a-95, 53a-103, 53a-103a, 53a-114, 53a-136 or 53a-216. For the purposes of this section, "convicted" means having a judgment of conviction entered by a court of competent jurisdiction.

(b) For purposes of this section, such offense may be deemed to have been committed either at the place where the telephone call was made or where it was received.

(c) The court may order any person convicted under this section to be examined by one or more psychiatrists.

(d) Harassment in the first degree is a class D felony.

Conn. Gen. Stat. § 53a-183 Harassment in the Second Degree: Class C Misdemeanor

(a) A person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network, as defined in section 53a-250, or by any other form of written communication, in a manner likely to cause annoyance or alarm; or (3) with intent to harass, annoy or alarm another person, he makes

a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm.¹⁷²

(b) For the purposes of this section, such offense may be deemed to have been committed either at the place where the communication originated or at the place where it was received.

(c) The court may order any person convicted under this section to be examined by one or more psychiatrists.

(d) Harassment in the second degree is a class C misdemeanor.

Delaware

Del. Code Ann. tit. 11, § 1311 Harassment; Class A Misdemeanor

(a) A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

(1) That person insults, taunts or challenges another person or engages in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to provoke a violent or disorderly response or cause a reasonable person to suffer fear, alarm, or distress;

(2) Communicates with a person by telephone, telegraph, mail or any other form of written or electronic communication in a manner which the person knows is likely to cause annoyance or alarm including, but not limited to, intrastate telephone calls initiated by vendors for the purpose of selling goods or services;

(3) Knowingly permits any telephone under that person's control to be used for a purpose prohibited by this section;

(4) In the course of a telephone call that person uses obscene language or language suggesting that the recipient of the call engage with that person or another person in sexual relations of any sort, knowing that the person is thereby likely to cause annoyance or alarm to the recipient of the call; or

(5) Makes repeated or anonymous telephone calls to another person whether or not conversation ensues, knowing that person is thereby likely to cause annoyance or alarm.

(b) Harassment is a class A misdemeanor.

Florida

Fla. Stat. § 784.048 Stalking; Definitions; Penalties

(1) As used in this section, the term:

(a) "Harass" means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests.

(c) "Credible threat" means a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for his

¹⁷² Provision (3) of this section was been held unconstitutional as applied in *State v. LaFontaine*, 16 A.3d 1281 (Conn. App. Ct. 2011).

or her safety or the safety of his or her family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section.

(d) "Cyberstalk" means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.

(2) A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) A person who, after an injunction for protection against repeat violence, sexual violence, or dating violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a child under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(6) A law enforcement officer may arrest, without a warrant, any person that he or she has probable cause to believe has violated this section.

(7) A person who, after having been sentenced for a violation of s. 794.011, s. 800.04, or s. 847.0135(5) and prohibited from contacting the victim of the offense under s. 921.244, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) The punishment imposed under this section shall run consecutive to any former sentence imposed for a conviction for any offense under s. 794.011, s. 800.04, or s. 847.0135(5).

(9)

(a) The sentencing court shall consider, as a part of any sentence, issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any such order be based upon the seriousness of the facts before the court, the probability of future violations by the perpetrator, and the safety of the victim and his or her family members or individuals closely associated with the victim.

(b) The order may be issued by the court even if the defendant is sentenced to a state prison or a county jail or even if the imposition of the sentence is suspended and the defendant is placed on probation.

Georgia

There is no cyberharassment statute in this state.

Hawaii**Haw. Rev. Stat. § 711-1106 Harassment**

(1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact;
- (b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another;
- (c) Repeatedly makes telephone calls, facsimile transmissions, or any form of electronic communication as defined in section 711-1111(2), including electronic mail transmissions, without purpose of legitimate communication;
- (d) Repeatedly makes a communication anonymously or at an extremely inconvenient hour;
- (e) Repeatedly makes communications, after being advised by the person to whom the communication is directed that further communication is unwelcome; or
- (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.

(2) Harassment is a petty misdemeanor.

Haw. Rev. Stat. § 711-1106.5 Harassment by Stalking

(1) A person commits the offense of harassment by stalking if, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, that person engages in a course of conduct involving pursuit, surveillance, or non-consensual contact upon the other person on more than one occasion without legitimate purpose.

(2) A person convicted under this section may be required to undergo a counseling program as ordered by the court.

(3) For purposes of this section, "nonconsensual contact" means any contact that occurs without that individual's consent or in disregard of that person's express desire that the contact be avoided or discontinued. Nonconsensual contact includes direct personal visual or oral contact and contact via telephone, facsimile, or any form of electronic communication, as defined in section 711-1111(2), including electronic mail transmission.

(4) Harassment by stalking is a misdemeanor.

Haw. Rev. Stat. § 708-893 Use of a Computer in the Commission of a Separate Crime

(1) A person commits the offense of use of a computer in the commission of a separate crime if the person:

* * *

(b) Knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure, pursue, surveil, contact, harass, annoy, or alarm the victim or intended victim of the following offenses:

* * *

(vii) Section 711-1106, relating to harassment;

(viii) Section 711-1106.5, relating to harassment by stalking; or

* * *

(2) Use of a computer in the commission of a separate crime is an offense one class or grade, as the case may be, greater than the offense facilitated. Notwithstanding any other law to the contrary, a conviction under this section shall not merge with a conviction for the separate crime.

Idaho

There is no cyberharassment statute in this state.

Illinois

720 Ill. Comp. Stat. 5/26.5-0.1 Definitions

"Electronic communication" means any transfer of signs, signals, writings, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system. "Electronic communication" includes transmissions through an electronic device including, but not limited to, a telephone, cellular phone, computer, or pager, which communication includes, but is not limited to, e-mail, instant message, text message, or voice mail.

"Family or household member" includes spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, and persons with disabilities and their personal assistants. For purposes of this Article, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship.

"Harass" or "harassing" means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, that would cause a reasonable person emotional distress and does cause emotional distress to another.

720 Ill. Comp. Stat. 5/26.5-1 Transmission of Obscene Messages

(a) A person commits transmission of obscene messages when he or she sends messages or uses language or terms which are obscene, lewd or immoral with the intent to offend by means of or while using a telephone or telegraph facilities, equipment or wires of any person, firm or corporation engaged in the transmission of news or messages between states or within the State of Illinois.

(b) The trier of fact may infer intent to offend from the use of language or terms which are obscene, lewd or immoral.

720 Ill. Comp. Stat. 5/26.5-3 Harassment through Electronic Communications

(a) A person commits harassment through electronic communications when he or she uses electronic communication for any of the following purposes:

- (1) Making any comment, request, suggestion or proposal which is obscene with an intent to offend;
- (2) Interrupting, with the intent to harass, the telephone service or the electronic communication service of any person;
- (3) Transmitting to any person, with the intent to harass and regardless of whether the communication is read in its entirety or at all, any file, document, or other communication which prevents that person from using his or her telephone service or electronic communications device;

(4) Transmitting an electronic communication or knowingly inducing a person to transmit an electronic communication for the purpose of harassing another person who is under 13 years of age, regardless of whether the person under 13 years of age consents to the harassment, if the defendant is at least 16 years of age at the time of the commission of the offense;

(5) Threatening injury to the person or to the property of the person to whom an electronic communication is directed or to any of his or her family or household members; or

(6) Knowingly permitting any electronic communications device to be used for any of the purposes mentioned in this subsection (a).

(b) Telecommunications carriers, commercial mobile service providers, and providers of information services, including, but not limited to, Internet service providers and hosting service providers, are not liable under this Section, except for willful and wanton misconduct, by virtue of the transmission, storage, or caching of electronic communications or messages of others or by virtue of the provision of other related telecommunications, commercial mobile services, or information services used by others in violation of this Section.

Indiana

Ind. Code § 35-45-2-2 Harassment; “Obscene Message” Defined

(a) A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:

(1) makes a telephone call, whether or not a conversation ensues;

(2) communicates with a person by telegraph, mail, or other form of written communication;

(3) transmits an obscene message, or indecent or profane words, on a Citizens Radio Service channel; or

(4) uses a computer network (as defined in IC 35-43-2-3(a)) or other form of electronic communication to:

(A) communicate with a person; or

(B) transmit an obscene message or indecent or profane words to a person; commits harassment, a Class B misdemeanor.

(b) A message is obscene if:

(1) the average person, applying contemporary community standards, finds that the dominant theme of the message, taken as a whole, appeals to the prurient interest in sex;

(2) the message refers to sexual conduct in a patently offensive way; and

(3) the message, taken as a whole, lacks serious artistic, literary, political, or scientific value.

Iowa

Iowa Code § 708.7 Harassment

1.

a. A person commits harassment when, with intent to intimidate, annoy, or alarm another person, the person does any of the following:

(1) Communicates with another by telephone, telegraph, writing, or via electronic communication without legitimate purpose and in a manner likely to cause the other person annoyance or harm.

* * *

2.
 - a. A person commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony, or commits harassment and has previously been convicted of harassment three or more times under this section or any similar statute during the preceding ten years.
 - b. Harassment in the first degree is an aggravated misdemeanor.
3.
 - a. A person commits harassment in the second degree when the person commits harassment involving a threat to commit bodily injury, or commits harassment and has previously been convicted of harassment two times under this section or any similar statute during the preceding ten years.
 - b. Harassment in the second degree is a serious misdemeanor.
4.
 - a. Any other act of harassment is harassment in the third degree.
 - b. Harassment in the third degree is a simple misdemeanor.
5. For purposes of determining whether or not the person should register as a sex offender pursuant to the provisions of chapter 692A, the fact finder shall make a determination as provided in section 692A.126.

Kansas

Kan. Stat. Ann. § 21-6206 Harassment by Telecommunication Device

- (a) Harassment by telecommunication device is the use of:
 - (1) A telecommunications device to:
 - (A) Knowingly make or transmit any comment, request, suggestion, proposal, image or text which is obscene, lewd, lascivious or indecent;
 - (B) make or transmit a call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the receiving end;
 - (C) make or transmit any comment, request, suggestion, proposal, image or text with intent to abuse, threaten or harass any person at the receiving end;
 - (D) make or cause a telecommunications device to repeatedly ring or activate with intent to harass any person at the receiving end;
 - (E) knowingly play any recording on a telephone, except recordings such as weather information or sports information when the number thereof is dialed, unless the person or group playing the recording shall be identified and state that it is a recording; or
 - (F) knowingly permit any telecommunications device under one's control to be used in violation of this paragraph.
- * * *
- (b) Harassment by telecommunication device is a class A nonperson misdemeanor.
- * * *
- (d) As used in this section, "telecommunications device" includes telephones, cellular telephones, telefacsimile machines and any other electronic device which makes use of an electronic communication service, as defined in K.S.A. 22-2514, and amendments thereto.
 - (e) An offender who violates the provisions of this section may also be prosecuted for, convicted of, and punished for any other offense in K.S.A. 2012 Supp. 21-5508, 21-5509, 21-5510 or 21-6401.

Kentucky

There is no cyberharassment statute in this state. (Note: Ky. Rev. Stat. Ann. § 525.080(1)(c) Harassing Communications is limited in scope to cyberbullying by students)

Louisiana

There is no cyberharassment statute in this state.

Maine

Me. Rev. Stat. tit. 17-A § 506 Harassment by Telephone or by Electronic Communication Device

1. A person is guilty of harassment by telephone or by electronic communication device if:

A. By means of telephone or electronic communication device the person makes any comment, request, suggestion or proposal that is, in fact, offensively coarse or obscene, without the consent of the person called or contacted;

B. The person makes a telephone call or makes a call or contact by means of an electronic communication device, whether or not oral or written conversation ensues, without disclosing the person's identity and with the intent to annoy, abuse, threaten or harass any person at the called or contacted number or account;

C. The person makes or causes the telephone or electronic communication device of another repeatedly or continuously to ring or activate or receive data, with the intent to harass any person at the called or contacted number or account;

D. The person makes repeated telephone calls or repeated calls or contacts by means of an electronic communication device, during which oral or written conversation ensues, with the intent to harass any person at the called or contacted number or account; or

E. The person knowingly permits any telephone or electronic communication device under the person's control to be used for any purpose prohibited by this section.

2. The crime defined in this section may be prosecuted and punished in the county in which the defendant was located when the defendant used the telephone or electronic communication device, or in the county in which the telephone called or made to ring or the electronic communication device called or made to ring or be activated or receive data by the defendant was located.

2-A. As used in this section, "electronic communication device" means any electronic or digital product that communicates at a distance by electronic transmission impulses or by fiber optics, including any software capable of sending and receiving communication, allowing a person to electronically engage in the conduct prohibited under this section.

3. Harassment by telephone or by electronic communication device is a Class E crime.

Maryland

Md. Code Ann., Crim. Law § 3-805 Misuse of Electronic Communication or Interactive Computer Service

(a) Definitions. --

(1) In this section the following words have the meanings indicated.

(2) "Electronic communication" means the transmission of information, data, or a communication by the use of a computer or any other electronic means that is sent to a person and that is received by the person.

(3) "Interactive computer service" means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a system that provides access to the Internet and cellular phones.

(b) Prohibited. --

(1) A person may not maliciously engage in a course of conduct, through the use of electronic communication, that alarms or seriously annoys another:

(i) with the intent to harass, alarm, or annoy the other;

(ii) after receiving a reasonable warning or request to stop by or on behalf of the other; and

(iii) without a legal purpose.

(2) A person may not use an interactive computer service to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury with the intent:

(i) to kill, injure, harass, or cause serious emotional distress to the minor;

or

(ii) to place the minor in reasonable fear of death or serious bodily injury.

(c) Construction of section. -- It is not a violation of this section for any of the following persons to provide information, facilities, or technical assistance to another who is authorized by federal or State law to intercept or provide electronic communication or to conduct surveillance of electronic communication, if a court order directs the person to provide the information, facilities, or technical assistance:

(1) a provider of electronic communication;

(2) an officer, employee, agent, landlord, or custodian of a provider of electronic communication; or

(3) a person specified in a court order directing the provision of information, facilities, or technical assistance to another who is authorized by federal or State law to intercept or provide electronic communication or to conduct surveillance of electronic communication.

(d) Exception. -- Subsection (b)(1) of this section does not apply to a peaceable activity intended to express a political view or provide information to others.

(e) Penalty. -- A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding \$ 500 or both.

Massachusetts

Mass. Gen. Laws ch. 265, § 43A Criminal Harassment; Punishment

(a) Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment and shall be punished by imprisonment in a house of correction for not more than 2 1/2 years or by a fine of not more than \$1,000, or by both such fine and imprisonment. The conduct or acts described in this paragraph shall include, but not be limited to, conduct or acts conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not

limited to, electronic mail, internet communications, instant messages or facsimile communications.

(b) Whoever, after having been convicted of the crime of criminal harassment, commits a second or subsequent such crime, or whoever commits the crime of criminal harassment having previously been convicted of a violation of section 43, shall be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than ten years.

Michigan

Mich. Comp. Laws § 750.411s Posting Message through Electronic Medium; Prohibition; Penalty; Exceptions; Definitions

(1) A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:

(a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.

(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(2) A person who violates subsection (1) is guilty of a crime as follows:

(a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$ 5,000.00, or both.

(b) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$ 10,000.00, or both:

(i) Posting the message is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction.

(ii) Posting the message is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

(iii) Posting the message results in a credible threat being communicated to the victim, a member of the victim's family, or another individual living in the same household as the victim.

(iv) The person has been previously convicted of violating this section or section 145d, 411h, or 411i, or section 6 of 1979 PA 53, MCL 752.796, or a substantially similar law of another state, a political subdivision of another state, or of the United States.

(v) The victim is less than 18 years of age when the violation is committed and the person committing the violation is 5 or more years older than the victim.

(3) This section does not apply to an internet or computer network service provider who in good faith, and without knowledge of the specific nature of the message posted, provides the medium for disseminating information or communication between persons.

(4) The court may order a person convicted of violating this section to reimburse this state or a local unit of government of this state for the expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under section 1f of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1f.

(5) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section.

(6) This section does not prohibit constitutionally protected speech or activity.

(7) A person may be prosecuted in this state for violating or attempting to violate this section only if 1 of the following applies:

(a) The person posts the message while in this state.

(b) Conduct arising from posting the message occurs in this state.

(c) The victim is present in this state at the time the offense or any element of the offense occurs.

(d) The person posting the message knows that the victim resides in this state.

(8) As used in this section:

(a) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.

(b) "Computer network" means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.

(c) "Computer program" means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.

(d) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

(e) "Credible threat" means a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.

(f) "Device" includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

(g) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(h) "Internet" means that term as defined in section 230 of title II of the communications act of 1934, chapter 652, 110 Stat. 137, 47 U.S.C. 230.

(i) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim.

(j) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following:

(i) Following or appearing within sight of the victim.

(ii) Approaching or confronting the victim in a public place or on private property.

(iii) Appearing at the victim's workplace or residence.

(iv) Entering onto or remaining on property owned, leased, or occupied by the victim.

(v) Contacting the victim by telephone.

(vi) Sending mail or electronic communications to the victim through the use of any medium, including the internet or a computer, computer program, computer system, or computer network.

(vii) Placing an object on, or delivering or having delivered an object to, property owned, leased, or occupied by the victim.

(k) "Victim" means the individual who is the target of the conduct elicited by the posted message or a member of that individual's immediate family.

Minnesota

Minn. Stat. § 609.795 Letter, Telegram, or Package; Opening; Harassment

Subdivision 1. Misdemeanors. -- Whoever does any of the following is guilty of a misdemeanor:

* * *

(3) with the intent to abuse, disturb, or cause distress, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages.

Subd. 2. [Repealed]

Subd. 3. Venue. -- The offense may be prosecuted either at the place where the letter, telegram, or package is sent or received or, alternatively in the case of wireless electronic communication, where the sender or receiver resides.

Mississippi

Miss. Code Ann. § 97-29-45 Obscene Electronic Communications

(1) It shall be unlawful for any person or persons:

(a) To make any comment, request, suggestion or proposal by means of telecommunication or electronic communication which is obscene, lewd or lascivious with intent to abuse, threaten or harass any party to a telephone conversation, telecommunication or electronic communication;

(b) To make a telecommunication or electronic communication with intent to terrify, intimidate or harass, and threaten to inflict injury or physical harm to any person or to his property;

(c) To make a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at the called number;

(d) To make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number;

(e) To make repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(f) Knowingly to permit a computer or a telephone of any type under his control to be used for any purpose prohibited by this section.

(2) Upon conviction of any person for the first offense of violating subsection (1) of this section, such person shall be fined not more than Five Hundred Dollars (\$ 500.00) or imprisoned in the county jail for not more than six (6) months, or both.

(3) Upon conviction of any person for the second offense of violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be fined not more than One Thousand Dollars (\$ 1,000.00) or imprisoned in the county jail for not more than one (1) year, or both.

(4) For any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not more than Two Thousand Dollars (\$ 2,000.00) and/or imprisoned in the State Penitentiary for not more than two (2) years, or both.

(5) The provisions of this section do not apply to a person or persons who make a telephone call that would be covered by the provisions of the federal Fair Debt Collection Practices Act, 15 USCS Section 1692 et seq.

(6) Any person violating this section may be prosecuted in the county where the telephone call, conversation or language originates in case such call, conversation or language originates in the State of Mississippi. In case the call, conversation or language originates outside of the State of Mississippi then such person shall be prosecuted in the county to which it is transmitted.

(7) For the purposes of this section, telecommunication and electronic communication mean and include any type of telephonic, electronic or radio communications, or transmission of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, cable, radio, electromagnetic, photoelectronic or photo-optical system or the creation, display, management, storage, processing, transmission or distribution of images, text, voice, video or data by wire, cable or wireless means, including the Internet.

(8) No person shall be held to have violated this section solely for providing access or connection to telecommunications or electronic communications services where the services do not include the creation of the content of the communication. Companies organized to do business as commercial broadcast radio stations, television stations, telecommunications service providers, Internet service providers, cable service providers or news organizations shall not be criminally liable under this section.

Missouri

Mo. Rev. Stat. § 565.090 Harassment

1. A person commits the crime of harassment if he or she:

(1) Knowingly communicates a threat to commit any felony to another person and in so doing frightens, intimidates, or causes emotional distress to such other person; or

(2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm; or

(3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication; or

(4) Knowingly communicates with another person who is, or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person; or

(5) Knowingly makes repeated unwanted communication to another person; or¹⁷³

(6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person.

2. Harassment is a class A misdemeanor unless:

(1) Committed by a person twenty-one years of age or older against a person seventeen years of age or younger; or

(2) The person has previously pleaded guilty to or been found guilty of a violation of this section, or of any offense committed in violation of any county or municipal ordinance in any state, any state law, any federal law, or any military law which, if committed in this state, would be chargeable or indictable as a violation of any offense listed in this subsection.

In such cases, harassment shall be a class D felony.

3. This section shall not apply to activities of federal, state, county, or municipal law enforcement officers conducting investigations of violation of federal, state, county, or municipal law.

Montana

Mont. Code Ann. § 45-8-213 Privacy in Communications

(1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely:

(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person. The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend.¹⁷⁴

(b) uses an electronic communication to attempt to extort money or any other thing of value from a person or to disturb by repeated communications the peace, quiet, or right of privacy of a person at the place where the communications are received;

(c) records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. This subsection (1)(c) does not apply to:

¹⁷³ This provision was held unconstitutional in *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012).

¹⁷⁴ The prima facie provision of this section was held to be unconstitutionally overbroad in *State v. Dugan*, 303 P.3d 755 (Mont. 2013).

- (i) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty;
- (ii) persons speaking at public meetings;
- (iii) persons given warning of the transcription or recording, and if one person provides the warning, either party may record; or
- (iv) a health care facility, as defined in 50-5-101, or a government agency that deals with health care if the recording is of a health care emergency telephone communication made to the facility or agency.

(2) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person purposely intercepts an electronic communication. This subsection does not apply to elected or appointed public officials or to public employees when the interception is done in the performance of official duty or to persons given warning of the interception.

(3)

(a) A person convicted of the offense of violating privacy in communications shall be fined an amount not to exceed \$ 500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) On a second conviction of subsection (1)(a) or (1)(b), a person shall be imprisoned in the county jail for a term not to exceed 1 year or be fined an amount not to exceed \$ 1,000, or both.

(c) On a third or subsequent conviction of subsection (1)(a) or (1)(b), a person shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed \$ 10,000, or both.

(4) "Electronic communication" means any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

Nebraska

Neb. Rev. Stat. § 28-311.02 Stalking and Harassment; Legislative Intent; Terms, Defined

(1) It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty and which will not prohibit constitutionally protected activities.

(2) For purposes of sections 28-311.02 to 28-311.05, 28-311.09, and 28-311.10:

(a) Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose;

(b) Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person;

(c) Family or household member means a spouse or former spouse of the victim, children of the victim, a person presently residing with the victim or who has resided with the victim in the past, a person who had a child in common with the victim, other persons related to the victim by consanguinity or affinity, or any person presently involved in a dating relationship with the victim or who has been involved in a dating relationship with the victim. For purposes of this subdivision, dating relationship means frequent, intimate

associations primarily characterized by the expectation of affectional or sexual involvement but does not include a casual relationship or an ordinary association between persons in a business or social context; and

(d) Substantially conforming criminal violation means a guilty plea, a nolo contendere plea, or a conviction for a violation of any federal law or law of another state or any county, city, or village ordinance of this state or another state substantially similar to section 28-311.03. Substantially conforming is a question of law to be determined by the court.

Nevada

There is no cyberharassment statute in this state.

New Hampshire

N.H. Rev. Stat. Ann. § 644:4 Harassment

I. A person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person:

(a) Makes a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose or without disclosing his or her identity and with a purpose to annoy, abuse, threaten, or alarm another; or

(b) Makes repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another; or

(c) Insults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response; or

(d) Knowingly communicates any matter of a character tending to incite murder, assault, or arson; or

(e) With the purpose to annoy or alarm another, communicates any matter containing any threat to kidnap any person or to commit a violation of RSA 633:4; or a threat to the life or safety of another; or

(f) With the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected.¹⁷⁵

II. As used in paragraph I, "communicates" means to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer. For purposes of this section, "computer" means a programmable, electronic device capable of accepting and processing data.

III. In any complaint or information brought for the enforcement of RSA 644:4, I(f), it shall not be necessary for the state to negate any exception, excuse, proviso, or exemption contained therein and the burden of proof of any exception, excuse, proviso, or exemption shall be upon the defendant.

IV. A person shall be guilty of a class B felony if the person violates RSA 644:4, I(a) under circumstances involving making telephone calls to a telephone number that he or she knows is being used, at the time of the calls, to facilitate the transportation of voters to polling places or otherwise to support voting or registering to vote.

¹⁷⁵ This provision was held to violate the State Constitution in *State v. Pierce*, 887 A.2d 132 (N.H. 2005).

New Jersey

There is no express cyberharassment statute in New Jersey, however N.J. Rev. Stat. § 2C:33-4 criminalizes the act of making, or causing to be made, “a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm” when done with the purpose to harass another. It also criminalizes engaging “in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.” It is unclear as to what extent and how this statute may be applied to cyberharassment.

New Mexico

There is no express cyberharassment statute in New Mexico; however N.M. Stat. Ann. § 30-3A-2 makes “knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose” a misdemeanor if the conduct “would cause a reasonable person to suffer substantial emotional distress.”

New York

N.Y. Penal Law § 240.30 Aggravated Harassment in the Second Degree

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she:

1. Either

(a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or

(b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or

* * *

5. Commits the crime of harassment in the first degree and has previously been convicted of the crime of harassment in the first degree as defined by section 240.25 of this article within the preceding ten years.

6. For the purposes of subdivision one of this section, "form of written communication" shall include, but not be limited to, a recording as defined in subdivision six of section 275.00 of this part.

Aggravated harassment in the second degree is a class A misdemeanor.

N.Y. Penal Law § 275.00 Definitions

The following definitions are applicable to this article:

* * *

6. "Recording" means an original phonograph record, disc, tape, audio or video cassette, wire, film, hard drive, flash drive, memory card or other data storage device or any other medium on which such sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original.

North Carolina

N.C. Gen. Stat. § 14-196 Using Profane, Indecent, or Threatening Language to any Person over Telephone; Annoying or Harassing by Repeated Telephoning or Making False Statements over Telephone

(a) It shall be unlawful for any person:

(1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation;

(2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person;

* * *

(b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received. For purposes of this section, the term "telephonic communications" shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem.

(c) Anyone violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

North Dakota

N.D. Cent. Code § 12.1-17-07 Harassment

1. A person is guilty of an offense if, with intent to frighten or harass another, the person:

a. Communicates in writing or by electronic communication a threat to inflict injury on any person, to any person's reputation, or to any property;

b. Makes a telephone call anonymously or in offensively coarse language;

c. Makes repeated telephone calls or other electronic communication, whether or not a conversation ensues, with no purpose of legitimate communication; or

d. Communicates a falsehood in writing or by electronic communication and causes mental anguish.

2. The offense is a class A misdemeanor if it is under subdivision a of subsection 1 or subsection 4. Otherwise it is a class B misdemeanor.

3. Any offense defined herein and committed by use of electronic communication may be deemed to have been committed at either the place at which the electronic communication was made or at the place where the electronic communication was received.

* * *

5. Any offense defined herein is deemed communicated in writing if it is transmitted electronically, by electronic mail, facsimile, or other similar means. Electronic communication means transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic, or photo-optical system.

Ohio

Ohio Rev. Code Ann. § 2917.21 Telecommunications Harassment

(A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following:

(1) Fails to identify the caller to the recipient of the telecommunication and makes the telecommunication with purpose to harass or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient;

(2) Describes, suggests, requests, or proposes that the caller, the recipient of the telecommunication, or any other person engage in sexual activity, and the recipient or another person at the premises to which the telecommunication is made has requested, in a previous telecommunication or in the immediate telecommunication, that the caller not make a telecommunication to the recipient or to the premises to which the telecommunication is made;

(3) During the telecommunication, violates section 2903.21 of the Revised Code;

(4) Knowingly states to the recipient of the telecommunication that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telecommunication is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

(5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises.

(B) No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person.

(C)

(1) Whoever violates this section is guilty of telecommunications harassment.

(2) A violation of division (A)(1), (2), (3), or (5) or (B) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(3) Except as otherwise provided in division (C)(3) of this section, a violation of division (A)(4) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense. If a violation of division (A)(4) of this section results in economic harm of one thousand dollars or more but less than seven thousand five hundred dollars, telecommunications harassment is a felony of the fifth degree. If a violation of division (A)(4) of this section results in economic harm of seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars, telecommunications harassment is a felony of the fourth degree. If a violation of division (A)(4) of this section results in economic harm of one hundred fifty thousand dollars or more, telecommunications harassment is a felony of the third degree.

(D) No cause of action may be asserted in any court of this state against any provider of a telecommunications service or information service, or against any officer, employee, or agent of a telecommunication service or information service, for any injury, death, or loss to person or property that allegedly arises out of the provider's, officer's, employee's, or agent's provision of information, facilities, or assistance in accordance with the terms of a court order that is issued in relation to the investigation or prosecution of an alleged violation of this section. A provider of a

telecommunications service or information service, or an officer, employee, or agent of a telecommunications service or information service, is immune from any civil or criminal liability for injury, death, or loss to person or property that allegedly arises out of the provider's, officer's, employee's, or agent's provision of information, facilities, or assistance in accordance with the terms of a court order that is issued in relation to the investigation or prosecution of an alleged violation of this section.

(E) As used in this section:

(1) "Economic harm" means all direct, incidental, and consequential pecuniary harm suffered by a victim as a result of criminal conduct. "Economic harm" includes, but is not limited to, all of the following:

(a) All wages, salaries, or other compensation lost as a result of the criminal conduct;

(b) The cost of all wages, salaries, or other compensation paid to employees for time those employees are prevented from working as a result of the criminal conduct;

(c) The overhead costs incurred for the time that a business is shut down as a result of the criminal conduct;

(d) The loss of value to tangible or intangible property that was damaged as a result of the criminal conduct.

(2) "Caller" means the person described in division (A) of this section who makes or causes to be made a telecommunication or who permits a telecommunication to be made from a telecommunications device under that person's control.

(3) "Telecommunication" and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(4) "Sexual activity" has the same meaning as in section 2907.01 of the Revised Code.

(F) Nothing in this section prohibits a person from making a telecommunication to a debtor that is in compliance with the "Fair Debt Collection Practices Act," 91 Stat. 874 (1977), 15 U.S.C. 1692, as amended, or the "Telephone Consumer Protection Act," 105 Stat. 2395 (1991), 47 U.S.C. 227, as amended.

ORC Ann. 2913.01 Definitions

As used in this chapter, unless the context requires that a term be given a different meaning:

* * *

(Y) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

* * *

Oklahoma

Okla. Stat. tit. 21, § 1172 Obscene, Threatening or Harassing Telecommunication or Other Electronic Communications – Penalty

A. It shall be unlawful for a person who, by means of a telecommunication or other electronic communication device, willfully either:

1. Makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent;

2. Makes a telecommunication or other electronic communication with intent to terrify, intimidate or harass, or threaten to inflict injury or physical harm to any person or property of that person;

3. Makes a telecommunication or other electronic communication, whether or not conversation ensues, with intent to put the party called in fear of physical harm or death;

4. Makes a telecommunication or other electronic communication, whether or not conversation ensues, without disclosing the identity of the person making the call or communication and with intent to annoy, abuse, threaten, or harass any person at the called number;

5. Knowingly permits any telecommunication or other electronic communication under the control of the person to be used for any purpose prohibited by this section; and

6. In conspiracy or concerted action with other persons, makes repeated calls or electronic communications or simultaneous calls or electronic communications solely to harass any person at the called number(s).

B. As used in this section, "telecommunication" and "electronic communication" mean any type of telephonic, electronic or radio communications, or transmission of signs, signals, data, writings, images and sounds or intelligence of any nature by telephone, including cellular telephones, wire, cable, radio, electromagnetic, photoelectronic or photo-optical system or the creation, display, management, storage, processing, transmission or distribution of images, text, voice, video or data by wire, cable or wireless means, including the Internet. The term includes:

1. A communication initiated by electronic mail, instant message, network call, or facsimile machine; and

2. A communication made to a pager.

C. Use of a telephone or other electronic communications facility under this section shall include all use made of such a facility between the points of origin and reception. Any offense under this section is a continuing offense and shall be deemed to have been committed at either the place of origin or the place of reception.

D. Except as provided in subsection E of this section, any person who is convicted of the provisions of subsection A of this section, shall be guilty of a misdemeanor.

E. Any person who is convicted of a second offense under this section shall be guilty of a felony.

Oregon

Or. Rev. Stat. § 166.065 Harassment

(1) A person commits the crime of harassment if the person intentionally:

(a) Harasses or annoys another person by:

(A) Subjecting such other person to offensive physical contact; or

(B) Publicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response;

(b) Subjects another to alarm by conveying a false report, known by the conveyor to be false, concerning death or serious physical injury to a person, which report reasonably would be expected to cause alarm; or

(c) Subjects another to alarm by conveying a telephonic, electronic or written threat to inflict serious physical injury on that person or to commit a felony involving the person or property of that person or any member of that person's family, which threat reasonably would be expected to cause alarm.

(2)

(a) A person is criminally liable for harassment if the person knowingly permits any telephone or electronic device under the person's control to be used in violation of subsection (1) of this section.

(b) Harassment that is committed under the circumstances described in subsection (1)(c) of this section is committed in either the county in which the communication originated or the county in which the communication was received.

(3) Harassment is a Class B misdemeanor.

(4) Notwithstanding subsection (3) of this section, harassment is a Class A misdemeanor if a person violates:

(a) Subsection (1)(a)(A) of this section by subjecting another person to offensive physical contact and the offensive physical contact consists of touching the sexual or other intimate parts of the other person; or

(b) Subsection (1)(c) of this section and:

(A) The person has a previous conviction under subsection (1)(c) of this section and the victim of the current offense was the victim or a member of the family of the victim of the previous offense;

(B) At the time the offense was committed, the victim was protected by a stalking protective order, a restraining order as defined in ORS 24.190 or any other court order prohibiting the person from contacting the victim;

(C) At the time the offense was committed, the person reasonably believed the victim to be under 18 years of age and more than three years younger than the person; or

(D)

(i) The person conveyed a threat to kill the other person or any member of the family of the other person;

(ii) The person expressed the intent to carry out the threat; and

(iii) A reasonable person would believe that the threat was likely to be followed by action.

(5) As used in this section, "electronic threat" means a threat conveyed by electronic mail, the Internet, a telephone text message or any other transmission of information by wire, radio, optical cable, cellular system, electromagnetic system or other similar means.

Pennsylvania

18 Pa. Cons. Stat. § 2709 Harassment

(a) Offense defined. -- A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

* * *

(3) engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose;

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;

(5) communicates repeatedly in an anonymous manner;

(6) communicates repeatedly at extremely inconvenient hours; or

(7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6).

(b) Stalking. -- (Deleted by amendment).

(b.1) Venue.

(1) An offense committed under this section may be deemed to have been committed at either the place at which the communication or communications were made or at the place where the communication or communications were received.

(2) Acts indicating a course of conduct which occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

(c) Grading.

(1) Except as provided under paragraph (3), an offense under subsection (a)(1), (2) or (3) shall constitute a summary offense.

(2) An offense under subsection (a)(4), (5), (6) or (7) shall constitute a misdemeanor of the third degree.

(3) The grading of an offense under subsection (a)(1), (2) or (3) shall be enhanced one degree if the person has previously violated an order issued under 23 Pa.C.S. § 6108 (relating to relief) involving the same victim, family or household member.

(d) False reports. -- A person who knowingly gives false information to any law enforcement officer with the intent to implicate another under this section commits an offense under section 4906 (relating to false reports to law enforcement authorities).

(e) Application of section. -- This section shall not apply to conduct by a party to a labor dispute as defined in the act of June 2, 1937 (P.L.1198, No.308), known as the Labor Anti-Injunction Act, or to any constitutionally protected activity.

(e.1) Course of conduct. -- (Deleted by amendment).

(f) Definitions. -- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Communicates." --Conveys a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

"Course of conduct." --A pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. Acts indicating a course of conduct which occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

"Emotional distress." --(Deleted by amendment).

"Family or household member." --Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.

Rhode Island

R.I. Gen. Laws § 11-52-4.2 Cyberstalking and Cyberharassment Prohibited

(a) Whoever transmits any communication by computer or other electronic device to any person or causes any person to be contacted for the sole purpose of harassing that person or his or her family is guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars (\$ 500), by imprisonment for not more than one year, or both. For the purpose of this section, "harassing" means any knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or bothers the person, and which serves no legitimate purpose. The course of conduct must be of a kind that would cause a reasonable person to suffer

substantial emotional distress, or be in fear of bodily injury. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(b) A second or subsequent conviction under subsection (a) of this section shall be deemed a felony punishable by imprisonment for not more than two (2) years, by a fine of not more than six thousand dollars (\$ 6,000), or both.

South Carolina

S.C. Code Ann. § 16-3-1700 Definitions

* * *

(B) "Harassment in the second degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the second degree may include, but is not limited to, verbal, written, or electronic contact that is initiated, maintained, or repeated.

* * *

(D) "Pattern" means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose.

* * *

(F) "Electronic contact" means any transfer of signs, signals, writings, images, sounds, data, intelligence, or information of any nature transmitted in whole or in part by any device, system, or mechanism including, but not limited to, a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.

(G) This section does not apply to words or conduct protected by the Constitution of this State or the United States, a law enforcement officer or a process server performing official duties, or a licensed private investigator performing services or an investigation as described in detail in a contract signed by the client and the private investigator pursuant to Section 40-18-70. S.C. Code Ann. § 16-17-430 Unlawful Communication

(A) It is unlawful for a person to:

(1) use in a telephonic communication or any other electronic means, any words or language of a profane, vulgar, lewd, lascivious, or an indecent nature, or to communicate or convey by telephonic or other electronic means an obscene, vulgar, indecent, profane, suggestive, or immoral message to another person;

(2) threaten in a telephonic communication or any other electronic means an unlawful act with the intent to coerce, intimidate, or harass another person;

(3) telephone or electronically contact another repeatedly, whether or not conversation ensues, for the purpose of annoying or harassing another person or his family;

* * *

(5) telephone or contact by electronic means another and make false statements concerning either the death or injury of a member of the family of the person who is telephoned or electronically contacted, with the intent to annoy, frighten, or terrify that person; or

* * *

(B) A person who violates any provision of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than thirty days.

South Dakota

S.D. Codified Laws § 49-31-31 Threatening or Harassing Telephone Calls as Misdemeanor

It is a Class 1 misdemeanor for a person to use a telephone or other electronic communication device for any of the following purposes:

- (1) To contact another person with intent to terrorize, intimidate, threaten, harass, or annoy such person by using obscene or lewd language or by suggesting a lewd or lascivious act;
- (2) To contact another person with intent to threaten to inflict physical harm or injury to any person or property;
- (3) To contact another person with intent to extort money or other things of value;
- (4) To contact another person with intent to disturb that person by repeated anonymous telephone calls or intentionally failing to replace the receiver or disengage the telephone connection.

It is a Class 1 misdemeanor for a person to knowingly permit a telephone or other electronic communication device under his or her control to be used for a purpose prohibited by this section.

S.D. Codified Laws § 49-31-31.1 Electronic Communication Device Defined

For the purposes of §§ 49-31-31 and 49-31-33, an electronic communication device is any electronic device capable of transmitting signs, signals, writing, images, sounds, messages, data, or other information by wire, radio, light waves, electromagnetic means, or other similar means, including telephones, cellular phones, and computers.

Tennessee

Tenn. Code Ann. § 39-17-308 Harassment

(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
 - (B) A reasonable person would perceive the communication to be a threat of harm.

* * *

(c) Except as provided in subsection (d), a violation of subsection (a) is a Class A misdemeanor. A violation of subsection (b) is a Class E felony.

(d)

(1) A violation by a minor of subdivision (a)(4) is a delinquent act and shall be punishable only by up to thirty (30) hours of community service, without compensation, for charitable or governmental agencies as determined by the court.

(2) The offense described in subdivision (a)(4) shall not apply to an entity providing an electronic communications service to the public acting in the normal course of providing that service.

(3)

(A) The service providers described in subdivision (d)(2) shall not be required to maintain any record not otherwise kept in the ordinary course of that service provider's business; provided, however, that if any electronic communications service provider operates a web site that offers a social network service and the electronic communications service provider provides services to consumers in this state, any log files and images or communications that have been sent, posted or displayed on the social network service's web site and maintained by the electronic communications service provider shall be disclosed to any governmental entity responsible for enforcing subdivision (a)(4) only if the governmental entity:

(i) Obtains a warrant issued using this state's warrant procedures by a court of competent jurisdiction;

(ii) Obtains a court order for the disclosure under subdivision (d)(3)(C); or

(iii) Has the consent of the person who sent, posted or displayed any log files and images or communications on the social network service's web site maintained by the electronic communications service provider.

(B) No cause of action shall lie in any court against any provider of an electronic communications service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order or warrant.

(C) A court order for disclosure under subdivision (d)(3)(A)(ii) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of an electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court order shall not issue if prohibited by the law of this state. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify the order, if the information or records requested are unusually voluminous in nature or compliance with the order otherwise would cause an undue burden on the provider.

(e) As used in this section:

(1) "Electronic communications service" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system;

(2) "Image" includes, but is not limited to, a visual depiction, video clip or photograph of another person;

(3) "Log files" mean computer-generated lists that contain various types of information regarding the activities of a computer, including, but not limited to, time of access to certain records, processes running on a computer or the usage of certain computer resources; and

(4) "Social network" means any online community of people who share interests and activities, or who are interested in exploring the interests and activities of others, and which provides ways for users to interact.

Texas

Tex. Penal Code Ann. § 33.07 Online Impersonation

(a) A person commits an offense if the person, without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to:

(1) create a web page on a commercial social networking site or other Internet website; or

(2) post or send one or more messages on or through a commercial social networking site or other Internet website, other than on or through an electronic mail program or message board program.

(b) A person commits an offense if the person sends an electronic mail, instant message, text message, or similar communication that references a name, domain address, phone number, or other item of identifying information belonging to any person:

(1) without obtaining the other person's consent;

(2) with the intent to cause a recipient of the communication to reasonably believe that the other person authorized or transmitted the communication; and

(3) with the intent to harm or defraud any person.

(c) An offense under Subsection (a) is a felony of the third degree. An offense under Subsection (b) is a Class A misdemeanor, except that the offense is a felony of the third degree if the actor commits the offense with the intent to solicit a response by emergency personnel.

(d) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

(e) It is a defense to prosecution under this section that the actor is any of the following entities or that the actor's conduct consisted solely of action taken as an employee of any of the following entities:

(1) a commercial social networking site;

(2) an Internet service provider;

(3) an interactive computer service, as defined by 47 U.S.C. Section 230;

(4) a telecommunications provider, as defined by Section 51.002, Utilities Code;

or

(5) a video service provider or cable service provider, as defined by Section 66.002, Utilities Code.

(f) In this section:

(1) "Commercial social networking site" means any business, organization, or other similar entity operating a website that permits persons to become registered users for the purpose of establishing personal relationships with other users through direct or real-time communication with other users or the creation of web pages or profiles available to the public or to other users. The term does not include an electronic mail program or a message board program.

(2) "Identifying information" has the meaning assigned by Section 32.51.

Tex. Penal Code Ann. § 42.07 Harassment

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:

(1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of the person's family or household, or the person's property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

* * *

(7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

(b) In this section:

(1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and

(B) a communication made to a pager.

(2) "Family" and "household" have the meaning assigned by Chapter 71, Family Code.

(3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

(c) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if the actor has previously been convicted under this section.

Utah

Utah Code Ann. § 76-9-201 Electronic Communication Harassment

(1) As used in this section:

(a) "Adult" means a person 18 years of age or older.

(b) "Electronic communication" means any communication by electronic, electro-mechanical, or electro-optical communication device for the transmission and reception of audio, image, or text but does not include broadcast transmissions or similar communications that are not targeted at any specific individual.

(c) "Electronic communication device" includes telephone, facsimile, electronic mail, or pager.

(d) "Minor" means a person who is younger than 18 years of age.

(2) A person is guilty of electronic communication harassment and subject to prosecution in the jurisdiction where the communication originated or was received if with intent to annoy, alarm, intimidate, offend, abuse, threaten, harass, frighten, or disrupt the electronic communications of another, the person:

- (a)
 - (i) makes repeated contact by means of electronic communications, whether or not a conversation ensues; or
 - (ii) after the recipient has requested or informed the person not to contact the recipient, and the person repeatedly or continuously:
 - (A) contacts the electronic communication device of the recipient;
 - or
 - (B) causes an electronic communication device of the recipient to ring or to receive other notification of attempted contact by means of electronic communication;
- (b) makes contact by means of electronic communication and insults, taunts, or challenges the recipient of the communication or any person at the receiving location in a manner likely to provoke a violent or disorderly response;
- (c) makes contact by means of electronic communication and threatens to inflict injury, physical harm, or damage to any person or the property of any person; or
- (d) causes disruption, jamming, or overload of an electronic communication system through excessive message traffic or other means utilizing an electronic communication device.

(3)

- (a)
 - (i) Electronic communication harassment committed against an adult is a class B misdemeanor, except under Subsection (3)(a)(ii).
 - (ii) A second or subsequent offense under Subsection (3)(a)(i) is a:
 - (A) class A misdemeanor if all prior violations of this section were committed against adults; and
 - (B) a third degree felony if any prior violation of this section was committed against a minor.
- (b)
 - (i) Electronic communication harassment committed against a minor is a class A misdemeanor, except under Subsection (3)(b)(ii).
 - (ii) A second or subsequent offense under Subsection (3)(b)(i) is a third degree felony, regardless of whether any prior violation of this section was committed against a minor or an adult.

(4)

- (a) Except under Subsection (4)(b), criminal prosecution under this section does not affect an individual's right to bring a civil action for damages suffered as a result of the commission of any of the offenses under this section.
- (b) This section does not create any civil cause of action based on electronic communications made for legitimate business purposes.

Vermont

Vt. Stat. Ann. tit. 13, § 1027 Disturbing Peace by Use of Telephone or Other Electronic Communications

(a) A person who, with intent to terrify, intimidate, threaten, harass or annoy, makes contact by means of a telephonic or other electronic communication with another and (i) makes any request, suggestion or proposal which is obscene, lewd, lascivious or indecent; (ii) threatens to inflict injury or physical harm to the person or property of any person; or (iii) disturbs, or attempts to disturb, by repeated anonymous telephone calls or other electronic communications, whether or not conversation ensues, the peace, quiet or right of privacy of any person at the place where the communication or communications are received shall be fined not more than \$ 250.00 or be imprisoned not more than three months or both. If the defendant has previously been convicted of a violation of this section or of an offense under the laws of another state or of the United States which would have been an offense under this act if committed in this state, the defendant shall be fined not more than \$ 500.00 or imprisoned for not more than six months, or both.

(b) An intent to terrify, threaten, harass or annoy may be inferred by the trier of fact from the use of obscene, lewd, lascivious or indecent language or the making of a threat or statement or repeated anonymous telephone calls or other electronic communications as set forth in this section and any trial court may in its discretion include a statement to this effect in its jury charge.

(c) An offense committed by use of a telephone or other electronic communication device as set forth in this section shall be considered to have been committed at either the place where the telephone call or calls originated or at the place where the communication or communications or calls were received.

Virginia

Va. Code Ann. § 18.2-152.7:1 Harassment by Computer; Penalty

If any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act, he shall be guilty of a Class 1 misdemeanor.

Washington

Wash. Rev. Code § 9A.46.020 Definition – Penalties

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)

(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if any of the following apply: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person; (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

(3) Any criminal justice participant who is a target for threats or harassment prohibited under subsection (2)(b)(iii) or (iv) of this section, and any family members residing with him or her, shall be eligible for the address confidentiality program created under RCW 40.24.030.

(4) For purposes of this section, a criminal justice participant includes any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.

(5) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

Wash. Rev. Code § 10.14.020 Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."

(2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

West Virginia**W. Va. Code § 61-3C-14a Obscene, Anonymous, Harassing and Threatening Communications by Computer, Cell Phones and Electronic Communication Devices; Penalty**

(a) It is unlawful for any person, with the intent to harass or abuse another person, to use a computer, mobile phone, personal digital assistant or other electronic communication device to:

(1) Make contact with another without disclosing his or her identity with the intent to harass or abuse;

(2) Make contact with a person after being requested by the person to desist from contacting them;

(3) Threaten to commit a crime against any person or property; or

(4) Cause obscene material to be delivered or transmitted to a specific person after being requested to desist from sending such material.

(b) For purposes of this section:

(1) “Electronic communication device” means and includes a telephone, wireless phone, computer, pager or any other electronic or wireless device which is capable of transmitting a document, image, voice, e-mail or text message using such device in an electronic, digital or analog form from one person or location so it may be viewed or received by another person or persons at other locations.

(2) “Use of a computer, mobile phone, personal digital assistant or other electronic communication device” includes, but is not limited to, the transmission of text messages, electronic mail, photographs, videos, images or other nonvoice data by means of an electronic communication system, and includes the transmission of such data, documents, messages and images to another's computer, e-mail account, mobile phone, personal digital assistant or other electronic communication device.

(3) “Obscene material” means material that:

(A) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest;

(B) An average person, applying contemporary adult community standards, would find, depicts or describes, in a patently offensive way, sexually explicit conduct consisting of an ultimate sexual act, normal or perverted, actual or simulated, an excretory function, masturbation, lewd exhibition of the genitals, or sadomasochistic sexual abuse; and

(C) A reasonable person would find, taken as a whole, lacks literary, artistic, political or scientific value.

(c) It is unlawful for any person to knowingly permit a computer, mobile phone or personal digital assistant or other electronic communication device under his or her control to be used for any purpose prohibited by this section.

(d) Any offense committed under this section may be determined to have occurred at the place at which the contact originated or the place at which the contact was received or intended to be received.

(e) Any person who violates a provision of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$500 or confined in jail not more than six months, or both fined and confined. For a second or subsequent offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000 or confined in jail for not more than one year, or both fined and confined.

Wisconsin**Wis. Stat. § 947.0125 Unlawful Use of Computerized Communication Systems**

(1) In this section, "message" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature, or any transfer of a computer program, as defined in s. 943.70 (1) (c).

(2) Whoever does any of the following is guilty of a Class B misdemeanor:

(a) With intent to frighten, intimidate, threaten, abuse or harass another person, sends a message to the person on an electronic mail or other computerized communication system and in that message threatens to inflict injury or physical harm to any person or the property of any person.

(b) With intent to frighten, intimidate, threaten, abuse or harass another person, sends a message on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the message and in that message threatens to inflict injury or physical harm to any person or the property of any person.

(c) With intent to frighten, intimidate, threaten or abuse another person, sends a message to the person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

(d) With intent to frighten, intimidate, threaten or abuse another person, sends a message on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the message and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

(e) With intent to frighten, intimidate, threaten or abuse another person, sends a message to the person on an electronic mail or other computerized communication system while intentionally preventing or attempting to prevent the disclosure of his or her own identity.

(f) While intentionally preventing or attempting to prevent the disclosure of his or her identity and with intent to frighten, intimidate, threaten or abuse another person, sends a message on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the message.

(3) Whoever does any of the following is subject to a Class B forfeiture:

(a) With intent to harass, annoy or offend another person, sends a message to the person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

(b) With intent to harass, annoy or offend another person, sends a message on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the message and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

(c) With intent solely to harass another person, sends repeated messages to the person on an electronic mail or other computerized communication system.

(d) With intent solely to harass another person, sends repeated messages on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the messages.

(e) With intent to harass or annoy another person, sends a message to the person on an electronic mail or other computerized communication system while intentionally preventing or attempting to prevent the disclosure of his or her own identity.

(f) While intentionally preventing or attempting to prevent the disclosure of his or her identity and with intent to harass or annoy another person, sends a message on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the message.

(g) Knowingly permits or directs another person to send a message prohibited by this section from any computer terminal or other device that is used to send messages on an electronic mail or other computerized communication system and that is under his or her control.

Wyoming

Wyo. Stat. Ann. § 6-2-506 Stalking; Penalty

(a) As used in this section:

(i) "Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose;

(ii) "Harass" means to engage in a course of conduct, including but not limited to verbal threats, written threats, lewd or obscene statements or images, vandalism or nonconsensual physical contact, directed at a specific person or the family of a specific person, which the defendant knew or should have known would cause a reasonable person to suffer substantial emotional distress, and which does in fact seriously alarm the person toward whom it is directed.

(b) Unless otherwise provided by law, a person commits the crime of stalking if, with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to any combination of the following:

(i) Communicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses;

* * *

(iv) Otherwise engaging in a course of conduct that harasses another person.

(c) This section does not apply to an otherwise lawful demonstration, assembly or picketing.

(d) Except as provided under subsection (e) of this section, stalking is a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars (\$750.00), or both.

(e) A person convicted of stalking under subsection (b) of this section is guilty of felony stalking punishable by imprisonment for not more than ten (10) years, if:

(i) The act or acts leading to the conviction occurred within five (5) years of a prior conviction under this subsection, or under subsection (b) of this section, or under a substantially similar law of another jurisdiction;

(ii) The defendant caused serious bodily harm to the victim or another person in conjunction with committing the offense of stalking;

(iii) The defendant committed the offense of stalking in violation of any condition of probation, parole or bail; or

(iv) The defendant committed the offense of stalking in violation of a temporary or permanent order of protection issued pursuant to W.S. 7-3-508 or 7-3-509, or pursuant to a substantially similar law of another jurisdiction.

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