

Cyberbullying Law Upheld Over First Amendment Challenge

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Date : June 22, 2015

The court of appeals just upheld North Carolina's cyberbullying statute over a First Amendment challenge. The result is especially noteworthy because it contrasts with a ruling last year in a similar case in New York. But the opinion does leave at least one important issue open.

Facts. The North Carolina case is [State v. Bishop](#). The defendant and the victim were students at the same high school. The defendant posted several comments on Facebook about the victim, including a post calling him "homosexual"; a comment referring to a message the victim had sent to another student on Facebook as "excessively homoerotic in nature"; a statement, in response to another student's suggestion that they "kick [the victim's] ass" that the defendant "never got the chance to slap [the victim] down before Christmas break"; and crude comments about the victim's genitals. The victim became distraught as a result of these and other comments, and his mother contacted law enforcement. The defendant acknowledged making the comments at issue.

Procedural history. The defendant was charged with cyberbullying under G.S. 14-458.1. (The title of the statute refers to "cyber-bullying," but I'll omit the hyphen in keeping with common usage.) Specifically, the State alleged that he used a computer or computer network, with the intent to intimidate or torment, to post or encourage others to post "private, personal, or sexual information pertaining to a minor." G.S. 14-458.1(a)(1)(d). He was convicted in district court and again in superior court, and appealed.

Defendant's argument. The defendant argued that the cyberbullying statute is unconstitutionally vague and overbroad on its face and as applied, and "fails to provide adequate notice of the prohibited speech, lends itself to arbitrary enforcement, and chills protected speech."

Court's ruling. The court of appeals affirmed the defendant's conviction. It found that the defendant's vagueness argument was not properly preserved. As to overbreadth, it held that the statute targets conduct, not speech:

The [c]yber-bullying [s]tatute is not directed at prohibiting the communication of thoughts or ideas via the Internet. It prohibits the intentional and specific conduct of intimidating or tormenting a minor. This conduct falls outside the purview of the First Amendment.

To the extent that the law creates any incidental burden on speech, the court found that the burden is no greater than necessary to serve the law's purpose.

New York case. The court briefly cited and distinguished *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014), a New York case striking down that state's cyberbullying law as overbroad. The case has received quite a bit of attention. The *Wall Street Journal* summarizes it [here](#). Professor Eugene Volokh writes about it [here](#).

Did the defendant really post "private, personal, or sexual information"? In addition to his First Amendment argument, the defendant also raised a sufficiency of the evidence challenge to his conviction, questioning the adequacy of the State's evidence that he posted "private, personal, or sexual information pertaining to [the victim]." The court of appeals found that this argument was not preserved and declined formally to address it.

The issue strikes me as a potentially tricky one for future cases. Obviously, the defendant's comments were of a personal nature and referred to the victim's sexuality. But whether they conveyed any "information" as opposed to opinions, insults, and interpretations, may be debatable. In other words, there does not appear to have been a breach of trust where the defendant publicized information that the victim conveyed to him in confidence. But perhaps "information" may be read more broadly. In declining to review the issue, the court remarked that the State presented "substantial evidence of the precise nature of the comments," and perhaps that is some indication of how this panel would have ruled had the issue been properly preserved.