

December 5, 2016; Are Cyberbullying Laws Constitutional?

Like most parents of teenagers, I have mixed emotions about my 15 year-old son's constant companion – his smartphone. On one hand, the phone is a technological miracle that puts the world's knowledge at his fingertips and allows him to stay in close contact with friends and family, no matter where they may be. On the other hand, it can be a dangerous weapon used to steal, deceive, and harass other people.

One of my worst nightmares is that his smartphone misuse lands him in jail. Guam, like many of the states, has passed a law criminalizing cyberbullying. What he might consider a prank could be viewed as a crime by the police.

As a lawyer, I've wondered if cyberbullying laws are legal. After all, the 1st Amendment to the Constitution prohibits the passage of laws "abridging the freedom of speech." Internet posting is a form of speech. The U.S. Supreme Court hasn't yet ruled on the legality of cyberbullying/sexting laws. However, a June 2016 decision by the North Carolina Supreme Court gives us insight into possible legal attacks against such laws.

In 2009, North Carolina passed a statute that punished anyone who "post[s] or encourages others to post on the Internet private, personal, or sexual information pertaining to a minor . . . with the intent to intimidate or torment a minor." In 2013, Robert Bishop, a high school student was found guilty of violating the law when he posted compromising photos of, and negative comments about, another student. The conviction was appealed to the North Carolina Supreme Court.

The higher court overturned the guilty verdict. The Court acknowledged that "the line is not always bright between what is protected by the First Amendment and what is not." However, the justices found that North Carolina's cyberbullying/sexting law restricts speech and not merely the conduct of posting information online as argued by the state. The justices noted that "Posting information on the Internet . . . can constitute speech as surely . . . as distributing pamphlets to passersbys – [an]activit[y] long protected by the First Amendment."

The Court rejected the state's argument that the law was content-neutral rather than content-based. For example, a law that prohibits *all* protestors from coming within 200 feet of a presidential motorcade is content neutral and does not violate the Constitution. On the other hand, a law that prohibits *only* protestors holding pro-abortion signs to remain 200 feet from the motorcade would be content-based and open to a Constitutional challenge. Similarly, the North Carolina law is content-based because police would have to read the content of an internet posting to determine whether a crime was committed.

Under such circumstances, to save the law from a Constitutional attack, the State must show that the statute serves a "compelling governmental interest," and employs "the least restrictive means" to combat the perceived harm. The Court acknowledged that the protection of minors is a compelling governmental interest.

However, the Court held that the law's approach was not the least restrictive approach. For example, the law doesn't require a victim to suffer an actual injury, nor does it define the words "intimidate" or "torment." How would Bishop know if he violated the law? Such vagueness offends the 1st Amendment right to free speech and negates the law.

Next week, we'll see how well Guam's statute withstands Constitutional scrutiny.