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> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.[1]

I. Introduction

The United States is an international outlier when it comes to incarceration. At 716 incarcerated per 100,000 people,[2] the United States has the highest incarceration rate in the world.[3] In 2013, U.S. Attorney General Eric Holder announced:

> We need to ensure that incarceration is used to punish, deter and rehabilitate—not merely to convict, warehouse and forget. Although incarceration has a role to play in our justice system, widespread incarceration at the federal, state and local levels is both ineffective and unsustainable . . . It imposes a significant economic burden—totaling $80 billion in 2010 alone—and it comes with human and moral costs that are impossible to calculate.[4]

Studies show that crime is in fact on the decline in America, yet policymakers at both the federal and state levels continue to create a stricter justice

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1. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) (Kennedy, J.).

2. Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population than the U.S.*, Huffington Post (Aug. 14, 2013 4:44 PM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html#es_share_ended.

3. *Highest to Lowest—Prison Population Total*, Int'l Centre Prison Stud., http://www.prisonstudies.org/highest-to-lowest/prisonpopulationtotal?field_region_taxonomy_tid=all (last visited Feb. 15. 2015).

4. Wing, *supra* note 2.

system.[5] Criminalizing cyberspace and other avenues of free speech is just one example of how both state and federal lawmakers are increasing these shocking incarceration statistics.[6] The creation of crime by prosecuting individuals in an area of American society that is controlled by (and should be left to) civil courtrooms is illogical in the scheme of our national legal system. This article highlights the First Amendment, the nature of the internet, case precedent relating to speech, and specifically, why regulating irreverent speech on the internet should be left to civil courts rather than legislatures that criminalize antisocial comments.

II. The First Amendment

Freedom of speech is a highly vaunted right in our society. Protected by the First Amendment, free speech is a foundational attribute of our uniquely American form of governance.[7] This right was intended to create an open society in which all citizens could fearlessly participate in the conversation about our national character and how it might be legislated.[8] It was a bold idea, even though women, Native Americans, African American slaves, and the poor were not originally envisioned as part of that conversation.[9]

It has been a rather bumpy road from the crafting of the Constitution to our present-day national conversation. Thanks to multiple forms of media available to Americans, more people exercise their right to speak freely amongst various forums than ever before. Much of what is said is not part of a dialogue, but rather consists of personal thoughts and opinions. Our valuable permission to speak freely has deteriorated into "having our say" or even "telling them off." But, is that not also what the framers intended to protect?

The First Amendment's simple command that, "Congress shall make no law . . . abridging the freedom of speech, or of the press"[10] has become a subject of great debate when it comes to electronic media and cyber-speech.[11] The nature of cyberspace as a forum for speech has created many arguments and varying laws to restrict, or limit restriction, of what citizens can or can-

5. *See id.*

6. *See id.*

7. *See* U.S. Const. amend. I.

8. *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. Rev. 1153, 1163 (2012).

9. *See The Bill of Rights: A Brief History*, Am. Civ. Liberties Union (Mar. 4, 2002), https://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/bill-rights-brief-history.

10. U.S. Const. amend. I.

11. Robert Corn-Revere, *Internet & First Amendment Overview*, First Amendment Center (Nov. 20, 2002, 12:00 AM), http://www.firstamendmentcenter.org/internet-first-amendment-overview/print/.

not express in this forum. The internet has been labeled by one federal judge as the "most participatory form of mass speech yet developed."[12]

A. History and Text of the First Amendment

The full text of the First Amendment to the U.S. Constitution states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances."[13] The First Amendment was ratified in 1791 when a political party known as the English Radical Whigs transformed what they believed to be Christian liberties into natural rights and political demands.[14] Since 1791, there has been ongoing debate about what the Framers of the First Amendment intended for the future of speech and the press, especially in the search for a technical legal definition of speech.[15] However, the Framers' commitment to freedom of conscience translated into support for freedom of speech and of the press. Perhaps most significantly, they recognized the category of speech would be molded over time by advancements in science and technology by citing broad categories to protect citizens from government intervention and intrusion relating to social and political ideas.[16] With this background in mind, it was and is clear that First Amendment protections will change as speech forums evolve and are created in the future.

B. The Internet

Technology has created new issues and challenges for freedom of speech, but the Constitution still applies when it comes to regulating the internet. In 1958, the U.S. military formed the Advanced Research Projects Agency (ARPA)[17] to pioneer advancements in science and technology in order to compete with the Soviet launch of Sputnik.[18] The result of this forma-

12. David L. Hudson, Jr., *Cyberspeech*, First Amendment Center (Apr. 9, 2002), http://www.firstamendmentcenter.org/cyberspeech.

13. U.S. Const. amend. I.

14. *See* David M. Rabban, *The Original Meaning of the Free Speech Clause of the First Amendment*, *in* The United States Constitution: The First 200 Years 36, 37 (R.C. Simmons ed., 1989).

15. *Id.*

16. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see also* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969).

17. *See First 50 Years*, DARPA, http://www.darpa.mil/About/History/First_50_Years.aspx (last visited Feb. 15, 2015).

18. Keenan Mayo & Peter Newcomb, *How the Web Was Won: An Oral History of the Internet*, Vanity Fair (July 2008), http://www.vanityfair.com/culture/features/2008/07/internet200807.

tion was a security communication system to be used in times of emergency when telephone systems may be damaged, making emergent communication impossible.[19] Since that time, the internet has become an avenue of change in the way humans interact, learn, work, organize their daily lives, and expand their business ventures.

III. The Unique Nature of Cyberspace

A quarter century ago, legal precedent in the United States reflected a firm constitutional right of free expression. One of the first Supreme Court decisions dealing with the internet as a forum for free speech, *Reno v. ACLU*, held that the internet was a forum similar to newspaper publishing, worthy of broad First Amendment protection.[20] Those internet freedoms have also been extended to social media platforms.

A. Cyberbullying

Cyberbullying is the use of the internet to deliberately bully, harass, or intimidate someone.[21] Many states have passed laws to criminalize online bullying, however legislating cyberbullying is very difficult because of the nature of the speech being scrutinized.[22] The nature of cyberbullying is that the words are online and are usually insulting someone's appearance, intelligence, friends, or sexual preferences.[23] Cyberbullying is often done anonymously, or the person who intended to make the statement cannot be identified with certainty.[24] It is very easy to create an identity online in a social forum; therefore, it is difficult to establish exactly who intended the statement to be threatening.[25]

The First Amendment protects freedom of speech, such as a racist tweet, from government intrusion.[26] The First Amendment protects *opinions* even to

19. *Id.*

20. Reno v. ACLU, 521 U.S. 844 (1997).

21. *See What Is Cyberbullying*, StopBullying.com, http://www.stopbullying.gov/cyberbullying/what-is-it/ (last visited Feb. 15, 2015) [hereinafter *Cyberbullying*].

22. Video: Bad Behavior Online: Bullying, Trolling & Free Speech (Off Book PBS Digital Studios 2012), *available at* https://www.youtube.com/watch?v=RVSAFhTjAdc.

23. *See Cyberbulling*, *supra* note 21.

24. *Id.*

25. *See* Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 Seton Hall Legis. J. 651, 653 (2009).

26. *See* Roasio v. Clark Cnty. Sch. Dist., No. 2:13-CV-362 JCM PAL, 2013 WL 3679375, at *4 (D. Nev. July 3, 2013).

the extent that some individuals may view them as mean or socially unpopular.[27]

Some people believe that laws should be written to establish a limit to online speech. For example, in 2012 a New York senator proposed an anti-cyberbullying bill that would have essentially banned all anonymous online speech.[28]The bill would have required website administrators to remove any anonymous comment upon request, unless the poster agreed to reveal his name and his home address.[29] This legislation undermined the constitutional right to speak anonymously on issues of public interest, a right affirmed by the United States Supreme Court multiple times.[30]

In its newest speech code report, the Foundation for Individual Rights in Education cites that "nearly 60 [percent] of the 427 colleges and universities analyzed maintain policies that seriously infringe upon the free speech rights of students."[31] Several public universities have formed "speech codes" that ban constitutionally protected speech.[32] For example, in 2014 one state university adopted an anti-cyberbullying rule defining cyberbullying as "harsh text messages or emails."[33] Under such a broad rule, simply texting a roommate with an angry tone about not doing their part of the roommate duties could be skewed to cause a student to face disciplinary consequences for expressing a very common human emotion under such a policy. When codes such as these are challenged in court, they are very often struck down by judges as being overly broad or having the effect of unnecessarily chilling

27. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).

28. Video: Fakhoury: NY Cyberbullying Law Could Violate Freedom of Speech (Bloomberg Law 2011), *available at* https://www.youtube.com/watch?v=BZF-xIogHSk.

29. *Id.*

30. *See id.* (highlighting that emotional harm is an objective standard that cannot pass constitutional muster).

31. *Spotlight on Speech Codes 2014: The State of Free Speech on Our Nation's Campuses*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, http://issuu.com/thefireorg/docs/2014_speech_code_report_final?e=6851166/6373933 (last visited Feb. 15, 2015).

32. *What Are Speech Codes?*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, http://www.thefire.org/spotlight/what-are-speech-codes/ (last visited Feb. 15, 2015) [hereinafter *Speech Codes*]; *see also Stand Up For Speech*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, http://www.standupforspeech.com (last visited Feb. 16, 2015) (listing Modesto Junior College, University of Hawaii-Hilo, Iowa State University, Citrus College, Chicago State University, Ohio University, and Western Michigan University).

33. *Free Speech, Western Michigan University – Stand Up for Speech*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, http://www.thefire.org/cases/western-michigan-university-stand-speech/ (last visited Feb. 16, 2015).

speech.[34] On the other hand, K-12 schools are allowed some discretion in protecting young students in the schooling environment.[35]

B. Geographic Anonymity: Jurisdiction as an Additional Hurdle for Prosecuting Online Speech

An attempt to regulate internet speech creates many issues within our justice system, including jurisdictional issues. The internet is such a global instrument, and likewise it is nearly impossible to formulate a concrete method of determining jurisdiction as to the cyber-speech that may be at issue. For example, if someone makes a controversial tweet that speech could qualify as illegal hate speech. In 2013, French citizens sued Twitter, demanding the identities of anonymous tweets described as anti-Semitic.[36] Hate speech, as offensive as it may be, is still protected by free speech laws in the United States.[37] However, in France, the tweets were not legal and the French court ruled that Twitter had to turn over the information requested by the French government.[38] Should Twitter be legally required to do this? There are many issues here: different countries have different ideas and policy procedures regulating the internet, our existing remedies for resolving international conflicts are not adequate to resolve internet disputes of this kind, and with 192 countries utilizing the internet, there is no one-size-fits-all solution to this jurisdictional issue.

In another case, a German court could not seize a Facebook account as evidence against a German citizen accused of burglary, because, although Facebook has an office in Hamburg, the data was located on a server in the United States.[39] While it is fairly simple to locate the geographical location,

34. *See Speech Codes*, *supra* note 32.

35. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that students and teachers don't "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *see also* New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (holding that school officials may search a student's property if they have a "reasonable suspicion" that a school rule has been broken, or a student has committed or is in the process of committing a crime).

36. Katia Moskvitch, *Twitter Told to Reveal Details of Racist Users*, BBC NEWS TECH. (June 13, 2013), http://www.bbc.com/news/technology-22887988.

37. Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); *see also* Virginia v. Black, 528 U.S. 343, 363 (2003) (allowing state regulation of hate speech only if extremely intimidating or directly inciting violence).

38. Moskvitch, *supra* note 36.

39. Mark Grabowski, *Internet Jurisdiction: Resolving International Conflicts of Law*, http://www.slideshare.net/cubreporters/internet-jurisdiction-short1.

online activity involves potentially incompatible laws, because the virtual frontier can contain service providers, actors, and intermediaries in various physical locations making it a cross-border avenue for speech. The servers and the providers may be in varying jurisdictions, causing difficulties in accurately pinpointing the proper jurisdiction to address issues of online speech.

IV. A History of Interpreting Opinionated Speech

A. *Brandenburg v. Ohio*: A Landmark Case for Freedom of Speech

In a landmark opinion, the Supreme Court reviewed Mr. Brandenburg's criminal conviction for statements made at a private political rally. Brandenburg made a speech at a Ku Klux Klan (KKK) rally and was convicted under color of an Ohio criminal syndicalism law.[40] This statute made it illegal to advocate "crime sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well to assemble "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[41] The Supreme Court utilized a two-part test to determine whether the Ohio law violated Brandenburg's free speech.[42] They opined that speech could be prohibited if it is "directed at inciting or producing imminent lawless action" and it is "likely to incite or produce such action."[43]

Applying this new test, the Court struck down Ohio's statute on its face, because the statute lacked a requirement to show *intent* on behalf of the person(s) to incite imminent lawless action or that lawless action was even *likely to result*.[44] In Mr. Brandenburg's case, the court held that while the rally was hateful, the sentiments of the KKK were not an immediate danger to others around the rally.[45] Specifically, the Court held that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."[46]

Brandenburg v. Ohio is one example of the Supreme Court's commitment to protecting freedom of speech. As one scholar has put it, "*Brandenburg v. Ohio* gave the greatest protection to what could be called subversive speech that it has ever had in the United States, and almost certainly greater

40. *Id.* at 444–45.

41. *Id.*

42. *Id.* at 447–48.

43. *Id.* at 447.

44. *Id.* at 448–49.

45. *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

46. *Id.* (quoting Noto v. United States 367 U.S. 290, 297–98 (1961)).

than such speech has in any other country."[47] While words may be offensive to some citizens or may lead to political discourse, those comments and opinions are appropriate even in the form of a large group such as the Ku Klux Klan.[48] *Brandenburg* relates to cyber-speech in the context of this article because rarely, if ever, can a written threat among individuals online, or in an opinionated or hateful email be construed as an imminent threat to safety.

B. *Watts v. United States*: Requiring a True Threat to Silence Political Speech

On August 27, 1966, Robert Watts, an eighteen-year-old African American man, attended a protest.[49] After an individual stated that the protesters should educate themselves before expressing their views, Mr. Watts uttered his opinion about being forced to join the military.[50] Mr. Watts stated, "I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[51] At the time this case was litigated, a federal statute from 1917 made it a crime to knowingly or willfully threaten the life of the President of the United States.[52] Watts was tried for this crime and convicted in a federal court.[53] He appealed, claiming that he did not make a true and legitimate threat within the language of the statute since he had no intent to follow through.[54] The U.S. Court of Appeals for the District of Columbia rejected Watt's argument, and found that the statement violated the statute even if Watts did not intend to carry out the "threat."[55]

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47. Susan M. Gilles, *Brandenburg v. State of Ohio: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 520 (2010) (quoting ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 236 (1st ed. 1991)); *see also* Lyrissa Barnett Lidsky, *Brandenburg and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1010 (2002) ("*Brandenburg* thus spreads a broad mantel of protection over the speech of radical, political dissidents from even the most despised groups in society."); Marc Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 3 (2002) (labeling the *Brandenburg* test as "extraordinarily speech-protective.").

48. *See Brandenburg*, 395 U.S. at 448.

49. Watts v. United States, 394 U.S. 705 (1969).

50. *Id.* at 706.

51. *Id.*

52. *Id.* at 705.

53. *Id.* at 678.

54. *Id.*

55. *Watts*, 394 U.S. at 678–82.

In *Watts v. United States*, the U.S. Supreme Court reversed and remanded the case, holding that although 18 U.S.C. § 871 (1964) prohibiting threats against the President was constitutional, Robert Watts's speech was not a "true threat."[56] Citing *New York Times v. Sullivan*,[57] the Court labeled the words spoken by Mr. Watts, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," as a "political hyperbole" that was protected by the principle that public debate on political issues should remain open to uninhibited, robust speech, even if the speech may be "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[58] This case highlights the importance of allowing individuals to have their say even if that say is unpopular political speech. So long as the speech is not a "true threat," it is protected by the First Amendment.[59] The Supreme Court recognized that even though Mr. Watts talked about shooting the President, the context of his words, a political rally, showed that they did not present a serious threat, a true threat, or a real threat.[60] In fact, the Supreme Court said:

> [T]he statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term . . . Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.[61]

C. *Virginia v. Black*: A Question of Intent in the Context of Free Speech

In the landmark case *Virginia v. Black*, the Supreme Court held that Barry Black could not be convicted for cross burning merely on evidence that he burned a cross.[62] The Virginia statute banned the burning of crosses with "an intent to intimidate a person or persons," but the court gave a jury instruction that the requisite intent could be found, which would allow for conviction, upon a simple prima facie showing that Black burned a cross in plain view.[63] Based on the instruction, Mr. Black was convicted by a jury, and he subsequently appealed.[64] The Supreme Court held that the statute al-

56. *Id.* at 712.

57. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

58. *See Watts*, 394 U.S. at 706, 708 (quoting *Sullivan*, 376 U.S. at 270).

59. *See id.* at 707.

60. *See id.* at 708.

61. *Id.*

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

63. *Id.* at 348.

64. *Id.* at 349–51.

lowing the state to punish cross burning was permissible, but the jury instruction in Black's trial instructing that a cross burning in plain view was "prima facie evidence of an intent to intimidate," was facially unconstitutional under the First Amendment.[65] The Supreme Court cited the First Amendment as the "hallmark of the protection of free speech [which] allow[s] *'[the] free trade [of] ideas*—even ideas that the overwhelming majority of people might find distasteful or discomforting."[66] The Court concluded that, "'[t]rue threats' encompass 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."[67]

D. *United States v. O'Dwyer*: E-mails Involving Statements Not Considered True Threats

In 2010, upset with a bankruptcy judge, Ashton O'Dwyer sent an e-mail containing horrendously insensitive and inflammatory remarks to the judge.[68] In his e-mail, O'Dwyer wrote "[m]aybe my creditors would benefit from my suicide, but suppose I become 'homicidal'? Given the recent 'security breach' at 500 Poydras Street, a number of scoundrels might be at risk if I DO become homicidal."[69] He was then charged by the government under the federal terroristic threat statute and filed his own *pro se* Motion to Dismiss.[70] His motion was primitive and as bare as one could ever be. O'Dwyer's Motion No. 8 called for the court, "[t]o dismiss the indictment upon the grounds that the defendant's words were non-criminal and constitutionally protected free speech" under *Watts v. United States*.[71]

Mr. O'Dwyer relied on the Supreme Court's ruling in *Watts* in this simple, yet succinct, Motion to Dismiss. At the hearing on the Motion to Dismiss, the Judge dismissed the charge before trial, claiming, "[t]he Court finds that Defendant's statements are insufficient to warrant submission to a jury to determine if they are a true threat."[72]

The government appealed, but then the Fifth Circuit Court of Appeals upheld the pre-trial dismissal, saying that it is appropriate for a trial judge to dismiss a case when it is determined that "no reasonable jury could find that

65. *Id.* at 348–52.

66. *Id.* at 358 (Holmes, J., dissenting) (citing Abrams v. United States, 250 U.S. 616, 630 (1919)) (emphasis added).

67. *Id.* at 359 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)); Watts v. United States, 394 U.S. 708 (1969).

68. United States v. O'Dwyer, No. 10-034, 2010 U.S. Dist. LEXIS 62978 (E.D. La. June 24, 2010).

69. *Id.* at *3 (emphasis added).

70. *Id.* at *1.

71. Motion To Dismiss, Doc. 61-7, O'Dwyer, 2010 U.S. Dist. LEXIS 62978.

72. *O'Dwyer*, 2010 U.S. Dist. LEXIS 62978 at *7.

O'Dwyer's communication constituted a true threat."[73] In its affirmation of the dismissal, the Fifth Circuit Court took into consideration the Supreme Court's Ruling in *Virginia v. Black*.[74]

E. *United States v. Bagdasarian*: Offensive Posts Online Are Not Necessarily "True Threats"

The Fifth Circuit is not the only circuit to hold that a person's statements must contain "true threats" as a matter of law in order for the person to be prosecuted under *terroristic threat statutes*.[75] In the Ninth Circuit case of *United States v. Bagdasarian*, Walter Bagdasarian posted some very offensive, racist, and violent statements about President Barack Obama on the internet.[76] Mr. Bagdasarian was very irate about President Obama's healthcare policies and stated, "[r]e: Obama fk the niggar, he will have a 50 cal in the head soon . . . shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? long term???? never in history, except sambos."[77]

The Secret Service was rightfully concerned about the contents of Bagdasarian's posts, and investigated. Upon investigation, the Secret Service found that Mr. Bagdasarian actually possessed a rare, but very lethal and powerful .50 caliber rifle capable of long-range sniper attacks.[78] As a result of this fact, Bagdasarian was charged and convicted of threatening the President.[79] On appeal, the Ninth Circuit held that Bagdasarian's nasty comments did not constitute a true threat, holding "[t]here is nevertheless insufficient evidence that either statement constituted a threat or would be construed by a reasonable person as a genuine threat by Bagdasarian against Obama."[80]

F. *Scott v. State*: Combating an Overbroad Statute that Inappropriately Chills Speech, a Texas Cyberbullying Statute

Lower courts prove to be even more inconsistent in how they determine whether speech is truly threatening. Some states require subjective intent to harm, while others only require a more generalized "objective" intent to

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73. United States. v. O'Dwyer, 443 F. App'x 18, 20 (5th Cir. 2011).

74. *Id.* at 20.

75. *See* United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011) (emphasis added).

76. *See id.*

77. *Id.* at 1115.

78. *Id.* at 1121.

79. *Id.* at 1130.

80. *Id.* at 1120.

communicate.[81] For example, in 2010, the Texas Court of Criminal Appeals heard the case of Scott v. State,[82] after a Texas Court of Appeals in San Antonio held that Section 42.07 of the Texas Penal Code entitled "Harassment" is an unconstitutionally vague statute.[83] The portion of the statute relevant to this discussion reads as follows:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> . . .
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
>
> . . .
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[84]

The court of appeals explained that what may be "annoying," "embarrassing," or even "alarming" may be speech that is protected by the First Amendment.[85] The Court gave examples of both political calls that may be made for a particular candidate and talk radio or commercials on television.[86]

The Texas Court of Criminal Appeals held that the statute was not unconstitutionally vague and reversed the San Antonio Court of Appeals decision.[87] Justice Keller wrote a dissenting opinion that began by highlighting legal authority that "set the backdrop for the claim . . ." before the court in *Scott v. State*.[88] Specifically the courts in *Long v. State*,[89] *May v. State*,[90] and *Kramer v. Price*[91] invalidated statutes that contained some of the same terms

81. *See generally* Scott v. State, 322 S.W.3d 662 (Tex. Crim. App. 2010) [hereinafter *Scott II*]; Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996); May v. State, 765 S.W.2d 438 (Tex. Crim. App. 1989); Kramer v. Price, 723 F.2d 1164 (5th Cir. 1984) (analyzing the intent needed for a statement to be a *true threat*).

82. *Scott II*, 322 S.W.3d at 662.

83. *See* Scott v. State, 298 S.W.3d 264, 267, 269, 270 (Tex. App.—San Antonio 2009, pet. granted) (holding that Section 42.07 implicated the free speech guarantee of the First Amendment) [hereinafter *Scott I*].

84. Tex. Penal Code Ann. § 42.07(a) (West 2011).

85. *See Scott I*, 298 S.W.3d at 269.

86. *Id.*

87. *Scott II*, 322 S.W.3d at 668.

88. *Id.* at 671–72.

89. Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996).

90. May v. State, 765 S.W.2d 438 (Tex. Crim. App. 1989).

91. Kramer v. Price, 712 F.2d 174 (5th Cir. 1983).

that were contested in this case, "annoy" and "alarm," and held that these terms implicate First Amendment freedoms because they are unduly vague.[92] In her dissent, Justice Keller also discusses the ambiguity of the word "repeated" in the statute as to whether repeated means that the incidents must be close in time or multiple instances of the same scheme.[93] It is clear that this statute as written allows plenty of discretion for the state to prosecute unpopular and unpleasant speech and thereby chills avenues of free speech.

G. *Elonis v. United States*: The Case That Could "Change Everything"

On December 1, 2014, the U.S. Supreme Court heard oral arguments in *Elonis v. United States*.[94] To date, Anthony Elonis has served more than three years in prison for posting words on his Facebook page, which he has now categorized as "therapeutic" rap lyrics.[95] In 2010, Elonis' wife of seven years left with their two children, and Elonis was fired from his job.[96] He then began posting lyrics on Facebook that he claims were not intended as a warning of material violence, but rather were his harmless expression of the emotion that overwhelmed him after his wife left him.[97] The issue in that case turned on subjective versus objective intent. At Mr. Elonis' trial, the jury was given a legal standard by which to evaluate the Facebook posts.[98] The instruction asserted that the Facebook posts may be considered a "true threat," unprotected by the First Amendment, if *they—meaning members of the jury*—considered Elonis' post to be threatening.[99] Mr. Elonis' contention was that the Facebook post should not have been evaluated objectively by the jury, but rather the words should be considered subjectively, evaluating whether *he* intended the post to be a threat.[100]

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92. *Id.* at 178 ("By failing to provide reasonably clear guidelines § 42.07 gives officials unbounded discretion to apply the law selectively and subjects the exercise of the right of speech to an unascertainable standard.").

93. *See Scott II*, 322 S.W.3d at 672.

94. Elonis v. United States, 730 F.3d 321 (3rd Cir. 2013), *cert. granted* 134 S. Ct. 2819 (June 16, 2014) (No. 12-3798) [hereinafter *Elonis II*].

95. Petition for Writ of Certiorari, Elonis v. United States, No. 11–13, 2011 WL 5024284 (E.D. Penn. 2011) (No. 13-983), 2014 WL 645438, at *5.

96. *Elonis II*, 730 F.3d at 327.

97. Elonis v. United States, 2011 WL 5024284 (E.D. Penn. 2011) [hereinafter *Elonis I*].

98. *Id.*

99. *Elonis II*, 730 F.3d at 327.

100. *Id.*

This opinion, written by a notably free-speech-friendly group of Supreme Court justices,[101] will decide (1) whether in the age of social media Mr. Elonis' behavior was outside of the norm; and (2) whether Mr. Elonis' written expression in the form ofFacebook posts may be considered "true threats" as defined by *Virginia v. Black*[102] in 2003. In Elonis' petition for Supreme Court review, he claims that this "issue is growing in importance as communication online by e-mail and social media has become commonplace."[103] He goes on to assert that "[m]odern media allow personal reflections intended for a small audience (or no audience) to be viewed widely by people who are unfamiliar with the context in which the statements were made and thus who may interpret the statements much differently than the speakers intended."[104] Similarly, in one of the many amicus briefs filed in this case, The Thomas Jefferson Center for the Protection of Free Expression argued that legal implementation of a *subjective* standard is necessary, because "unique communicative norms emerge and evolve, heightening the likelihood of misinterpretation by juries not intimately familiar with these novel means of expression."[105] *Elonis v. United States* addresses a pertinent issue courts are confronted with when evaluating whether or not to prosecute online speech—the speaker's actual intent for the publicized dialogue. While the Supreme Court is scheduled to hear oral arguments for up to fifty different cases over the next few months,[106] *Elonis* has been noted as the case that could "change everything" due to the widespread effect this opinion will have on modern speech.[107]

101. Adam Liptak, *For Justices, Free Speech Often Means 'Speech I Agree With'*, N.Y. TIMES, May 5, 2014, *available at* http://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html?_r=0.

102. *See* Virginia v. Black, 528 U.S. 343 (2003).

103. Petition for Writ of Certiorari, Elonis v. United States, No. 11–13, 2011 WL 5024284 (E.D. Penn. 2011) (No. 13-983), 2014 WL 645438.

104. *Id.*

105. Brief for The Thomas Jefferson Center for The Protection of Free Expression, et al. as Amici Curiae Supporting Petitioner, Elonis v. United States, 730 F.3d 321 (3d. Cir. 2013) (No. 13-983), 2014 WL 4298029, at *4.

106. Argument Calendar, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/oral_arguments/argument_calendars.aspx (last visited Oct. 23, 2014).

107. Tess VandenDolder, *3 Upcoming Supreme Court Cases that Could Change Everything*, IN THE CAPITAL (Oct. 6, 2014, 5:16 PM), http://inthecapitalstreetwise.co/2014/10/06/3-upcoming-supreme-court-cases-that-could-change-everything/.

H. Current Bullying Case in the News

Children have been bullying each other for generations. Millions of teens are bullied annually. This fact is an all too common reality of adolescence. According to John Wright, a pediatrician at Children's National Health System in Washington, D.C., seventy-five percent of kids have been exposed to the pervasive behavior of bullying, either as bystanders or as the ones being bullied.[108] Whether we were bullied on the playground, by a sibling, or by someone on social media, just about everyone has experienced some sort of negative experience with the words of another person that are socially unacceptable, rude or hurtful. However, society, teachers, and parents are the ones who should be dealing with this all too common situation, not the justice system.

Two young girls, ages twelve and fourteen, are facing felony charges in Florida for harassing a classmate who allegedly committed suicide after being harassed in an online chat by up to fifteen girls from her school.[109] After a sheriff saw one of the girl's comments online about the suicide, he took her into custody.[110] The post stated "Yes ik [I know] I bullied REBECCA nd [and] she killed her[ ]self but [I don't care]."[111] While this statement is certainly not friendly or kind, the fact remains that this young girl was merely making an immature and juvenile comment, not a criminal one.

V. Civil Action as a Remedy for Online Behavior

The underlying acts that constitute cyberbullying are already covered in civil actions under the law. Regardless of whether the content was expressed online or in person, conventional tort law offers a remedy for harassment, defamation, and intentional infliction of emotional distress.[112] While the remedies may vary depending on state law, the basic elements of these causes of action are substantially similar.[113] Civil harassment involves willful and malicious acts with intent to cause a reaction. To prove intentional infliction of emotional distress, the plaintiff must show that the harasser's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly in-

108. Nanci Hellmich, *Lessons Learned from Latest Cyberbully*, USA Today (Oct. 16, 2013, 12:18 PM EDT), http://www.usatoday.com/story/news/nation/2013/10/15/cyberbullying-parents-internet-guide/2988651/.

109. Eli Federman, *Bullying is Bad, But Criminalizing Bullying Would Be Even Worse*, Forbes (Oct. 23, 2013, 8:00 AM), http://www.forbes.com/sites/realspin/2013/10/23/bullying-is-bad-but-criminalizing-bullying-would-be-even-worse/.

110. *Id.*

111. *Id.*

112. Kroger Tex. Ltd. P'ship v. Subaru, 216 S.W.3d 788, 796 (Tex. 2006).

113. Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011).

tolerable in a civilized community."[114] The victim also needs to prove that he suffered damage as the result of the action of the defendant, such as financial, physical or psychological injury. To prove defamation, the victim usually must show that the defendant negligently or willfully, wantonly, recklessly, or intentionally made an untrue statement regarding the plaintiff, published the statement to others, and in doing so, caused damage to the victim.

In Texas, The elements of a cause of action for intentional infliction of emotional distress are:

(1) the defendant acted intentionally or recklessly;

(2) the conduct was extreme and outrageous;

(3) the acts of the defendant caused the plaintiff to suffer emotional distress; and

(4) the emotional distress suffered by the plaintiff was severe.[115]

This is a prime example of a civil cause of action that covers many of the cases that are now resulting in unnecessary criminal prosecution over words that cause mental and emotional harm to others.

Civil actions have been the proper remedy until recent years in which the actor was first required to pay on the personal damage to individuals. The Internet has magnified this issue because words are often permanently documented and may be viewed by multiple people rather than just the person the message was intended to reach. However, this fact does not change the truth that people have been insulting others for generations. Moreover, the world-wide reach of the internet may magnify the degree of damage caused by anonymous online conduct beyond that of the typical in person encounter.

VI. Conclusion

The First Amendment is essentially a promise made to the American people by the government. It enables Americans to maintain considerable freedom of speech with other personal rights and societal interests such as privacy, reputation, national security, and obscenity. While some types of expression are not protected by the First Amendment, cyber-speech is a form of speech that, as the law stands today, does not allow for government intrusion if it does not fall into one of the categories justifying government intervention. Additionally, the government cannot expect to legislate social norms.

The high crime rate in America is considerably costly to taxpayers, with state governments bearing the majority of the fiscal burden. Imposing criminal consequences for hurting someone's feelings, an unfortunate reality of society, is not a rational or useful utilization of our legal resources. Resorting to criminalizing hurtful words is just as frightening as the innocent young girl being told she is "ugly" and "should go kill herself." Furthermore, the law in

114. Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 303 (1983).

115. *Kroger*, 216 S.W.3d at 796; Twyman v. Twyman, 855 S.W.2d 619, 620 (Tex. 1993).

itself does not alter cyberbullying or unpopular expression in the online forum. Rather, we need to have a national conversation about early intervention from bullying, civility, and widespread education of the permanent nature of our internet interactions, rather than resorting to criminal prosecutions.[116] As long as humans harbor opinions and a means to express those thoughts and opinions, we will be regulating those opinions as a last resort to chilling the freedom the First Amendment promises.

116. *See* Dr. Gwenn's Family Media Use Plan (Aug. 22, 2011), http://www.pediatricsnow.com/2011/08/dr-gwenns-family-media-plan-2/ (outlining a Media Time Family Pledge for Kids and Teens to act responsibly online, and for parents to properly monitor their child's online and social activity).