

## Cyberbullying and the First Amendment

### A talk with Lee Rowland

#### I. First Amendment Rights Online

- What is cyberbullying?
  - “Cyberbullying” is a term that entered common vernacular in recent decades as our online communications have increased.
  - Cyberbullying can occur via social media, messaging systems like SMS or instant messages, emails, message forums and the like.
  - It takes many forms, from sharing embarrassing private information to criminal harassment.
- First Amendment rights online
  - Reno v. ACLU<sup>1</sup>
    - Provisions of the Communications Decency Act (CDA) passed in 1996 criminalized the “knowing” transmission of “obscene or indecent” or “patently offensive” messages to minors under 18. The ACLU argued that the CDA was overbroad and vague.
    - The Supreme Court ruled unconstitutional those provisions of the Communications Decency Act. In its analysis, the Court noted that there was no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet versus offline.
  - Government censoring of online speech is impermissible as it is of offline speech unless it falls under one of the First Amendment exceptions of obscenity, fighting words, true threats, or incitement.
- Threats online
  - Elonis v. US<sup>2</sup>
    - Anthony Elonis posted graphically violent rap lyrics on Facebook, sometimes with disclaimers that the lyrics were fictitious. He was charged with violating 19 USC § 875(c) criminalizing “any communication containing any threat... to injure the person of another.” The statute did not specify a mental state requirement. At trial, Elonis requested a jury instruction that the government was required to prove that he intended to communicate a true threat. The District Court instructed the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. The jury convicted Elonis. The Third Circuit affirmed.

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<sup>1</sup> 521 U.S. 844 (1997): <https://www.law.cornell.edu/supremecourt/text/521/844>

<sup>2</sup> 135 S. Ct. 2001 (2015):

[https://scholar.google.com/scholar\\_case?case=8982315358461177445&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=8982315358461177445&hl=en&as_sdt=6&as_vis=1&oi=scholar)

- The Supreme Court reversed and remanded, finding the jury instruction erroneous. Writing for the majority, Justice Roberts wrote, “Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.” *Elonis* was decided on statutory grounds.

## II. Cyberbullying Laws Landscape

- Law enforcement challenges to investigating true threat complaints.
  - Most jurisdictions currently have laws on the books that would cover online conduct. Many types of cyber threats could fall under current statutory criminal harassment regime. Most states also have laws regarding workplace harassment and school bullying that extends to online conduct.
  - There exists, however, a gap in the know-how and resources to effectively investigate and prosecute all reported digital crimes.
- States attempts to create cyberbullying laws
  - *People v. Marquan M.*
    - In 2010, Albany adopted a law criminalizing “any act of communication or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexual explicit photographs; disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.” Albany County local Law No. 11 of 2010, §2.
    - Marquan M., a 15-year-old high school student, posted on Facebook photographs and descriptions of his high school classmates’ alleged sexual practices. He was charged with Albany’s cyberbullying law. Provision outlawed cyberbullying against “any minor or person.” § 3. Defendant moved to dismiss arguing that the law violated his First Amendment rights. The city court denied his motion, and he pleaded guilty but reserved his right to raise his constitutional arguments on appeal.
    - The Court of Appeals struck down the Albany law, finding it overbroad and facially invalid under the First Amendment because it included speech other than cyberbullying minors.
  - *State v. Bishop*<sup>3</sup>
    - Bishop was one of the students who posted derogatory comments on a classmate’s Facebook page. North Carolina’s cyberbullying statute

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<sup>3</sup> 787 S.E.2d 814 (2016): <https://www.leagle.com/decision/inadvncco161025000430>

makes it “unlawful for any person to use a computer or computer network ... [p]ost or encourage others to post on the Internet private, person, or sexual information pertaining to a minor... [w]ith the intent to intimidate or torment a minor.” N.C.G.S. § 14–458.1(a)(1)(d) (2015). Bishop was charged with cyberbullying and convicted. On appeal, the Court of Appeals found that the statute prohibited conduct, not speech, and upheld the conviction.

- The North Carolina Supreme Court reversed, finding that the statute prohibits content-based speech and is not narrowly tailored to the State’s interest in protecting children from cyberbullying.

### III. Private censorship

- Should companies like Facebook and Twitter do more to censor “hate speech”?
  - Facebook instituted a policy in June 2018 to remove false information that contributes to violence. The policy was in part a response to a wave of mob violence against Muslims in Sri Lanka after the spread of misinformation through Facebook and Whatsapp.
  - In Facebook’s community standards, Facebook defines hate speech “as a direct attack” based on “race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, gender identity, and serious disability or disease.”<sup>4</sup> It acknowledges that whether speech constitutes hate speech may not be clear.<sup>5</sup>
- What about due process considerations when companies like Facebook and Twitter censor speech?

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<sup>4</sup> Facebook Community Standards: <https://www.facebook.com/communitystandards/introduction>

<sup>5</sup> Hard Questions: Who Should Decide What Is Hate Speech in an Online Global Community?  
By Richard Allan, VP EMEA Public Policy. June 27, 2017:  
<https://newsroom.fb.com/news/2017/06/hard-questions-hate-speech/>