PRESERVING THE 'JEWEL OF THEIR SOULS': HOW NORTH CAROLINA'S COMMON LAW COULD SAVE CYBER-BULLYING STATUTES[1]

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INTRODUCTION

In 2016, the North Carolina Supreme Court declared the State's cyber-bullying statute unconstitutional because it violated the First Amendment right to free speech.[2] The court held that North Carolina's content-based restriction on speech was not narrowly tailored to serve the legitimate interest of protecting minors from online bullying.[3]

Punishment for speech is viewed unfavorably by Americans, largely due to free speech's important role in our nation's history.[4] Nonetheless, legislatures occasionally criminalize acts with a speech component that are likely to threaten the social order and cause a breach of the peace.[5] One such act is cyber-bullying.[6]

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1. Good name in man and woman, dear my lord
   Is the immediate jewel of their souls . . .

WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.

2. State v. Bishop, 787 S.E.2d 814 (N.C. 2016).

3. *Id.* at 822.

4. *See, e.g.*, Richard Wike, *Americans more tolerant of offensive speech than others in the world,* PEW RES. CTR. (Oct. 12, 2016), http://www.pewresearch.org/fact-tank/2016/10/12/americans-more-tolerant-of-offensive-speech-than-others-in-the-world (explaining the place of free speech in the Bill of Rights and current views in support of free speech in the United States); Richard Wike, *5 ways Americans and Europeans are different*, PEW RES. CTR. (Apr. 19, 2016), http://www.pewresearch.org/fact-tank/2016/04/19/5-ways-americans-and-europeans-are-different/ (comparing views on free speech between Germany and America, with Americans being more tolerant of free speech).

5. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (explaining that content-based restrictions are allowed in limited situations).

6. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws*, CYBERBULLYING RES. CTR., (last updated Jan. 2016), https://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf.

Cyber-bullying, bullying that occurs online, has become a growing problem in recent years, especially as much of adolescent social life has transitioned to online communities through social media networks.[7] No longer is bullying confined to the stereotype of playground harassment during the school day.

As with all societal and technological advances, the unforeseen ramifications of online conduct warrant reconsidering how the legal framework is equipped to deter such abuses. Cyber-bullying law is currently in a state of flux, where scholars and practitioners must consider a multitude of variables and adapt to the cyber-landscape's constant change.[8]

This Note examines North Carolina's failed attempt to limit cyber-bullying, starting with the enactment of a constitutionally flawed criminal statute and the North Carolina Supreme Court decision that ultimately invalidated it. Part I provides a brief overview of cyber-bullying and the impetus for legislation across state governments. Part II discusses the facts and the North Carolina Supreme Court's analysis in *State v. Bishop*. Part III proposes an alternative approach to address cyber-bullying through the common law torts of libel and intentional infliction of emotional distress ("IIED"). Part IV argues that, given the severe nature of the offense relative to today's society, and the ineffectiveness of assigning punitive damages to the parents of cyber-bullies, cyber-bullying should warrant criminal liability. Finally, Part V provides an example of a cyber-bullying statute that avoids the constitutional pitfalls found in North Carolina's original statute.

I. CYBER-BULLYING: AN OVERVIEW

Cyber-bullying has several definitions, none more straightforward than "bullying that takes place using electronic technology."[9] All definitions specify that the victim be a child, preteen, or teenager,[10]

7. Sameer Hinduja & Justin W. Patchin, *Cyberbullying fact sheet: Identification, Prevention, and Response*, CYBERBULLYING RES. CTR. (Oct. 2014), http://cyberbullying.org/ Cyberbullying _Identification_Prevention_Response.pdf. 95% of teens in the United States are regularly online, and 74% access the internet on their mobile device. *Id.*

8. *See, e.g.*, U.S. DEP'T OF ED., Key Policy Letters from the Education Secretary and Deputy Secretary (Dec. 16, 2010), https://www2.ed.gov/policy/gen/guid/secletter/101215.html (explaining continuing strategies and stakeholders for developing cyberbullying laws).

9. U.S. DEP'T. OF HEALTH & HUMAN SERVS., *Effects of Bullying* (Sept. 12, 2017), http://www.stopbullying.gov/at-risk/effects/.

10. *See, e.g.*, *What is Cyberbullying?*, NAT'L CRIME PREVENTION COUNCIL,

while most definitions state that the offender must also be a minor.[11] If adults become involved, the acts are often considered "cyber-harassment" or "cyber-stalking."[12] This difference is grounded in the common understanding of traditional bullying.[13]

Electronic technology includes devices such as cell phones, computers, and tablets, as well as services like social media sites, text messages, chat, and websites.[14] As the technology landscape continues to change, so too will the avenues for cyber-bullying.

The use of electronic technology distinguishes cyber-bullying from bullying in many ways. Cyber-bullying can occur anywhere a victim has access to the internet.[15] This means that even a child's home, the place in which a child should feel most safe, becomes vulnerable. The abuse of such technology also allows for cyber-bullies to say things that they would not say in person,[16] to reach an audience that they would not reach in person,[17] and even to hide behind anonymity.[18] Unlike traditional bullying, cyber-bullying can be inescapable, extending well past the school day; as more of social life transitions to the internet, it becomes increasingly difficult for children to simply "log off" to ignore cyber-bullies.[19]

Cyber-bullying has severe and concerning effects on children. Studies show that cyber-bullying victims experience significantly lower levels of self-esteem, decreased academic performance, and increased delinquent behavior.[20] There is also a strong correlation between

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http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying (last visited Oct. 12, 2017); *What is cyberbullying exactly?* STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Oct. 12, 2017).

11. *See What is cyberbullying exactly?*, *supra* note 10.

12. *Id*.

13. *What is Bullying?*, CYBERBULLYING RES. CTR., https://cyberbullying.org/what-is-bullying (last visited Oct. 12, 2017) ("Bullying is any unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated. Bullying may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm.").

14. *Cyber Bullying*, SAFER TOMORROWS, https://www.safertomorrows.com/get-help/cyber-bullying/ (last visited Nov. 2, 2017).

15. *What is Cyberbullying?, supra* note 10.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Sameer Hinduja & Justin W. Patchin, *Cyberbullying research summary: Cyberbullying and Self-Esteem*, CYBERBULLYING RES. CTR. (2010), http://cyberbullying.org/cyberbullying_and_self_esteem_research_fact_sheet.pdf; *see also* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That*

experiencing cyber-bullying and increased levels of depression.[21] Furthermore, cyber-bullying victims are just as likely as victims of traditional bullying to have suicidal thoughts and actions.[22]

Similar to traditional bullying, many state legislatures have authorized school boards to implement cyber-bullying policies to regulate communication on school grounds or through technology provided by the school.[23] Although the Supreme Court has stated that schools may prohibit on-campus speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities"[24] or that interferes "with the rights of other students to be secure and to be let alone,"[25] electronic technology and the rise of social media has complicated the line between on-campus speech and off-campus speech.[26] The Supreme Court has not addressed whether schools can regulate speech that originates off campus but affects the environment on campus. As a result, the lower courts are split as to whether schools can regulate off-campus speech, and if so, under what circumstances.[27]

Framing cyber-bullying as an educational issue has both its benefits and disadvantages. Using the recognized power of public schools to regulate on-campus speech grounds the issue in constitutional authorization.[28] However, the applicability of this power to cyber-speech that arises off-campus raises new First Amendment issues. Even if the Court addresses these issues and holds that schools can regulate off-campus speech, limiting the issue of cyber-bullying to the schools

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Considers First Amendment, Due Process, And Fourth Amendment Challenges, 46 WAKE FOREST L. REV. 641, 645 (2011).

21. Michele P. Hamm et al., *Prevalence and Effect of Cyberbullying on Children and Young People*, 169 JAMA PEDIATR. 770–777 (2015).

22. Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCH. SUICIDE RES. 206–221 (2010).

23. *Cyberbullying research summary: Cyberbullying and Self-Esteem*, *supra* note 20.

24. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

25. *Id.* at 508.

26. *See* Clay Calvert, *Punishing Public School Students For Bashing Principals, Teachers & Classmates In Cyberspace: The Speech Issue The Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 213 (2009).

27. *See* Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015); Kowalski v. Berkeley Cty. Schs. 652 F.3d 565, 537 (4th Cir. 2011); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); Doninger v. Niehoff 527 F.3d 41, 48 (2d Cir. 2008); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001).

28. *See*, *e.g.*, Morse v. Frederick, 551 U.S. 393, 401 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); *Tinker*, 393 U.S. at 509.

overlooks those children who are not enrolled in school and overlooks the periods of time that school is not in session.

Congress and state legislatures have enacted or attempted to enact criminal cyber-bullying legislation, many of which are named in honor of cyber-bullying victims whom took their own lives.[29] In 2009, the North Carolina General Assembly addressed the effects of cyber-bullying by passing House Bill 1261, also known as the Protect Our Kids/Cyber Bullying Misdemeanor Act.[30] The bill was codified into Chapter 14 of the North Carolina General Statutes, which frames the offense as a computer crime akin to damaging computers[31] and computer trespass.[32] Under the statute, it is "unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" with "the intent to intimidate or torment a minor."[33]

II. *STATE V. BISHOP*: FACTS & PROCEDURAL HISTORY

A. Facts of the Case

One morning in September 2011, Dillon Price received a Facebook notification.[34] Price, then a sophomore at Southern Alamance High School in North Carolina, opened the Facebook application on his phone to discover that several classmates had posted offensive and vulgar comments and pictures of him.[35] Unfortunately, these posts were the first in a consistent stream of similar behavior from his classmates that continued for months.[36] Among the classmates was Robert Bishop, who posted several vulgar and threatening comments about Price, including a screenshot of a sexually themed text message that Price had accidentally sent him.[37] Many of the messages included comments and accusations about Price's sexual orientation, along with other name-calling and insults.[38]

29. *State Cyberbullying Laws*, *supra* note 6.
30. N.C. GEN. STAT. § 14-458.1 (2012).
31. *Id.* § 14-455.
32. *Id.* § 14-458.
33. *Id.* § 14-458.1(a)(1)(d).
34. State v. Bishop, 787 S.E.2d 814, 815 (N.C. 2016).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 816.

The constant Facebook commentary eventually became emotionally and physically overwhelming for Price. One night in December 2011, Price's mother found him crying, punching his pillow, and physically harming himself.[39] Price's mother confiscated his phone, discovered the Facebook comments, and subsequently contacted local law enforcement.[40]

After conducting an undercover investigation, the Alamance County Sherriff's Office arrested Bishop and charged him with one count of cyber-bullying under N.C. Gen. Stat. § 14–458.1(a)(1)(d).[41]

B. Lower Court Proceedings

At trial, the State introduced three exhibits as evidence—each a separate screenshot of a Facebook post and its respective comments.[42] The first exhibit consisted of a Facebook post that included both a screenshot of a text message Price had accidentally sent to a classmate and a series of over 30 comments from a variety of individuals in reference to the screenshot.[43] Among those comments were four from Bishop: (1) "This is excessively homoerotic in nature. Exquisite specimen;" (2) "Anyone who would be so defensive over Dillon can't be too intelligent;" (3) "And you are equally pathetic for taking the internet so seriously;" and (4) "There isn't a fight. We're slamming someone on the open forum that is the internet."[44]

The second exhibit was another Facebook post containing a screenshot of a text message conversation between Price and a classmate.[45] In the comment section, several classmates stated that they hated Dillon.[46] In response to a comment that said, "Can we just kick his ass already," Bishop replied, "I never got to slap him down before Christmas break."[47]

The third exhibit was another Facebook post containing a screenshot of a text message conversation between Dillon and a classmate.[48] One of the text messages included a digitally-altered

39. *Id.*
40. *Id.*
41. N.C. GEN. STAT. § 14–458.1(a)(1)(d) (2012).
42. State v. Bishop, 774 S.E.2d 337, 341 (N.C. Ct. App. 2015).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

picture of Dillon and his dog, prompting students to post vulgar and derogatory comments in response.[49] Bishop posted several comments, including: "I heard that his anus was permanently stressed from having awkwardly shaped penises in it" and that Dillon's genitals were "probably a triangle."[50]

The court denied Bishop's motion to dismiss, and he was eventually convicted by a jury of one count of cyber-bullying.[51] Bishop was sentenced to four years supervised probation.[52]

Bishop appealed the conviction, arguing that the statute restricted speech protected by the First Amendment; that this restriction was content based; and that it swept too broadly to satisfy the demands of strict scrutiny analysis.[53] The North Carolina Court of Appeals concluded that the statute did not regulate speech, but rather that it "punishe[d] the act of posting or encouraging another to post on the Internet with the intent to intimidate or torment" a minor.[54]

C. North Carolina Supreme Court Ruling

On August 20, 2015, the North Carolina Supreme Court granted Bishop's petition for discretionary review.[55] When considering the constitutionality of the statute, the court determined that: (1) the statute restricted speech and not conduct; (2) the restricted speech was content-based; and (3) the statute did not embody the least restrictive means of serving North Carolina's compelling interest in protecting minors from harm; thus, the statute failed the strict scrutiny analysis.[56] The court identified several problems with the cyber-bullying statute that led it to its conclusion: the statute did not require the subject of any online posts to experience actual harm,[57] the requisite intent ("intimidate" and "torment") was too broad,[58] and the description of

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 343.
55. State v. Bishop, 787 S.E.2d 814, 815 (N.C. 2016).
56. *Id.* "Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest." *Strict Scrutiny*, Wex Legal Dictionary (2016), https://www.law.cornell.edu/wex/strict_scrutiny (last visited Nov. 11, 2017).
57. *Bishop*, 787 S.E.2d at 815.
58. *Id.* at 821.

the conduct was too expansive.[59] Although the court found the statute's purpose laudable, it ultimately held that the cyber-bullying statute had "create[d] a criminal prohibition of alarming breadth."[60] The court declared that the statute violated the First Amendment right to freedom of speech, and thus reversed the court of appeals.[61]

III. ESTABLISHING A COMMON LAW BACKDROP TO CYBER-BULLYING LEGISLATION

In light of the threats to free expression posed by content-based restrictions, the Supreme Court of the United States has rejected a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits" as "startling and dangerous."[62] But restrictions on speech have generally been permitted when confined to the few "historic and traditional categories [of expression] long familiar to the bar," such as fighting words, obscenity, incitement, and defamation.[63] These categories have a historical foundation in the Court's free speech tradition.[64] Adherence to these established categories and rules allows the vast realm of protected speech and free thought to thrive.[65]

Although the interest that North Carolina's defunct cyber-bullying statute meant to address—the protection of children from bullying—is a compelling interest, the statute's structure ran afoul of the First Amendment by punishing content-based speech.[66] The First Amendment's content-based speech discrimination doctrine examines whether government action falls within the narrow range of situations in which the freedom of speech can be overridden by the government's interest.[67] The strict scrutiny analysis employed in *Bishop* seeks to limit the government's ability to suppress otherwise protected speech.[68]

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59. *Id.*
60. *Id.*
61. *Id.*
62. United States v. Alvarez, 567 U.S. 709, 717 (2012) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).
63. *Id.*
64. *Id.*
65. *Id.* at 718.
66. *Bishop*, 787 S.E.2d at 822.
67. *Id.* at 819.
68. *Id.*

In contrast, the categories the Supreme Court has recognized, which include the dignitary torts of defamation (both libel and slander) and IIED, address important and legitimate interests unrelated to the suppression of protected speech and are compatible with the First Amendment if properly constructed.[69] If the North Carolina General Assembly were to redraft a cyber-bullying bill, carefully framing the issue of cyber-bullying in terms of dignitary torts and confinining the definition within the constitutional boundaries developed by the Supreme Court, then that bill could withstand a *Bishop*-like constitutional challenge.

A. Supreme Court Considerations and Limitations

Beginning in the mid-twentieth century, the Supreme Court assumed the task of resolving the conflict between states' dignitary tort law and the First Amendment's freedom of speech.[70] The Court's decisions display a meticulous consideration of the competing interests, resulting in a nuanced balancing to determine whether tortious speech is protected by the Constitution. The Court focused largely on two factors—the nature of the plaintiff and the nature of the speech—in reaching its conclusions.

1. Nature of the Plaintiff

The Supreme Court initially confronted the tension between the First Amendment and tortious speech in the 1964 landmark case, *New York Times v. Sullivan*.[71] In *New York Times*, the Court established that the First Amendment prevents a "public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[72]

The Court has repeatedly upheld the *New York Times* definition of "actual malice" when deciding defamation cases.[73] Furthermore, it has clarified that "actual malice" is a term of art, created to "provide a

69. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1765 (2017); Snyder v. Phelps, 562 U.S. 443, 451 (2011).

70. *See*, *e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

71. *Id.*

72. *Id.* at 279–80.

73. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); St. Amant v. Thompson, 390 U.S. 727, 728 (1968); Time, Inc. v. Hill, 385 U.S. 374, 397 (1967); Rosenblatt v. Baer, 383 U.S. 75, 87 (1966); Garrison v. Louisiana, 379 U.S. 64, 78–79 (1964).

convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers"[74] and thus "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."[75]

The Court has held that "reckless disregard" within the meaning of the *New York Times* rule can be measured by whether the publisher entertained serious doubts as to the truth of the publication and still published with a "high degree of awareness of probable falsity."[76] However, the Court was careful to assert that "reckless disregard" cannot be held to one infallible definition; its outer limits will be defined on a case-by-case basis.[77]

Determination of a person's status as a "public official" is a matter of federal rather than state law.[78] The Court has held that the "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs,"[79] and that "the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."[80]

In *Curtis Publishing Co. v. Butts*,[81] the Court extended the *New York Times* rule of "actual malice" to public figures who were not public officials.[82] In that case, the Court defined a "public figure" as one who commands a substantial amount of public interest by his position alone, or one who has thrust himself by purposeful activity into the vortex of an important public controversy.[83] Later, in *Gertz v. Robert Welch, Inc.*,[84] the Court held that a public figure within the *New York Times*

74. Cantrell v. Forest City Pub. Co., 419 U.S. 245, 251 (1974).
75. Masson v. New Yorker Mag., 501 U.S. 496, 510 (1991).
76. *St. Amant*, 390 U.S. at 730.
77. *See id.* ("[N]evertheless it is clear that reckless conduct is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing; rather, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication.").
78. *Rosenblatt*, 383 U.S. at 84.
79. *Id.* at 85.
80. *Id.* at 86 n.13.
81. 388 U.S. 130, 155 (1967).
82. *Id.* at 134.
83. *Id.* at 154–55.
84. 418 U.S. 323 (1974)

rule to be either "an individual [who] may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts"[85] or "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[86] The Court noted that an individual should not be deemed a public figure for all aspects of his or her life without "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society."[87]

In *Hustler Magazine, Inc. v. Falwell*,[88] the Court held that the First Amendment precludes public figures and public officials from recovering for an IIED claim unless they show that the publication contains a false statement of fact which was made with "actual malice," as understood in the *New York Times* rule.[89] It reasoned that a state's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is offensive and is intended to inflict emotional injury.[90] However, the Court did not eradicate IIED completely, even for public figures. The tailored nature of its holding meant the Court left open the possibility that a public figure could prevail on an IIED claim on a showing that the defendant acted with actual malice. Furthermore, the Court said nothing of private individuals succeeding in an IIED claim.

Ten years after *New York Times*, the Court examined the constitutional limits on defamation suits brought by private individuals.[91] In *Gertz*, the Court held that "States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[92] However, because "the constitutional requirement of fault supersedes the common law's presumptions as to fault and damages,"[93] the Court mandated that States cannot impose liability without fault.

Since *New York Times*, the Supreme Court has adapted and extended its ruling that the First Amendment prohibits a public official

85. *Id.* at 351.
86. *Id.*
87. *Id.* at 352.
88. 485 U.S. 46 (1988).
89. *Id.* at 56.
90. *Id.* at 50.
91. *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1996).
92. *Id.* at 347.
93. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) (discussing *Gertz*).

from recovering damages for a defamation claim absent "actual malice." In doing so, the Court has created a framework that stresses the importance of the plaintiff's status as a "public" person—either as a "public official" or a "public figure"—versus a private individual. If the plaintiff of a defamation suit falls within the "public" category of persons, he or she cannot recover damages unless he or she can show that the publication was made with "actual malice." However, if the plaintiff is a private individual, the Constitution only requires a level of fault higher than strict liability to recover damages.

2. Nature of the Speech

A plurality of the justices clarified in *Dun & Bradstreet v. Greenmoss Builders*[94] that when a defamation suit involved not only a private individual, but also speech of purely private concern, the showing of "actual malice" was unnecessary.[95] In doing so, the Court effectively created a second measure by which to evaluate defamation's constitutional limitations.[96] However, one can trace the Court's distinction back to *Sullivan*, in which the Court declared that "uninhibited, robust, and wide-open" debate on public issues is the very essence of self-government and is a central purpose of the First Amendment.[97] Writing for the Court, Justice Powell expressed the view that "speech on matters of purely private concern is of less First Amendment concern," because laws that restrict private speech pose "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."[98] The Court later affirmed the plurality's rule in *Philadelphia Newspapers v. Hepps*,[99] in which it further articulated that, in defamation suits involving private individuals, but also utterances of public concern, the plaintiff must bear the burden of showing fault and falsity to recover damages.[100]

94. 472 U.S. 749 (1985).
95. *Id.* at 753.
96. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–74 (1964).
97. *Id.*
98. *Id.* at 760.
99. 475 U.S. 767 (1986).
100. *Id.* at 776. The public concern in *Hepps* stemmed from a series of articles reporting that a beverage-store chain and its principal stockholder had links to organized crime and used such links to influence governmental decisions. *Id.*

The Court most recently considered the nature of tortious speech in *Snyder v. Phelps*,[101] in which the father of a deceased marine brought an IIED suit against the group protesting and picketing at his son's funeral.[102] The Court stressed that its decisions as to whether Snyder could recover damages for an IIED claim "turn[ed] largely on whether that speech is of public or private concern, as determined by all the circumstances of the case."[103] A matter of public concern, according to the Court, is "any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest."[104] To determine whether speech is a "matter of public concern," the Court looked to the content, form, and context of the statements.[105] Because the group was well known for picking military funerals to convey its belief that God hates the United States for its acceptance of homosexuality,[106] especially in the military, the Court concluded that the content of the speech related to the issues of interest to society at large, and thus was protected by the First Amendment.[107]

Cases like *Dun & Bradstreet* and *Snyder* provide a second layer of analysis for tortious speech. The Court's rulings underscored the importance of determining whether speech involves matters of public or private concern when drawing lines at the crossroads of the First Amendment and state common law. While "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection,"[108] speech concerning private issues is not afforded such protection.

3. Current Framework

The case law up to this point suggests that courts should consider the circumstances of each case when deciding a matter where state tort law and First Amendment protection conflict. The Supreme Court has primarily focused on two sets of factors resulting in four distinct categories of circumstances: (1) Public figure-Public concern,[109] (2)

101. 562 U.S. 443 (2011).
102. *Id.* at 443.
103. *Id.* at 444.
104. *Id.* (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).
105. *Id.*
106. *Id.* at 445–55.
107. *Id.* at 454. Justice Alito was the Court's lone dissenter, writing that the Constitution did not allow Westboro to "brutalize" the Snyder family with hateful messages even if they were in a public setting. *Id.* at 463–75 (Alito, J., dissenting).
108. *Dun & Bradstreet*, 472 U.S. at 759 (citations omitted).
109. *See* N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 298–99 (1964).

Public figure-Private concern,[110] (3) Private individual-Public concern,[111] and (4) Private individual-Private concern.[112]

When the plaintiff is a public figure and the speech is of a public concern, the law holds that the plaintiff must demonstrate "actual malice" before he or she can recover damages under common law defamation.[113] When the plaintiff is a public figure, but the speech is not of public concern, the courts also require the plaintiff demonstrate "actual malice" to prevail, at least in an IIED claim.[114] When the speech is of public concern, but the plaintiff is a private figure, "the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding."[115] Finally, when the plaintiff is a private individual and the speech is of private concern, "the state interest in compensating private individuals for injury to their reputation adequately supports awards of presumed and punitive damages, even absent a showing of actual malice," in accordance with the state's common law.[116] This last category is most analogous to *Bishop* and to typical instance of cyber-bullying: the plaintiffs are private individuals and the speech is not a legitimate matter of public concern. In these cases, the circumstances most resemble *Dun & Bradstreet*, and thus the First Amendment only compels states to apply a level of fault higher than strict liability to its common law rules.

B. North Carolina's Common Law

1. Libel

The common law applies with full force in North Carolina. Unless modified or repealed by the General Assembly or the courts, the "common law" is applied as it existed when North Carolina became a state in 1776.[117]

North Carolina recognizes three classes of libel: (1) publications that are obviously defamatory are called libel *per se*; (2) publications

110. The Supreme Court has not yet decided a case that fits this particular set of circumstances.

111. *See* Snyder v. Phelps, 562 U.S. 443, 463 (2011).

112. *See Dun & Bradstreet*, 472 U.S. at 775.

113. *See N.Y. Times*, 376 U.S. 254 at 279–80.

114. *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988).

115. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

116. *Dun & Bradstreet*, 472 U.S. at 749.

117. Hall v. Post, 372 S.E.2d 711 (N.C. 1988) (quoting Bruton v. Enters., Inc., 160 S.E.2d 482, 494 (1968)); *see* N.C. GEN. STAT. § 4-1 (1986).

that are susceptible of two interpretations, one of which is defamatory and the other not; and (3) publications that are not obviously defamatory, but when considered with innuendo, colloquium, and explanatory circumstances, become libelous are called libels *per quod*.[118] In traditional common law, when an authorized publication is libelous *per se*, damages are presumed from the fact of publication and no proof is required as to any resulting injury.[119]

Publication includes any writing, printing, signs, or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charge that a person has committed an infamous crime; (2) charge a person with having an infectious disease; (3) tend to impeach a person in that person's trade or profession; or (4) otherwise tend to subject one to ridicule, contempt or disgrace.[120] Otherwise put, defamatory words must disgrace and degrade the party or hold him or her up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.[121]

In determining whether publications are susceptible to only one defamatory meaning, the principle of common sense requires that courts understand them as the average person would. The question always is "how would ordinary men naturally understand the publication."[122] The fact that "supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous."[123]

2. IIED

Under North Carolina law, the essential elements of an IIED claim are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress.[124]

Whether conduct is sufficiently extreme and outrageous to support an action for IIED is a question of law for the court.[125] Extreme and

118. Renwick v. News & Observer Pub. Co., 312 S.E.2d 405, 408 (N.C. 1984) (quoting Arnold v. Sharpe, 251 S.E.2d 452, 455 (1979)).

119. *Id*.

120. *Id.* at 409 (quoting Flake v. Greensboro News Co., 195 S.E. 55, 60 (N.C. 1938)).

121. *Id*.

122. *Id.* (citation omitted).

123. *Id*.

124. Rouse v. Duke Univ., 914 F. Supp. 2d 717, 728 (M.D.N.C. 2012), *aff'd*, 2013 WL 3828308 (4th Cir. 2012) (applying North Carolina Law).

125. Emmons v. Roses's Stores, Inc., 5 F. Supp. 2d. 358, 365 (E.D.N.C. 1997), *aff'd*, 141 F.3d 1158 (4th Cir. 1998) (applying North Carolina law).

outrageous conduct includes acts that "exceed all bounds usually tolerated by a decent society."[126] In making this determination, courts have noted that the foreseeability of injury, while not itself an element of IIED, is a factor to consider when calculating the outrageousness of the conduct.[127]

Intent to physically injure is not essential to satisfy a claim of IIED. Therefore, the perpetrator of a practical joke is liable for a resulting foreseeable injury.[128] Additionally, IIED may be established when a defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress.[129] For IIED, "severe emotional distress means any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."[130] This means any "emotional or mental disorder, such as . . . neurosis, psychosis, chronic depression, [or] phobia."[131] When considering if the resulting distress is severe, courts have looked to the intensity and duration as factors.[132]

C. Libel and IIED Applied to Cyber-Bullying

Victims of school-related cyber-bullying are often private individuals dealing with matters of private concern, and thus resemble those in the Supreme Court's tortious speech category that largely defers to the common law rules for recovering damages. It follows that, if cyber-bullying is sufficiently analogous to libel and IIED, victims of cyber-bullying should be able to recover damages as well. Although aspects of both libel and IIED can be found in acts of cyber-bullying, the similarities do not necessarily make them the synonymous. Cyber-bullying is a relatively new phenomenon, and thus any attempt to analogize it with centuries-old common law torts deserves a thorough analysis. Relating each element of the respective torts with the act of cyber-bullying shows the comparison to be complicated.

Although North Carolina's libel *per se* traditionally presumed a defendant was acting with malice[133]—that is, the colloquial use of

126. Glenn v. Johnson 787 S.E.2d 65, 72 (N.C. Ct. App. 2016).
127. Turner v. Thomas, 794 S.E.2d 439, 446 (N.C. 2016).
128. Langford v. Shu, 128 S.E.2d 210, 211–12 (N.C. 1962).
129. *Turner*, 794 S.E.2d at 446.
130. Mullis v. Mechanics & Farmers Bank, 994 F. Supp. 680, 689 (M.D.N.C. 1997).
131. Owens v. Dixie Motor Co., 2013 WL 3490395, at *4 (E.D.N.C. 2013).
132. Strickland v. Jewell, 562 F. Supp. 2d 661, 676 (M.D.N.C. 2007).
133. Renwick v. News & Observer Pub. Co., 312 S.E.2d 405, 408 (N.C. 1984) (citations omitted).

"malice," not the *New York Times* "actual malice" term of art—the *Dun & Bradstreet* framework requires a level of fault higher than this presumed strict liability even in cases concerning private plaintiffs and private concerns. Thus, North Carolina's common law libel *per se* must adapt to allow express findings of malice.[134] North Carolina's IIED law, by comparison, includes a heightened *mens rea* element, and thus, is unaffected by the Supreme Court's limitations in cases of private plaintiffs and private concerns. At first glance, the "intent to cause severe emotional distress" resembles both a general depiction of bullying and the North Carolina statute's "intent to intimidate or torment." However, after Bishop's lawyers noted that the statute did not define "intimidate" or "torment,"[135] the State argued that the court should define torment broadly to reference contact that annoyed, pestered, or harassed.[136] Not only does this definition fall far below "intent to cause severe emotional distress" as it pertains to North Carolina's IIED law, but it undermines the actual severity of cyber-bullying. Cyber-bullying encompasses a broad range of activity, but, to withstand constitutional challenges, the law should err on the side of punishing malicious intent to cause severe harm rather than attempting to protect people from online annoyances.

Common law IIED encompasses a broad array of acts, so long as they may be considered "extreme and outrageous conduct." In contrast, libel requires a publication, which, in today's technological landscape, includes various forms of internet activity. Moreover, because society generally condemns bullying, it can be considered extreme and outrageous conduct.[137] Therefore, cyber-bullying as an act can embody elements of both extreme and outrageous conduct and publication.

Both IIED and libel seek to address particular harms caused by such acts. Victims of libel are disgraced, ridiculed, and held in contempt as a result of the preceding malicious publication. Victims of IIED have suffered severe emotional distress as a result of conduct intended to

134. *See* Ellis v. Northern Star Co. 388 S.E.2d 127, 129 (N.C. 1990) ("We note at the outset that, since the jury expressly found that the defendants acted with actual malice, this case does not present the issue of whether damages may be presumed in libel per se actions absent a finding of malice, as this Court has held in previous cases . . . . Certain cases decided by the Supreme Court of the United States give rise to a question as to whether North Carolina can continue the common law presumption of damages in libel per se actions absent express findings of malice.").

135. State v. Bishop, 787 S.E.2d 814, 820–21 (N.C. 2016).

136. *Id*.

137. *See* Glenn v. Johnson, 787 S.E.2d 65, 72 (N.C. Ct. App. 2016).

cause such distress. The North Carolina statute, however, failed to include any harm element whatsoever.[138] The statute did not even require the target of the cyber-bullying to be aware that the content exists.[139] This downplays the numerous tangible harms directly caused by cyber-bullying, including mental and physical problems, decreased academic achievement, increased anxiety and depression, changes in eating and sleeping patterns, increased likelihood of skipping school or dropping out, physical retaliation, and frequent suicidal thoughts or actions.[140] Moreover, to avoid potential due process challenges, especially when attempting to address a broadly defined problem like cyber-bullying, a statute must require harm to occur.[141]

The analogy is not perfect, but it does not have to be. The *mens rea* of a civil tort for cyber-bullying may fall between libel's "anything but strict liability" requirement and IIED's "intent to cause severe emotional distress." Cyber-bullying can take many forms, some of which fit under IIED's "extreme and outrageous conduct" definition,[142] and many of which include libel's "publication" definition. Most importantly, cyber-bullying has the ability to cause the underlying harms addressed by each tort: severe emotional distress, ridicule, contempt, or disgrace. At the very least, because North Carolina can address the underlying harms caused by cyber-bullying without running afoul of the First Amendment, it should be able to legally address the act of cyber-bullying in some meaningful way as well.

IV. THE CASE FOR CRIMINALIZING CYBER-BULLYING

North Carolina allows punitive damages in civil libel and IIED lawsuits to punish offenders and to deter others from committing similar offenses in the future.[143] Many states, including North Carolina, already criminalize similar non-physical harms such as stalking and

138. N.C. GEN. STAT. § 14-458.1 (2012).

139. *Id.*; *see Bishop*, 787 S.E.2d at 820.

140. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 9.

141. *Cf.* State v. Packingham, 748 S.E.2d 146, 153 (N.C. Ct. App. 2013) ("Expansively written laws designed to protect children are not exempt from the constitutional requirement of clarity under the First Amendment and the Due Process Clause.").

142. Because "extreme and outrageous conduct" is any conduct deemed inexcusable by society, and because society has universally condemned bullying, bullying falls under the definition of "extreme and outrageous conduct" as it pertains to IIED. *See Glenn*, 787 S.E.2d at 72.

143. *See* Brian Timothy Beasley, *North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?*, 74 N.C. L. REV. 2174, 2175 (1996).

harassing to deter these acts.[144] Some of these statutes expressly include online activity, while others have been later applied to online activity in the absence of a cyber-bullying statute.[145] While only a few examples of criminal libel and IIED statutes exist, the drafters of the Model Penal Code provide an argument in support of criminalizing those offenses.[146] Accordingly, because cyber-bullying laws seek to punish and deter the same harms as criminal libel and IIED do, states should be able to directly criminalize cyber-bullying.

A. Insufficiency of Monetary Damages

The harms addressed in libel and IIED actions are similar to those experienced by cyber-bullying victims.[147] It follows that the means of compensating victims of such harms should be similar as well. Although the civil liability status of libel and IIED allow for a variety of monetary damages, the particular status of cyber-bullying victims and cyber-bullies themselves as minors leaves open the probability that monetary damages will not effectively punish cyber-bullies nor deter cyber-bullying.

North Carolina allows compensatory damages for plaintiffs in libel and IIED cases.[148] Compensatory damages include (1) pecuniary loss direct or indirect, or special damages, (2) damages for physical pain and inconvenience, (3) damages for mental suffering, and (4) damages for injury to reputation.[149] Additionally, the North Carolina legislature authorized a trier of fact to award punitive damages in appropriate cases to punish egregiously wrongful acts and to deter both the defendant and others from committing such acts in the future.[150]

These rationales introduce a problem with respect to the parties involved in cyber-bullying situations. When a tortfeasor is an adult, he or she is liable, absent any established doctrines of vicarious liability. This is not the same for a child tortfeasor. North Carolina law allows

144. *See infra* text accompanying notes 157–166.

145. *See* Brian S. Brazeau, *The Transformation Of Indirect Harassment In The 21st Century: Harassment Telephone Laws, Cyberbullying, And New Ways Of Analyzing First Amendment Rights*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 292 (2016–2017); George L. Blum, *Validity, Construction, and Application of State and Municipal Criminal and Civil Cyberbullying Laws*, 26 A.L.R. Art. 4 (7th ed. 2017).

146. *See infra* text accompanying notes 173–175.

147. *See infra* Part I.

148. *See, e.g.*, R. H. Bouligny, Inc. v. United Steelworkers of Am., 154 S.E.2d 344, 353–54 (N.C. 1967); Wilson v. Pearce, 412 S.E.2d 148, 155 (N.C. Ct. App. 1992).

149. Hien Nguyen v. Taylor, 723 S.E.2d 551, 559 (N.C. Ct. App. 2012).

150. *See* N.C. GEN. STAT. § 1D-1 (1996).

for injured persons to recover actual or nominal damages from the parents of minors who act maliciously or willfully in some respects, but the law is silent with respect to punitive damages.[151]

The purpose of assigning damages to parents is to compensate innocent victims and to oblige parents to stop their child's behavior.[152] Another rationale for parental liability assumes that the parents' inaction is the cause of the delinquency and thus the parent should be punished for bad parenting.[153] However, legal experts have raised numerous issues with assigning parental liability for any malfeasance resulting from a child's unsupervised use of the internet.[154] It is unreasonable to expect, as technology becomes more engrained in everyday life, that even a diligent parent will be able to monitor and sufficiently curtail a child's internet use. Courts recognized this long before the prevalence of social networks, as it dealt with issues of copyright infringement and access to pornographic websites.[155] Furthermore, parenting is far from the only factor to a bully's behavior. Numerous studies show that socioeconomic status and biology can contribute to the bullying mentality.[156] Furthermore, punishing a parent for a child's bullying with monetary damages does not provide the desired deterrence. The parent pays that price, which only indirectly punishes the child, if the parent chooses to do so. Thus, punitive monetary damages do not adequately punish or deter cyber-bullying. Assigning criminal liability, however, remains another option.

B. Existing North Carolina Criminal Law

Several states have utilized their harassment and stalking laws to combat cyber-bullying.[157] North Carolina's stalking law already provides a definition of harassment that includes modern internet technology:

> Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or

151. N.C. GEN. STAT. § 1-538.1 (2017).

152. *See* Amy L. Tomaszewski, *From Columbine To Kazaa: Parental Liability In A New World*, 2005 U. ILL. L. REV. 573, 579–80 (2005).

153. *Id.*

154. *Id*.

155. *Id.*

156. Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148, 150 (2006).

157. *See* Allison Lockhart, *Online Harassment: Can Cyberbullying Laws Keep Up With Technology?* 16 PUB. INT. L. REP. 132 (2011).

> transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.[158]

North Carolina also enacted a criminal cyber-stalking statute in 2001—long before social networks became commonplace, but well after the establishment of the internet.[159] The comprehensive statute criminalized everything from installing tracking devices[160] to committing extortion over email.[161] If North Carolina were to apply its cyber-stalking statute to cyber-bullying, the section most relevant is §(b)(2), which makes it unlawful to:

> Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.[162]

In theory, these laws could provide adequate means to bring charges against cyber-bullying activity. Unfortunately, this section may not account for the indirect nature of most cyber-bullying offenses.[163] The cyberstalking statute targets electronic transmissions directed at a specific person or communicated to another.[164] When Robert Bishop posted his comments on Facebook, he was not directing them at Dillon Price, but instead to his entire social network.[165]

Ultimately, these statutes were written to address direct communication; they were not constructed for the world of social networks. Harassment statutes could potentially cover direct cyber-bullying, (i.e., cases in which the cyberbully communicates directly to the victim). It would be more difficult, however, to apply these laws to the indirect form of cyber-bullying in which the harassing communications are posted in a "reasonably public area of cyberspace" such as Facebook.[166]

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158. Stalking, N.C. GEN. STAT. § 14-277.3A (2015).
159. Cyberstalking, N.C. GEN. STAT. § 14-196.3.
160. *Id.* § (a)(3).
161. *Id.* § (b)(1).
162. *Id.* § (b)(2).
163. The use of "repeatedly" indicates that the recipient of the excessive communication is the protected target, while the use of "any person" suggests that the statute is more focused on the act itself.
164. *Id.*
165. State v. Bishop, 787 S.E.2d 814, 815 (N.C. 2016).
166. Susan W. Brenner, '*Kiddie Crime?' The Utility of Criminal Law in Controlling*

C. Criminal law's Normative and Representative Influence

While North Carolina is not alone in limiting libel and IIED to the world of civil law, criminalizing libel and IIED could serve North Carolina's legitimate interest in eradicating cyber-bullying. The status of defamation in the criminal law has ebbed and flowed over the centuries, adapting to changes in both public perception and technological realities.

In the early seventeenth century, the English Court of Star Chamber assumed the responsibility for controlling speech.[167] The court developed four separate criminal offenses under the rule of criminal libel: seditious libel, blasphemy, obscenity, and defamation.[168] Defamation covered comments directed toward an individual on the theory that "they tend[ed] to create breaches of the peace when the defamed . . . undert[ook] to revenge themselves on the defamer."[169]

English colonists brought to the New World the understanding that criminal libel threatened social order, not just the individual.[170] It was therefore enforced more stringently than civil libel; truth was not a defense.[171] This conception of criminal libel has rarely been used in American courts. A quantitative study shows that the number of criminal libel cases has steadily declined since the turn of the twentieth century.[172] The drafters of the Model Penal Code cited this decline as a factor in deciding "one of the hardest questions" they confronted in choosing whether to retain a crime of defamation.[173] The drafters explained that although "willful public defamation of an individual can be a traumatic experience which deserves to be taken . . . seriously,"[174]

Cyberbullying, 8 FIRST AMEND. L. REV. 1, 31. (2009).

> This aspect of indirect cyberbullying gives rise to two issues, neither of which arises with direct cyberbullying: (1) to what extent did the cyberbully intentionally direct the online communication(s) at the victim; and (2) to what extent did he or she intend the communication(s) to be seen by others whose reactions were likely to have a negative impact on the victim?

Id.

167. Susan W. Brenner, *Symposium: Prosecution Responses To Internet Victimization: Should Online Defamation Be Criminalized?,* 76 MISS. L.J. 705, 713 (2007).

168. *Id.*

169. *Id.*

170. *Id.*

171. Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 791–92 (1964).

172. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433, 466–67 (2004).

173. MODEL PENAL CODE § 250.7 cmt. at 44 (AM. LAW INST., Tentative Draft No. 13, 1961).

174. *Id.* at 45.

the likelihood of such situations occurring, given the media landscape at the time, was not enough to justify criminalizing defamation.[175]

Neither the English colonists nor the Model Penal Code drafters could have foreseen the monumental change in the publication landscape brought forth by the internet. At the time the Model Penal Code was drafted, avenues of publication consisted of a limited set of professionalized media: radio, network television, and print media.[176] These organizations had both the professional standards to avoid irresponsible defamation and the financial ability to provide adequate damages when they were liable.[177] Moreover, the commercial nature of publication resulted in stories and articles that focused on matters of public concern that would attract a large audience.[178] The media industry of the 1960s thus had an economic reason to police itself and exercise a fair amount of control to avoid libel and slander suits. Operating under this reality, the drafters saw no reason to include any form of criminal defamation in the Model Penal Code.

The democratization of online publication has changed many of the assumptions on which the Model Penal Code drafters based their decision to omit criminal defamation. Anyone with internet access can become a publisher. As such, publishers are no longer required to engage in professional vetting procedures to ensure accuracy of the published material.[179] Because publishing is no longer confined to large media organizations, there is no guarantee that one who commits defamation could adequately compensate a victim with civil damages. Collectively, the current model of publishing differs significantly from the model on which the Model Penal Code drafters relied. Thus, the reason cited by the drafters for omitting criminal defamation is no longer dispositive.

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175. *See id.* at 44. ("[O]ur alarm may, as in the case of petty theft or malicious mischief, derive from the higher likelihood that such lesser harms will be inflicted upon us by those who manifest disregard of other people's ownership. It seems evident that personal calumny" does not fall in this class, and is therefore "inappropriate for penal control.").

176. Todd Leopold, *TV in 1960s vs today: Times have changed, right?,* CNN (Aug. 25, 2014) http://www.cnn.com/2014/05/29/showbiz/tv/sixties-television-then-now/index.html.

177. Quint Randle, *A Historical Overview of the Effects of New Mass Media Introductions on Magazine Publishing During the Twentieth Century*, 6 FIRST MONDAY 9 (2001) http://firstmonday.org/ojs/index.php/fm/article/view/885/794.

178. *Id.*

179. Martin Belam, *Journalism in the digital age: trends, tools and technologies*, THE GUARDIAN, Apr. 14, 2010, https://www.theguardian.com/help/insideguardian/2010/apr/14/journalism-trends-tools-technologies.

Despite the drafters' omission, twenty-three states criminalize some form of libel.[180] These state statutes focus either on preventing "a breach of the peace"[181] or preventing an "impeach[ment] [of] the honesty, integrity, virtue, or reputation" of a person.[182] Alabama, for example, enacted a libel law in the mid-nineteenth century that still exists today:

> Any person who publishes a libel of another which may tend to provoke a breach of the peace shall be punished, on conviction, by fine and imprisonment in the county jail, or hard labor for the county; the fine not to exceed in any case $500.00 and the imprisonment or hard labor not to exceed six months.[183]

North Carolina's sole criminal libel law, however, punishes only those who give libelous information concerning any person or corporation to a newspaper or periodical, if the newspaper publishes it.[184]

The status of a law is not considered in a vacuum. Societal views, technological limitations, and the development of Supreme Court doctrine have all influenced the status of libel laws. Defamation, both as libel and slander, has a complex history in common law. Following the *New York Times* decision and the Model Penal Code's omission, defamation's prevalence in both civil and criminal law declined. Many states have no form of criminal defamation, and those that do provide different rationales for its criminal status. Some states frame the law in terms of maintaining a peaceful society, while others stress the desire to prevent harm to the individual. This complex history demonstrates the role that external factors play in affecting law. The rise of cyber-bullying is one such factor, and thus, society has reacted by demanding legislation.

V. CRAFTING A NEW CYBER-BULLYING STATUTE

The *Bishop* decision struck down North Carolina's cyber-bullying statute on First Amendment grounds; specifically, its broad language failed to reach the narrowest means of protecting children from cyber-

180. *See* Lisby, *supra* note 172, at 479–81.

181. *See, e.g.*, ALA. CODE § 13A-11-160 (1975); VA. CODE. § 18.2-417 (2009).

182. *See, e.g.*, IDAHO CODE ANN. § 18-4801 (West 2004); MINN. STAT. ANN. § 609.765(1) (West 2009); MONT. CODE ANN. § 45-8-212(1) (2007); N.H. REV. STAT. ANN. § 644:11(1) (LexisNexis 2007); N.D. CENT. CODE § 12.1-15-01(1) (1997); OKLA. STAT. ANN. tit. 21, § 771 (West 2002); UTAH CODE ANN. § 76-9-404(1) (2008); WIS. STAT. ANN. § 42.01(2) (West 2005).

183. ALA. CODE § 13A-11-160 (1975).

184. N.C. GEN. STAT. § 14-47 (1994).

bullying.[185] The statute was entirely content-based, containing a list of several forms of expression that were prohibited if done "with the intent to torment a minor."[186]

If North Carolina were to draft a new statute—one that would survive a constitutional challenge—the statute must reframe the issue in terms of the harm that cyber-bullying causes. By doing so, the law would find roots in traditionally unprotected forms of expression such as defamation and IIED instead of listing various forms of online activity, thus avoiding the problems discussed by the *Bishop* court.[187] Instead, by expressing the law in terms of tortious speech, the statute would fall within the *New York Times*' "private individual-private concern" category, further minimizing potential constitutional issues. Furthermore, the statute could tether its *mens rea* component to those specific harms, thus satisfying any vagueness challenge as expressed by the *Bishop* court.[188] A bill for such a statute may resemble the following:

AN ACT PROTECTING CHILDREN OF THIS STATE BY MAKING CYBERBULLYING A CRIMINAL OFFENSE PUNISHABLE AS A MISDEMEANOR.

<< N.C.G.S. § 14–196.4 >>

SECTION 1. This Act shall be known as the Cyber-bullying Prevention Act.

SECTION 2. The purpose of this Act is to protect children from the psychological, social, emotional, and physical harms caused by cyber-bullying. This Act incorporates and punishes the underlying harms addressed by common law defamation and intentional infliction of emotional distress, as enforced in N.C.G.S. § 4-1.

SECTION 3. Nothing in this Act is intended to interfere with the First Amendment rights of free speech and expression of any person affected.

185. State v. Bishop, 787 S.E.2d 814, 817 (N.C. 2016).
186. N.C. GEN. STAT. § 14-458.1(a)(1) (2012).
187. *Bishop*, 787 S.E.2d at 821.
188. *Id.*

SECTION 4. Article 26 of Chapter 14 of the General Statutes is amended by adding a new section to read:

§ 14–196.4. Cyber-bullying; penalty

(a) The following definitions apply in this section:

(1) Cyber-bullying.—an act or acts exhibited by one person or group of people to a minor or group of minors through any form of electronic communication that:

a. with the intent to cause such harm:

1. endangers the psychological, emotional, or physical health of a minor, including, but not limited to, causing fear, anxiety, depression, neurosis, phobia, paranoia, or any other type of severe and disabling emotional or mental condition that may be generally recognized and diagnosed by professionals trained to do so;

2. misleads a person or group of people in order to harass a minor, substantially disgrace and degrade a minor, subject a minor to public hatred, hostility, contempt or ridicule, or cause a minor to be shunned and avoided; or

3. otherwise bullies or harasses a minor, as described in § 115C-407.15.

(2) Electronic communication.—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 system, photo-electronic system, or photo-optical system, or other transmission or medium such as electronic mail, text messaging, instant messaging, social media, internet communications, or facsimile communications.

(b) It shall be unlawful for any person to use any form of electronic communication to engage in any act of cyber-bullying:

(1) in which the victim subjectively views the conduct as cyber-bullying; and

(2) the conduct is objectively severe or pervasive enough that a reasonable person would agree that it is cyber-bullying.

(c) Any person who violates this section shall be guilty of cyber-bullying, which shall be punishable as a Class 1 misdemeanor if the defendant is 18 years of age or older at the time the offense is

committed. If the defendant is under the age of 18 at the time the offense is committed, the offense shall be punishable as a Class 2 misdemeanor.

SECTION 5. This act becomes effective upon enactment, and applies to offenses committed on or after that date.

VI. CONCLUSION

Cyber-bullying is a serious and recurrent problem that harms children. The increased access and growing dependence on electronic communication and online social networks give cyber-bullies more avenues to inflict harm on their victims. North Carolina's valiant effort to address this phenomenon fell short after the ruling in *State v. Bishop*. The statute was flawed, and the court held that it infringed upon the First Amendment.

A statute crafted with more care could achieve the same goal while avoiding any constitutional limitations. North Carolina's robust common law can offer a source of relief for victims of cyber-bullying. The torts of libel and intentional infliction of emotional distress seek to remedy psychological and dignitary harms like those experienced by cyber-bullying victims. By navigating the Supreme Court's intersection of the First Amendment and such harmful speech, North Carolina can impose civil liability, including punitive damages, using its common law torts. However, if the legislature wants to reflect the views of society and prevent cyber-bullying instead of compensating for it indirectly through parental liability, the legislature should turn to the criminal law. Whether the legislature expands existing harassment law, incorporates the common law torts into the criminal law, or redrafts a cyber-bullying statute that complies with the First Amendment, criminalizing cyber-bullying is both constitutional and a fervent societal condemnation of bullying in the twenty-first century.