

CYBERBULLYING IN TEXAS: REFORM IS NECESSARY TO KEEP THE VIRTUAL PLAYGROUND SAFE

Adrienne Morris*

I. INTRODUCTION

Cyberbullying is “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”¹ This harm comes in the form of “aggressive behavior that is persistent, intentional, and involves an imbalance of power or strength.”² Bullying includes everything from being threatened or physically assaulted to being called derogatory names or being ostracized.”³ Cyberbullying only occurs when a minor is targeted.⁴ According to the Texas Attorney General’s Office, cyberbullying occurs when “a student is threatened, harassed, humiliated, embarrassed or otherwise singled out via an e-mail or post on the Internet (blogs or other Web sites), text message from a cell phone or other wireless device.”⁵ Cyberbullying incidents leading to litigation have originated from e-mails sent to the intended victim, blog entries regarding the intended victim, posts on social networking sites such as Facebook or MySpace, Internet parodies of the intended victim, fake Internet profiles of the victim, and creating or accessing an unauthorized website to harass or bully the victim.⁶

*Notes & Comments Editor, Baylor Law Review; J.D. Candidate, Baylor University School of Law, May 2012; B.A. Public Relations, University of Central Arkansas, 2008. The author would like to thank Professor Brian Serr, Cindy Morris, and Taylor Lyons for their advice, assistance, and support throughout the writing process.

¹Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER 1 (2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.

²*See id.*

³NAT’L CRIME PREVENTION CTR., *21st Century Bullying, Crueler Than Ever*, <http://www.ncpc.org/topics/cyberbullying> (last visited Dec. 3, 2010).

⁴*See id.*; *see also, e.g.*, TEX. EDUC. AGENCY, *Coordinated School Health – Bullying and Cyberbullying*, http://www.tea.state.tx.us/CSH_Bullying.html (last visited Dec. 3, 2010).

⁵OFFICE OF THE ATTORNEY GEN. OF TEX., *SCHOOL SAFETY GUIDE 14* (2007), <https://www.oag.state.tx.us/criminal/schoolsafety.shtml>.

⁶115 AM. JUR. *Trials* 355 § 5 (2010).

As technology has become more prevalent in our society, especially among younger users, the detrimental effects of this type of harassment have begun to increase exponentially.⁷ Even as early as 2007, forty-three percent of all teenagers with Internet access reported being bullied online.⁸ In 2004, fifty-eight percent of fourth through eighth grade students nationwide reported having had mean or cruel things said to them online, and over forty percent of this number were victimized on more than one occasion.⁹

Cyberbullying causes many adverse effects, especially in preteens and young teens, including depression, violence, and even suicide.¹⁰ In fact, one recent study found that victims of cyberbullying were twice as likely to attempt suicide than those who had not been cyberbullied.¹¹ A recent tragedy that has brought this problem to the attention of our nation and prompted a federal legislative response was thirteen-year-old Megan Meier's suicide.¹² Texas has experienced similar incidents. For example, in March 2010, an eight-year-old boy in Houston attempted suicide by jumping off a balcony because he was "tired of the teasing."¹³

The tragic results of cyberbullying have caused several states and the federal government to pass or propose legislation to combat the problem.¹⁴ Thirty-four states, including Texas, and the federal government have either adopted or proposed legislation addressing online harassment.¹⁵ Texas's

⁷Hinduja & Patchin, *supra* note 1, at 1.

⁸NAT'L CRIME PREVENTION CTR., *Teens and Cyberbullying* 1 (2007), <http://www.ncpc.org/topics/cyberbullying>.

⁹i-SAFE, *Cyber Bullying: Statistics and Tips*, http://isafe.org/channels/sub.php?ch=op&sub_id=media_cyber_bullying (last visited Dec. 2, 2010).

¹⁰Hinduja & Patchin, *supra* note 1, at 1.

¹¹Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Study: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CENTER 2 (2010), http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf.

¹²Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007. Megan attempted suicide after her neighbor created a MySpace profile and used it to torment Megan for weeks. *See id.*

¹³*See* Ned Hibberd, *School District Battles 'Cyber-Bullies'*, MYFOX HOUSTON, Mar. 30, 2010, <http://www.myfoxboston.com/dpp/news/education/100330-school-district-battles-cyber-bullies>.

¹⁴*See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. §§ 2–3 (2009); *see also, e.g.*, TEX. PENAL CODE ANN. § 33.07 (West Supp. 2010).

¹⁵TEX. PENAL CODE ANN. § 33.07; Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING

criminal statute, Penal Code Section 33.07 (Section 33.07), as well as seven other statutes across the nation, specifically address cyberbullying.¹⁶ However, the deficiencies inherent in this type of solution leave much wanting for the victims of cyberbullying, particularly in a statute formulated like Section 33.07.¹⁷ Because Texas's statute is underinclusive, and could be in danger of repeal, it cannot serve as an effective tool for prosecuting cyberbullies.

This Comment will address the problems with Texas's current response to cyberbullying and discuss possible sources of Texas law for prosecuting and recovering against cyberbullies, including Section 33.07, school district responses mandated by the Education Code, and common law tort principles. By comparing Texas law with the positions other states have taken on this issue, the Comment will propose amendments to the current statutes and an addition to the currently recognized tort causes of action that could better protect our youth against the dangers of the virtual playground.

II. VICTIMS OF CYBERBULLYING ARE UNLIKELY TO RECOVER IN CIVIL CAUSES OF ACTION

Tort causes of action have consistently been applied to torts committed over the Internet in Texas.¹⁸ Invasion of privacy and defamation are the most applicable tort causes of action to most cyberbullying cases, but a victim has to overcome several hurdles to recover under either theory. Additionally, a cyberbullying victim's ability to plead intentional infliction of emotional distress is a very remote possibility.

A. Defamation

For children or teens whose cyberbullies have made inaccurate comments about the victim himself, defamation would seem to be the primary applicable tort cause of action. However, the types of insults

RESEARCH CENTER 1 (Mar. 2011), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

¹⁶TEX. PENAL CODE ANN. § 33.07; Hinduja & Patchin, *supra* note 15, at 1.

¹⁷See TEX. PENAL CODE ANN. § 33.07 (West Supp. 2010).

¹⁸See, e.g., *Milo v. Martin*, 311 S.W.3d 210, 214 (Tex. App.—Beaumont 2010, no pet.); see also *Tex. Intern. Prop. Assocs. v. Hoerbiger Holding AG*, 624 F. Supp. 2d 582, 592–93 (N.D. Tex. 2009); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850–51 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008); *Draker v. Schreiber*, 271 S.W.3d 318, 322 (Tex. App.—San Antonio 2008, no pet.).

commonly directed at those cyberbullied may make it difficult to recover for defamation in many cases. To recover for defamation in Texas, a cyberbullying victim must prove that the cyberbully: (1) published a statement; (2) that was defamatory concerning the victim; (3) while acting with negligence regarding the truth of the statement; and (4) that the victim suffered damages as a result.¹⁹ While the first, third, and fourth factors would not normally present insurmountable difficulties, the second factor will often be difficult to prove in a cyberbullying case.

The second factor—the crux of this cause of action—is that the statement is actually defamatory, which means that the cyberbully presented the statement as an actual fact, rather than only an opinion.²⁰ Courts look at four factors to determine the connotation of the statement: (1) the common usage or meaning of the specific language of the challenged statement itself; (2) whether the statement is capable of being objectively characterized as true or false; (3) the context in which the statement was made; and (4) the broader context or setting in which the statement appears.²¹ Most of the types of statements made in cyberbullying cases—for example, “he’s ugly” or “she’s a slut”—cannot be characterized as true or false.²² Often, these types of hurtful terms do not even have precise definitions.²³ Since there is no objective definition of words like “ugly,” there is no way to prove the statement’s truth or falsity.²⁴ Whether a statement is a fact or an opinion is a question of law for the court.²⁵ Thus, if the court finds that the statements made by the cyberbully are classified as opinion rather than fact, the cause of action will not survive a defendant’s motion for summary judgment.

¹⁹ See 50 TEX. JUR. 3d *Libel and Slander* § 6. (2008). Although the plaintiff must prove that the defendant acted with actual malice if the victim is a public figure, only negligence must be proven if the victim is a private citizen. See *id.*

²⁰ See *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989).

²¹ See *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

²² See Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 279 (2008) (commenting that “the law doesn’t deal well with parsing student slang”).

²³ See *id.*

²⁴ See *id.*

²⁵ See *Carr*, 776 S.W.2d at 570 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

B. Invasion of Privacy

The tort of intentional invasion of right to privacy may provide relief to victims of cyberbullying in certain cases.²⁶ This tort cause of action recognizes the fact that “the ‘right to be let alone’ is as much a part of personal liberty as the right to be free from physical restraint and the right to possess property.”²⁷ Texas has traditionally recognized three causes of action for invasion of privacy: (1) intrusion upon a person’s right to be left alone in his or her own affairs; (2) publicity given to private information about a person; and (3) appropriation of some element of the person’s personality for commercial use.²⁸ False light, a fourth cause of action, is not recognized in Texas.²⁹ The first two causes of action—invasion of privacy by unreasonable intrusion and invasion of privacy by public disclosure of private facts—are the most applicable to cyberbullying cases, but each presents unique challenges that victims of cyberbullying must overcome to recover for the invasion of their privacy.

1. Invasion of Privacy by Unreasonable Intrusion

Texas has adopted the Second Restatement of Torts’ cause of action for invasion of privacy by unreasonable intrusion upon seclusion, under which “one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”³⁰ Thus, in Texas, a victim of cyberbullying must establish three elements in order to recover under a claim for invasion of privacy by unreasonable intrusion: (1) the cyberbully intentionally intruded on the victim’s solitude, seclusion, or private affairs; (2) the intrusion would be highly offensive to a reasonable person; and (3) the victim suffered injury as a result of the cyberbully’s intrusion.³¹

²⁶“One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.” RESTATEMENT (SECOND) OF TORTS § 652A (1977). *See also* Billings v. Atkinson, 489 S.W.2d 858, 861 (Tex. 1973).

²⁷Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890)).

²⁸*See* Cain v. Hearst Corp., 878 S.W.2d 577, 578 (Tex. 1994).

²⁹*See id.* at 578–79.

³⁰RESTATEMENT (SECOND) OF TORTS § 652B (1977); *see also* 16 TEX. PRAC., TEXAS ELEMENTS OF AN ACTION § 27:1 (Gardner ed. West 2010).

³¹*See* 16 TEX. PRAC., TEXAS ELEMENTS OF AN ACTION § 27:1 (Gardner ed. West 2010).

Establishing injury should be the easiest element for victims of cyberbullying. To recover, the victim must prove that he or she suffered injury as a result of the cyberbully's intrusion into his affairs.³² A victim can recover for invasion of privacy even in the absence of physical injury because "the injury is essentially mental and subjective, not actual harm done to the plaintiff's body."³³ Thus, although mental anguish is the most common injury involved in cyberbullying situations, this will not preclude a victim from recovering in a claim for invasion of privacy by unreasonable intrusion into seclusion.³⁴ However, the other two elements present difficulties that a victim may not be able to overcome.

The first element will likely be the hardest to prove in light of prior Texas cases.³⁵ To establish the first element of the cause of action, the victim must prove that the cyberbully intentionally intruded on his solitude, seclusion, or private affairs.³⁶ Traditionally, this element can only be established by proving some type of physical intrusion.³⁷ For example, in *Cornhill Insurance v. Valsamis*, the Fifth Circuit, applying Texas law, addressed a claim for invasion of privacy where offensive comments were made toward the plaintiff.³⁸ The court held that the plaintiff could not recover based on the intentional intrusion upon her solitude or private affairs because she did not allege a "physical invasion of a person's property or eavesdropping on another's conversation."³⁹ A more recent Texas case has recognized a non-physical "intrusion."⁴⁰ In *Bray v. Cadle Co.*, the Southern District of Texas recognized a claim for invasion of

³² See *Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973).

³³ *Id.*

³⁴ In a recent study, fifty-six percent of teen cyberbullying victims reported feeling angry, thirty-three percent reported feeling hurt, thirty-two percent reported being embarrassed, and thirteen percent reported being scared by the cyberbully's actions. See NAT'L CRIME PREVENTION CTR., *supra* note 8, at 9.

³⁵ See, e.g., *Clayton v. Richards*, 47 S.W.3d 149, 153 (Tex. App.—Texarkana 2001, pet. denied). "The core of the tort of invasion of privacy is the offense of prying into the private domain of another." *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 244 S.W.3d 629, 636 (Tex. App.—Austin 2008), *aff'd in part, rev'd in part*, *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 54 Tex. Sup. Ct. J. 245 (Tex. 2010).

³⁶ See, e.g., *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

³⁷ See *Cornhill Ins. PLC v. Valsamis*, 106 F.3d 80, 85 (5th Cir. 1997).

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *Bray v. Cadle Co.*, CIV.A. 4:09-CV-663, 2010 WL 4053794, at *17 (S.D. Tex. Oct. 14, 2010).

privacy when the plaintiff alleged that the defendant hired people to monitor the plaintiff's bank accounts.⁴¹ This may suggest that courts are becoming more willing to recognize nontraditional invasions of privacy and thus might be more receptive to a claim based upon offensive comments made over the Internet. However, this remains a significant obstacle in the path of recovery for victims of cyberbullying.

The second element may be equally difficult for a victim of cyberbullying to establish. The victim must also prove that the cyberbully's intrusion would be highly offensive to a reasonable person.⁴² To establish the "highly offensive" element, the intrusion must involve "prying into the private domain of another."⁴³ Those who expose their private information to the public cannot recover under this cause of action.⁴⁴ A claim based, for example, on comments solicited by a question posted on the website Formspring might not serve to establish this element.⁴⁵ Formspring users receive anonymous communications from other users in the form of questions or comments in a private mailbox, which are then posted publicly when the user answers them.⁴⁶ Thus, the victim has arguably "exposed" the topic to the public by answering the question someone has asked of him or her.⁴⁷ In the same vein, offensive comments based on the victim's personal appearance might not meet this element either, because one's appearance is constantly visible to others. Therefore, claims for invasion of privacy by unreasonable intrusion brought by victims of certain types of cyberbullying will be less likely to succeed based on the second element of the cause of action.

2. Invasion of Privacy by Public Disclosure of Private Facts

A victim of cyberbullying may be most likely to succeed in a claim for invasion of privacy by public disclosure of private facts. Many victims of cyberbullying have had personal and damaging information about them

⁴¹ *Id.* at *16–17.

⁴² *See, e.g.,* Valenzuela v. Aquino, 853 S.W.2d 512, 513 (Tex. 1993).

⁴³ Vaughn v. Drennon, 202 S.W.3d 308, 320 (Tex. App.—Tyler 2006, no pet.).

⁴⁴ *See id.* In *Vaughn*, the court refused to recognize an invasion of privacy cause of action when the plaintiffs had been watched with binoculars while standing inside their home in front of a large window or while outside the home. *See id.*

⁴⁵ *See* Tamar Lewin, *Teenage Insults, Scrawled on Web, Not on Walls*, N.Y. TIMES, May 5, 2010, at A1.

⁴⁶ *See id.*

⁴⁷ *See id.*

disseminated over the Internet.⁴⁸ For example, a Rutgers University student recently committed suicide after two classmates allegedly streamed his sexual encounters online.⁴⁹ If a victim has been cyberbullied in this manner, the victim must establish three factors to recover under this cause of action: (1) the cyberbully publicized matters concerning the victim's personal life; (2) the publication would be highly offensive to a reasonable person of ordinary sensibilities; and (3) the matter publicized is not of legitimate public concern.⁵⁰

First, the victim must prove that the cyberbully publicized matters concerning the victim's personal life.⁵¹ The first prong of this element requires that the cyberbully actually made the information "public."⁵² To be "public," the information must be communicated to the public at large, making the information public knowledge.⁵³ Information disseminated online can be viewed by everyone with Internet access instantaneously and thus is clearly a form of communication to the public at large.⁵⁴ The second prong of the first element requires that the information be "private."⁵⁵ The Texas Supreme Court has defined this type of information as "confidential," or "known only to a limited few: not publicly disseminated."⁵⁶ For example, information released in open court or contained in public records is not "private" information.⁵⁷ However, information known only to a small

⁴⁸ See *supra* notes 1–7 and accompanying text.

⁴⁹ See *Rutgers Student Suicide Renews Debate Over Cyberbullying*, FOX NEWS, Oct. 1, 2010, <http://www.foxnews.com/politics/2010/10/01/rutgers-student-suicide-renews-debate-cyberbullying/>.

⁵⁰ See *Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995); see also 16 TEX. PRAC., TEXAS ELEMENTS OF AN ACTION § 28:1 (Gardner ed. West 2010).

⁵¹ See *Star Telegram*, 915 S.W.2d at 473–74.

⁵² See *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683–84 (Tex. 1976).

⁵³ See *id.*

⁵⁴ "In today's Internet world where information . . . can be instantly and anonymously obtained by anyone with access to the worldwide web." *Texas Comptroller of Pub. Accounts v. Attorney Gen. of Texas*, No. 08-0172, 2010 WL 4910163, at *8 (Tex. Dec. 3, 2010) (citing *Op. Tex. Att'y Gen. No. GA-519*, at 6 (2007)).

⁵⁵ See *Indus. Found. of the S.*, 540 S.W.2d at 683–84.

⁵⁶ *Id.* (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 3d ed. 1961).

⁵⁷ See *Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App.—San Antonio 2001, pet. denied); *Hogan v. Hearst Corp.*, 945 S.W.2d 246, 250–51 (Tex. App.—San Antonio 1997, no writ).

number of individuals falls under this definition.⁵⁸ Thus, victims of the type of cyberbullying that involves publication of personal information over the Internet should be able to establish this element.

Victims of cyberbullying should also be able to establish the third element. The victim must prove that the matter publicized is not of legitimate public concern, which the court determines based on the facts and circumstances particular to each individual case.⁵⁹ There has long been a presumption that “the public has no legitimate interest in private embarrassing facts about private citizens.”⁶⁰ Even when a general topic, such as a criminal investigation, may be of legitimate interest for the public, details about the victim that are not uniquely relevant to the case have been found to meet the burden for this element.⁶¹ Thus, hurtful and embarrassing comments made public over the Internet, unrelated to any investigation or other legitimate governmental proceeding should surely be enough to meet the burden for the final element of invasion of privacy by public disclosure of private facts.

However, the victim must also establish that the publication would be highly offensive to a reasonable person.⁶² A certain “threshold” of offensiveness must be met to establish this element.⁶³ This is a high threshold—the matter disclosed must be “so offensive as to shock the ordinary sense of decency or propriety.”⁶⁴ The Texas Supreme Court has suggested that information regarding issues such as sexual assault, illegitimate children, physical or mental abuse, psychiatric treatment, or attempted suicide might meet the “highly offensive” burden.⁶⁵ Thus, while much of the information cyberbullies could disclose about a child or teen will be hurtful, few instances will actually be “shocking” to an ordinary

⁵⁸ See *Indus. Found. of the S.*, 540 S.W.2d at 683–84.

⁵⁹ See *Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995); *Indus. Found. of the S.*, 540 S.W.2d at 685.

⁶⁰ *Star Telegram*, 915 S.W.2d at 474 (citing *Indus. Found. of the S.*, 540 S.W.2d at 685).

⁶¹ See *Star Telegram*, 915 S.W.2d at 474.

⁶² See *id.* at 473–74.

⁶³ See, e.g., *Polansky v. Sw. Airlines Co.*, 75 S.W.3d 99, 105 (Tex. App.—San Antonio 2002, no pet.) (“Whether something is ‘highly offensive’ is first a matter of law; a certain threshold of offensiveness is required.”).

⁶⁴ DAVID A. ELDER, *PRIVACY TORTS* § 3:6 (2010).

⁶⁵ See *Star Telegram*, 915 S.W.2d at 474; *Indus. Found. of the S.*, 540 S.W.2d at 683.

person.⁶⁶ Therefore, only victims of the most serious accusations and taunts will be able to recover under this theory.

C. *Intentional Infliction of Emotional Distress*

If all other tort causes of action fail, a victim of cyberbullying can attempt to pursue a claim for intentional infliction of emotional distress (IIED).⁶⁷ Texas has adopted the Second Restatement of Torts' elements of this cause of action.⁶⁸ Thus, to recover for IIED in Texas, the victim must prove that: (1) the cyberbully acted intentionally or recklessly; (2) the cyberbully's conduct was extreme and outrageous; (3) the cyberbully's actions caused the victim emotional distress; and (4) the victim's emotional distress was severe.⁶⁹ The first element—intent—would be easy for a victim of cyberbullying to prove, as cyberbullying is by definition willful.⁷⁰ The second element—"extreme and outrageous"—is satisfied if the behavior is "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 intolerable in a civilized community."⁷¹ The third element—emotional distress—includes all highly unpleasant mental reactions, such as fright, humiliation, embarrassment, anger, worry, and nausea.⁷² The fourth element—severe emotional distress—is only satisfied when the distress is so severe that no reasonable person should be expected to endure it.⁷³ Whether these elements are satisfied, of course, will depend upon the facts and circumstances unique to each individual cyberbullying case.⁷⁴

However, it is unlikely that a victim will be able to successfully plead a claim for IIED. As a "gap-filler" tort, IIED is not available if the victim also seeks to recover under any other tort cause of action.⁷⁵ Additionally,

⁶⁶ See Lewin, *supra* note 45, at A1.

⁶⁷ See Draker v. Schreiber, 271 S.W.3d 318, 322 (Tex. App.—San Antonio 2008, no pet.).

⁶⁸ See Twyman v. Twyman, 855 S.W.2d 619, 621–22 (Tex. 1993).

⁶⁹ See *id.*; 16 TEX. PRAC., TEXAS ELEMENTS OF AN ACTION § 25:1 (West 2010).

⁷⁰ Cyberbullying is "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices." Hinduja & Patchin, *supra* note 1, at 1.

⁷¹ Diamond Shamrock Ref. and Mktg. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992).

⁷² See Behringer v. Behringer, 884 S.W.2d 839, 844 (Tex. App.—Fort Worth 1994, writ denied).

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ IIED is a "gap-filler" tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a

the court may treat a cyberbullying victim's claim for intentional infliction of emotional distress as simply another tort cause of action disguised as IIED.⁷⁶ For example, in *Draker v. Schreiber*, the plaintiff making a claim for IIED complained of many offensive behaviors within the purview of the cause of action.⁷⁷ But because the plaintiff did not allege any facts independent from a separate claim for defamation, the San Antonio Court of Appeals upheld the trial court's order of summary judgment for the defendant.⁷⁸ Thus, if the victim's complaints would support a claim apart from IIED, this cause of action will be unavailable.⁷⁹

III. TEXAS'S CURRENT LEGISLATIVE SOLUTIONS ARE ALSO INEFFECTIVE

Texas law includes anti-cyberbullying statutes in both the Texas Penal Code and the Texas Education Code.⁸⁰ In 2009, the Texas legislature enacted a statute, Penal Code Section 33.07, making online harassment a third-degree felony.⁸¹ However, this statute has not been adequate to prosecute cyberbullies because it is limited to only persons who use an assumed identity when harassing their victims.⁸² For example, not even a

manner so unusual that the victim has no other recognized theory of redress." *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004); *see also Draker v. Schreiber*, 271 S.W.3d 318, 322 (Tex. App.—San Antonio 2008, no pet.).

⁷⁶ *See Draker*, 271 S.W.3d at 323–24.

⁷⁷ Plaintiff Draker asserted the following in support of her IIED claim:

(1) the use of her identity without her knowledge or permission; (2) the worldwide publication of facts about her, while portraying such facts as if they were true and as if they were about and from her; (3) the acceptance of other members of MySpace.com as "friends" to her supposed site; (4) the worldwide publication of her name, profession, and place of employment, along with false statements about her sexual preferences and activities, without her knowledge or permission; and (5) the portrayal of her as an individual who engages in lewd and offensive behavior, as well as the portrayal of her as a lesbian.

Id. at 324. These comments are very similar to the typical offensive comments made by cyberbullies. *See supra* notes 1–6 and accompanying text.

⁷⁸ *Draker*, 271 S.W.3d at 324.

⁷⁹ *See id.*

⁸⁰ *See* TEX. PENAL CODE ANN. § 33.07 (West Supp. 2010); TEX. EDUC. CODE §§ 25.0342, 37.001, 37.217 (West 2006); *see also* TEX. EDUC. AGENCY, *supra* note 4.

⁸¹ TEX. PENAL CODE ANN. § 33.07.

⁸² *Id.*

month after the statute was enacted, charges against a sixteen-year-old girl were dropped within a week of her arrest because she never concealed her identity when sending harmful messages.⁸³ Additionally, Section 33.07 may violate the First Amendment rights of those charged under the statute.⁸⁴ The provisions in the Education Code have also proven to be ineffective in preventing cyberbullying.⁸⁵ Thus, to cure the defects in the current statutory scheme, Texas should look to other states' solutions to the cyberbullying issue.⁸⁶

A. Texas's Current Criminal Statute

Texas Penal Code Section 33.07(a) provides that "a person commits an offense if the person uses the name or persona of another person to create a web page on or to post one or more messages on a commercial social networking site without obtaining the other person's consent, and with the intent to harm, defraud, intimidate, or threaten any person."⁸⁷ This offense is a third-degree felony.⁸⁸ Section 33.07(b) imposes a Class A misdemeanor on any person who transmits another individual's name, domain address, phone number, or other identifying information over electronic mail, instant message, text message, or similar communication: "(1) without obtaining the other person's consent; (2) with the intent to cause a recipient of the communication to reasonably believe that the other person authorized or transmitted the communication; and (3) with the intent to harm or defraud any person."⁸⁹ Subsection A of the statute addresses the most typical cyberbullying situation, as most instances of cyberbullying

⁸³ See James Muñoz, *Teen Arrested on Charges of Online Harassment*, KHOU HOUSTON, Oct. 13, 2009, <http://www.khou.com/news/national/66205747.html>; James Muñoz, *Online Harassment Charges Dropped Against Texas Teen*, KHOU.com, Oct. 17, 2009, <http://www.khou.com/news/national/66207272.html>; Cary Snyder, *Federal Government, States Grapple with Cyber-Bullying Laws*, U. of Minn. C. of Liberal Arts, CLA Publications, (Jan. 5, 2010, 9:35 A.M.), <http://blog.lib.umn.edu/cla/discoveries/2010/01/federal-government-states-grap.html>; see also Hibberd, *supra* note 13, at 1.

⁸⁴ See *infra* Part III(C)(i).

⁸⁵ See *infra* Part III(B).

⁸⁶ See Hinduja & Patchin, *supra* note 15, at 1 (brief review of state cyberbullying laws).

⁸⁷ TEX. PENAL CODE ANN. § 33.07(a).

⁸⁸ *Id.*

⁸⁹ *Id.* § 33.07(b)–(c).

involve hurtful comments posted on social networking or other Internet sites, not transfers of identifying information.⁹⁰

However, the underinclusive nature of the statute will render it ineffective in addressing the problem with cyberbullying. The statute has been in effect since September 2009, but it has not been effectively used to prosecute cyberbullies.⁹¹ This is, in part, because the statute is narrowly tailored to include only cyberbullies who have used a web page or social networking site to impersonate another party or have transmitted only certain types of personal, “identifying” information through the media.⁹² This “identifying information” only includes a person’s “name and social security number, date of birth, or government-issued identification number; unique biometric data . . . ; unique electronic identification number, address, routing code, or financial institution account number; [or] telecommunication identifying information or access device.”⁹³ Transmitting this type of information is not the subject of cyberbullying, which involves threatening, harassing, or embarrassing another person—not merely publishing identifying information.⁹⁴ Additionally, most cyberbullies do not use a false persona, as required by Section 33.07(a), to disseminate personal information or say hurtful things to their victims.⁹⁵ The comments are typically either stated by a known party or are completely anonymous.⁹⁶

For example, a common source of cyberbullying is the website Formspring, which allows its users to post anonymous comments directed toward another person.⁹⁷ The site, which one guidance counselor remarked contains “absolutely nothing” positive, has experienced over twenty-eight million visits and has had three million questions answered.⁹⁸ Common

⁹⁰ See OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 5, at 14; see also *supra* notes 1–6 and accompanying text.

⁹¹ See TEX. PENAL CODE ANN. § 33.07; see, e.g., Snyder, *supra* note 83.

⁹² See TEX. PENAL CODE ANN. § 33.07(a)–(b).

⁹³ TEX. PENAL CODE ANN. §§ 32.51, 33.07(f)(2).

⁹⁴ See, e.g., ATTORNEY GEN. OF TEX., *supra* note 5, at 14; NAT’L CRIME PREVENTION Ctr., *supra* note 3.

⁹⁵ See NAT’L CRIME PREVENTION CTR., *supra* note 8, at 3 (reporting that most cyberbullied teens know the person that cyberbullied them).

⁹⁶ See *id.* (reporting that seventy-five percent of the teens who are cyberbullied know or eventually discover who is cyberbullying them).

⁹⁷ See Lewin, *supra* note 45, at A1.

⁹⁸ See *id.*

posts include negative comments such as “‘Everyone knows you’re a slut’ or ‘You’re ugly.’”⁹⁹ One seventeen-year-old girl committed suicide after receiving hurtful messages on Formspring and Facebook.¹⁰⁰ Although hurtful comments posted on these websites are the type of behavior an anti-cyberbullying statute should target, Section 33.07 would not apply to the communications because the person posting does not use “the name or persona of another person,” as the statute requires.¹⁰¹

Social networking sites such as Facebook and MySpace are common non-anonymous sources of cyberbullying.¹⁰² Facebook allows its users to create a profile page, which displays the user’s name and picture.¹⁰³ The user can then send messages to other users, post messages on other users’ profile pages, and create groups and events for other members to join.¹⁰⁴ Although Facebook does not allow users to create groups for the purpose of discriminating against others or to create “hate” groups, the site cannot monitor all messages or posts exchanged between contacts, a common source of cyberbullying.¹⁰⁵ MySpace, the forum of choice for Megan Meier’s cyberbully, is structured similarly and presents similar issues.¹⁰⁶ Because these mediums are largely unregulated, users can post hurtful messages to or about another individual with essentially no repercussions.¹⁰⁷ Thus, these most common forms of cyberbullying—those that do not involve the creation or adoption of a false persona—do not fall within the scope of the current statute.

Section 33.07 also limits the parties that can be prosecuted for cyberbullying offenses.¹⁰⁸ Cyberbullying victims may not use the statute to prosecute a social networking site, an Internet service provider, a

⁹⁹ *Id.*

¹⁰⁰ *See id.*; see also Edecio Martinez, *Alexis Pilkington Brutally Cyber Bullied, Even After Her Suicide*, CBS NEWS, Mar. 26, 2010, http://www.cbsnews.com/8301-504083_162-20001181-504083.html. Facebook is another very popular social networking website. See FACEBOOK, <http://www.facebook.com/facebook#!/facebook?v=info> (last visited Dec. 6, 2010).

¹⁰¹ TEX. PENAL CODE ANN. § 33.07(a) (West Supp. 2010).

¹⁰² *See* Lewin, *supra* note 45, at A1.

¹⁰³ *See* FACEBOOK, <http://www.facebook.com/facebook#!/facebook?v=info> (last visited Dec. 6, 2010).

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See* Maag, *supra* note 12.

¹⁰⁷ *See, e.g., id.*

¹⁰⁸ *See* TEX. PENAL CODE ANN. § 33.07(e) (West Supp. 2010).

telecommunications provider, a video service provider, a cable service provider, or any of the employees of these entities.¹⁰⁹ This is consistent with the common law concept in criminal law that third parties generally do not have a duty to prevent harm from occurring to another absent a special relationship between the two parties.¹¹⁰ Texas law has made clear that Internet content providers do not have a relationship with their users worthy of imposing a legal duty on the providers.¹¹¹ In a cyberbullying situation, therefore, the host website has no legal duty to prevent one user from cyberbullying another.¹¹² Therefore, the statute does not allow provider-type entities to be prosecuted under Section 33.07.¹¹³

Section 33.07, however, does not prevent victims from pursuing other causes of action.¹¹⁴ The statute reads, "If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both."¹¹⁵ Therefore, cyberbullies may potentially be prosecuted under federal law, as well. A piece of legislation, entitled the Megan Meier Cyberbullying Prevention Act, was introduced and submitted for consideration in the United States House of Representatives in 2009.¹¹⁶ The bill, H.R. 1966, made cyberbullying a criminal offense, carrying a maximum penalty of a fine plus two years imprisonment.¹¹⁷ The bill's sponsor, Representative Linda Sanchez, is planning to reintroduce the bill in the upcoming

¹⁰⁹ *See id.*

¹¹⁰ "As a general rule, a person has no legal duty to protect another from the criminal acts of third parties or to control the conduct of another." *Guevara v. State*, 191 S.W.3d 203, 206 (Tex. App.—San Antonio 2005, pet. ref'd).

¹¹¹ When parents sued social network operator MySpace for harm occurring to their daughter via the site, the court held that "MySpace had no duty to protect Julie Doe from Pete Solis's criminal acts nor to institute reasonable safety measures on its website." *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 852 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).

¹¹² *See id.*

¹¹³ *See* TEX. PENAL CODE § 33.07(e).

¹¹⁴ *See id.* § 33.07(d).

¹¹⁵ *Id.*

¹¹⁶ The bill proposed to amend Title 18 of the United States Code to include, "Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both." Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 881 (2009).

¹¹⁷ *Id.*

legislative session.¹¹⁸ If the bill becomes law, cyberbullies could be prosecuted under both Texas law and federal law.

B. Texas Education Code Provisions

The Texas Education Code provides limited protections against bullying.¹¹⁹ Section 37.001 requires each school district in Texas to have a local policy that prohibits bullying and harassment, including options for preventing and intervening in these behaviors.¹²⁰ Section 25.0342 allows a parent to transfer their child to another campus if the school district finds that the child is being bullied.¹²¹ Additionally, Section 37.217 requires the state to develop and make available to public schools a program providing instruction on “the prevention, detection, and reporting of bullying or threats occurring over the Internet.”¹²² However, these provisions are inadequate to address the cyberbullying problem in Texas schools.

The Education Code provides that the state must address the problem with cyberbullying in Texas schools through educating students about the dangers of this type of bullying.¹²³ Section 37.217 requires the Texas School Safety Center and the Texas Attorney General to work together to create a program, to be implemented in Texas schools, that addresses Internet safety issues, including cyberbullying.¹²⁴ In an attempt to comply with the statute, the Attorney General’s office provides each Texas school district’s superintendent and principals with materials related to school safety.¹²⁵ “New” materials were distributed to schools in fall 2010.¹²⁶ However, the materials are only current through the 2007 legislative session and thus do not specifically mention Section 33.07, although the School Safety Guide includes a brief description of cyberbullying.¹²⁷ The other

¹¹⁸ See FOX NEWS, *supra* note 49.

¹¹⁹ See TEX. EDUC. CODE §§ 37.001, 37.217, 25.0342 (West 2006 & Supp. 2010).

¹²⁰ See *id.* § 37.001.

¹²¹ See *id.* § 25.0342.

¹²² *Id.* § 37.217.

¹²³ See *id.* §§ 37.001, 37.217.

¹²⁴ See *id.* § 37.217.

¹²⁵ OFFICE OF THE ATTORNEY GEN. OF TEX., SAVING LIVES WHEN SECONDS COUNT: SCHOOL SAFETY FOR TEXAS SCHOOLS (May 6, 2010), <https://www.oag.state.tx.us/criminal/schoolsafety.shtml>.

¹²⁶ See *id.*

¹²⁷ See ATTORNEY GEN. OF TEX., *supra* note 5, at 14–15; Attorney Gen. of Tex. School Safety, *supra* note 125.

materials do not include any discussion of cyberbullying.¹²⁸ Nor do the Texas Unified School Safety Standards created by the School Safety Center.¹²⁹ Instead, the School Safety Center conducts workshops on cyberbullying in various school districts.¹³⁰

Current Texas law also mandates that the individual school districts take action to prevent bullying.¹³¹ Education Code Section 37.001 requires each school district to prohibit bullying and harassment by developing options for preventing and intervening in these behaviors.¹³² Many Texas school districts attempt to prevent cyberbullying by conducting preventative education seminars for students.¹³³ If the options the district has taken have not effectively addressed a student's problem with bullying, Section 25.0342 allows the child's parent(s) to transfer the child to another campus, provided that the school district finds that the child is being bullied.¹³⁴

However, these statutes and the implementation methods currently in force are simply inadequate. Studies have shown that, while education may increase students' knowledge about cyberbullying, these programs do not effectively change their behavior.¹³⁵ Teens are also not receptive to programs implemented by their schools.¹³⁶ The National Crime Prevention

¹²⁸ See ATTORNEY GEN. OF TEX., *supra* note 125. The other materials include a video regarding emergency procedures, an instructional toolkit on implementing school safety audits, and a booklet of applicable public school laws only current through the 2007 legislative session. *Id.*

¹²⁹ See TEXAS SCHOOL SAFETY CENTER, Texas Unified School Safety Standards, <http://www.txssc.txstate.edu/K12/standards> (last visited Dec. 4, 2010).

¹³⁰ TEXAS SCHOOL SAFETY CENTER, TxSSC Training & Workshop Schedule, <http://www.txssc.txstate.edu/K12/schedule> (last visited Dec. 4, 2010).

¹³¹ See TEX. EDUC. CODE ANN. §§ 25.0342, 37.217 (West 2006 & Supp. 2010).

¹³² See *id.* § 37.01.

¹³³ See, e.g., Ilona Carson, *Aldine ISD Tackles Cyberbullying*, ABC 13 KTRK-TV HOUSTON, May 14, 2010, <http://abclocal.go.com/ktrk/story?section=news/local&id=7440839>; Fort Worth ISD, November: Cyberbullying Supplemental Materials and Implementation Ideas, <http://www.fortworthisd.org/safe/Pages/cyberbullying.aspx> (last visited Dec. 4, 2010).

¹³⁴ See TEX. EDUC. CODE ANN. § 25.0342.

¹³⁵ SUSAN CHIBNALL, ET AL., I-SAFE EVALUATION FINAL REPORT 65 (2006). i-SAFE America conducted a study, reporting minimal changes in the participant children's behavior after an educational program regarding Internet safety. *Id.* at i-ii. The i-SAFE report also discussed two other Internet safety education studies, each of which reported an increase in knowledge but a minimal effect on the participants' behavior. *Id.* at 2-3. Teens also do not believe that education is effective in preventing cyberbullying. See NAT'L CRIME PREVENTION CTR., *supra* note 8, at 10.

¹³⁶ NAT'L CRIME PREVENTION CTR., *supra* note 8, at 10.

Center (NCPC) found that less than forty percent of teens believe that schools should have rules against cyberbullying; that schools should teach students, in classrooms or small groups, to not cyberbully; or that adults should be taught how to help young people stop cyberbullying.¹³⁷ Additionally, the Education Code's transfer provision is only effective if the bullied child's parents and the school district are aware of the problem, which is often not the case.¹³⁸ The NCPC found that only eleven percent of the children nationwide who had been cyberbullied reported the incident to their parents.¹³⁹ This indicates that the Education Code provisions are inadequate to address the cyberbullying issue, making the criminal statute's effectiveness even more important.

C. Potential Constitutional Challenges

Both Section 33.07 and the Education Code provisions may be subject to challenge on First Amendment grounds.¹⁴⁰ Additionally, Section 33.07 may face challenges from defendants charged under the statute based on unconstitutional vagueness.¹⁴¹

1. Section 33.07

Section 33.07 may face constitutional challenges similar to those directed at a previous Texas online harassment statute, Penal Code Section 42.07.¹⁴² Section 42.07 makes it a Class B misdemeanor to engage in certain actions "with intent to harass, annoy, alarm, abuse, torment, or embarrass another."¹⁴³ In *Scott v. State*, defendant Samuel Scott argued that Section 42.07 violated his First Amendment free speech privilege and that

¹³⁷Only a few teens believe that "schools should have rules against cyberbullying (37%), schools should educate students in classrooms or small groups about not cyberbullying (33%), [or] adults should be taught on how to help young people stop cyberbullying (32%)." NAT'L CRIME PREVENTION CTR., *supra* note 8, at 10.

¹³⁸See TEX. EDUC. CODE ANN. § 25.0342; NAT'L CRIME PREVENTION CTR., STOP CYBERBULLYING BEFORE IT STARTS 2 (2007), <http://www.ncpc.org/topics/cyberbullying>.

¹³⁹See NAT'L CRIME PREVENTION CTR., *supra* note 138.

¹⁴⁰See Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 309 (2008).

¹⁴¹See *infra* Part III(C)(i).

¹⁴²See *Scott v. State*, 322 S.W. 3d 662, 664 (Tex. Crim. App. 2010) (*Scott II*).

¹⁴³TEX. PEN. CODE ANN. § 42.07 (West 2003 & Supp. 2010).

the statute was unconstitutionally vague.¹⁴⁴ The Texas Court of Appeals agreed with Scott, holding that the statute implicated his First Amendment protections and that Section 42.07 was unconstitutionally vague.¹⁴⁵ However, the Texas Court of Criminal Appeals later held that the statute did not implicate Scott's First Amendment free speech protections and thus did not reach the vagueness issue.¹⁴⁶ Therefore, Section 33.07 is likely to survive a First Amendment challenge, but may still be open to challenge for unconstitutional vagueness.

Section 33.07's similarity to Section 42.07 should insulate it from repeal on First Amendment grounds. The Texas Court of Criminal Appeals in *Scott* held that Section 42.07 did not implicate the First Amendment because the statute does not address protected speech.¹⁴⁷ Because Section 42.07 requires the communication to be made with a "specific intent to inflict emotional distress," the type of communication the statute contemplates is not the "legitimate communication of ideas, opinions, or information" that the First Amendment protects.¹⁴⁸ Similarly, Section 33.07 requires the perpetrator to take action "with the intent to harm, defraud, intimidate, or threaten any person."¹⁴⁹ This is the same type of malicious intent that the court in *Scott* held is not protected by the First Amendment.¹⁵⁰ Thus, a Texas court is not likely to find Section 33.07 unconstitutional on First Amendment grounds.

However, the language used in Section 33.07 leaves it open to a constitutional challenge for vagueness.¹⁵¹ A statute is unconstitutionally vague if "it is so vague and standardless that it leaves the public uncertain

¹⁴⁴ See *Scott II*, 322 S.W. 3d at 665.

¹⁴⁵ *Scott v. State*, 298 S.W.3d 264, 273 (Tex. App.—San Antonio 2009) (*Scott I*), *rev'd*, 322 S.W.3d 662 (Tex. Crim. App. 2010) (*Scott II*).

¹⁴⁶ See *Scott II*, 322 S.W. 3d at 670. A defendant may challenge the constitutionality of a statute on vagueness grounds, even though the statute may not be vague as applied to his conduct, only when the statute implicates the First Amendment. *Kramer v. Price*, 712 F.2d 174, 176 n.3 (5th Cir. 1983). Thus, because the court held that the statute did not implicate the First Amendment, Scott was required to show that it was unduly vague as applied to his own conduct. *Scott II*, 322 S.W. 3d at 670–71. Because Scott had not preserved error on this aspect in the trial court, the court of Criminal Appeals could not consider his argument on appeal. *Id.* at 667, 673.

¹⁴⁷ See *Scott II*, 322 S.W. 3d at 669–70.

¹⁴⁸ *Id.*

¹⁴⁹ TEX. PEN. CODE § 33.07 (West Supp. 2010).

¹⁵⁰ See *Scott II*, 322 S.W. 3d at 669–70.

¹⁵¹ See Charlotte Chang, *Internet Safety Survey: Who Will Protect the Children?*, 25 BERKELEY TECH. L.J. 501, 520 (2010).

as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.”¹⁵² Although the Texas Court of Criminal Appeals in *Scott* did not discuss the issue of vagueness, the Texas Court of Appeals found Section 42.07 to be unconstitutionally vague because “[i]t is impossible for a citizen to know what, in the disjunctive, is meant by this statute’s series of vague terms.”¹⁵³ The series of terms in Section 42.07 that the court referred to is: “harass, annoy, alarm, abuse, torment, or embarrass.”¹⁵⁴ Terms such as “alarm” and “annoy” have been held unconstitutionally vague in previous Texas cases.¹⁵⁵ Section 33.07 includes a similar series of terms: “harm, defraud, intimidate, or threaten.”¹⁵⁶ The Texas Penal Code defines only one of these terms—“harm.”¹⁵⁷ However, even with the definition provided in the Penal Code, some legislators worry that the term is susceptible to being interpreted too broadly.¹⁵⁸ The terms “defraud,” “intimidate,” and “threaten” in Section 33.07 are similar to the challenged terms appearing in Section 42.07 and are not defined in the Code.¹⁵⁹ Additionally, there is not a consensus among Texas courts as to the precise definition of either “defraud”¹⁶⁰ or “threaten.”¹⁶¹ The only term

¹⁵² *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966).

¹⁵³ *Scott I*, 298 S.W.3d at 267, *rev’d*, 322 S.W.3d 662. *See Scott II*, 322 S.W. 3d at 670–71; *Karenev v. State*, 258 S.W.3d 210, 218 (Tex. App.—Forth Worth, 2008), *rev’d* on procedural grounds, 281 S.W.3d 428.

¹⁵⁴ TEX. PEN. CODE ANN. § 42.07 (West).

¹⁵⁵ *See Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996); *May v. State*, 765 S.W.2d 438, 440 (Tex. Crim. App. 1989); *see also Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983).

¹⁵⁶ TEX. PEN. CODE ANN. § 33.07.

¹⁵⁷ *See id.* § 1.07(a)(25). Harm is defined as “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.” *Id.*

¹⁵⁸ *See* Crim. Jurisprudence Comm., House Research Organization Bill Analysis, (May 8, 2009), <http://www.hro.house.state.tx.us/pdf/ba81r/hb2003.pdf#navpanes=0>.

¹⁵⁹ *See* TEX. PEN. CODE ANN § 1.07 (West 2003).

¹⁶⁰ *See, e.g., In re E.P.*, 185 S.W.3d 908, 910 (Tex. App.—Austin 2006, no pet.) (stating that “a person defrauds another if she takes or withholds from another ‘some possession . . . by calculated misstatement or perversion of truth, trickery, or other deception’”); *Martinez v. State*, 6 S.W.3d 674, 678 (Tex. App.—Corpus Christi 1999, no pet.) (defining “intent to defraud” as “the intent to cause another to rely upon the falsity of a representation, such that the other person is induced to act or to refrain from acting”); *McElroy v. State*, 667 S.W.2d 856, 866 (Tex. App.—Dallas 1984), *aff’d*, 720 S.W.2d 490 (Tex. Crim. App. 1986) (defining “intent to defraud” as “an intention to deceive another person, and to induce such other person, in reliance upon such

that appears to have been defined consistently by the Texas Court of Criminal Appeals is “intimidate.”¹⁶² This leaves Section 33.07 open to challenges for unconstitutional vagueness, which may place the statute in danger of repeal.

2. Education Code Provisions

The current Education Code provisions are likely to survive a facial challenge to their constitutionality, but the implementation of the provisions may produce unconstitutional results. Although the Education Code mandates that schools “prevent and intervene” in bullying situations, including enforcement of punishments such as removal or expulsion, the statutes give school districts a level of discretion in the methods for dealing with cyberbullying.¹⁶³ School districts are to create and implement their own policies.¹⁶⁴ Thus, a potential constitutional challenge would likely be to the application of the statute within a particular school, not a facial challenge to the Education Code provision itself.

The United States Supreme Court has held that students in public schools do not enjoy the full protection of the First Amendment when their conduct invades the rights of other students.¹⁶⁵ The First Amendment also does not protect defamatory or hate speech.¹⁶⁶ Courts have seemed to extend this exclusion to many types of speech common in cyberbullying,

deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property”).

¹⁶¹ See, e.g., *Schmidt v. State*, 232 S.W.3d 66, 68 (Tex. Crim. App. 2007) (“[T]he court of appeals’ bright-line rule defines ‘threaten’ too narrowly by assuming that a threat of harm and harm are mutually exclusive.”); *Andrews v. State*, 636 S.W.2d 756, 758–59 (Tex. App.—Beaumont 1982, no writ) (The court was forced to set aside the defendant’s conviction due to the vagueness of the undefined term “threaten” in the statute under which the defendant was convicted.).

¹⁶² See, e.g., *Teer v. State*, 923 S.W.2d 11, 16 (Tex. Crim. App. 1996) (using definition from MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 613 (10th ed. 1993): “[T]o make timid or fearful: FRIGHTEN: esp. to compel or deter by or as if by threats”); *Ward v. State*, 642 S.W.2d 782, 783 (Tex. Crim. App. 1982) (using same definition from WEBSTER’S NEW COLLEGIATE DICTIONARY (150th Anniversary Ed., 1981)).

¹⁶³ See TEX. EDUC. CODE ANN. § 37.001 (West Supp. 2010).

¹⁶⁴ See *id.*

¹⁶⁵ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 513 (1969).

¹⁶⁶ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

including creating fake profiles for other individuals.¹⁶⁷ For example, in *Barnett v. Tipton County Board of Education*, a student who was suspended after creating a fake MySpace profile for his principal challenged the school board's decision on First Amendment grounds.¹⁶⁸ The student argued that the website was intended as a parody, but the District Court for the Western District of Tennessee awarded the school board summary judgment, stating that the profile was in no way protected speech.¹⁶⁹ This indicates that courts are not inclined to view behaviors like this, which are common types of cyberbullying, as protected speech under the First Amendment.

Whether the application of the Education Code provisions is constitutional may also depend on whether the cyberbullying in question has occurred on or off school premises.¹⁷⁰ Off-campus speech has traditionally received greater First Amendment protection than on-campus speech.¹⁷¹ However, the Internet has muddled this distinction, making the traditional off-campus versus on-campus distinction largely inapplicable to speech that occurs over the Internet.¹⁷² Websites can be accessed on-campus even if created off-campus.¹⁷³ The District of Northern Ohio has distinguished creating a website as off-campus speech, even when the website is later accessed on school property.¹⁷⁴ Conversely, Arkansas allows schools to sanction students for cyberbullying "whether or not the electronic act originated on school property or with school equipment, if the electronic act is directed specifically at students."¹⁷⁵ Some states, including Texas, have ignored the distinction entirely.¹⁷⁶ Thus, no clear standard has

¹⁶⁷ See, e.g., *Barnett ex rel. Barnett v. Tipton Cnty. Bd. of Educ.*, 601 F. Supp. 2d 980, 983–84 (W.D. Tenn. 2009).

¹⁶⁸ See *id.* at 983.

¹⁶⁹ See *id.* at 984.

¹⁷⁰ See Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 75 (2005).

¹⁷¹ See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (Pa. 2002) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

¹⁷² See Li, *supra* note 170, at 75–87.

¹⁷³ See *id.* at 83.

¹⁷⁴ See *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 800 (N.D. Ohio 2002) (considering viewing a website, previously created while off-campus, by a student while on-campus "not even akin to putting up a poster in a school hallway").

¹⁷⁵ ARK. CODE ANN. § 6-18-514(b)(2)(B)(ii) (West 2007).

¹⁷⁶ The Texas Education Code provision requiring school districts to "prohibit bullying, harassment, and making hit lists" makes no mention of whether or not the specified actions must

emerged as to which activities should be considered on-campus speech, and it is still unclear whether the on-campus/off-campus distinction will continue to apply to First Amendment challenges based on Internet speech.¹⁷⁷

Of course, the particular facts of each cyberbullying case will also determine whether a school district's action violates the First Amendment. Speech that is not school-sponsored or plainly offensive may only be prohibited if the speech "readily promotes disruption and diversion from the educational curriculum."¹⁷⁸ Student actions over the Internet that have met this standard include a student-created Instant Messenger (IM) icon depicting a stick figure being shot and the words "Kill Mr. VanderMolen," which the student e-mailed to classmates,¹⁷⁹ and a student filming his teacher without authorization, then editing the footage in an unflattering manner and posting the video on YouTube.¹⁸⁰ Although both of these cases involved student actions targeted at teachers, the same type of conduct is often directed at other students in instances of cyberbullying. Thus, courts are likely to make similar findings and continue to uphold school districts' punishments for cyberbullies.

IV. REFORM IS NECESSARY TO ENSURE JUSTICE FOR VICTIMS OF CYBERBULLYING

Reforming the current legislative solution and expanding the available civil causes of action is necessary to effectively address Texas's problem with cyberbullying. Neither Section 33.07 nor the Education Code provisions effectively address cyberbullying concerns. Additionally, if these statutes—particularly Penal Code Section 33.07—are repealed after a constitutional challenge, victims of cyberbullying will be left with only limited civil remedies to address the harm they have experienced.¹⁸¹ Thus, these limited offerings should also be expanded to include a cause of action

occur on school property or during school hours. TEX. EDUC. CODE ANN. § 37.001 (West Supp. 2010).

¹⁷⁷ See Li, *supra* note 170, at 75–87.

¹⁷⁸ Behymer-Smith *ex rel.* Behymer v. Coral Acad. of Sci., 427 F. Supp. 2d 969, 972 (D. Nev. 2006) (citing Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)).

¹⁷⁹ See Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 35–36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

¹⁸⁰ See Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1274–76 (W.D. Wash. 2007).

¹⁸¹ For a discussion of the civil causes of action available in cyberbullying cases, see *supra* Part II.

for invasion of privacy by publicity placing another in a false light.

A. Penal Code Reform

To effectively prosecute cyberbullying as a criminal offense, the current Penal Code provisions should be amended to strike the requirement that the perpetrator adopt a false persona while cyberbullying.¹⁸² Texas can look to North Carolina's criminal cyberbullying statute to expand the offense to incorporate the many methods of cyberbullying that cannot currently be prosecuted under Section 33.07. North Carolina's cyberbullying offense includes "build[ing] a fake profile or Web site," but also makes it a crime to "post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor," to "[p]ost a real or doctored image of a minor on the Internet," or to "[u]se a computer system for repeated, continuing, or sustained electronic communications . . . to a minor."¹⁸³ This statute goes to the heart of the cyberbullying problem, covering most instances of cyberbullying without being overinclusive. The statute, like its Texas counterpart, still requires a mens rea—"intent to intimidate or torment a minor."¹⁸⁴ If Texas's statute had read more like North Carolina's statute, prosecutors would not have been forced to drop the charges against the sixteen-year-old recently arrested under Section 33.07.¹⁸⁵ Additionally, amending the Penal Code to define the words in Section 33.07(a), particularly the words "defraud" and "threaten," may help ensure the statute's survival if faced with a challenge for unconstitutional vagueness.¹⁸⁶ Thus, the legislature has a lot more work to do to make Section 33.07 a success.

B. Education Code Reform

Changes also must be made to the current Education Code statutes to effectively prevent and punish instances of cyberbullying. The Education Code provisions, which currently specify only general types of behavior

¹⁸²The current statute can only be used when the accused "uses the name or persona of another person" to commit the acts of cyberbullying. TEX. PEN. CODE ANN. § 33.07(a) (West Supp. 2010).

¹⁸³N.C. GEN. STAT. ANN. § 14-458.1 (LexisNexis 2009).

¹⁸⁴*Id.* § 14-458.1(a)(1).

¹⁸⁵*See supra* note 83 and accompanying text.

¹⁸⁶*See* Crim. Jurisprudence Comm., *supra* note 158 (addressing the potential for "harm" to be broadly interpreted).

that school districts must prohibit and intervene in, should be amended to specifically include cyberbullying.¹⁸⁷ Nevada's anti-bullying statute is a good example of the appropriate language. First, the statute defines cyberbullying as a separate offense, instead of leaving school districts to decide whether the legislature meant to include online harassment under the general category of "bullying."¹⁸⁸ The statute then clearly states that cyberbullying is prohibited for all parties associated with the school district, and requires each school district to develop, publish, and distribute to students the district's rules under the heading "Bullying, Cyber-Bullying, Harassment and Intimidation Is Prohibited in Public Schools."¹⁸⁹ "Cyberbullying" is also included in the statute's legislative declaration and policy sections concerning safe and respectful learning environments.¹⁹⁰ Nevada's statute is much more comprehensive than Texas's current Education Code provision, which does not even specifically mention "cyberbullying."¹⁹¹ Following Nevada's lead will force each school district in Texas to adopt policies and regulations regarding cyberbullying and reduce the confusion teachers may face when dealing with cyberbullies.

Texas has already taken the first step in reforming the Education Code during the 82nd Legislative Session by proposing amendments to the current statute to include cyberbullying.¹⁹² The proposed legislation adds Section 37.0832, titled "Bullying, Including Cyberbullying: Policies, Procedures, and Training" to the current statute.¹⁹³ The proposed Section 37.0832 defines "bullying," effective for all provisions of the section, as "includ[ing] cyberbullying," and then defines cyberbullying as "bullying that is done using electronic communication, including electronic media."¹⁹⁴ The new section also defines thirteen specific elements that each school

¹⁸⁷Section 37.001 of the Texas Education Code currently reads, "The board of trustees of an independent school district shall . . . prohibit bullying, harassment, and making hit lists and ensure that district employees enforce those prohibitions." TEX. EDUC. CODE ANN. § 37.001(a)(7) (West Supp. 2010).

¹⁸⁸The statute provides the following definition: "'Cyber-bullying' means bullying through the use of electronic communication." NEV. REV. STAT. ANN. § 388.123 (West Supp. 2010). The statute then further defines "electronic communication." *See id.* § 388.124.

¹⁸⁹NEV. REV. STAT. ANN. §§ 388.135, 388.139 (West 2006 & Supp. 2010).

¹⁹⁰*See id.* §§ 388.132–33.

¹⁹¹*See* TEX. EDUC. CODE ANN. § 37.001(a)(7).

¹⁹²*See* Tex. S.B. 205, 82nd Leg., R.S. (2011); Tex. S.B. 242, 82nd Leg., R.S. (2011); Tex. S.B. 245, 82nd Leg., R.S. (2011); Tex. H.B. 224, 82nd Leg., R.S. (2011).

¹⁹³S.B. 245.

¹⁹⁴*Id.*

district must include in its anti-bullying policy.¹⁹⁵ This is a vast improvement over the current statute, which never specifically mentions cyberbullying and only includes the vague requirement that school districts “prohibit” bullying.¹⁹⁶ Thus, Texas is on the right track to adopting a serious stance on cyberbullying in schools.

However, although the proposed amendments will call more attention to cyberbullying in Texas schools, the legislature must also ensure that the application of the Education Code provisions will not invite constitutional challenges. Proposed Section 37.0832 covers bullying that occurs on school property, at a school-sponsored event, or “off school property or outside of a school-sponsored or school-related activity, if the conduct interferes with a student’s educational opportunities or substantially disrupts the orderly operation of a school or school-sponsored or school-related activity.”¹⁹⁷ Thus, if the proposed amendments to the Education Code pass, additional amendments will be needed to ensure that the statute permits punishment only for certain instances that occur on school property—thus removing the incentive for litigants to challenge the statute’s constitutionality by engaging in an on-campus/off-campus debate.¹⁹⁸ Thus, the Texas legislature still needs to make some changes to ensure that the Education Code complies with the United States Constitution.

C. Additional Civil Cause of Action

To give victims of cyberbullying a better chance for civil recovery, Texas courts should unanimously recognize a cause of action for invasion of privacy by publicity placing the other in a false light. To recover under this theory, the victim of cyberbullying must prove that: (1) the false light in which the other was placed would be highly offensive to a reasonable person; and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.¹⁹⁹ A false light exists when the victim is “given unreasonable and highly objectionable publicity that attributes to her characteristics, conduct or beliefs that are false, and so is placed before the

¹⁹⁵ S.B. 205.

¹⁹⁶ See TEX. EDUC. CODE ANN. § 37.001.

¹⁹⁷ S.B. 245.

¹⁹⁸ See *supra* notes 170–77 and accompanying text.

¹⁹⁹ See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

public in a false position.”²⁰⁰ The “highly offensive” element is met when the victim experiences “such a major misrepresentation of her character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in her position.”²⁰¹

Recognizing this cause of action would give cyberbullying victims who might not be able to recover in a claim for defamation or invasion of privacy by public disclosure of private facts a chance to recover under an alternate theory. First, victims who would not be able to establish that the statements made were not “opinions” for purposes of a defamation claim might have more success in a false light cause of action.²⁰² Second, the “highly offensive” element requires only that an ordinary person take “serious offense”—a lower threshold than must be proven for this element in the invasion of privacy by public disclosure of private facts causes of action.²⁰³ A victim of cyberbullying is also more likely to recover under this theory because both elements of the false light cause of action are questions of fact.²⁰⁴ Thus, there is a better chance that the claim will be submitted to a jury.²⁰⁵ In one of the only cases recognizing this cause of action under Texas law, the District Court for the Northern District of Texas dismissed the plaintiff’s claim for defamation but maintained that she had stated a false light claim.²⁰⁶ Therefore, recognizing this cause of action across Texas would likely give more victims of cyberbullying a chance to recover in a civil action.

V. CONCLUSION

It is clear that action must be taken in order for Texas to show a serious commitment to protecting our youth against cyberbullying. While the

²⁰⁰*Ritzmann v. Weekly World News, Inc.*, 614 F. Supp. 1336, 1341 (N.D. Tex. 1985).

²⁰¹*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c at 396 (1977)).

²⁰²RESTATEMENT (SECOND) OF TORTS § 652E, cmt. b (1977).

²⁰³*See Ritzmann*, 614 F. Supp. at 1341. (citing RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c at 396 (1977)); Elder, *supra* note 64 (highly offensive element only established when the information publicized is “so offensive as to shock the ordinary sense of decency or propriety”).

²⁰⁴While the factual nature of the statements made in a defamation cause of action is a question of law, “whether the publication does actually place the subject in a false light . . . is [a] question[] of fact.” *Ritzmann*, 614 F. Supp. at 1340–41.

²⁰⁵Whether a statement is a fact or an opinion, one element of a defamation claim, is a question of law. *See Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

²⁰⁶*See Ritzmann*, 614 F. Supp. at 1340–41.

2011]

CYBERBULLYING IN TEXAS

525

current legislative solutions and civil remedies are inadequate, reforming and expanding these solutions will ensure the safety of Texas's youth. The Texas legislature is on the right track with its proposed reforms for the Education Code, but additional revisions and additions are needed in all areas of Texas law to keep our children safe while on the Internet—the newest, and potentially most dangerous, playground.