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# Salvaging the North Carolina Teacher-Cyberbullying Statute

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## Salvaging the North Carolina Teacher-Cyberbullying Statute

### ABSTRACT

*In 2012, the North Carolina General Assembly criminalized student Internet activity intended to “torment” school employees. This Comment contends that the legislation violates the First and Fourteenth Amendments. It violates the First Amendment because it creates both subject matter and viewpoint limitations on speech. It violates the Fourteenth Amendment because the requirement that the student must intend to “torment” a school employee creates an impermissibly vague standard.*

*This Comment suggests that the North Carolina General Assembly could correct the constitutional deficiencies in the legislation through revisions that limit punishment to “true threats.” Such revisions would reign in the broad coverage of the statute, while still protecting school employees and school systems from the most serious and disruptive online student misconduct.*

### INTRODUCTION

Students have long engaged in irreverent put-downs of their teachers.<sup>1</sup> In the past, students whispered these things to each other in the cafeteria, at recess, or at home. Today, students post these comments online.

Consider the predicament faced by Chip Douglas, a former high school English teacher in the Mecklenburg County School System.<sup>2</sup> One of his students created a fake social-media account on Twitter<sup>3</sup> under Douglas’s name.<sup>4</sup> The Twitter profile, made available to the public online, portrayed Douglas as a hypersexual, violent drug addict.<sup>5</sup> While students

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1. See Adam Cohen, *Why Students Have a Right to Mock Teachers Online*, TIME (June 20, 2011), <http://content.time.com/time/nation/article/0,8599,2078636,00.html>.

2. See Lisa Miller, *Cyberbullying Law Shields Teachers from Student Tormentors*, NPR (Feb. 19, 2013, 3:04 AM), <http://www.npr.org/2013/02/19/172329526/cyber-bulling-law-shields-teachers-from-student-tormentors>.

3. TWITTER, <https://twitter.com> (last visited Apr. 30, 2015).

4. See Miller, *supra* note 2.

5. *Id.*

may have viewed the fake Twitter profile as a mere prank, Douglas took it seriously—especially when students in his classroom laughed at him.<sup>6</sup> Douglas eventually resigned.<sup>7</sup>

The North Carolina General Assembly passed legislation titled “An Act to Enact the School Violence Prevention Act of 2012” to prohibit the type of student Internet activity that tormented Chip Douglas.<sup>8</sup> The law criminalizes various forms of student Internet activity conducted “[w]ith the intent to intimidate or torment a school employee.”<sup>9</sup> The new law stands as one-of-a-kind. While student-on-student cyberbullying statutes have become commonplace across the country, no other state legislature has passed a criminal law solely aimed at protecting school employees from the Internet activity of their students.<sup>10</sup>

This Comment argues that the North Carolina teacher-cyberbullying statute cannot withstand constitutional scrutiny under the Due Process Clause and the First Amendment. Because the open-ended intent-to-torment requirement fails to put the public on notice of what conduct is prohibited, the statute violates void-for-vagueness principles encompassed in the Due Process Clause, allowing for arbitrary enforcement.<sup>11</sup> The statute also violates the First Amendment as a content-based restriction on speech: it restricts speech based on both subject matter and viewpoint, proscribing only speech that is intimidating or tormenting to school employees, and only speech made by students.<sup>12</sup>

This Comment also suggests a solution: the statute should be revised to punish only true threats,<sup>13</sup> which do not receive constitutional

6. *See id.*

7. *Id.*

8. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws 715.

9. N.C. GEN. STAT. § 14-458.2(b)(1) (2013); *see also id.* §§ 14-458.2(b)(4), (5).

10. *See* Kevin P. Brady, Commentary, *Criminal State Anti-Cyberbullying Statutes: Does Legislative Zeal Outweigh Constitutional Considerations?*, in 298 WEST’S EDUCATION LAW REPORTER 21, 26–35 (2014) (categorizing various legislative responses to cyberbullying and noting that North Carolina currently stands as the only state to pass a criminal statute aimed at protecting school employees from cyberbullying).

11. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that statutes must not be “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” (first citing *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914); then citing *Collins v. Kentucky*, 234 U.S. 634, 638 (1914))).

12. *See Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983))).

13. “True threats” are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular

protection.<sup>14</sup> This approach would also resolve due-process vagueness concerns, since courts have recognized and defined true threats.<sup>15</sup> Thus, under a true-threat standard, students, parents, and law enforcement would be put on notice as to what the law prohibits.

This Comment shows that the North Carolina teacher-cyberbullying statute cannot pass constitutional muster as the law is currently written, but argues that prohibiting only students' true threats against school employees can salvage it. First, this Comment provides an overview of the North Carolina teacher-cyberbullying statute.<sup>16</sup> Next, it recognizes two constitutional objections to the statute: the due process void-for-vagueness objection and the First Amendment free-speech objection.<sup>17</sup> Finally, this Comment demonstrates how limiting the application of the statute to true threats can salvage the constitutional viability of the statute, while still protecting school employees and school systems from the most harmful and disruptive student Internet activity.<sup>18</sup>

## I. OVERVIEW OF THE TEACHER-CYBERBULLYING STATUTE

Generally speaking, North Carolina's teacher-cyberbullying law prohibits various forms of student Internet activity that is intended to "intimidate or torment a school employee."<sup>19</sup> Students who violate the

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individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (first citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); then citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

14. *R.A.V.*, 505 U.S. at 388 (noting that "threats of violence are outside the First Amendment").

15. *See id.*

16. *See infra* notes 19–52 and accompanying text.

17. *See infra* notes 53–163 and accompanying text.

18. *See infra* notes 164–203 and accompanying text.

19. N.C. GEN. STAT. § 14-458.2(b)(1) (2013); *see also id.* §§ 14-458.2(b)(4), (5). The operative language reads as follows:

- (b) Except as otherwise made unlawful by this Article, it shall be unlawful for any student to use a computer or computer network to do any of the following:
  - (1) With the intent to intimidate or torment a school employee, do any of the following:
    - (a) Build a fake profile or Web site.
    - (b) Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a school employee.
    - (c) Post a real or doctored image of the school employee on the Internet.
    - (d) Access, alter, or erase any computer network, computer data, computer program, or computer software, including breaking into a password-protected account or stealing or otherwise accessing passwords.

statute are guilty of a Class 2 misdemeanor,<sup>20</sup> which can carry a sentence of up to sixty days in jail and a one-thousand-dollar fine.<sup>21</sup> In addition to criminal punishment, the statute requires that the offending student be transferred to a different school.<sup>22</sup> If no “appropriate school” is available, the student must be transferred to a different class or assigned a different teacher—one who was not a target of the student’s cyberbullying.<sup>23</sup>

#### A. *Legislative Purpose to Protect Children*

The teacher-cyberbullying law was part of 2012 short-session legislation aimed at preventing school violence.<sup>24</sup> According to the legislation, “the sole purpose of [the] law is to protect all children from bullying and harassment, and no other legislative purpose is intended nor should any other intent be construed from passage of [the] law.”<sup>25</sup> In other words, to achieve the purpose of protecting children, the General Assembly elected to impose criminal sanctions on children who bully adults.

In support of the legislation, the North Carolina General Assembly found that “a safe and civil environment in school is necessary in order for students to learn and achieve high academic standards.”<sup>26</sup> Further, bullying

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- (e) Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a school employee.
  - (2) Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee.
  - (3) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a school employee for the purpose of intimidating or tormenting that school employee (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network).
  - (4) Sign up a school employee for a pornographic Internet site with the intent to intimidate or torment the employee.
  - (5) Without authorization of the school employee, sign up a school employee for electronic mailing lists or to receive junk electronic messages and instant messages, with the intent to intimidate or torment the school employee.

*Id.* §§ 14-458.2(b)(1)–(5).

20. *Id.* § 14-458.2(c).

21. *Id.* § 15A-1340.23 (listing sentencing guidelines for various offense classifications).

22. *Id.* § 115C-366.4.

23. *Id.* However, the statute also permits a superintendent to “modify, in writing, the required transfer of an individual student on a case-by-case basis.” *Id.*

24. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws 715, 715.

25. *Id.*

26. *Id.*

and harassment “disrupt both a student’s ability to learn and a school’s ability to educate its students in a safe environment” by creating “a climate that fosters violence in our schools.”<sup>27</sup> The General Assembly believed that it was necessary to pass this law to protect students and to provide them with the best possible learning environment.<sup>28</sup>

#### B. *The Scope of the North Carolina Teacher-Cyberbullying Statute*

Under the teacher-cyberbullying statute, criminal sanctions follow when (1) any student using a computer or computer network<sup>29</sup> (2) engages in a form of the Internet activities contemplated in the statute<sup>30</sup> (3) with an “intent to intimidate or torment a school employee.”<sup>31</sup>

The statute defines the operative terms “student”<sup>32</sup> and “school employee,”<sup>33</sup> and enumerates the proscribed Internet activities.<sup>34</sup> Specifically, the Internet activities that the statute prohibits include building a fake profile or website;<sup>35</sup> posting or encouraging others to post private information pertaining to a school employee;<sup>36</sup> posting an image of a school employee;<sup>37</sup> accessing, altering or erasing digital data;<sup>38</sup> repeated electronic communications to a school employee;<sup>39</sup> inciting the stalking or

27. *Id.*

28. *Id.* (“[I]t is essential to enact a law that seeks to protect the health and welfare of North Carolina students and improve the learning environment for North Carolina students.”).

29. N.C. GEN. STAT. § 14-458.2(b) (2013).

30. *Id.* §§ 14-458.2(b)(1)–(5) (listing various prohibited Internet activities).

31. *Id.* § 14-458.2(b)(1). Subsection (b)(2), which prohibits students from making “any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a school employee,” does not require a student to have an intent to intimidate or torment a school employee. *Id.* § 14-458.2(b)(2). All other Internet activities require a specific intent to intimidate or torment. *Id.* § 14-458.2(b).

32. The term “student” includes persons assigned to a traditional public school, enrolled in a charter school or non-public school recognized by the state, as well as a person suspended or expelled from any of these within the last year. *Id.* § 14-458.2(a)(2).

33. The term “school employee” includes any employee at a traditional public school, charter school, or non-public school recognized by the state, as well as independent contractors who carry out “duties customarily performed by employees of the school.” *Id.* § 14-458.2(a)(1).

34. *Id.* § 14-458.2(a).

35. *Id.* § 14-458.2(b)(1)(a).

36. *Id.* § 14-458.2(b)(1)(b).

37. *Id.* § 14-458.2(b)(1)(c).

38. *Id.* § 14-458.2(b)(1)(d).

39. *Id.* § 14-458.2(b)(1)(e).

harassment of a school employee;<sup>40</sup> copying and disseminating unauthorized data pertaining to a school employee;<sup>41</sup> signing a school employee up for a pornographic Internet site;<sup>42</sup> and signing a school employee up for junk e-mail and instant messages.<sup>43</sup>

Thus, the statute makes relatively clear what persons qualify as students, what persons qualify as school employees, and what Internet activity the statute encompasses. Not all operative requirements under the statute, however, are so well delineated.

### C. *The Meaning of “Intent to Intimidate or Torment a School Employee”*

The cyberbullying law fashions a specific-intent requirement—the “intent to intimidate or torment a school employee”<sup>44</sup>—that is defined neither by the statute nor by common law. In North Carolina, specific-intent crimes require “as an essential element a specific intent that a result be reached.”<sup>45</sup> In this context, the student must desire that the school employee will be “intimidate[d] or torment[ed]” as a result of the online Internet activity.<sup>46</sup> However, the General Assembly left the task of deciphering the meaning behind the statute’s “intent to intimidate or torment” requirement to the public.<sup>47</sup>

The statute’s use of the word *intimidate*, standing alone, does not create interpretive ambiguities. In North Carolina, “[i]ntimidate means to make timid or fearful, inspire or affect with fear, and to compel action or inactions as by threats.”<sup>48</sup> Further, the Supreme Court of the United States has defined *intimidate* to mean “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>49</sup> *Intimidate* has been incorporated as an element in several crimes, ranging from threatening a witness<sup>50</sup> to common-law robbery.<sup>51</sup> As

40. *Id.* § 14-458.2(b)(2).

41. *Id.* § 14-458.2(b)(3).

42. *Id.* § 14-458.2(b)(4).

43. *Id.* § 14-458.2(b)(5).

44. *Id.* § 14-458.2(b).

45. *State v. Jones*, 451 S.E.2d 826, 844 (N.C. 1994).

46. N.C. GEN. STAT. § 14-458.2.

47. *See id.* § 14-458.2(b).

48. *St. John v. Brantley*, 720 S.E.2d 754, 759 (N.C. Ct. App. 2011) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabr. 2002)).

49. *Virginia v. Black*, 538 U.S. 343, 360 (2003).

50. *See* N.C. GEN. STAT. § 14-226 (prohibiting the threatening of witnesses through intimidation).

such, an “intent to intimidate” requirement stands readily adaptable to the new criminal statute.

Conversely, the “torment” requirement lacks a statutory definition, a settled legal meaning, or a common colloquial understanding.<sup>52</sup> As written, it is unclear what the intent-to-torment requirement prohibits or how broadly it sweeps.

## II. CONSTITUTIONAL DEFICIENCIES

Two particularly thorny constitutional problems arise from the North Carolina teacher-cyberbullying statute’s narrow subject matter and specific-intent requirement.<sup>53</sup> First, the statute’s undefined specific-intent element, which requires an “intent to intimidate or torment a school employee,” invokes due-process concerns because it is unclear what actions constitute tormenting a school employee.<sup>54</sup> Second, the statute creates an impermissible content-based restriction on speech because criminal sanctions depend on whether the speech relates to the subject matter of intimidating or tormenting a school employee from the viewpoint of students.<sup>55</sup>

### A. Fourteenth Amendment Due-Process Vagueness Concerns

The statute’s “intent to torment a school employee” requirement violates due-process principles. The Fourteenth Amendment Due Process Clause requires that state criminal laws possess some minimum degree of definiteness.<sup>56</sup> A statute must not be “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>57</sup> When a statute is both vague and restrictive of speech,

51. See *State v. Rivens*, 261 S.E.2d 867, 869 (N.C. 1980) (explaining that robbery requires “violence or intimidation” (citing *State v. Smith*, 150 S.E.2d 194, 200 (N.C. 1966))).

52. See *United States v. Williams*, 553 U.S. 285, 306 (2008) (stating that vague statutes commonly lack “statutory definitions, narrowing context, or settled legal meanings” (first citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); then citing *Reno v. ACLU*, 521 U.S. 844, 870–71, 871 n.35 (1997))).

53. N.C. GEN. STAT. § 14-458.2(b)(1).

54. See *id.*

55. See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (citations omitted)).

56. See U.S. CONST. amend. XIV, § 1; see also *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citing *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914)).

57. *Connally*, 269 U.S. at 391 (first citing *Int’l Harvester Co.*, 234 U.S. at 221; then citing *Collins v. Kentucky*, 234 U.S. 634, 638 (1914)); see also *Papachristou v. City of*



courts should be especially wary of the “obvious chilling effect on free speech.”<sup>58</sup> The purpose behind the definiteness requirement is twofold: vague criminal statutes fail to place the public on notice of the prohibited conduct and they allow for arbitrary arrests and prosecutions.<sup>59</sup>

The teacher-cyberbullying law violates this due-process definiteness requirement for the following reasons: (1) the meaning of the word *torment* lacks a common understanding, as demonstrated by a host of varying dictionary definitions; (2) the torment requirement is reminiscent of other vague statutes that have been struck down by the Supreme Court of the United States; (3) the extent of allowable speech under the statute depends on arbitrary circumstances, such as student location and a law enforcement officer’s personal predilections; and (4) North Carolina case law fails to clarify or limit the broad language of the statute.

### 1. *Multitude of Dictionary Definitions*

The due-process problem with the North Carolina teacher-cyberbullying statute is not that it may occasionally be difficult for fact-finders to determine whether a student intends to torment their teacher. Rather, the problem is that it is difficult for students to determine what *torment* actually means.<sup>60</sup> Because *torment* lacks a common understanding or plain meaning, as reflected by a multitude of varying dictionary definitions, a person of ordinary intelligence lacks fair notice of the type of conduct that the teacher-cyberbullying statute prohibits.

For example, in *State v. Watson*,<sup>61</sup> the North Carolina Court of Appeals looked to *The American Heritage College Dictionary* to define *torment* for the purpose of interpreting the felony-stalking statute.<sup>62</sup> From that source, the court understood *torment* to mean “[t]o annoy, pester, or

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Jacksonville, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))).

58. *Reno*, 521 U.S. at 872; see also *id.* at 871–72 (explaining that “[t]he vagueness of such a [content-based] regulation,” coupled with its increased deterrent effect as a criminal statute, “raise[] special First Amendment concerns because of its obvious chilling effect on free speech”).

59. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (describing the two “discrete due process concerns” behind the void-for-vagueness doctrine).

60. See *United States v. Williams*, 553 U.S. 285, 306 (2008) (“What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”).

61. *State v. Watson*, 610 S.E.2d 472 (N.C. Ct. App. 2005).

62. *Id.* at 477 (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY 1428 (3d ed. 1997)).

harass.”<sup>63</sup> This definition, however, is not the only understanding of the term. Depending on which dictionary is consulted, the types of activity that may implicate the word *torment* range from the severe to the mundane—from subjecting others to medieval torture devices,<sup>64</sup> to throwing others into a commotion,<sup>65</sup> to causing mere annoyance or anxiety.<sup>66</sup> The fact that no two dictionary definitions are consistent illustrates the lack of a common understanding of the word.

Because *torment* lacks a uniform meaning, students, parents, teachers, and the general public have little notice as to what the teacher-cyberbullying statute actually prohibits. A student who intends to merely pester or annoy a teacher might not realize that, to some, her conduct could be interpreted as an intent to torment.<sup>67</sup> The standard created under the statute is not merely imprecise; with drastically different connotations behind the word *torment*, the North Carolina teacher-cyberbullying statute creates no workable standard for students and for the public to know what the law prohibits. The statute “violates the first essential of due process of law”: the public must “guess at its meaning and differ as to its application.”<sup>68</sup>

## 2. *Modern Equivalent to Coates v. City of Cincinnati*

The word *torment* as used in the statute is reminiscent of other laws that the Supreme Court of the United States has previously struck down as void for vagueness.<sup>69</sup> The classic example of a hopelessly vague standard is found in *Coates v. City of Cincinnati*.<sup>70</sup> In *Coates*, a city ordinance prohibited three or more people from assembling on a sidewalk and “conduct[ing] themselves in a manner annoying to persons passing by.”<sup>71</sup>

63. *Id.*

64. *Torment*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/torment> (last visited May 3, 2015).

65. *Torment*, DICTIONARY.COM, <http://dictionary.reference.com/browse/torment> (last visited May 3, 2015).

66. *Torment*, YOURDICTIONARY, <http://www.yourdictionary.com/torment> (last visited May 3, 2015).

67. *See Watson*, 610 S.E.2d at 477 (“‘Torment’ is defined as ‘[t]o annoy, pester, or harass.’” (alteration in original) (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 62, at 1428)).

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

69. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 849 (1997) (striking down a statute as vague for use of the words “indecent” and “patently offensive”); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking down a statute as vague for use of the word “annoying”).

70. *Coates*, 402 U.S. 611.

71. *Id.*

Writing for the majority, Justice Stewart observed that “[c]onduct that annoys some people does not annoy others.”<sup>72</sup> Ultimately, the Court found it constitutionally impermissible for criminal sanctions to depend on something as arbitrary as whether or not someone is annoyed.<sup>73</sup>

The teacher-cyberbullying law stands as a contemporary equivalent to the city ordinance struck down in *Coates*. Both the city ordinance in *Coates* and the teacher-cyberbullying statute in North Carolina impose criminal punishment on First Amendment rights based on a similar “unascertainable standard.”<sup>74</sup> The meaning of *torment* as judicially defined by the North Carolina Court of Appeals includes the vague word *annoy*.<sup>75</sup> As detailed above, numerous other definitions of *torment* also rely on the word *annoy*.<sup>76</sup> Because the statute’s torment requirement creates an unascertainable standard, like the word *annoying*, the reasoning in *Coates* should control. If criminal sanctions cannot depend on a standard as arbitrary as whether someone is annoyed, they similarly cannot depend on a standard as arbitrary as whether a student intends to torment (or pester, annoy) a school employee.

### 3. *Permissible Speech and Arbitrary Circumstances*

One of the primary reasons that the Due Process Clause forbids vague criminal laws is because they allow for arbitrary enforcement.<sup>77</sup> The Due Process Clause requires “a legislature [to] establish minimal guidelines to govern law enforcement.”<sup>78</sup> Vague criminal statutes “permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’”<sup>79</sup>

72. *Id.* at 614.

73. *See id.* (“[T]he ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.”).

74. *See id.* (striking down an ordinance as “unconstitutionally vague” where “it subjects the exercise of the right of assembly to an unascertainable standard”).

75. *See State v. Watson*, 610 S.E.2d 472, 477 (N.C. Ct. App. 2005); *see also supra* notes 61–63 and accompanying text.

76. *See supra* notes 64–66 and accompanying text.

77. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“[P]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972))).

78. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

79. *Id.* (alteration in original) (quoting *Smith*, 415 U.S. at 575).

At best, inconsistent arrests can be expected to follow as a direct result of the uncertainty within the specific-intent requirement of the teacher-cyberbullying statute.<sup>80</sup> A school-resource officer in Robeson County may understand torment to mean “annoy excessively,”<sup>81</sup> while a school-resource officer in Halifax County may apply the much more stringent definition of “extreme pain or anguish of body or mind.”<sup>82</sup> As such, the officer in Robeson County would arrest a student for online comments that the officer in Halifax County would not believe amounted to more than a mere annoyance. With statutory uncertainty, the extent of permissible online student speech may vary based on one’s county of residence or even the school-resource officer assigned to a particular school.

At worst, a law-enforcement officer could use the uncertainty within the statute to justify penalizing a student that the officer dislikes. An imprecise criminal statute “furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against groups deemed to merit their displeasure.’”<sup>83</sup> A law-enforcement officer who, for whatever reason, holds a grudge against a certain student, would be able to take advantage of the vague statutory standard, taking a more relaxed view of the intent-to-torment requirement than he otherwise would. Essentially, the uncertainty behind the intent-to-torment requirement invites arbitrary enforcement in violation of the Due Process Clause.

#### 4. *Lack of Guidance in the Case Law*

North Carolina case law fails to offer much guidance for interpreting the word *torment*. In *State v. Watson*,<sup>84</sup> the North Carolina Court of Appeals upheld the state’s felony-stalking statute<sup>85</sup> in the face of due-process objections.<sup>86</sup> At that time, the felony-stalking statute criminalized the willful following or harassing of another person, with the intent to place a person in reasonable fear, or the intent to cause a person emotional distress.<sup>87</sup> The parties in *Watson* disputed the meaning of the words

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80. See N.C. GEN. STAT. § 14-458.2(b)(1) (2013) (stating the specific-intent requirement for the teacher-cyberbullying law); see also *supra* notes 44–47 and accompanying text.

81. *Torment*, DICTIONARY.COM, *supra* note 65.

82. *Torment*, MERRIAM-WEBSTER, *supra* note 64.

83. *Kolender*, 461 U.S. at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

84. *State v. Watson*, 610 S.E.2d 472 (N.C. Ct. App. 2005).

85. N.C. GEN. STAT. § 14-277.3(a)(1) (repealed 2008).

86. *Watson*, 610 S.E.2d at 477–78.

87. N.C. GEN. STAT. § 14-277.3(a)(1).

*harasses* and *harassment*,<sup>88</sup> and whether those terms complied with definiteness requirements under the Due Process Clause.<sup>89</sup> The felony-stalking statute defined harassment as communication “directed at a specific person that *torments*, terrorizes, or terrifies that person and that serves no legitimate purpose.”<sup>90</sup>

Rejecting the defendant’s argument that the statute failed to meet definiteness requirements, the North Carolina Court of Appeals defined the harassment statute’s use of the word *torments* to mean “annoy, pester, or *harass*.”<sup>91</sup> This would be fine if the felony-stalking statute itself did not define harassment with reference to the word *torment*.<sup>92</sup> A circular definition of *torment* that relies on the unconstitutionally vague word *annoy*<sup>93</sup> is not particularly helpful in defining the specific-intent requirement within the cyberbullying context, because it fails to put the public on notice of the prohibited conduct.

The felony-stalking statute, as construed in *Watson*, however, is distinguishable from the teacher-cyberbullying statute. Although the felony-stalking statute used the word “torment,” that word was not an essential element of the crime. Rather, the word was merely a part of the definition for the word *harassment*.<sup>94</sup> The felony-stalking statute required placing a person in reasonable fear of harm or causing substantial emotional harm—a more readily definable standard.<sup>95</sup>

The troubling result of the teacher-cyberbullying law’s imprecision is that a student familiar with the statute may avoid any sort of online criticism of school employees whatsoever. Free speech is “delicate and vulnerable,” and “[t]he threat of sanctions may deter [its] exercise almost as potently as the actual application of sanctions.”<sup>96</sup> Aside from multiple inconsistent dictionary meanings, many of which define *torment* with

88. The felony-stalking statute defined harassment as communication “directed at a specific person that *torments*, terrorizes, or terrifies that person and that serves no legitimate purpose.” *Watson*, 610 S.E.2d at 476 (emphasis added) (quoting N.C. GEN. STAT. § 14-277.3(3)).

89. *Id.* at 476–77.

90. *Id.* at 476 (emphasis added) (quoting N.C. GEN. STAT. § 14-277.3(3)).

91. *Id.* at 477 (emphasis added).

92. *Id.* at 476.

93. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (striking down the statute as vague for use of the word “annoying”).

94. *Watson*, 610 S.E.2d at 476.

95. *Id.*

96. *NAACP v. Button*, 371 U.S. 415, 433 (1963); see also *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (“The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” (citing *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965))).

reference to the already unconstitutionally vague word *annoy*,<sup>97</sup> the public has little guidance for deciphering the word *torment*. As such, “men of common intelligence must necessarily guess at its meaning.”<sup>98</sup> The Due Process Clause requires more.

### B. *First Amendment Freedom-of-Speech Concerns*

In addition to violating due-process definiteness requirements, the North Carolina teacher-cyberbullying statute violates the First Amendment guarantee of free speech.<sup>99</sup> Freedom of speech “is the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>100</sup> The teacher-cyberbullying statute violates this principal right by silencing speech of a particular viewpoint and subject matter.

#### 1. *Content-Based Restriction*

The North Carolina teacher-cyberbullying statute creates a selective, content-based limitation on speech, because criminal sanctions depend on whether the speech relates to the subject of intimidating or tormenting a school employee. The law also discriminates on the basis of viewpoint, punishing only speech that is made by students, and only those students whose perspective toward school employees is negative.

A law that burdens speech because of its content is “presumptively invalid” as an impermissible abridgment of freedom of speech.<sup>101</sup> The First Amendment principle of content neutrality “prohibits the government from choosing the subjects that are appropriate for public discussion.”<sup>102</sup> “[T]he content neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area.”<sup>103</sup> When a law

97. *Compare Coates*, 402 U.S. at 614 (striking down statute as vague for use of the word *annoying*), *with Watson*, 610 S.E.2d at 477 (defining *torment* as used in the felony-stalking statute to mean “annoy, pester, or harass”).

98. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (first citing *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914); then citing *Collins v. Kentucky*, 234 U.S. 634, 638 (1914)).

99. U.S. CONST. amend. I.

100. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969).

101. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

102. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1983).

103. *Id.*

prohibits “particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”<sup>104</sup>

The Supreme Court of the United States has repeatedly held that “a speaker has the autonomy to choose the content of his own message.”<sup>105</sup> North Carolina courts have been especially cautious in deciding cases involving abridgements of the freedom of speech.<sup>106</sup> Such abridgments are particularly dangerous because they “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>107</sup>

The First Amendment permits restrictions based on the content of speech in only “a few limited areas.”<sup>108</sup> This narrow range of well-defined areas includes instances of incitement, obscenity, defamation, fighting words, child pornography, frauds, true threats, and speech presenting a grave and imminent threat to the government.<sup>109</sup> No legislator possesses “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”<sup>110</sup>

The North Carolina teacher-cyberbullying law constitutes an impermissible subject-matter restriction on speech because it imposes a restriction on student speech that is outside the permissibly restricted categories. The law proscribes an entire subject area: “intimidat[ing] or torment[ing] a school employee.”<sup>111</sup> Speech concerning school employees

104. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *R.A.V.*, 505 U.S. at 391).

105. *See, e.g.,* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2820 (2011) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995)); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (quoting *Hurley*, 515 U.S. at 573).

106. *See* *Hall v. Post*, 372 S.E.2d 711, 717 (N.C. 1988) (refusing to recognize “the constitutionally suspect private facts invasion of privacy tort”). *See generally* C. Calhoun Walters, Comment, *A Remedy for Online Exposure: Recognizing the Public-Disclosure Tort in North Carolina*, 37 CAMPBELL L. REV. 419, 429–37 (2015) (discussing North Carolina’s traditionally conservative approach to First Amendment jurisprudence).

107. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

108. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V.*, 505 U.S. at 382–83).

109. *See* *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing categories of unprotected speech).

110. *Stevens*, 559 U.S. at 472; *see also* *R.A.V.*, 505 U.S. at 383 (“[T]he freedom of speech’ referred to by the First Amendment does not include a freedom to disregard these traditional limitations.”).

111. *See* N.C. GEN. STAT. § 14-458.2 (2013).

does not fall outside First Amendment protection.<sup>112</sup> Nevertheless, the North Carolina General Assembly deemed speech that relates to the subject of intimidating or tormenting school employees inappropriate for student online discussion.<sup>113</sup>

It remains permissible under the statute to direct intimidating and tormenting online remarks to another person, so long as that person is not a school employee. For example, the statute does not impose criminal sanctions on a student who builds a fake social-media profile or website for a librarian employed at the county public library. But criminal sanctions can follow if a student creates an identical profile or website for a librarian employed at the high school library.<sup>114</sup> On its face, the statute constitutes a selective, content-based limitation on speech, since criminal sanctions are keyed to the subject matter of the speech—the intimidating or tormenting of a school employee.

The statute also creates viewpoint discrimination that disfavors the views of specific speakers—students who voice negative feelings toward a school employee. The Supreme Court of the United States describes viewpoint discrimination as “an egregious form of content discrimination” where the law targets “particular views taken by speakers on a subject”<sup>115</sup> or “restrict[s] the expression of specific speakers.”<sup>116</sup> As such, “[v]iewpoint discrimination is censorship in its purest form.”<sup>117</sup>

Under the teacher-cyberbullying law, non-student members of the public are free to say what they wish about school employees—online or otherwise—regardless of whether they have the intent to torment a school employee. A non-student who desires to intimidate or torment a school employee by posting a picture of that school employee online is not prohibited from doing so under the teacher-cyberbullying law. But criminal sanctions can follow when a student posts that same picture of the school employee with the intent to intimidate or torment.<sup>118</sup> Because the law criminalizes speech by students that would be legal if delivered by a non-student, the statute discriminates based on viewpoint.

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112. See *Alvarez*, 132 S. Ct. at 2544 (listing categories of unprotected speech); see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 59 (1983) (stating that the First Amendment “prohibits the government from choosing the subjects that are appropriate for public discussion”).

113. See N.C. GEN. STAT. § 14-458.2.

114. *Id.* § 14-458.2(b)(1)(a).

115. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *R.A.V.*, 505 U.S. 391).

116. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000).

117. *Perry Educ. Ass’n*, 460 U.S. at 62 (Brennan, J., dissenting).

118. See N.C. GEN. STAT. § 14-458.2(b)(1)(c).



While the public, including students, generally enjoys the right to speak freely on the Internet, students are now at risk of criminal sanctions if they speak ill of school employees online with a specified intent.<sup>119</sup> Because the law on its face burdens speech on the basis of subject matter and viewpoint, courts must hold the statute to exacting scrutiny.<sup>120</sup>

## 2. *Strict Scrutiny and the Teacher-Cyberbullying Statute*

“[S]trict scrutiny leaves few survivors.”<sup>121</sup> As a content-based, subject matter, and viewpoint restriction on free speech, the North Carolina teacher-cyberbullying law would not survive constitutional review. Strict scrutiny imposes a high burden on state speech regulations, and “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”<sup>122</sup> Strict scrutiny requires a statute that regulates speech based on its content to be narrowly tailored to promote a compelling governmental interest.<sup>123</sup> If a less restrictive alternative would serve the government’s purpose, the legislature must employ that alternative.<sup>124</sup>

As stated above, the enacting legislation states that the “sole purpose” of the teacher-cyberbullying law is to protect children from bullying and harassment, expressly disclaiming any other purpose.<sup>125</sup> Punishing students, who are almost always children, for cyberbullying school employees, who are almost always adults, is not narrowly tailored to fit the General Assembly’s sole expressed purpose of “protect[ing] all children.”<sup>126</sup> Under the teacher-cyberbullying statute, no *child* receives protection from bullying and harassment; in fact, children are only punished under the law. Tenuous logic and a bit of imagination would be required to fathom situations where the law serves the purpose of protecting children. To find a compelling governmental interest served by the statute, courts would have to ignore the statement in the legislation that

119. *See id.* § 14-458.2.

120. *See United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (“When content-based speech regulation is in question . . . exacting scrutiny is required.”).

121. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

122. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000).

123. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (stating that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”).

124. *See id.*

125. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws 715, 715; *see also supra* text accompanying note 25.

126. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws at 715.

provides “no other legislative purpose . . . be construed from passage of this law.”<sup>127</sup>

Within the legislative findings, the General Assembly identified several other potential governmental interests that might be advanced by the teacher-cyberbullying statute.<sup>128</sup> Specifically, the findings noted the importance of fostering the optimal learning environment for children, while also serving their general welfare.<sup>129</sup> The General Assembly found that “a safe and civil environment in school is necessary in order for students to learn.”<sup>130</sup> The bill also noted that permitting bullying in any form promotes the potential for school violence.<sup>131</sup> Thus, if one discounts the General Assembly’s “sole purpose” proviso,<sup>132</sup> it is clear that the law seeks to protect the health and welfare of students *and school employees* for the purpose of improving the learning environment.

A compelling interest has been described as an interest “of the highest order,”<sup>133</sup> an “overriding state interest,”<sup>134</sup> and an “unusually important interest.”<sup>135</sup> The Supreme Court has recognized education as “perhaps the most important function of state and local governments.”<sup>136</sup> As such, this Comment assumes that protecting the health and welfare of school employees for the purpose of improving the learning environment constitutes a compelling state interest. It does not follow, however, that imposing criminal sanctions on students who intend to intimidate or torment a school employee on the Internet is sufficiently tailored to protecting that interest.<sup>137</sup>

127. *Id.*

128. *Id.*

129. *Id.* (“[I]t is essential to enact a law that seeks to protect the health and welfare of North Carolina students and improve the learning environment for North Carolina students.”).

130. *Id.*

131. *Id.* (stating that “bullying and harassing behaviors create a climate that fosters violence in our schools” and “national data and anecdotal evidence have established the need to identify the most vulnerable targets and potential victims of bullying and harassment”).

132. *See id.*; *supra* text accompanying note 25.

133. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

134. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978)).

135. *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O’Connor, J., dissenting).

136. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

137. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children . . . does not foreclose inquiry into its validity.” (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989))).

While fostering an optimal educational environment is undeniably a worthy legislative goal, the teacher-cyberbullying statute fails to achieve that goal because it does not actually deter teacher cyberbullying. Despite the “national data and anecdotal evidence” cited in the legislation,<sup>138</sup> research suggests that criminal sanctions are not an effective means to combat cyberbullying, because such measures have no deterrent effect on students.<sup>139</sup> While the law punishes student cyberbullies with potential jail time, the threat of harsh punishment will not cross most students’ minds when they post content on the Internet about school employees.<sup>140</sup>

It is generally agreed that adolescent brains have not “yet fully developed to the point where we can assume rationality in the face of unknown or unlikely consequences.”<sup>141</sup> The Supreme Court of the United States also recognized this principle when, in the context of a juvenile death-penalty case, it suggested that “[t]he likelihood that the teenage offender has made the kind of . . . cost-benefit analysis . . . is so remote as to be virtually nonexistent.”<sup>142</sup>

Students are especially unlikely to consider the consequences of their online actions. Adolescent students, as social media users, often do not even realize the potential breadth of their online audience.<sup>143</sup> Many people, including students, post online under the false belief that only “friends” will ever look at their content.<sup>144</sup> Exacerbating this problem, many commonly used social-media websites, such as Twitter, design their

138. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws 715, 715.

139. See, e.g., John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 90 (2011) (“Rather than attempting to legislate cyber bullying out of existence (a quixotic dream), a more productive approach would be one that is proactive and educational, while seeking to guide young people in the responsible use of new technology.”); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 385 (2012) (arguing that criminal penalties “are unlikely to solve the problem of bullying and cyberbullying in schools and unlikely to succeed as effective punishments”).

140. See Waldman, *supra* note 139, at 434.

141. Justin W. Patchin, *Deterring Teen Bullying: Dos and Don'ts*, CYBERBULLYING RES. CTR. (Feb. 21, 2014), <http://cyberbullying.us/deterring-bullying/>.

142. *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988).

143. See Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1315 (2009) (stating that technology “permit[s] users to create social networks with ‘blurry edges’—places where they post information generally intended for a small network of friends and family, but which is left available to the whole world to access”).

144. See *id.* at 1329 (“[T]he design of [social media] sites creates an aura of privacy by suggesting they are for limited disclosure of information to a defined social network of ‘friends.’”).

privacy controls in such a way that users of the site do not deploy them.<sup>145</sup> Moreover, the Internet's "disinhibiting effect" is well documented. Users, including students, do not hesitate to post messages online that they would never say in person.<sup>146</sup>

Unaware of their audience and emboldened in a virtual world, students who are subject to criminal punishment for cyberbullying remain unlikely to stop and weigh the consequences before posting online about a school employee. Thus, criminal sanctions fail to deter teacher cyberbullying. In fact, the law achieves no purpose beyond the punishment and retribution of student offenders.<sup>147</sup>

Criminal punishment of students who cyberbully school employees is not narrowly tailored if it can be replaced with a less restrictive alternative, such as school administrative punishment.<sup>148</sup> North Carolina law already requires local educators to address the problem of cyberbullying on a school administrative level.<sup>149</sup> Specifically, schools must "develop and implement methods and strategies for promoting school environments that are free of bullying or harassing behavior."<sup>150</sup> Public school systems across the state have developed ways to address the problem of cyberbullying through school discipline.

The Wake County School Board's disciplinary policies, for example, apply to any student "whose conduct at any time, place, or cyberspace, on or off campus, has or is reasonably expected to have a direct and immediate impact on the orderly and efficient operation of the schools or the safety of individuals in the school environment."<sup>151</sup> This succinct policy encompasses online posts and avoids burdening a student with a criminal

145. *Id.* at 1328–29 (first citing Jay P. Kesan & Rajiv C. Shah, *Setting Software Defaults: Perspectives from Law, Computer Science and Behavioral Economics*, 82 NOTRE DAME L. REV. 583, 589–97 (2006); then citing Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks*, 2005 ACM WORKSHOP ON PRIVACY ELECTRONIC SOC'Y 71, 74–78).

146. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. & BEHAV. 321, 321 (2004) ("Everyday users on the Internet—as well as clinicians and researchers—have noted how people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world.").

147. *See* Waldman, *supra* note 139, at 434 ("[A]ntibullying criminal laws seem to lack all indicia of good criminal laws other than their provision of retributive value.").

148. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000) ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.").

149. *See* N.C. GEN. STAT. § 115C-407.17 (2013).

150. *Id.*

151. *6410 Code of Student Conduct*, WAKE COUNTY PUB. SCH. SYS., <http://webarchive.wcpss.net/policy-files/series/policies/6410-bp.html> (last visited May 2, 2015).

record. Similarly, public schools in Durham County punish bullying in “written, electronic, or verbal” forms,<sup>152</sup> implying that online bullying can be punished. School boards in less populous counties have adopted similar policies. Columbus County schools, for example, prohibit bullying “at any time or place when the behavior has a direct and immediate effect on maintaining order and discipline in the schools.”<sup>153</sup> These examples are not exhaustive, but illustrative, as many other systems across the state have adopted similar policies.

School-board policies cover much of the same conduct contemplated by the statute. For example, a school in Columbus County could administratively punish a student for creating a fake social-media profile or website directed at a school employee.<sup>154</sup> Consider how a Columbus County school could respond to the students who created the fake Twitter profile portraying Chip Douglas.<sup>155</sup> Columbus County schools prohibit online bullying “when the behavior has a direct and immediate effect on maintaining order and discipline in the schools.”<sup>156</sup> Because the fake Twitter profile disturbed class time with students laughing at their teacher, it caused a “direct and immediate effect on maintaining order and discipline in the schools.”<sup>157</sup> Thus, a student who creates a parody profile could be administratively punished in Columbus County without criminal repercussions.

It is important to note, however, that school discipline is not entirely free from First Amendment concerns. The Third Circuit has held that a student cannot be punished for online speech that occurs away from school.<sup>158</sup> The Fourth Circuit where North Carolina sits, however, allows schools to punish online student speech where it “could reasonably be expected to reach the school or impact the school environment.”<sup>159</sup> The Fourth Circuit standard, however, does not address the viability of criminal

152. 4411: *Bullying/Harassment*, DURHAM PUB. SCHOOLS, [http://www.dpsnc.net/pages/Durham\\_Public\\_Schools/District/About\\_DPS/District\\_Policies/Series\\_4000\\_-\\_Student\\_Services/4411](http://www.dpsnc.net/pages/Durham_Public_Schools/District/About_DPS/District_Policies/Series_4000_-_Student_Services/4411) (last visited May 2, 2015).

153. *Student Rules and Regulations: Grades K–8*, COLUMBUS CTY. SCH. 23 (July 16, 2012), <http://www.columbus.k12.nc.us/k8rulesregs.pdf>.

154. N.C. GEN. STAT. § 14-458.2(b)(1).

155. See *supra* notes 2–6 and accompanying text.

156. *Student Rules and Regulations*, *supra* note 153, at 23.

157. *Id.*

158. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (holding that a school could not punish student speech “reaching beyond the schoolyard to impose what might otherwise be appropriate discipline”).

159. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011). The court allowed a student to be administratively punished for creating a social-media page that was “dedicated to ridiculing a fellow student.” *Id.* at 567.

punishment, since it involved only school administrative punishment.<sup>160</sup> Thus, according to Fourth Circuit precedent, North Carolina school boards have a license to implement less drastic, noncriminal administrative methods to punish teacher cyberbullying.

Instead of allowing school boards and school officials to continue implementing policies that address teacher cyberbullying, the teacher-cyberbullying statute shifts responsibility to law enforcement. The legislation states that its “sole purpose” is to protect children,<sup>161</sup> but, as this Comment has explained, the law does not in fact protect any child. Even if the legislative aim is to protect school employees in order to “improve the learning environment for North Carolina students,”<sup>162</sup> the law is not tailored to achieving that end. Criminal sanctions fail to deter instances of school-employee cyberbullying and, instead, function only as retribution. School administrative punishment already serves this function and does not result in criminal charges against students. Given the overwhelming burden for statutes that restrict speech based on its content under the First Amendment, the North Carolina teacher-cyberbullying statute does not pass constitutional muster.

### III. THE NORTH CAROLINA TEACHER-CYBERBULLYING STATUTE SALVAGED

While the North Carolina teacher-cyberbullying statute raises both due process and First Amendment concerns, the North Carolina General Assembly can revise the statute to rectify these concerns. This Part suggests that the General Assembly take two steps. First, the legislative record should be revised to reflect an accurate and realistic legislative purpose. Second, the statute should only prohibit “true threats.” Revising the statute in this manner would reign in the overly broad coverage of the statute, while still allowing punishment for the most disruptive and culpable student Internet activity.

#### *A. Prerequisite to Improvement*

As a prerequisite to any redrafting of the statute, the North Carolina General Assembly should revise the legislative record to better reflect the

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160. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (“Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”).

161. See Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws 715, 715; see also *supra* text accompanying note 25.

162. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws at 715.

statute's intended purpose. As written, the legislation states that its "sole purpose . . . is to protect all children from bullying and harassment," and that "no other legislative purpose is intended nor should any other intent be construed from passage of [the] law."<sup>163</sup> Since the teacher-cyberbullying statute in fact protects not children, but only adult school employees, from bullying and harassment, it fails to achieve its express legislative purpose.<sup>164</sup> Exacerbating the problem, the General Assembly tied the hands of judges to construe the statute by forbidding consideration of any other legislative intent.<sup>165</sup>

The law seeks to protect school employees, not children, from online bullying and harassment. By protecting school employees from certain online student activity, presumably, the General Assembly aims to "improve the learning environment for North Carolina students."<sup>166</sup> Before making any improvement to the substance of the North Carolina teacher-cyberbullying statute, the legislative record should be revised to reflect this broader, more realistic, legislative end.

#### B. *The "True Threat" Requirement*

To cure the due process and First Amendment objections, the statute should be revised in a manner that only punishes students who communicate "true threats" to school employees. To accomplish this end, the word *torment* should be stricken from the statute. The remaining "intent to intimidate" requirement should be legislatively defined to mean "a threat to a [school employee] with the intent of placing the [school employee] in fear of bodily harm or death." Such a revision would avoid the Fourteenth Amendment vagueness problem, as well as the First Amendment content-based restriction problem, while still protecting school employees and school systems from the most disruptive student Internet activity.

In the 2003 case of *Virginia v. Black*,<sup>167</sup> the Supreme Court of the United States defined what speech constitutes "true threats."<sup>168</sup> *Black* involved two defendants accused of violating the same Virginia law, which

163. *Id.*

164. See N.C. GEN. STAT. § 14-458.2(b) (2013).

165. See Elec. Supply Co. of Durham v. Swain Elec. Co., 403 S.E.2d 291, 294 (N.C. 1991) ("In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." (citing State *ex rel.* Hunt v. N.C. Reinsurance Facility, 275 S.E.2d 399, 405 (N.C. 1981))).

166. Act of July 12, 2012, ch. 149, 2012 N.C. Sess. Laws at 715.

167. *Virginia v. Black*, 538 U.S. 343 (2003).

168. *Id.* at 359–60.

prohibited cross burning with the intent to intimidate others.<sup>169</sup> The first defendant burned a cross on the front yard of an African American.<sup>170</sup> The second defendant burned a cross on private property during a Ku Klux Klan rally.<sup>171</sup> According to the Court, the First Amendment did not protect the first defendant, but shielded the second defendant.<sup>172</sup> A majority of the Court found that the first defendant's speech was not protected because burning a cross in another's front yard was "likely to inspire fear of bodily harm."<sup>173</sup> As to the second defendant, however, the Court ruled that the act of burning a cross on private property, without more, did not constitute a true threat, since the same fear of personal injury did not exist.<sup>174</sup>

The Court clearly defined "true threats" as "those statements where 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."<sup>175</sup> The speaker need not intend to carry out the threat, but only to place another in fear of bodily harm.<sup>176</sup>

Proscribing only true threats would avoid due-process vagueness concerns by "provid[ing] a person of ordinary intelligence fair notice of what is prohibited."<sup>177</sup> Unlike the word *torment*, with its multiple inconsistent definitions,<sup>178</sup> the Supreme Court has defined *intimidate* in the context of true threats.<sup>179</sup> By removing *torment* from the statute and defining *intimidate* to mean "true threats," neither the public nor law enforcement would have to guess what types of student Internet activity is prohibited. Namely, the crime would only occur when a student possesses "the intent of placing [a school employee] in fear of bodily harm or death."<sup>180</sup> The intimidation-as-true-threat standard has been approved by the Supreme Court of the United States and has developed through

169. *Id.* at 348.

170. *Id.* at 350.

171. *Id.* at 348–49.

172. *Id.* at 362–63.

173. *Id.* at 363.

174. *Id.* at 359.

175. *Id.*

176. *Id.* at 360 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.").

177. *United States v. Williams*, 553 U.S. 285, 304 (2008) (first citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000); then citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

178. *See supra* notes 60–68 and accompanying text.

179. *Black*, 538 U.S. at 360.

180. *Id.*



subsequent judicial decisions. As such, the amendment would assuage Fourteenth Amendment due-process concerns.

Overcoming First Amendment content-based objections presents a more complex hurdle. Even if the teacher-cyberbullying law prohibits only a category of unprotected speech, such as true threats, it continues to hinge on the content of the speech.

The prohibition on content-based restrictions is so entrenched within the First Amendment's protection that even a law restricting speech within the narrow range of permissible areas, such as true threats, may still violate the First Amendment. In *R.A.V. v. City of St. Paul*,<sup>181</sup> a local ordinance prohibited fighting words, but only those based on race, color, creed, religion, or gender.<sup>182</sup> Although fighting words are considered to fall outside of the First Amendment's protection, the Court in *R.A.V.* held that the ordinance failed as a content-based restriction on speech.<sup>183</sup> The primary problem with the restriction was that the law only applied to fighting words that "insult[ed] or provoke[d] violence[] 'on the basis of race, color, creed, religion or gender.'"<sup>184</sup> Other forms of fighting words, such as those based on political affiliation, union membership, or sexual orientation, were not covered by the ordinance.<sup>185</sup> The Court ruled that the First Amendment did not permit the city "to impose special prohibitions on those speakers who express views on disfavored subjects."<sup>186</sup>

The Court, however, did indicate that content-based restrictions within a category of unprotected speech would be permissible "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."<sup>187</sup> Under this exception, "a content-based distinction is permissible if it directly advances the reason why the category of speech is unprotected."<sup>188</sup>

The *R.A.V.* Court identified three principal reasons why the First Amendment does not protect true threats: (1) to protect "individuals from

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

182. *Id.* at 380.

183. *Id.* at 381.

184. *Id.* at 391 (quoting the ordinance at issue in *R.A.V.*).

185. *Id.*

186. *Id.* (first citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); then citing *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229–30 (1987)).

187. *Id.* at 388.

188. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.3.3, at 1038 (4th ed. 2011).

fear of violence”; (2) to prevent “the disruption that fear engenders”; and (3) to prevent “the possibility that the threatened violence will occur.”<sup>189</sup>

The Court has illustrated the operation of this exception in the context of true threats in two cases.

First, in *Virginia v. Black*,<sup>190</sup> discussed above in this Comment,<sup>191</sup> the Court found burning a cross with the intent to intimidate proscribable because it is “a particularly virulent form of intimidation” that is “most likely to inspire fear of bodily harm.”<sup>192</sup> In other words, a state can prohibit cross-burning in order to protect individuals from “fear of violence.”<sup>193</sup>

Second, in *R.A.V.*, the Court explained that the federal government may not prohibit threats against the President that only reference the President’s “policy on aid to inner cities”; but the federal government may generally prohibit threats against the President because of the overwhelming interest “in allowing him to perform his duties without interference from threats of physical violence.”<sup>194</sup> Thus, true threats are also proscribable in order to prevent “the disruption that fear engenders.”<sup>195</sup>

The North Carolina General Assembly should be able to constitutionally prohibit students’ online true threats against school employees because of the overwhelming state interest in education and allowing school employees to perform their educational duties without disruptive threats of violence coming from students on the Internet. In the unique context of schools and education, student Internet activity that aims to intimidate school employees constitutes a “particularly virulent form of intimidation” with great potential to create substantial disruption in schools and communities.<sup>196</sup> Fear of violence takes away the ability of school employees “to focus on educating and supporting students.”<sup>197</sup> Instead of spending more time on improving the educational environment, the school must expend “resources to assure student and building security and address discipline issues.”<sup>198</sup> Moreover, threats of violence against school

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189. *R.A.V.*, 505 U.S. at 388.

190. *Virginia v. Black*, 538 U.S. 343 (2003).

191. *See supra* notes 167–76 and accompanying text.

192. *Black*, 538 U.S. at 363.

193. *R.A.V.*, 505 U.S. at 388.

194. *Id.* (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam)).

195. *Id.* (citing *Watts*, 394 U.S. at 707).

196. *Black*, 538 U.S. at 363.

197. PREVENTION INST., FACT SHEET: VIOLENCE AND LEARNING 1 (May 2011), <http://www.preventioninstitute.org/component/jlibrary/article/id-301/127.html>.

198. *Id.*

employees “affect the ability to recruit and maintain a quality of teaching and administrative staff in the system.”<sup>199</sup>

A student’s threat of violence against a school employee, even if it is made online, detracts from the educational environment because of the disruption that it engenders. Punishing student threats against school employees is constitutionally permissible in order to prevent that type of disruption.<sup>200</sup> Such a restriction fits squarely within the *R.A.V.* framework.<sup>201</sup>

Revising the legislative record and defining the statute’s intent-to-intimidate requirement to mean “true threats” would salvage the North Carolina teacher-cyberbullying statute while still protecting school employees and school systems from the most disruptive and culpable forms of online student speech—online student activities that are designed to intimidate school employees.

#### CONCLUSION

The North Carolina General Assembly has taken a proactive approach to preventing the emerging problems of teacher cyberbullying. Unfortunately, the current North Carolina teacher-cyberbullying statute creates a vague standard that risks chilling student speech. Restriction on student speech in this area is particularly problematic, given that students are the most likely to alert the public of teacher misconduct, with the Internet serving as their most likely forum.<sup>202</sup> This modern problem must be met and curbed with realistic, effective, constitutional solutions.

If lawmakers altered the statute to prohibit only “true threats,” as defined by the Supreme Court of the United States in *Black*, the public would be able to ascertain what the statute forbids, and students would be able to adjust their conduct accordingly.<sup>203</sup> This would quell vagueness concerns under the Due Process Clause.

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199. *Id.*

200. *See R.A.V.*, 505 U.S. at 388 (stating that true threats are unprotected to prevent “the disruption that fear engenders”).

201. *See id.*

202. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (observing that through the Internet, any person can become “a town crier with a voice that resonates farther than it could from any soapbox”).

203. *Virginia v. Black*, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”).

Freedom-of-speech concerns would also dissipate, as the First Amendment would not protect true threats of violence against school employees.<sup>204</sup> This revision would reign in the broad coverage of the statute and still protect school employees and school systems from the most serious and disruptive online student misconduct. Until changes are made, however, student speech in North Carolina will remain suppressed due to the absence of clear guidelines regarding what types of Internet activity will cross the line.

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204. *See R.A.V.*, 505 U.S. at 388 (“[T]hreats of violence are outside the First Amendment.”).

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