AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees and Schools

**People v. Marquan, 24 N.Y. 3d 1** (NY 2014)

*In 2010, the state of New York adopted the Dignity for All Students Act, which declared that the state must provide all students in public schools “an environment free of discrimination and harassment” caused by “bullying, taunting, or intimidation.” Additional training and policies were to be adopted by local school boards to deter bullying. In 2012, the legislature amended the act to specify that the anti-bullying policies applied to “any form of electronic communication,” including off-campus activities that “foreseeably create a risk of substantial disruption within the school environment.” In 2010, the Albany county government created a criminal offense of “cyberbullying,” defined as “any act of communication . . . by electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs, disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.” Violation of the cyberbullying ordinance was classified as a misdemeanor subject to a term in jail and a monetary fine.*

*Marquan M., a student in a high school in Albany county, created pseudonymous Facebook page. On that page he posted photographs of his classmates with detailed descriptions of their sexual practices. He was charged with cyberbullying under the county ordinance. He pleaded guilty but reserved the right to appeal. A succession of state and local courts upheld the ordinance. The state supreme court reversed the lower courts and declared the ordinance as written unconstitutional in a 5-2 decision. The court found the cyberbullying ordinance to be overbroad as written, though it thought a more narrowly written ordinance that focused on electronic communication that served no public purpose and intended to inflict significant emotional harm on children would be valid.*

JUDGE GRAFFEO delivered the opinion of the Court.

. . . .

Under the Free Speech Clause of the First Amendment, the government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens* (2010). Consequently, it is well established that prohibitions of pure speech must be limited to communications that qualify as fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation or statements integral to criminal conduct. Outside of such recognized categories, speech is presumptively protected and generally cannot be curtailed by the government.

Yet, the government unquestionably has a compelling interest in protecting children from harmful publications or materials. *Reno v. American Civil Liberties Union* (1997). Cyberbullying is not conceptually immune from government regulation, so we may assume, for the purposes of this case, that the First Amendment permits the prohibition of cyberbullying directed at children, depending on how that activity is defined. Our task therefore is to determine whether the specific statutory language of the Albany County legislative enactment can comfortably coexist with the right to free speech.

. . . .

Based on the text of the statute at issue, it is evident that Albany County "create[d] a criminal prohibition of alarming breadth." he language of the local law embraces a wide array of applications that prohibit types of protected speech far beyond the cyberbullying of children. . . . On its face, the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on school-aged children. The county law also lists particular examples of covered communications, such as "posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail." But such methods of expression are not limited to instances of cyberbullying—the law includes every conceivable form of electronic communication, such as telephone conversations, a ham radio transmission or even a telegram. In addition, the provision pertains to electronic communications that are meant to "harass, annoy. . . taunt . . . [or] humiliate" any person or entity, not just those that are intended to "threaten, abuse . . . intimidate, torment. . . or otherwise inflict significant emotional harm on" a child. In considering the facial implications, it appears that the provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult.

. . . .

We conclude that it is not a permissible use of judicial authority for us to employ the severance doctrine to the extent suggested by the County or the dissent. It is possible to sever the portion of the cyberbullying law that applies to adults and other entities because this would require a simple deletion of the phrase "or person" from the definition of the offense. But doing so would not cure all of the law's constitutional ills. As we have recently made clear, the First Amendment protects annoying and embarrassing speech. *People v. Golb* (NY 2014); *People v. Dietze* (NY 1989), even if a child may be exposed to it, so those references would also need to be excised from the definitional section. And, the First Amendment forbids the government from deciding whether protected speech qualifies as "legitimate," as Albany County has attempted to do. . . .

t is undisputed that the Albany County statute was motivated by the laudable public purpose of shielding children from cyber-bullying. The text of the cyberbullying law, however, does not adequately reflect an intent to restrict its reach to the three discrete types of electronic bullying of a sexual nature designed to cause emotional harm to children. Hence, to accept the County's proposed interpretation, we would need to significantly modify the applications of the county law, resulting in the amended scope bearing little resemblance to the actual language of the law. Such a judicial rewrite encroaches on the authority of the legislative body that crafted the provision and enters the realm of vagueness because any person who reads it would lack fair notice of what is legal and what constitutes a crime. Even if the First Amendment allows a cyberbullying statute of the limited nature proposed by Albany County, the local law here was not drafted in that manner. Albany County therefore has not met its burden of proving that the restrictions on speech contained in its cyberbullying law survive strict scrutiny.

There is undoubtedly general consensus that defendant's Facebook communications were repulsive and harmful to the subjects of his rants, and potentially created a risk of physical or emotional injury based on the private nature of the comments. He identified specific adolescents with photographs, described their purported sexual practices and posted the information on a website accessible world-wide. Unlike traditional bullying, which usually takes place by a face-to-face encounter, defendant used the advantages of the Internet to attack his victims from a safe distance, 24 hours a day, while cloaked in anonymity. Although the First Amendment may not give defendant the right to engage in these activities, the text of Albany County's law envelops far more than acts of cyberbullying against children by criminalizing a variety of constitutionally-protected modes of expression. . . .

*Reversed*.

JUDGE SMITH, with whom JUDGE PIGOTT joins, dissenting.

Albany County has conceded that certain provisions of its Cyber-Bullying law are invalid. It seems to me that those provisions can be readily severed from the rest of the legislation and that what remains can, without any strain on its language, be interpreted in a way that renders it constitutionally valid.

. . . . The County concedes that the words "embarrassing" and "hate mail" are "vague and thus unenforceable." It argues, correctly I think, that these terms can be dealt with in the same way as the reference to "person" in the operative section: simply by crossing them out. Once these deletions are made, I see nothing in the law that renders it unconstitutional.

The majority, it seems, is troubled by two other aspects of the definition of "Cyber-Bullying": the requirement that the forbidden communications be made "with no legitimate private, personal, or public purpose"; and the series of verbs—"harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate"— that precedes the words "or otherwise." Neither requires us to invalidate the law.

I grant that the words "no legitimate . . . purpose" are not remarkable for their precision. We have twice held, however, that they are clear enough to withstand a constitutional challenge for vagueness. *People v. Shack* (NY 1995). . . . Similarly here, the phrase "no legitimate purpose" should be understood to mean the absence of expression of ideas or thoughts other than the mere abuse that the law proscribes.

. . . . The Cyber-Bullying law prohibits a narrow category of valueless and harmful speech when the government proves, among other things, that the speaker had no legitimate purpose for engaging in it. The speech so prohibited is not protected speech.

. . . . the acts within the scope of the Cyber-Bullying law—disseminating sexually explicit photographs or private, personal, false or sexual information— are prohibited only where they are intended to "inflict significant emotional harm" on the victim, and the verbs merely serve as examples of ways in which significant emotional harm may be inflicted. . . . So read, the law does not prohibit conduct intended to harass, annoy, threaten or the like unless the actor specifically intended "significant emotional harm." I do not find such a prohibition to be unconstitutionally vague or overbroad.

In short, I think the majority makes too much of what it sees as flaws in the draftsmanship of the Cyber-Bullying law. The crux of the case, in my view, is whether Albany County constitutionally may do what it is trying to do—to prohibit certain kinds of communication that have no legitimate purpose and are intended to inflict significant emotional injury on children. The answer to this question is not self-evident. The First Amendment protects some extremely obnoxious forms of speech. *Snyder v. Phelps* (2011). . . .