



4-1-2016

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Castaños, Juan (2016) "Updating Antiquated Legal Analysis: Re-evaluating the Need to Prosecute Cyberstalkers," *Brigham Young University Prelaw Review*: Vol. 30 , Article 14.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol30/iss1/14>

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UPDATING ANTIQUATED LEGAL ANALYSIS: RE-EVALUATING THE NEED TO PROSECUTE CYBERSTALKERS

Juan Castaños¹

I. INTRODUCTION

Social media outlets have evolved past the virtual adjective they are often limited to. Industry leaders like Mark Zuckerberg are often on record calling their social media creations communities, which many would agree more accurately describes the function of social media sites.² Monetary and service transactions, exchanges of information and ideas, and social networking are a few of the daily functions of these online communities. Facebook, Instagram, LinkedIn, and Twitter have connected the world so that at any given time, someone can have a “friend” in Taiwan, a “connection” in Australia, and “followers” in Brazil and England. However, not every user appreciates such a degree of social exposure and openness. According to an independent statistics company, 73% of Americans

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2 Mark Zuckerberg, *Q&A with Mark*, FACEBOOK, (Oct. 30, 2014), <https://www.facebook.com/zuck/posts/10101719793886061>.

have a social media profile.³ 90% of young adults between the ages 18-29 actively use social media.⁴ It is without doubt that social media sites are prevalent and part of the everyday life of many individuals. For this reason, social mediums have created privacy settings which allow greater control to limit how personal property, meaning an individual's social media profile, interacts with one's neighbors (i.e., other fellow users).⁵ Specifically, these settings define who you allow in or keep out of your personal cyber life. This has been done to address the need of social media consumers, 50% of whom are worried about their privacy and security on social media sites with 55% of internet users actively trying to hide from specific people or organizations.⁶

Kate was constantly reminded of a relationship she was trying to forget whenever her stalker, her ex-boyfriend's fiancée, felt the need to friend request and comment on her personal social media. The stalker began to follow Kate on Instagram and then on Facebook. Kate could not understand why someone would torment another human being the way she had been targeted. Regardless of the amount of "requests" or "views," Kate never responded. Kate supposed that silence would deny her cyberstalker future pleasure, thus deterring further harassment. Kate was unaware that cyberstalking can last anywhere ranging from one day to twenty-six years with the average

3 *Percentage of U.S. population with a social network profile from 2008 to 2015*, STATISTA, (Nov. 20, 2015), <http://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/>.

4 *Social Media Usage: 2005-2015*, PEW RESEARCH CENTER, (Oct. 08, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

5 Kurt Opsahl, *Terms of Engagement*, NY. MAG. (Jun. 30, 2013) <http://nymag.com/news/frank-rich/facebook-privacy-2013-7/> (see Nov. 2009 Privacy update).

6 Lee Rainie et al., *Anonymity, Privacy, and Security Online*, PEW RESEARCH CENTER (Sept. 05, 2013), <http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online/>.

being for a period of sixteen months.⁷ The cyberstalking and harassment that she experienced continued through the friends of the stalker and fake accounts fabricated by the stalker to continue the abusive tirade. All of the negative abuse continued despite Kate having blocked the stalker and restricting her privacy settings. When the stalker was able to elicit no response from Kate, she began to target Kate’s family and close friends.⁸

Kate’s experience was not an isolated incident. The recent Supreme Court case, *Elonis v. United States*, demonstrates a deficiency in the specificity of cyberstalking laws. The Court ruled that in accordance to common standards for proving criminal action, *mens rea*⁹ is required in order to prosecute a subject according to 18 U. S. C. §875(c).¹⁰ In the words of Chief Justice Roberts, the defendant must transmit “a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.”¹¹ Because of the indirect nature of cyber interactions, such an intention is hard to prove. Justice Alito concurred only in part with majority opinion, for he recognized the shortcoming of current statutes that do not “explain what type of intent [is] necessary” for a conviction under 18 U. S. C. §875(c).¹² In his dissenting opinion, Justice Thomas highlighted a contradiction between the Supreme Court’s aforementioned decision and the appellate courts’ popular opinion that accepts proof of general intent to be a sufficient prerequisite

7 Kris Mohandie et al., *The Recon Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, 51 J. FORENSIC SCI. 147, 149 (2006).

8 E-mail from (victim name withheld), to author of this article, (Sept. 20, 2015, 09:26 MST) (on file with author).

9 *Mens rea* refers to the presence of knowledge and intent that a particular action violates a law.

10 18 U. S. C. §875 (c) (1994). This is the U.S. Code dealing with interstate communications of which social media interactions qualify as a subset.

11 *Elonis v. United States*, 13-983 U.S. 8, 17 (2015)

12 *Elonis v. United States*, 13-983 U.S. 8, 18 (2015) (Alito, J., concurring)

for conviction.¹³ Due to the ambiguity surrounding benchmarks to be met before obtaining a conviction according to §875(c), victims and potential victims of cyber harassment and cyberstalking suffer from a lack of proper protection and redress from the law.

Physical stalking and harassment laws address violations in the event of indirect contact to individuals, while cyber laws do not. The lack of specificity with cyber laws present a deficiency in the proper and fair treatment of the many violations that take place on social media platforms. While these violations are deemed indirect, they still present an invasion of personal property and an infringement of 14th Amendment rights. Therefore, it is our opinion that such attacks against a person's 14th Amendment rights should be prosecuted with equal adherence.

II. BACKGROUND

In the background section, three key areas will be presented. First, the necessity of protection of personal property will be established. Second, a brief analysis on the terms of use for the different social media platforms will be conducted, highlighting deficiencies in current protections. Third, a brief overview of current cyberstalking legislation will be presented. These three subsections provide the foundation for the argument this article makes, namely, the need for greater regulation to prevent cyber harassment and cyberstalking.

A. Protection of Personal Property

The Due Process Clause of the Fourteenth Amendment has two main components relating to the protection of property.¹⁴ The first component guarantees the use of fair procedures to improve the accuracy of results where wrongful deprivation of property might take

13 *Elonis v. United States*, 13-983 U.S. 8, 23 (2015) (Thomas, J., dissenting)

14 U.S. CONST. amend. XIV §1.

place. The other ensures that people feel the government has treated them fairly when deprivation does occur.¹⁵

The Due Process Clause can be summarized as a guarantee of basic fairness. This process can be witnessed in, but not limited to, our adversarial system of law. The legal system permits an opportunity for plaintiffs and respondents, prosecutors and defendants, to be heard by judges and juries; it allows for permissible evidence to substantiate the claims made by either side. For example, the termination of an employee who is always late for work at a fast food restaurant requires a much different process than a criminal convicted of murder facing the death penalty. In summary, there are varying degrees or levels of interest that govern whether or not an interest is protected by the Fourteenth Amendment.

The Supreme Court in *Board of Regents v Roth* established a key definition with regards to property interest. David Roth was hired for a political science teaching position at Wisconsin State University-Oshkosh for one year. If a university declines to rehire an untenured professor, the professor in question has to be given notice before the first of February. This is unlike the situation of a tenured professor who cannot be fired without cause and a written presentation of charges. The President of Wisconsin State University-Oshkosh followed the appropriate protocol for an untenured professor. Roth was discharged and neither given reasons nor opportunity to challenge. Roth brought a suit saying he should have been given reasons or an opportunity to challenge his termination and claimed that he was fired because of comments critical of the administration. Roth felt that this was a violation of his freedom of speech. The Supreme Court concluded that he had no property interest because he lacked “a legitimate claim of entitlement.”¹⁶ The Court, however, differentiated that if he had been a tenured professor, then he would have been afforded a more thorough procedure because of the legitimacy of his claim. Therefore, according to the decision of the Supreme

15 Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (1999).

16 *Bd of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Court, property interest must be found in statutory or common laws to legitimize claims of entitlement.

Facebook Inc., v. New York County District Attorney's Office yields an interesting argument highlighting the interaction of the property interest and legitimate claims of entitlement. At the crux of the constitutional dispute is whether or not Facebook can litigate on behalf of its users. A warrant allowing access to the data of 381 users was issued, and Facebook filed for a motion to quash the warrants in order to protect the privacy of the users under investigation.¹⁷ The Appellate Division of the New York Supreme Court ruled that Facebook could not raise constitutional issues on behalf of its users. The true owners of the data were the individuals sharing, liking, and following, not the provider. Two of the biggest players in regards to a determination of a property interest online essentially argue for the same thing: the users are responsible for their pages, and what they do on them.¹⁸

B. Terms of Use

In November 2014, the Science and Technology Committee commissioned by the United Kingdom's Parliament conducted an inquiry regarding the "Responsible Use of Data."¹⁹ As part of this inquiry, the committee examined the existing terms of use for social media sites and found various shortcomings. The most pressing issue lay in the lack of adequate protection afforded to users of social media. This deficiency results from the ambiguous phrasing of prevailing terms of use and is exacerbated by the fact that "terms and conditions currently favored by many organizations are lengthy

17 Brief of Appellant at 26, *Facebook Inc., v New York County District Attorney's Office*, No. 30207-13 (N.Y. S. Ct. Jun. 20, 2014).

18 381 Search Warrants Directed to Facebook, Inc., v. N.Y. County Dist. Attorney's Off., 132 A.D.3d 11, 1, 21 (2015).

19 *Responsible use of Data: Fourth Report of Session 2014-2015*, HOUSE OF COMMONS: SCIENCE AND TECHNOLOGY COMMITTEE (Nov. 19, 2014) <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmsctech/245/245.pdf>

and filled with jargon.”²⁰ The combination of these two factors, the length and jargon-filled language, “renders [the term and conditions] unsuitable for conveying an organization’s intent.”²¹ While the focus of the inquiry was the examination of ways to improve data privacy and protection, the findings of this report highlights limitations in the regulation of social media. Therefore, this foreign report is relevant to the paper’s focus on protection from cyberstalking and cyber harassment in America.

An overview of the terms of use for social media networks must first be provided in order to fully comprehend the essential nature of greater legal protection from cyberstalking and harassment. An analysis of four social media networks (Instagram, Twitter, LinkedIn and Facebook) shows overlaps in their respective terms of use. Two major terms of use that are pertinent to this paper will be highlighted.

First, either positively or negatively stated, the four social media platforms emphasize that content posted on their sites does not belong to them, but instead is the property of the user who posted such content. Instagram states that they do “not claim ownership of any Content.”²² Twitter, LinkedIn and Facebook in one form or another explicitly highlight that the user “[owns] all of the content and information” posted.²³ As such, social media networks explicitly declare that they are “not responsible” or liable for any content on their sites.

Second, an examination of the terms of use for the four social media networks highlights a deficiency in accountability and therefore repercussion for negative behavior. While regulations are listed informing the public on what might constitute inappropriate use of the respective social networking sites, they are ambiguous. Facebook’s “Statement of Rights and Responsibilities,” as part of its

20 *Id.* at 22.

21 *Id.* at 32.

22 *Terms of Use-Rights*, INSTAGRAM (Oct. 20, 2015), <https://help.instagram.com/478745558852511>

23 *Statement of Rights and Responsibilities-Sharing Your Content and Information*, FACEBOOK (Oct. 21, 2015) <https://www.facebook.com/legal/terms>.

safety clause, states that users “will not bully, intimidate, or harass any user.”²⁴ What constitutes as bullying, intimidation or harassment, however, remains unspecified. Out of the four social media platforms, LinkedIn has the most comprehensive list of appropriate and inappropriate use.

Despite having defined to a certain extent malapropos behaviors, all of these social networking platforms shirk any responsibility. As a result, there lacks real detriments or barriers against unfitting behavior, leaving all users exposed to abuse and mistreatment. Actions or behaviors that violate the Terms of Use are met only with a mild slap of the hand; the most severe repercussion taken against violations is a discontinuation of the service provided to the consumer. With the foundational logic highlighting protections that should be in place and empirical evidence showing the desire from the public to have greater security, it is time for stronger laws prosecuting cyber harassment and cyberstalking.²⁵

C. Cyberstalking Legislation

Today, all fifty states have cyberstalking or related laws because of advancements in technology and the corresponding need to stop threats and harassment sent electronically.²⁶ It was not until recently that states began to prosecute cyberstalking cases. Despite slight variations between the laws for each state, certain similarities exist. An analysis of these laws yields the following commonalities:

Means—communication by electronic, electro-mechanical, or electro-optical communication device for the transmission and reception of audio, image, or text.²⁷

24 *Id.* (see section on Safety).

25 Steven D. Hazelwood & Sarah Koon-Magnin, *Cyber Stalking and Cyber Harassment Legislation in the United States: A Qualitative Analysis*, 7 INT’L. J. OF CYBER CRIMINOLOGY 155, 158 (2013).

26 *Id.* at 160-62.

27 UT. CODE § 76-9-201 (2006).

Specific individual—intentionally or knowingly engages in a course of conduct directed at a specific individual.²⁸

Intent—to fear bodily injury to himself or a member of his immediate family; or to suffer emotional distress; to have reasonable knowledge that specific person will be in reasonable fear of bodily injury or will suffer emotional distress.²⁹

Transmission—communication originated or was received with the intent to annoy, alarm, intimidate, offend, abuse, threaten, harass, frighten, or disrupt the electronic communication of another.³⁰

Most stalking laws require that a credible threat be made by the perpetrator against the victim or the victim’s immediate family. The Supreme Court recently ruled in *Elonis v. United States* that the credible threat is inseparable from handing down a guilty verdict in a criminal court. However, statutes that require a showing of a “credible threat” will be problematic when prosecuting crimes where cyberstalking takes place.³¹ Cyberstalkers often do not threaten their victims in person; instead, they engage in conduct that, when taken in context, would cause a reasonable person to fear violence.³² The credible threat requirement in cyberstalking becomes even more problematic now that social media sites allow for the stalker, sometimes unknown to the victim, to be located a great distance away and may therefore appear to have less ability to make a credible threat. The Supreme Court’s ruling in *Elonis v. United States* exemplifies

28 *Id.*

29 UT. CODE § 76-5-106.5 (2006).

30 UT. CODE § 76-9-201 (2006).

31 Eugene Volokh, *The Supreme Court Doesn’t Decide When Speech Becomes A Constitutionally Protected “True Threat,”* WASH. POST (Jun. 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/the-supreme-court-doesnt-decide-when-speech-becomes-a-constitutionally-unprotected-true-threat/>.

32 Brian H. Spitzberg, & Gregory Hoobler, *Cyberstalking and the Technologies of Interpersonal Terrorism*, 4 N. MEDIA & SOC’Y, 67, 69 (2002).

the deficiencies that society is facing when it comes to understanding how cyberstalking works and its effects. Stripping cyberstalking and cyber harassment laws of the reasonableness standard that many states adhere to, leaves simply a collection of guidelines on how to use the Internet.

III. PROOF OF CLAIM

Social media platforms were originally designed with the noble intention of creating a connected world. The amount of electronic data and communication has given opportunity for segments of society to act unethically, unlawfully, and immorally.

As a member of any of the cyber communities, one is entitled to regulate and control who comes and who goes. “Facebook is an online social networking service with over one billion users worldwide that allows its users to create an online presence to record all manner of life events, opinions, affiliations, and other biographical and personal data.”³³ The Supreme Court of New York recognized the actions of users across social media platforms as users dealing with their personal property.³⁴ An online presence is an extension of individuals where within the community you can make acquaintances who make you feel happiness and joy or intense sadness, fear, and anxiety if you are the victim of cyberstalking. These are people to people interactions. In recent precedent, it is observable that individuals who believed their actions on social media platforms were untouchable, were then required to face less than desirable consequences in civil cases.³⁵ It is duly noted that the burden of proof in civil disputes does not face the scrutiny that criminal convictions must face, but cyberstalking is a new crime that requires new evaluative

33 381 Search Warrants Directed to Facebook, Inc., v. N.Y. County Dist. Attorney’s Off., 132 A.D.3d 11, 1,3 (2015).

34 *Id.*

35 Zoe Rosenthal, *Sharing with the Court: The Discoverability of Private Social Media Accounts in Civil Litigation*, 25 Fordham Intell. Prop. Media & Ent. L. J. 227, 231 (2014).

measures for determining whether a violation of the law has taken place or not.

Consider the following example: First, a home with locks on the windows, and all doors. There is a security system present as well. It is safe to make the assumption that the owner of this home has a reasonable expectation of privacy and has taken the necessary precautions to ensure that his home is protected. Second, a personal social media profile where the owner has the privacy settings locked to the maximum level afforded to the user. No one can have access to the information unless they request permission. The owner also has a security system in place where his social media account texts or emails him if logged on from an unfamiliar location. This person has also taken the necessary precautions to ensure that his cyber home is protected. Anyone that stalks an individual outside of their physical home will be prosecuted. An individual that cyberstalks an individual using their social media profiles should be prosecuted as well.

In Kate's situation as previously narrated, she could not escape the repeated cyberstalking incidents that she was subject to. She blocked her stalker on every social media website, but the requests and the unwanted contact continued.³⁶ No one should be subject to such attacks. Cyberstalking can no longer be seen as a self-inflicted problem or rationalized as insignificant. Its effects run parallel to physical stalking. As technology has evolved with respect to the cultural landscape and in its role in facilitating crime, it is important to consider the distinctions and similarities between offline stalking and cyberstalking. As explained above, the actions of committing the crime, and effects of cyberstalking and physical stalking run parallel. There are virtually no distinguishing traits other than cyberstalking requires an electronic device.

IV. CONCLUSION

Cyberstalking is often seen as a much lesser offense because interactions online are often seen as play-at-your-own-risk. Those

36 E-mail from (victim name withheld), to author of this article, (Sept. 20, 2015, 09:26 MST) (on file with author).

that operate under the mystified eyes of free speech might argue that prosecuting someone for stating opinions online is a much graver constitutional violation. What has been presented in this paper highlights that this is not the case. It is well within the right of an individual who has reasonably tried to avoid a criminal who has the means, the transmission capabilities, and the intent of carrying out cyberstalking, to prosecute the perpetrator. Current cyberstalking laws are deficient in specifically addressing what some consider a new type of crime. New laws that address the ambiguity of current legislation will be effective in greatly reducing the presence of cyberstalkers. When a law is broken, there will be consequences. No guise of free speech authorizes the attacks that people like Kate have faced.