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With Great Technology Comes Great Responsibility: Virginia's Legislative Approach to Combating Cyberbullying

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COMMENTS

WITH GREAT TECHNOLOGY COMES GREAT RESPONSIBILITY: VIRGINIA'S LEGISLATIVE APPROACH TO COMBATING CYBERBULLYING

*Kelsey Farbotko**

I. INTRODUCTION

Thirteen-year-old Megan Meier was one of many teens who owned a MySpace account when she began receiving attention online from a sixteen-year old boy named “Josh Evans.”¹ “Josh” paid Megan compliments, and the two began a relationship.² Suddenly, he turned on Megan, telling her that she was “fat” and a “slut,” and “not nice to [her] friends.”³ “Josh” broke off the relationship, telling Megan the “world would be a better place without her.”⁴ Shortly after the devastating rejection, Megan went into her bedroom and hanged herself.⁵ After Megan’s death, her parents discovered that Josh never existed.⁶ Josh’s MySpace webpage was the creation of a neighborhood mother.⁷ The mother, Lori Drew, created the webpage with the involvement of others, who police refuse to name.⁸ According to po-

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¹ *Mom Indicted in Deadly MySpace Hoax*, CNN.COM (May 15, 2008, 10:33PM), <http://www.cnn.com/2008/CRIME/05/15/internet.suicide/index.html>.

² *Id.*

³ *Parents: Cyber Bullying Led to Teen’s Suicide*, ABC NEWS.COM (Nov. 19, 2007), <http://abcnews.go.com/GMA/story?id=3882520&page=1>.

⁴ *Mom Indicted in Deadly MySpace Hoax*, *supra* note 1.

⁵ *Id.*

⁶ *Parents: Cyber Bullying Led to Teen’s Suicide*, *supra* note 3.

⁷ *Parents: Cyber Bullying Led to Teen’s Suicide*, *supra* note 3.

⁸ *Mom Indicted in Deadly MySpace Hoax*, *supra* note 1.

lice, Drew started the account to monitor Megan's posts about her daughter.⁹ However, what started out as a prank wound up pushing a depressed, self-doubting teenager over the edge.¹⁰ Lori Drew was convicted of "accessing protected computers without authorization," which was based on the violation of MySpace policies prohibiting fraudulent activity.¹¹ The conviction was later overturned because the judge believed that the statute at issue was vague.¹²

The case of Megan Meier is one of the most well-known and influential instances of cyberbullying, and led to the currently pending federal legislation called the "Megan Meier Cyberbullying Prevention Act."¹³ This bill creates criminal charges for harmful communications that cross state borders or traverse through interstate commerce.¹⁴ The reaction to cyberbullying has not been confined to the federal level. Every state has passed a statute dealing with cyberbullying, or the related crimes of cyber-harassment and cyberstalking, in some form.¹⁵

This comment will examine Virginia's statutory response to the growing problem of cyberbullying, focusing particularly on the bills introduced in the most recent Virginia General Assembly session. Section II will define cyberbullying and other cybercrimes, as well as discuss the effects of this form of harassment and the importance of regulating speech in this manner. Section III will describe current statutes that regulate cyberbullying, as well as the three bills that came before the Virginia General Assembly in its 2011 session. Particularly important is House Bill 2059, which differs from the other two bills not only because it was the only bill of the three to pass the General Assembly, but because it extends its reach of regulation

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Conviction in MySpace Suicide Case Tentatively Overturned*, CNN.COM (July 2, 2009, 8:56PM), <http://www.cnn.com/2009/CRIME/07/02/myspace.suicide/index.html>.

¹² *Id.*

¹³ *See Sameer Hinduja & Justin Patchin, State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER, 12 (Mar. 2011), available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

¹⁴ *Id.*

¹⁵ *See id.* at 1–12.

beyond the school yard.¹⁶ Section IV will discuss the two schemes for controlling cyberbullying, legislation and education, and how House Bill 2059 fits in the statutory scheme.

II. CYBERBULLYING, DEFINED AND EXPLAINED

A. Defining the Crime

Cyberbullying is a relatively new phenomenon, and it is the product of the development of text messaging, emails, and social media.¹⁷ Cyberbullying is often confused with cyberharassment.¹⁸ They are essentially defined by the same action, the “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”¹⁹ The distinguishing feature of cyberbullying is the nature of the participants: both the bully and the victim must be a child or teenager, or the situation must have at least begun as an interaction between a child or teen bully and victim.²⁰ When adults are involved on either side of the bullying, it becomes cyberharassment.²¹

Cyberbullying may be further divided into “direct attacks” or “cyberbullying by proxy.”²² Direct attacks are those sent from the bully to the victim by several methods, including text or picture mes-

¹⁶ 2011 Va. Legis. Serv. 523 (West) (codified at VA. CODE ANN. § 18.2-427 (2011)).

¹⁷ See Sameer Hinduja & Justin Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CENTER, 1, available at http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf (last visited Mar. 15, 2011) (“Without question, the nature of adolescent peer aggression has evolved due to the proliferation of information and communications technology”).

¹⁸ Sameer Hinduja & Justin Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, 1, available at http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf (last visited Mar. 15, 2011).

¹⁹ *Id.*

²⁰ *What is Cyberbullying, Exactly?*, STOPCYBERBULLYING.ORG, WIRED KIDS, INC., http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.pdf (last visited Mar. 15, 2011).

²¹ *Id.*

²² *How Cyberbullying Works*, STOPCYBERBULLYING.ORG, WIREDKIDS, INC., www.stopcyberbullying.org/how_it_works/index.html (last visited Mar. 15, 2011).

sages, instant message, blogs, web pages, video gaming, viruses, or electronic mail spam.²³ Another type of direct attack is when a bully chooses one of these forms of communication and poses as the victim to harm the victim's reputation.²⁴

Cyberbullying by proxy, in contrast, is a situation in which the bully gets another person to actually do the antagonizing for him or her.²⁵ This occurs when the bully turns the victim's parents or friends against him or her by using electronic media to get the victim into trouble or make it seem like the victim is posting nasty messages.²⁶ In other instances, the bully provokes the victim, and then when the victim retaliates, the bully notifies the service provider that the victim has violated its rules.²⁷ In another example of the seriousness of cyberbullying, "[c]yberbullies have even posted information in child molester chat rooms and discussion boards, advertising their victim for sex."²⁸ It is no surprise that many teens suffer serious psychological effects from cyberbullying.²⁹

B. The Importance of Prohibiting and Preventing Cyberbullying

Cyberbullying is prevalent throughout the United States, with up to 40% of children or teens experiencing it in their lives.³⁰ This varies depending on age group.³¹ One study found that 20% of the tested participants, ages eleven through eighteen, were bullied either over the computer or phone.³² Cyberbullying has become such a large issue because the technology is easy to access, and because the bully is able to harass and remain removed from witnessing the victim's an

²³ See *Direct Attacks*, STOPCYBERBULLYING.ORG, WIREDKIDS, INC., http://www.stopcyberbullying.org/pdf/direct_attacks.pdf (last visited Mar. 15, 2011).

²⁴ See *id.*

²⁵ *Cyberbullying By Proxy*, STOPCYBERBULLYING.ORG, WIREDKIDS, INC., http://www.stopcyberbullying.org/pdf/cyberbullying_by_proxy.pdf (last visited Mar. 15, 2011).

²⁶ See *id.*

²⁷ See *Id.*

²⁸ See *Id.*

²⁹ See Hinduja & Patchin, *Cyberbullying: Identification, Prevention, and Response*, *supra* note 17, at 1.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

guish when the communication is received.³³ This anguish often takes the form of low self-esteem, which is a universal result across individual characteristics, such as age or gender.³⁴

Much more serious is the incidence of suicide among children and teens who are cyberbullying victims.³⁵ Cyberbullying increases the risk of suicidal ideations (considering or planning suicide) by “contribut[ing] to depression, decreased self-worth, hopelessness, and loneliness.”³⁶ In a study conducted by the Cyberbullying Research Center, twenty percent of participants admitted considering suicide, while nineteen percent admitted to at least one attempt.³⁷ These numbers tend to be higher than with conventional bullying, and were similar for all age groups within a child or teen population.³⁸ Like Megan Meier³⁹, many cyberbullying victims had other personal issues before the cyberbullying.⁴⁰

III. VIRGINIA LEGISLATES CYBERBULLYING

A. Virginia’s Cyberbullying Laws before the 2011 General Assembly Session

The Code of Virginia includes laws regulating cybercrimes that preceded the 2011 General Assembly session.⁴¹ Virginia Code § 22.1-

³³ *See id.* at 2.

³⁴ Sameer Hinduja & Justin Patchin, *Cyberbullying Research Summary: Cyberbullying and Self-Esteem*, Cyberbullying Research Center, 1, available at http://www.cyberbullying.us/cyberbullying_and_self_esteem_research_fact_sheet.pdf (last visited Mar. 16, 2011).

³⁵ *See* Hinduja & Patchin, *supra* note 16, at 1 (“Even though suicide rates have decreased 28.5 percent among young people in recent years, upward trends were identified in the 10- to 19-year-old age group.”).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Mom Indicted in Deadly MySpace Hoax*, *supra* note 1.

⁴⁰ Hinduja & Patchin, *supra* note 16, at 2.

⁴¹ *See State Cyberstalking, Cyberharassment, and Cyberbullying Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13495#Laws> (last updated Jan. 26, 2011). The NCSL has categorized the statutes mentioned in this section as either “cyberbullying,” “cyberharassment,” or “cyberstalking” statutes; however, this is more of a reflection of the fact that “cyberbullying” statutes are classified by their intent to impact the activities of school-age children and teens, rather than a reflection of

279.6 sets forth the requirements for all public school boards' codes of conduct.⁴² Regarding cyberbullying, the statute requires that school systems punish "bullying, hazing, and profane or obscene language or conduct," and allows school systems to manage and restrict students' use of communication devices, including cell phones, when the students are present on school grounds.⁴³ General threats of harm on school grounds or made to school staff are prohibited under another section of the Virginia Code.⁴⁴ The Virginia legislature has also prohibited harassing communications made over the computer, stating that "[i]f any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language . . . he shall be guilty of a Class 1 misdemeanor."⁴⁵ This law criminalizes this behavior without referring to "cyberbullying."⁴⁶ Despite the fact that "cyberbullying" technically refers to crimes of children against children, it does not necessarily exclude application of statutes to prohibit cyberharassment or cyberstalking as well.⁴⁷ Although these statutes help combat cyberbullying and other cyber-crimes, the bills introduced in the 2011 General Assembly Session were more explicit in their attempts to combat the epidemic.⁴⁸

B. The 2011 General Assembly Session

In the most recent Virginia General Assembly session, the House of Delegates introduced three bills dealing with cyberbullying. These bills include House Bill 1576, defining bullying and the subsequent punishment within the school system;⁴⁹ House Bill 1748, amending the definition of bullying to include cyberbullying and de-

whether the statutes may apply in situations in which the act of cyberbullying has occurred. *Id.*

⁴² VA. CODE ANN. § 22.1-279.6 (Supp. 2010).

⁴³ *Id.*

⁴⁴ VA. CODE ANN. § 18.2-60 (2009).

⁴⁵ VA. CODE ANN. § 18.2-152.7:1 (2009).

⁴⁶ *See id.*

⁴⁷ *See What is Cyberbullying, Exactly?*, *supra* note 19 ("Cyberbullying may arise to the level of a misdemeanor cyberharassment charge"). However, it is important to note that while cyberbullying actions may be punishable by cyberstalking or cyberharassment statutes, cyberharassment is never punishable as cyberbullying. *See id.*

⁴⁸ *See infra* notes 48, 49.

⁴⁹ H.B. 1576, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (as introduced Jan. 12, 2011).

scribing how schools must handle bullying incidents;⁵⁰ and House Bill 2059, amending a prohibition on harmful speech over telephones to extend to electronic communications.⁵¹ House Bills 1576 and 1748 were written to interact with one another to combat cyberbullying on school grounds with both administrative and criminal schemes.⁵² House Bill 1576, introduced by Delegate Ebbin, amended § 18.2-56 of the Code of Virginia, which presently combats hazing by making such actions a Class 1 Misdemeanor and creating the right to sue.⁵³ It also currently mandates that a school's authority must take action against anyone guilty of hazing, as defined in the statute.⁵⁴ If House Bill 1576 had passed, the law would have treated bullying in the same manner as hazing.⁵⁵ The bill also defines bullying, which includes actions "through direct physical contact or through the use of information or communication technology."⁵⁶ This definition does not impose itself on § 22.1-279.6,⁵⁷ which presently allows school systems to define bullying in their respective codes of conduct.⁵⁸

House Bill 1748, introduced by Delegate Ken Plum, amended § 22.1-279.6 by adding a definition for both conventional bullying and cyberbullying, and by including cyberbullying in the legislature's direction to school boards to establish policies on certain issues.⁵⁹ Had this bill passed, it would have taken the power to define bullying away from individual school boards.⁶⁰ The bill also required a report to the highest school board authority when bullying occurs.⁶¹ Both House Bill 1748 and House Bill 1576 made explicit that the intended

⁵⁰ H.B. 1748, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (as introduced Jan. 12, 2011).

⁵¹ 2011 Va. Legis. Serv. 523 (West) (codified at VA. CODE ANN. § 18.2-427 (2011)).

⁵² See H.B. 1576, 2011 Gen. Assemb., Reg. Sess. (Va 2011) (as introduced Jan. 12, 2011) (creating the criminal penalty and cause of action); H.B. 1748, 2011 Gen. Assemb., Reg. Sess. (Va 2011) (as introduced Jan. 12, 2011) (creating a scheme for how school systems handle cyberbullying).

⁵³ VA. CODE ANN. § 18.2-56 (2009).

⁵⁴ *Id.*

⁵⁵ H.B. 1576, 2011 Gen. Assemb., Reg. Sess. (Va 2011) (as introduced Jan. 12, 2011).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ VA. CODE ANN. § 22.1-279.6 (Supp. 2010).

⁵⁹ H.B. 1748, 2011 Gen. Assemb., Reg. Sess. (Va 2011) (as introduced Jan. 12, 2011).

⁶⁰ *Id.*

⁶¹ *Id.*

target of the statutory changes was cyberbullying on school property.⁶²

House Bill 2059, introduced by Delegate Bell, differs from the other two cyberbullying bills introduced in the House of Delegates because it was passed by both the Virginia House of Delegates and Senate.⁶³ It is also different from the other two bills because it does not mention cyberbullying or schools, or children and teens.⁶⁴ However, the patron of the bill, Delegate Robert Bell, had cyberbullying in mind when he introduced the bill.⁶⁵ Specifically, his goal was to protect Virginia's students by allowing for punishment for hurtful text messages.⁶⁶ House Bill 2059 aims to do this by amending §18.2-427 of the Virginia Code, which currently creates a criminal penalty for anyone "us[ing] obscene, vulgar, profane, lewd, lascivious, or indecent language, or makes any suggestion or proposal of an obscene nature, or threatens any illegal or immoral act with the intent to coerce, intimidate, or harass any person, over any telephone."⁶⁷ "Over any telephone" was once defined to include the only technology available at the time, as clearly stated, the telephone.⁶⁸ Delegate Bell's bill changes the definition of "over any telephone" to include "any electronically transmitted communication producing a visual or electronic message that is received or transmitted by cellular telephone or other wireless telecommunications device."⁶⁹

If House Bill 2059 is read together with Virginia Code §18.2-60(A), criminal penalties are now enforceable against any person who chooses to send harmful messages either by phone call, text

⁶² See H.B. 1576, 2011 Gen. Assemb., Reg. Sess. (Va 2011) (as introduced Jan. 12, 2011); H.B. 1748, 2011 Gen. Assemb., Reg. Sess. (Va 2011) (as introduced Jan. 12, 2011).

⁶³ See *HB 2059 Telecommunications Devices; Prohibiting Use of Obscene Language Including Electronic Messages*, LEGISLATIVE INFORMATION SERVICES, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=111&typ=bil&val=hb2059> (last visited July 11, 2011).

⁶⁴ See 2011 Va. Legis. Serv. 523 (West) (codified at VA. CODE ANN. § 18.2-427 (2011)).

⁶⁵ Matt Birch, *New Law Targets 'Cyberbullying'*, THE COMMONWEALTH TIMES, Feb. 24, 2011, available at <http://www.commonwealthtimes.org/?p=16690>.

⁶⁶ *Id.*

⁶⁷ VA. CODE ANN. § 18.2-427 (Supp. 2010).

⁶⁸ *Id.*

⁶⁹ Act of Mar. 18, 2011, Ch. 246, 2011 Va. Acts (codified at VA. CODE ANN. § 18.2-427 (2011)).

message, or computer communication, “cyberbullies” included.⁷⁰ Virginia statutes will cover the entire spectrum of potential media used for cyberbullying, without restricting the statutes’ applications to children and teens at school.⁷¹

IV. ARE CRIMINAL PENALTIES THE BEST WAY TO STOP CYBERBULLYING?

There have been two methods adopted by various states and the federal government in the widespread effort to control cyberbullying: 1) legislation creating criminal penalties or enforcement by the school system, and 2) education.⁷²

A. The First Amendment and Cyberbullying Speech

For those statutes that directly regulate speech amounting to cyberbullying, First Amendment issues may arise.⁷³ Both classes of statutes, those that regulate all citizens and employ criminal penalties and those that empower schools to solve cyberbullying issues, are affected by this constitutional restriction.⁷⁴ For statutes that may apply to adults and off-campus schoolchildren, the First Amendment protects the vast majority of speech.⁷⁵ Exceptions do apply, because “[t]here are certain categories of speech that have been found to have such little social value that they do not merit protection. Examples include obscenity, true threats and fighting words — defined as words that incite an immediate breach of the peace.”⁷⁶ Because of

⁷⁰ VA. CODE ANN. § 18.2-60(A) (Vol. 2009); 2011 Va. Legis. Serv. 523 (codified at VA. CODE ANN. § 18.2-427 (2011)).

⁷¹ See VA. CODE ANN. § 18.2-60(A) (Vol. 2009).

⁷² See generally Jessica Meredith, *Combating Cyberbullying: Emphasizing Education Over Criminalization*, 63 FED. COMM. L.J. 311, 334 (2010); Hinduja & Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, *supra* note 12.

⁷³ See Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 664 (2009); David Hudson, *Cyberspeech*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=yberspeech> (last visited Mar. 16, 2011).

⁷⁴ Turbert, *supra* note 72, at 664–65.

⁷⁵ David Hudson, *Personal and Public Expression*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/speech/personal/overview.aspx> (last visited Mar. 16, 2011) (“The First Amendment protects a broad range of public and personal expression on political, commercial, social and private matters”).

⁷⁶ *Id.*

the nature of the student-school relationship, the Supreme Court has given school boards more leeway to prohibit hurtful speech.⁷⁷ The first case that allowed students the right to freedom of speech, *Tinker*, held that schools could limit speech in certain instances to ensure the safety and well-being of students.⁷⁸ Two subsequent cases, *Bethel School Dist. No. 403 v. Fraser*,⁷⁹ and *Hazelwood School Dist. v. Kuhlmeier*,⁸⁰ expanded schools' power by allowing speech restrictions where the speech was contrary to the school's "educational mission."⁸¹ While these restrictions may apply to students while at school, the Supreme Court has not yet decided the extent of the school board's control over off-campus student speech.⁸² The Court came close to making a decision on off-campus speech in *Morse v. Frederick*; however, the Court upheld the suspension in *Morse*, explaining that it was not deciding how far off-campus the school system's right to regulate speech extends.⁸³ Any language that is not protected by the First Amendment, like obscenity and threats, could be subject to school regulation.⁸⁴

While these concerns plague many statutes that impose criminal penalties, Virginia courts have already examined §18.2-427 for constitutionality.⁸⁵ In an early case, *Walker v. Dillard*, the court found that the construction of the statute was overbroad.⁸⁶ The decision rested on whether or not the courts had construed the text of the statute to only criminalize speech traditionally not covered by the First Amendment, like fighting words, threats, or obscenity.⁸⁷ However, *Walker* was based on an earlier version of the statute that was later amended and recodified as §18.2-427.⁸⁸ Instead, *Walker* was based

⁷⁷ Turbert, *supra* note 72, at 664–65 (citing *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 509 (1969)).

⁷⁸ Turbert, *supra* note 76, at 664–65 (citing *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 509 (1969)).

⁷⁹ 478 U.S. 675, 685 (1986).

⁸⁰ 484 U.S. 260, 276 (1988).

⁸¹ 478 U.S. at 681 (1986).

⁸² Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-campus Student Cyberbullying*, 13 BARRY L. REV. 103, 115 (2009); Turbert, *supra* note 72, at 664.

⁸³ *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

⁸⁴ See e.g. Turbert, *supra* note 72, at 670–71 (discussing "true threats").

⁸⁵ *Walker v. Dillard*, 523 F.2d 3, 5 (4th Cir. 1975).

⁸⁶ *Id.* ("Nearly every operative word of the statute is susceptible of an overbroad construction, and several have been stricken at one time").

⁸⁷ *Id.*

⁸⁸ VA. CODE ANN. § 18.2-427 (2000).

on §18.1-427, which read, “If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor.”⁸⁹ In light of the changes made to the statute, the Virginia Court of Appeals re-examined it and ruled the amended statute to be constitutional.⁹⁰ In *Perkins*, the Virginia Court of Appeals held: “In view of the legislature’s amendments . . . we conclude that the legislature intended to address harassing conduct as the evil to be proscribed and intended to narrow the scope of the speech phrases to that which is obscene. This construction . . . removes protected speech from within the statute’s sweep.”⁹¹ As stated above, obscenity is speech that is traditionally not protected by the First Amendment, and has been viewed by the Virginia Court of Appeals as speech that conflicts with society’s accepted standard for sexuality.⁹² Therefore, the acts of an individual may be profane, vulgar, or indecent, but only speech that is obscene by the above definition may be subject to criminal sanctions.⁹³ Although this may seem to limit the statute’s potential application to cyberbullying, much of what falls into the category of “cyberbullying” includes actions such as misuse of websites and impersonation.⁹⁴

B. Let the Punishment Fit the Crime

House Bill 2059 is characterized by its breadth in application. It does not limit itself to situations that revolve around school, and could therefore apply to both adults and children.⁹⁵ Commentators object to the application of these statutes to children and teens because they see the statutes as overlooking the definition of cyberbullying.⁹⁶ Cyberbullying is defined almost universally among scholars as being be-

⁸⁹ *Walker*, 523 F.2d at 4 n. 1 (quoting VA. CODE ANN. § 18.1-238 (1975), *recodified at* § 18.2-427 (2000)). *See also Criminal Law*, 60 VA. L. REV. 1697, 1699 (1975) (discussing judicial decisions that found statutes to be overbroad, including §18.2-238 and *Walker*).

⁹⁰ *Perkins v. Commonwealth*, 402 S.E.2d 229, 231; 12 Va. App. 7, 10–11 (1991).

⁹¹ *Perkins*, 402 S.E.2d at 233; 12 Va. App. at 14 (1991).

⁹² *Lofgren v. Commonwealth*, 684 S.E.2d 223, 225; 55 Va. App. 116, 119–20 (2009).

⁹³ *Id.*

⁹⁴ *Direct Attacks*, *supra* note 22.

⁹⁵ *See* H.B. 2059, 2011 Gen. Assemb., Reg. Sess. (Va. 2011) (as passed Feb. 25, 2011 by House and Senate).

⁹⁶ Zande, *supra* note 81, at 127.

tween children and teens, *never* adults.⁹⁷ Although Delegate Bell's goal is to regulate the use of texting for cyberbullying,⁹⁸ the statute cannot technically be called a "cyberbullying statute" because of its application to adults.⁹⁹ The cases construing the statute before the bill's passage all involved harassment between adults.¹⁰⁰ Therefore, the worry becomes the extent to which the statute punishes speech that society does not fiend deserving of a hefty fine or jail time.¹⁰¹ In comparing adult activity with the typical interaction among school-children, one could conclude that the adult offenses are often more realistically threatening or cruel.¹⁰² According to one commentator, "it would be a waste to utilize court resources in a cyberbullying claim when schools are in a better position to educate the cyberbully as to appropriate online and social behavior, as well as to determine and oversee punishment."¹⁰³

C. Education First, No Cyberbullying Later?

Education provides a way for states to combat cyberbullying while avoiding the negative effects that result from imposing criminal penalties on children.¹⁰⁴ Another positive aspect of education is that legislatures would not have to worry about First Amendment challenges.¹⁰⁵ A complete educational program may not only educate children and teens how to avoid cyberbullying, but also how to react when they are bullied.¹⁰⁶ Parents may learn the websites, programs and language that their children use in order to know how to monitor their child's activities.¹⁰⁷ Other important lessons for parents might be how to identify the warning signs of cyberbullying victimization

⁹⁷ *State Cyberstalking, Cyberharassment, and Cyberbullying Laws*, *supra* note 40; *What is Cyberbullying, Exactly?*, *supra* note 19.

⁹⁸ Birch, *supra* note 64.

⁹⁹ *State Cyberstalking, Cyberharassment, and Cyberbullying Laws*, *supra* note 40.

¹⁰⁰ *See, e.g. Lofgren*, 684 S.E.2d at 224–25; 55 Va. App. 116–19 (2009) (involving a domestic dispute with name-calling); *Allman v. Commonwealth*, 596 S.E.2d 531–32; 43 Va. App. 104, 106–107 (2004) (involving a man calling an attorney a "pus-sy").

¹⁰¹ Zande, *supra* note 81, at 128.

¹⁰² *Id.* at 127.

¹⁰³ *Id.* at 127–28.

¹⁰⁴ Meredith, *supra* note 71, at 334.

¹⁰⁵ *Id.* at 336.

¹⁰⁶ *Id.* at 337.

¹⁰⁷ *Id.* at 337–38.

and how to comfort and encourage their child.¹⁰⁸ The vastness of the internet can be overwhelming, and both parents and students may not be aware of where the child's information is going once it is uploaded to a social media site.¹⁰⁹ There is federal support for this approach, as indicated by the 2009 passage of the Student Internet Safety Act by the United States House of Representatives.¹¹⁰ The bill sets forth certain educational goals pertaining to internet use and cyberbullying, and allows federal funds to be distributed to further these goals.¹¹¹ The House of Representatives has also introduced a bill that promotes grants for cyberbullying education programs,¹¹² while the Senate introduced a bill supporting grants for research on the issue.¹¹³ While the legislatures decide upon a statutory scheme, "[t]hese non-legal, communal efforts are the most direct and noncontroversial ways to suppress off-campus cyberbullying"¹¹⁴

V. CONCLUSION

Virginia has taken the threat of cyberbullying seriously, and has an extensive statutory scheme to regulate these activities.¹¹⁵ The state also has the advantage of already having litigated this statute, so perhaps the potential threats to similar statutes in other states are not present here.¹¹⁶ If §18.2-427 only regulates the truly obscene, then perhaps the commentators' worries that criminal punishments will be widespread for almost all offensive communications is less likely. A statute like Virginia's might then fall back on the school system's code of conduct, or the discretion of individual school employees, to handle incidents that do not rise to the level of the much more serious criteria of obscenity, profanity, or overt threats. However, not all

¹⁰⁸ *Id.* at 337.

¹⁰⁹ Amanda Cooley, *Guarding Against a Radical Redefinition of Liability for Internet Misrepresentation: The United States v. Drew Prosecution and the Computer Fraud and Abuse Act*, 14 J. INTERNET L. 1, 23 (2011).

¹¹⁰ Meredith, *supra* note 71, at 334–35 (citing Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009)).

¹¹¹ *Id.*

¹¹² *Id.* at 335 (citing Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009)).

¹¹³ *Id.* at 336 (citing SAFE Internet Act, S. 1047, 111th Cong. (2009)).

¹¹⁴ Turbert, *supra* note 72, at 690.

¹¹⁵ *Supra* notes 48–50 and accompanying text.

¹¹⁶ *Supra* note 90.

students are caught in the act; therefore, not all children and teens will be prosecuted for their crimes, even if the cyberbullying is truly abhorrent.

An educational element would be beneficial to both parents and students. Cell phone, text messaging, and social media are all relatively new technologies and are continuously evolving. Although not a complete solution, education is the only method of controlling cyberbullying that can stop it before it starts. With great technology comes great responsibility—responsibility in its use, and responsibility in legislation.