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## The First Amendment Has Entered the Chat: Oklahoma's Cyberharassment Law

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# The First Amendment Has Entered the Chat: Oklahoma's Cyberharassment Law

## I. Introduction

*If he wants to be a female, make him a female.  
A good sharp knife will do the job really quick[.]*<sup>1</sup>

In August 2018, a Facebook post sent the small town of Achille, Oklahoma, into chaos.<sup>2</sup> As classes resumed in the small, rural town, a local mother took to Facebook, warning other parents that the school was allowing a twelve-year-old transgender girl named Maddie to use the girls' restroom.<sup>3</sup> The comments section of the post soon became riddled with demeaning language, calling the young girl derogatory names like "the transgender."<sup>4</sup> Soon thereafter the language turned threatening, and the digital crowd began to suggest that the young girl's genitalia should be mutilated, and that other youth should "whip" her until she stops coming back to school.<sup>5</sup> The vicious comments made the young girl "afraid to sleep alone at night," eventually leading the family to raise money to move away from the community.<sup>6</sup>

The story of Maddie's torment is the unfortunate product of a digital revolution. The world is rapidly advancing in digital technology, presenting users with new platforms for speech and markets for communication.<sup>7</sup> Lawmakers are racing to curtail the undesirable speech of an increasingly

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1. Brooke Sopelsa, *Oklahoma Schools Close After Adults Threaten Transgender Student*, NBC NEWS (Aug. 15, 2018, 8:44 AM CDT), <https://www.nbcnews.com/feature/nbc-out/oklahoma-schools-close-after-adults-threaten-transgender-student-n900881> (quoting Facebook comment).

2. *See id.*

3. *Id.*

4. Christina Caron, *Transgender Girl, 12, Is Violently Threatened After Facebook Post by Classmate's Parent*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/transgender-oklahoma-school-bullying.html>.

5. *Id.*

6. *Id.*; Eli Rosenberg, *Transgender Girl and Family Plan to Leave Oklahoma After She Was Threatened for Using Girls' Restroom*, WASH. POST (Aug. 20, 2018, 8:53 PM CDT), <https://www.washingtonpost.com/education/2018/08/21/transgender-girl-family-plan-leave-oklahoma-after-she-was-threatened-using-girls-restroom/>.

7. *See* Richard M. Martinez, *The Legal Landscape of Cyberharassment, Cyberstalking, and Cyber Bullying*, in BRIAN D. DERSHAW ET AL., THE IMPACT OF RECENT CYBERSTALKING AND CYBERHARASSMENT CASES (2014), 2014 WL 1600590.

digital world.<sup>8</sup> As modern interaction gravitates towards the internet, the laws surrounding digital communication are slow to catch up.<sup>9</sup> In many ways, the online community is a metaphorical wild west, forcing lawmakers to handle behavior seldom tolerated in person. Laws that once criminalized traditional harassment now carry the burden of reigning in unregulated cyberspeech.<sup>10</sup>

In a recent study, sixty-two percent of Americans said that online harassment was a “major problem.”<sup>11</sup> The same study found that “[a]round four-in-ten Americans” have fallen victim to some form of online harassment.<sup>12</sup> Despite a general consensus about the problematic nature of cyberharassment, “[Americans] are highly divided on how to balance concerns over safety with the desire to encourage free and open speech.”<sup>13</sup> In November 2019, Oklahoma enacted statutory protections against threatening online behavior with amendments to title 21, section 1172 of the Oklahoma Statutes. In doing so, Oklahoma joins many other states that have attempted to protect their citizens from threatening online communication.<sup>14</sup> However, these statutes, which are largely analogous to Oklahoma’s law, raise alarming First Amendment issues. As Oklahoma grapples with cyberharassment restrictions in their infancy, citizens must consider if this law survives the exacting standards of the First Amendment.

This Note will analyze Oklahoma’s threatening communications or “cyberharassment” statute in two contexts. First, this Note will discuss the relevant statutes and cases which precede Oklahoma’s updated law. Cyberharassment laws are ubiquitous in the United States and have enjoyed varying degrees of success in challenges to their constitutionality. Thus, a comparison of those laws and the cases stemming from their enactment is necessary. Second, this Note will evaluate the statutory language and mechanics of Oklahoma’s law from a constitutional perspective. Much of the debate surrounding these cyberharassment laws implicates the First Amendment, as lawmakers attempt to tiptoe around unconstitutionally

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8. *See generally id.*

9. *Id.* at \*1.

10. *See id.* at \*3–9.

11. Maeve Duggan, *Online Harassment 2017*, PEW RES. CTR. (July 11, 2017), <https://www.pewinternet.org/2017/07/11/online-harassment-2017/>.

12. *Id.*

13. *Id.*

14. *See, e.g.*, ALA. CODE § 13A-11-8 (2018); KAN. STAT. ANN. § 21-6206 (West 2018); MD. CODE ANN., CRIM. LAW § 3-805 (West 2018); NEB. REV. STAT. ANN. § 28-1310 (West 2019); W. VA. CODE ANN. § 61-3C-14a (West 2018).

limiting online speech. This Note argues that Oklahoma's law has both permissible and unconstitutionally overbroad language. Therefore, cases like that of twelve-year-old Maddie still need statutory authority that is both structurally clear and constitutional. This Note will conclude with a roadmap for Oklahoma's legislators to accomplish this goal.

## II. State and Federal Cyberharassment Laws

### A. First Amendment Jurisprudence: 10,000 Foot View

A brief overview of First Amendment jurisprudence is helpful to lay the foundation for the analysis of state and federal law. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>15</sup> The First Amendment and its protections apply to Oklahoma laws through the Fourteenth Amendment.<sup>16</sup> At the core of the First Amendment's promises lies the understanding that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>17</sup> However, the First Amendment is not without bounds; "[t]here is a point where First Amendment protections end and government regulation of speech or expressive conduct becomes permissible."<sup>18</sup> The Supreme Court has historically observed the following speech to be outside of the First Amendment's protections: "speech or expressive conduct designed to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent."<sup>19</sup> Although the media of speech and communication have rapidly advanced in recent years, First Amendment principles remain the same for communication online and through computer technology.<sup>20</sup>

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15. U.S. CONST. amend. I.

16. *See* State v. Washington-Davis, 881 N.W.2d 531, 538 (Minn. 2016) (explaining that the First Amendment applies to the states through the Fourteenth Amendment).

17. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)).

18. *In re Welfare of A. J. B.*, 929 N.W.2d 840, 846 (Minn. 2019).

19. *Id.* (internal quotation marks omitted) (quoting *United States v. Alvarez*, 567 U.S. 709, 717 (2012)).

20. *See* *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary'").

Finally, many states have passed “cyberbullying” laws for communication directed at minors.<sup>21</sup> However, this Note will focus instead on general cyberharassment laws which apply to all persons.<sup>22</sup>

*B. It Takes Two (Statutes) to Tango: West Virginia and Minnesota*

West Virginia is among the many states that specifically name “electronic” or “telecommunication” in their harassment statutes.<sup>23</sup> In February 2002, West Virginia passed a statute that criminalizes “[o]bscene, anonymous, harassing and threatening communications by computer.”<sup>24</sup> Under this statute, it is “unlawful for any person, with the intent to harass or abuse another person, to use a computer, mobile phone, personal digital assistant” or any other device for electronic communication to:

- (1) Make contact with another person without disclosing his or her identity with the intent to harass or abuse;
- (2) Make contact with a person after being requested by the person to desist from contacting them . . . ;
- (3) Threaten to commit a crime against any person or property; or
- (4) Cause obscene material to be delivered or transmitted to a specific person after being requested to desist from sending such material.<sup>25</sup>

In 2013, Matthew Calvert was arrested by law enforcement in West Virginia and subsequently indicted by a grand jury for “the misdemeanor offense of making harassing and threatening communications by computer.”<sup>26</sup> On a website called “Topix,” Calvert threatened the family of Clarksburg, West Virginia’s former chief of police, saying “I will have no problem answering your husband, your son, your friend, and any

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when a new and different medium for communication appears.” (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952))).

21. *See, e.g.*, *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016) (determining that the cyberbullying law “swe[pt] far beyond the State’s legitimate interest in protecting the psychological health of minors” and failed a strict scrutiny analysis).

22. Cyberharassment and cyberstalking are sometimes used interchangeably. However, cyberharassment is defined as “the use of electronic communication, such as the Internet or e-mail to stalk, which generally includes a pattern of threatening or menacing behaviors.” *Martinez, supra* note 7, at \*2.

23. *See* Brief for NACDL as Amicus Curiae in Support of Petitioner at 4–5, *Ogle v. Texas*, 140 S. Ct. 118 (2019) (No. 18-1182), 2019 WL 2267215, at \*4–5.

24. *See* W. VA. CODE ANN. § 61-3C-14a (West 2018).

25. *Id.* § 61-3C-14a (a)(1)–(4).

26. *State v. Calvert*, No. 15-0195, 2016 WL 3179968, at \*2 (W. Va. June 3, 2016).

Clarksburg police department officer with my Mossberg shotgun” and “you come to my house bitch, I will open your chest with my 12 gauge.”<sup>27</sup> Local detectives soon began monitoring the comment thread and questioned Calvert before eventually arresting him.<sup>28</sup> Calvert was convicted and subsequently appealed the lower court’s sentencing order, arguing that the statute violates the First Amendment.<sup>29</sup>

On appeal, Calvert’s First Amendment argument did not persuade the Supreme Court of Appeals of West Virginia. The court noted that “the right of free speech is not absolute at all times and under all circumstances” and “[t]hreats of violence do not fall within the parameters of constitutionally protected speech.”<sup>30</sup> The opinion pointed to Supreme Court precedent that acknowledged the government’s interest in “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”<sup>31</sup> The court then compared the West Virginia cyberharassment statute to the “nearly identical” West Virginia telecommunication statute.<sup>32</sup> This law,<sup>33</sup> which is similar to Oklahoma’s telecommunication statute, was upheld by the Fourth Circuit.<sup>34</sup>

The Supreme Court of Appeals of West Virginia also noted that “[p]rohibiting harassment is not prohibiting speech, because harassment is not a protected speech.”<sup>35</sup> Although harassment can manifest through speech, it is not communication. Therefore, because this statute is purely targeting actions taken to harass, it is directed at conduct—not protected speech.<sup>36</sup> Because this telecommunications statute targets conduct and not the *content* of the communication, “[i]t seeks to protect citizens from harassment in an even-handed and neutral fashion,” avoiding any concerns

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27. *Id.* at \*1.

28. *Id.* at \*2.

29. *See id.* at \*4–5.

30. *Id.* at \*4 (first quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); and then quoting *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992)).

31. *Id.* (quoting *R.A.V.*, 505 U.S. at 388).

32. *Id.* at \*5.

33. W. VA. CODE ANN. § 61–8–16(a)(4) (West 2020).

34. *Thorne v. Bailey*, 846 F.2d 241, 245 (4th Cir. 1988) (concluding that West Virginia’s telecommunications statute “is narrowly drawn to effect the legitimate interest of government in protecting its citizens from harassing conduct”).

35. *Id.* at 243 (quoting *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va. 1985)).

36. *Id.*

about free speech or overbreadth.<sup>37</sup> Thus, West Virginia's harassment statute remains in effect.

Like West Virginia's cyberharassment and telecommunications statutes, Minnesota utilizes multiple statutes to address cyberharassment. However, Minnesota's statutory scheme relies on both harassment and stalking laws.<sup>38</sup> Minnesota Statute section 609.795 is known as the "mail-harassment statute."<sup>39</sup> This statute originated as a mail privacy law in 1963, but the state legislature amended the statute in 2000 to include communications sent "electronic[ally]."<sup>40</sup> Subdivision 1(3) makes it a misdemeanor to "repeatedly mail[] or deliver[] or cause[] the delivery by any means, including electronically, of letters, telegrams, or packages" with the specific intent to "abuse, disturb, or cause distress."<sup>41</sup>

Minnesota's second important statute is known as the "stalking-by-mail provision."<sup>42</sup> The stalking statute went into effect in 1993 and was updated in 2000 to include electronic communications.<sup>43</sup> The stalking-by-mail provision makes it a misdemeanor to harass another by "repeatedly mail[ing] or deliver[ing] or caus[ing] the delivery by any means, including electronically, of letters, telegrams, messages, packages . . . or any communication made through any available technologies or other objects."<sup>44</sup> Unlike the mail-harassment statute, the stalking statute did *not* include a specific intent clause.<sup>45</sup>

The Minnesota Supreme Court focused on this "intent" distinction in *In re Welfare of A. J. B.*<sup>46</sup> In March 2016, A.J.B. created an anonymous Twitter account to target a fellow high school student, M.B.<sup>47</sup> In a period of two to three hours, A.J.B. posted forty tweets with "cruel and egregious insults" either relating to or directly mentioning M.B. on Twitter.<sup>48</sup> Some of the tweets preyed on M.B.'s autism, while others used homophobic

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37. *See id.* at 244.

38. *See In re Welfare of A. J. B.*, 929 N.W.2d 840, 844 (Minn. 2019).

39. *Id.*; MINN. STAT. ANN. § 609.795 (West 2020).

40. Act of Apr. 3, 2000, ch. 311, 2000 Minn. Laws 185, 185.

41. MINN. STAT. ANN. § 609.795 (West 2020).

42. *A. J. B.*, 929 N.W. 2d at 844; MINN. STAT. ANN. § 609.749(2)(6) (West 2018), *invalidated by A. J. B.*, 929 N.W.2d 840.

43. 2000 Minn. Laws at 185.

44. MINN. STAT. ANN. § 609.749 (West 2018), *invalidated by A. J. B.*, 929 N.W.2d 840.

45. *Id.*

46. *See A. J. B.*, 929 N.W. 2d at 844.

47. *Id.* at 844–45.

48. *Id.*

language.<sup>49</sup> A collection of the tweets also urged M.B. to kill himself by either drinking bleach or wearing “a cologne called ‘[a]nthrax.’”<sup>50</sup> Upon seeing the forty abusive tweets, M.B. contemplated suicide.<sup>51</sup> Minnesota charged A.J.B. with “one count of gross-misdemeanor stalking by use of the mail . . . and one count of misdemeanor harassment by use of the mail . . . .”<sup>52</sup> Additionally, the state attached a charge for felony stalking due to the “offender’s bias toward the victim’s disability.”<sup>53</sup> A.J.B. argued that “the statutes were facially unconstitutionally overbroad in violation of the First Amendment and as applied to him”; this argument, however, was rejected by the trial and appellate courts.<sup>54</sup>

The Minnesota Supreme Court concluded that (1) the stalking-by-mail provision “is facially overbroad and not subject to either a narrowing construction or severance of unconstitutional provisions” and (2) the mail-harassment statute “is facially overbroad, but that the statute can be saved through severance of the constitutionally problematic language.”<sup>55</sup> For the stalking-by-mail provision, the court determined that the phrase “letters, telegrams, messages, packages . . . or any communication made through any available technologies or other objects” ignores the protections of the First Amendment and “covers every type of communication without limitation.”<sup>56</sup> There is no intent requirement to separate this conduct from protected speech.<sup>57</sup> For the mail-harassment statute, the court severed the phrases “disturb” and “causes distress” for their overbreadth but retained the phrase “abuse” for its narrower and more specific requirement.<sup>58</sup> Thus, the court reversed A.J.B.’s charge under the unconstitutional stalking-by-mail provision and remanded the case for reconsideration under the narrowed mail-harassment statute.<sup>59</sup> This result allowed for a statutory

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49. *Id.* at 845.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 844.

56. *Id.* at 849 (quoting MINN. STAT. ANN. § 609.749(2)(6) (West 2018)).

57. *See id.*

58. *Id.* at 863 (explaining that “abuse” is universally understood to be criminal conduct, while “disturb” and “causes distress” can be reactions to non-criminal content, which is protected speech).

59. *Id.* at 864.

answer that has both a clear intent requirement and constitutional protections for the freedoms of state citizens.

*C. The Feds and Their Two Cents (Statutes)*

The federal government has also struggled to protect constitutional freedom while addressing cyberharassment. The two primary federal statutes used to address cyberharassment are 18 U.S.C. § 2261A (stalking) and 47 U.S.C. § 223 (harassing telecommunications). In the 1990s, stalking crimes “gr[ew] tremendously, plaguing law enforcement officials at all levels.”<sup>60</sup> The federal stalking statute (§ 2261A) went into effect in September 1996.<sup>61</sup> According to the House Judiciary Committee, the federal stalking statute “establish[ed] a new federal crime for crossing a State line, or otherwise entering a federal jurisdiction for the purpose of injuring or harassing another person,” specifically when this action “places the person in reasonable fear of bodily harm.”<sup>62</sup> Congress amended this statute three times to arrive at the current version in 2018.<sup>63</sup> Presently, the statute criminalizes use of “any interactive computer service or electronic communication service or electronic communication system of interstate commerce” with the intent to “kill, injure, harass, [or] intimidate,” to place a person in “reasonable fear of the death of or serious bodily injury” or cause “substantial emotional distress” to that person.<sup>64</sup>

In *United States v. Sayer*, the First Circuit considered the constitutionality of the federal stalking statute amid truly terrifying facts.<sup>65</sup> Shawn Sayer and Jane Doe dated from 2004 to 2006, when Jane Doe ended their relationship.<sup>66</sup> Although Jane Doe terminated the relationship, Sayer proceeded to stalk and harass Jane Doe “for over four years.”<sup>67</sup> After Jane Doe filed a protective order against Sayer, he began to use the internet to invite anonymous, “dangerous-looking” men to Jane Doe’s house for “sexual entertainment.”<sup>68</sup> On Craigslist, Sayer posted an ad in the “casual encounters section” which featured private photos of Jane Doe in lingerie,

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60. H.R. REP. NO. 104-557, at 2 (1996).

61. *Id.* at 1; 18 U.S.C. § 2261A (2018).

62. H.R. REP. NO. 104-557, at 2.

63. 18 U.S.C. § 2261A.

64. *Id.* § 2261A(2)(A)–(B).

65. *United States v. Sayer*, 748 F.3d 425, 427 (1st Cir. 2014).

66. *Id.* at 428.

67. *Id.*

68. *Id.* (internal quotation marks omitted).

directions to her home, and a detailed “list of sexual acts she was supposedly willing to perform.”<sup>69</sup>

The “unwanted visits from men seeking sex” continued for eight more months until Jane Doe packed up her life, changed her name, and moved from Maine to Louisiana.<sup>70</sup> Jane Doe started a new job and finally felt safe until two months later, “when an unknown man showed up at her home in Louisiana and addressed her by her new name.”<sup>71</sup> Jane Doe ultimately decided to move back to Maine and did not stop receiving visits from these unwanted men until Sayer’s arrest in July 2010.<sup>72</sup>

A grand jury indicted Sayer in 2011 with one count of cyberstalking and one count of identity theft.<sup>73</sup> Sayer pled guilty to cyberstalking, conditional to a plea agreement that he be able to appeal.<sup>74</sup> On appeal, Sayer argued that the stalking statute is unconstitutionally overbroad, vague, and, “because his course of conduct involved speech, or online communications, it cannot be proscribed in accord with the First Amendment.”<sup>75</sup> The court rejected all these claims, pointing out that Sayer’s overbreadth argument takes the statute’s words “wholly out of context.”<sup>76</sup> The court also noted that Sayer’s online communications are speech “integral to criminal conduct” which is recognized as part of a “long-established category of unprotected speech.”<sup>77</sup> Lastly, and perhaps most importantly, the court affirmed the constitutionality of the statute. For the court,

[t]he interstate stalking statute, which prohibits a course of conduct done with “intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress” clearly targets conduct performed with serious criminal intent, not just speech that happens to cause annoyance or insult.<sup>78</sup>

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69. *Id.* (internal quotation marks omitted).

70. *Id.*

71. *Id.*

72. *Id.* at 429.

73. *Id.*

74. *Id.* at 427.

75. *Id.* at 433–36.

76. *Id.* at 435–36.

77. *Id.* at 433–34 (internal quotation marks omitted) (quoting *United States v. Stevens*, 559 U.S. 460, 471 (2010)).

78. *Id.* at 435.

Thus, the court affirmed Sayer's sentence and left the federal stalking statute intact.

The second primary federal statute addressing cyberharassment regulates "obscene or harassing telephone calls."<sup>79</sup> This statute originated with the Communications Act of 1934, which "combined and organized federal regulation of telephone, telegraph, and radio communications."<sup>80</sup> The Telecommunications Act of 1996 completely overhauled the 1934 Act by introducing language prohibiting certain types of "interstate or foreign communication by means of tele[phone]."<sup>81</sup> Although earlier versions of the statute prohibited "indecent" transmissions, Congress subsequently removed this language on constitutional grounds.<sup>82</sup> After several amendments, the current version prohibits the transmission of "any comment, request, suggestion, proposal, image, or other communication [via a telecommunications device] which is obscene or child pornography, with intent to abuse, threaten, or harass another person."<sup>83</sup>

In *United States v. Popa*, the District of Columbia Circuit found that elements of this harassing telecommunications statute (47 U.S.C. § 223) were unconstitutional as applied to a defendant engaging in political speech.<sup>84</sup> Ion Cornel Popa, the defendant, came to the United States as a "political refugee from Romania" in 1986.<sup>85</sup> In 1997, Popa made multiple anonymous phone calls to the office of then-U.S. Attorney for the District of Columbia Eric Holder.<sup>86</sup> In recordings of the calls, Popa referred to Holder as a "whore, born by a negro whore" and as "a criminal, a negro."<sup>87</sup> The jury found Popa guilty under 47 U.S.C. § 223(a)(1)(C), which criminalizes "mak[ing] a telephone call or utiliz[ing] a telecommunications device, whether or not conversation or communication ensues, without

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79. 47 U.S.C. § 223 (2018).

80. *The Communications Act of 1934*, 47 U.S.C. § 151 *et. seq.*, U.S. DEP'T OF JUSTICE (Nov. 27, 2013), <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1288#:~:text=The%20Communications%20Act%20of%201934%20combined%20and%20organized%20federal%20regulation,oversee%20and%20regulate%20these%20industries>.

81. *Id.*; 47 U.S.C. § 223.

82. *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650; *see also* *Reno v. ACLU*, 521 U.S. 844, 883 (1997).

83. 47 U.S.C. § 223.

84. 187 F.3d 672, 679 (D.C. Cir. 1999).

85. *Id.* at 673.

86. *Id.*

87. *Id.* (internal quotation marks omitted).

disclosing [one's] identity and *with intent* to annoy, abuse, threaten, or harass any specific person at the called number or who receives the communications.”<sup>88</sup>

On appeal, Popa challenged the constitutionality of the harassing telecommunications statute “based upon the expressive content of his speech, that is to say, that there was no conduct, separate from his communication, that would have caused his conviction.”<sup>89</sup> The court accepted the government’s argument that intermediate scrutiny should be applied because the statute would “not survive even [a] less searching inquiry.”<sup>90</sup> For the D.C. Circuit Court, “the statute could have been drawn more narrowly, without any loss of utility to the Government, by excluding from its scope those who intend to engage in public or political discourse.”<sup>91</sup> The statute was constitutionally deficient because “no protection whatsoever is given to the political speech of one who intends both to communicate his political message and to annoy his auditor.”<sup>92</sup> Thus, the court held that the statute violated the First Amendment as applied, though the text remained through various challenges to other sections of the statute.<sup>93</sup>

The survival of this harassing telecommunications statute, along with the stalking statute in *Sayer*, gives the federal government a strong toolkit to combat cyberharassment. The federal courts herein made clear that serious criminal intent is not a protected category of speech.<sup>94</sup> However, *Popa* found that public and political discourse, being necessary to a free society, *was* a category of protected speech and should be carved out in harassment statutes.<sup>95</sup> At the state level, West Virginia and Minnesota have successfully protected the citizenry and kept constitutionally tested cyberharassment laws in place.<sup>96</sup> The West Virginia Supreme Court upheld harassment

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88. *Id.* at 674 (emphasis added).

89. *Id.* at 675 (internal quotation marks omitted).

90. *Id.* at 676.

91. *Id.* at 677.

92. *Id.* at 678.

93. *Id.* at 679; *see, e.g., Reno v. ACLU*, 521 U.S. 844, 883 (1997) (severing only “or indecent” from section 223(a)); 16 C.J.S. *Const. Law* § 243 (2020) (“If an as-applied challenge to the constitutionality of a statute is successful, the statute may not be applied to the challenger but is otherwise enforceable.”).

94. *See, e.g., United States v. Sayer*, 748 F.3d 425, 433–34 (1st Cir. 2014).

95. *Popa*, 187 F.3d at 677.

96. *In re Welfare of A. J. B.*, 929 N.W.2d 840, 863 (Minn. 2019); *State v. Calvert*, No. 15-0195, 2016 WL 3179968, at \*5 (W. Va. June 3, 2016).

statutes because harassment is not protected speech.<sup>97</sup> The Minnesota Supreme Court went a step further and emphasized that these harassment statutes need a specific intent requirement to avoid First Amendment encroachments.<sup>98</sup> The caselaw on these federal and state statutes signals a warning siren, alerting Oklahoma's legislators to the former errors in cyberharassment statute drafting.

### III. Analysis

#### A. Oklahoma Logs On

Like West Virginia, Oklahoma's cyberharassment law originated from a standard telecommunications statute.<sup>99</sup> In 2017, the Oklahoma Court of Criminal Appeals described the law as "designed to criminalize the use of electronic communications to harass, intimidate, threaten, terrify, or make remarks which are 'obscene, lewd, lascivious, filthy, or indecent.'"<sup>100</sup> On May 30, 2019, Oklahoma added language that brings communications "including text, sound or images posted to a social media or other public media source"<sup>101</sup> into the purview of its harassment statute.<sup>102</sup> This new cyberharassment language makes it unlawful to make obscene, threatening, or harassing telecommunications.<sup>103</sup>

Oklahoma's cyberharassment statute has five subsections (A, B, C, D, and E), with subsection (A) listing the six ways in which a person can unlawfully use telecommunication devices.<sup>104</sup> Subsection (A)(1) makes it unlawful to make "any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent."<sup>105</sup> Similar to the federal statute in *Popa*,<sup>106</sup> subsection (A)(2) of Oklahoma's new communication harassment law prohibits making communications "with intent to terrify,

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97. *Calvert*, 2016 WL 3179968, at \*4.

98. *See A. J. B.*, 929 N.W.2d at 860–61 ("Under certain circumstances, a specific-intent requirement may sufficiently limit the reach of a statute into protected speech and expressive conduct to avoid overbreadth." (citing *State v. Muccio*, 890 N.W.2d 914, 978 (Minn. 2017))).

99. *See* 21 OKLA. STAT. § 1172 (Supp. 2020).

100. *Rousch v. State*, 2017 OK CR 7, ¶ 5, 394 P.3d 1281, 1283.

101. Act of May 13, 2019, ch. 357, 2019 Okla. Sess. Laws 1416, 1417.

102. *Id.* at 1416.

103. *Id.* at 1416–17.

104. *See* 21 OKLA. STAT. § 1172(A)–(E).

105. *Id.* § 1172(A)(1).

106. 47 U.S.C. § 223 (2018).

intimidate or harass, or threaten to inflict injury or physical harm to any person or property of that person.”<sup>107</sup> Subsection (A)(3) prohibits making “a telecommunication or other electronic communication, whether or not conversation ensues, with intent to put the party called in fear of physical harm or death.”<sup>108</sup> Finally, although subsection (A)(6) addresses repeated calls or communications, this subsection only pertains to crimes in concert with others and does not include language such as “disturb” or “cause[s] distress” like Minnesota’s harassment law.<sup>109</sup>

Notably, subsection (A)(1) is the only portion of the statute that does not assign some type of specific criminal intent.<sup>110</sup> The remaining subsections of the statute target conduct of harassment, abuse, or inflicting the fear of death or serious injury.<sup>111</sup> Persons convicted once of harassment under this statute are guilty of a misdemeanor, while persons convicted of their second offense are guilty of a felony.<sup>112</sup> Lastly, Oklahoma’s harassment statute makes clear that the applicable communications may include “text, sound or images posted to a social media or other public media source.”<sup>113</sup>

#### *B. Specific Criminal Intent, but More Than Annoyance*

Oklahoma’s legislature can prohibit harassment committed with criminal intent.<sup>114</sup> The First Amendment does not block legislators from prohibiting harassment simply because “the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed,” or even posted on the internet.<sup>115</sup> A statute that prohibits harassment is not limiting speech because harassment is not protected by the First Amendment.<sup>116</sup> As the Fourth Circuit explained, “[h]arassment is not

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107. 21 OKLA. STAT. § 1172(A)(2).

108. *Id.* § 1172(A)(3).

109. Compare *id.* § 1172(A)(6), with MINN. STAT. ANN. § 609.795(3) (West 2020).

110. See 21 OKLA. STAT. § 1172(A)(1). Subsection (A)(5) prohibits “[k]nowingly permit[ing] any telecommunication or other electronic communication under the control of the person to be used for any purpose prohibited by this section.” *Id.* § 1172(A)(5).

111. *Id.* § 1172(A)(2)–(6).

112. *Id.* § 1172(D)–(E).

113. *Id.* § 1172(B)(3).

114. See *supra* notes 94–98 and accompanying text.

115. *United States v. Sayer*, 748 F.3d 425, 433–34 (1st Cir. 2014) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

116. *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988) (quoting *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va. 1985)).

communication, although it may take the form of speech.”<sup>117</sup> Harassment, abuse, and threats intended to cause fear of physical harm or death are criminal conduct.<sup>118</sup> This speech-integral-to-criminal-conduct category has long been exempted from general free speech protections.<sup>119</sup> Therefore, when statutes prevent these types of harassment, “any expressive aspects of speech are not protected under the First Amendment when the speech, as an integral part of criminal conduct, serves solely to implement the . . . [criminal’s] purpose in intentionally harassing the victim.”<sup>120</sup>

The subsections of Oklahoma’s cyberharassment statute that appropriately target criminal conduct (with criminal intent) do not abridge the First Amendment because they do not limit protected speech. As discussed above, the requirement of criminal intent is helpful, if not critical, to establish that the statute complies with the First Amendment.<sup>121</sup> Four of the six subsections require some type of criminal intent.<sup>122</sup> For example, subsection (A)(2) prohibits making an “electronic communication . . . with intent to terrify, intimidate or harass, or threaten to inflict injury or physical harm to any person or property of that person.”<sup>123</sup> Other subsections prohibit conduct with the “intent to put the party in fear of physical harm or death” or “annoy, abuse, threaten, or harass.”<sup>124</sup> Not only do these subsections match the language of similar statutes,<sup>125</sup> but courts around the country have upheld similar statutory language.<sup>126</sup> It must be noted that the necessary intent to abuse, annoy, or harass found in *Popa* was only questioned as applied to *Popa*’s engagement in political discourse.<sup>127</sup>

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117. *Id.*

118. *See* *Buchanan v. Crisler*, 922 N.W.2d 886, 899 (Mich. Ct. App. 2018).

119. *See, e.g., Giboney*, 336 U.S. at 498 (“It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a criminal statute. We reject the contention now.”).

120. *Buchanan*, 922 N.W.2d at 898.

121. *See In re Welfare of A. J. B.*, 929 N.W.2d 840, 854–55 (Minn. 2019); *Dugan v. State*, 451 P.3d 731, 737–38 (Wyo. 2019).

122. 21 OKLA. STAT. § 1172(A)(2)–(A)(4), (A)(6) (Supp. 2020).

123. *Id.* § 1172(A)(2).

124. *Id.* § 1172(A)(3)–(A)(4).

125. *See* ALA. CODE § 13A-11-8 (2018); W. VA. CODE ANN. § 61-3C-14a (West 2020).

126. *See Dugan*, 451 P.3d at 737–38.

127. *United States v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999). The challenge here could have been avoided if the statute had language “excluding from its scope those who intend to engage in public or political discourse.” *Id.* Oklahoma should add this language to its cyberharassment statute to avoid similar as-applied challenges.

Several U.S. courts, however, have criticized the constitutionality of the specific intent to “annoy.”<sup>128</sup> The word “annoy” appears only once in this statute, and as the Supreme Court has held: “[t]he state may not abridge one’s First Amendment freedoms merely to avoid annoyances.”<sup>129</sup> The Court has also stated that “[s]peech is often provocative and challenging . . . [But it] is nevertheless protected . . . unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”<sup>130</sup>

In Oklahoma’s primary harassment statute, courts have looked for more than just “annoyance”; there must be “objective facts that would support the court’s determination that [the victim] actually feared death, bodily injury or experienced emotional distress.”<sup>131</sup> Oklahoma legislators should seek to amend subsection (A)(4), which includes the word “annoy” in its intent clause, to avoid any facial criticism. While Oklahoma’s legislators are free to leave the statute intact and simply wait for a challenge, cutting out this language now can avoid unnecessary litigation down the road.

### C. Overbreadth Concerns

Since specific criminal intent is pivotal to avoid limiting protected speech, subsection (A)(1) of Oklahoma’s cyberharassment statute risks unfavorable judicial scrutiny. This subsection makes it unlawful for a person to use a “telecommunication or other electronic communication device” to willfully “[m]ake[] any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent.”<sup>132</sup> This language matches the 1994 text of the federal “[o]bscene or harassing telephone calls” statute verbatim.<sup>133</sup> Congress added specific intent to that section in 1996.<sup>134</sup> In 1997, the Supreme Court found that “indecent” was unconstitutionally overbroad and severed this word from the statute.<sup>135</sup>

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128. *Coates v. City of Cincinnati*, 402 U.S. 611, 614–15 (1971); *In re Welfare of A. J. B.*, 929 N.W.2d 840, 862 (Minn. 2019).

129. *Gov’t of V.I. v. Vanderpool*, 767 F.3d 157, 168 (3d Cir. 2014) (citing *Coates*, 402 U.S. at 615).

130. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (internal quotation marks omitted) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

131. *Holeman v. White*, 2012 OK CIV APP 107, ¶¶ 14–15, 292 P.3d 65, 68.

132. 21 OKLA. STAT. § 1172(A)(1) (Supp. 2020).

133. Compare 47 U.S.C. § 223(1)(A) (1994), with 21 OKLA. STAT. § 1172(A)(1).

134. See 47 U.S.C. § 223(1)(A)(ii) (Supp. II 1996).

135. *Reno v. ACLU*, 521 U.S. 844, 883 (1997).

Finally, in 2003, Congress replaced “lewd, lascivious, filthy or indecent” with “child pornography.”<sup>136</sup>

The Supreme Court has “categorically settled . . . that obscene material is unprotected by the First Amendment.”<sup>137</sup> However, the Court has admonished that “where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”<sup>138</sup> As the Supreme Court stated, language that is merely “indecent” can be protected speech.<sup>139</sup> For the Court recognized that indecent speech may have “significant social or artistic value.”<sup>140</sup>

Oklahoma’s statute correctly attempts to limit obscene communication; however, the statute sweeps far beyond obscene speech. Subsection (A)(1) has no intent requirement and targets an almost unlimited category of communication. As one state supreme court noted, “Properly crafted harassment or stalking statutes do not punish the simple act of communicating statements.”<sup>141</sup> Therefore, it seems unlikely that subsection (A)(1), which includes “any comment, request, suggestion, or proposal” that might be considered “indecent,” would survive a constitutional challenge.<sup>142</sup> This wide reach ignores any permissible purpose for communication found to be merely indecent or offensive.<sup>143</sup> Moreover, if Oklahoma adds an intent requirement, the legislature should also consider severing the same language which Congress eliminated (“lewd, lascivious, filthy, or indecent”) and replacing it with “child pornography.”<sup>144</sup> This structure allows the statute to retain prohibitions on two types of speech which are constitutionally permissible: obscenity and child pornography.<sup>145</sup>

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136. Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 603, 117 Stat. 650, 687.

137. *Miller v. California*, 413 U.S. 15, 23 (1973).

138. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977).

139. *See Reno*, 521 U.S. at 877–78.

140. *Id.* at 882 n.47.

141. *Dugan v. State*, 451 P.3d 731, 737 (Wyo. 2019).

142. 21 OKLA. STAT. § 1172(A)(1) (Supp. 2020).

143. “Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material ‘indecent’ or ‘patently offensive,’ if the college town’s community thought otherwise.” *Reno*, 521 U.S. at 878.

144. *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 603, 117 Stat. 650, 687.

145. *In re Welfare of A. J. B.*, 929 N.W.2d 840, 846 (Minn. 2019) (quoting *United States v. Alvarez*, 567 U.S. 709, 717 (2012)).

Obscene matter and child pornography are never protected; however, indecent matter can have constitutionally permissible purposes made without criminal intent.<sup>146</sup>

#### *D. Simple Solutions for Simple Errors*

This Note has identified three key constitutional solutions for Oklahoma's cyberharassment statute: First, legislators should assign a specific criminal intent for every subsection. Second, legislators should eliminate any use of the intent to "annoy." Lastly, legislators should remove the phrase "or indecent" and its accompanying descriptors and replace this language with "child pornography." The court in *State v. Calvert* properly upheld the West Virginia Statute<sup>147</sup> which complies with each of the requirements this Note has identified. This statute gives intent to each subsection at the outset and does not include any of the problematic language mentioned above.<sup>148</sup>

Further, West Virginia's statute complies with the drafting requirements set out in another state's supreme court.<sup>149</sup> For that court, a proper harassment statute must include that "the defendant act with specific criminal intent . . . and political speech is expressly excluded from the statute's reach."<sup>150</sup> While not as pressing as the three issues mentioned above, Oklahoma can also consider making an exception for political speech—just as the D.C. Circuit suggested in *Popa*.<sup>151</sup> The amendments proposed herein provide a roadmap for Oklahoma legislators to continue shielding the citizenry from cyberharassment while also avoiding unconstitutional limits on free speech.

#### *IV. Conclusion*

After a comparative analysis, there are subsections of Oklahoma's cyberharassment law that are more constitutionally sound than others. While Oklahoma's lawmakers are free to await the storm, the solutions are too simple to jeopardize the protection of cyberharassment victims. Subsection (A)(1) of Oklahoma's statute is unconstitutionally overbroad because it lacks a specific intent requirement and restricts both protected

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146. *See Reno*, 521 U.S. at 883.

147. *State v. Calvert*, No. 15-0195, 2016 WL 3179968, at \*5 (W. Va. June 3, 2016).

148. *See W. VA. CODE ANN.* § 61-3C-14a(a) (West 2020).

149. *Dugan v. State*, 451 P.3d 731, 737 (Wyo. 2019).

150. *Id.*

151. *United States v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999).

and unprotected speech. This overbreadth leaves room for the state to suppress offensive-but-protected speech. The remaining subsections of this statute comply with the First Amendment and target purely criminal conduct.<sup>152</sup> However, the legislature ought to consider severing the word “annoy” and carving out specific protections for political speech.

This Note opened with the story of Maddie, a young transgender girl from rural Oklahoma.<sup>153</sup> The malicious language her community used online intended to do her harm—they wanted her to feel the fear of physical harm or death. This intentionally harassing language is probably not unfamiliar to girls like Maddie, but it is certainly criminal. The survival of Oklahoma’s cyberharassment statute is imperative to the safety of all individuals subject to online abuse. The statute’s language is a legal quilt of the many cyberharassment and telecommunication laws across the country. A unique collection of statutory language brings the inherent history behind each phrase (some of which have already been verified or deemed unconstitutional). The legislature should work quickly to remedy structural errors to allow Oklahoma to keep proper statutory protections for cyberharassment. Whether it be a young transgender girl from rural Oklahoma or a single woman seeking a new beginning, there are endless examples of citizens who need the protections of these statutes in a digital world.

*Trae Havens*

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152. *See supra* note 111 and accompanying text.

153. *Supra* note 3 and accompanying text.