

IS ONLINE HARASSMENT A CRIME?

By: Jack Greiner on May 18, 2017 on graydon.law

A recently filed federal lawsuit is challenging the constitutionality of a recently enacted Ohio statute that makes it a crime to post material on the internet. The plaintiffs — who describe themselves as “online publishers and a membership organization of political activists who routinely engage in constitutionally protected, if provocative, online speech” — contend the statute will criminalize protected speech in violation of the First Amendment.

The General Assembly enacted the offensive statute last August. It provides:

(1) No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person’s control, with purpose to abuse, threaten, or harass another person.

(2) No person shall knowingly post a text or audio statement or an image on an internet web site or web page for the purpose of abusing, threatening, or harassing another person.

There are some interesting aspects to the statute. First, it is content based. That is, it matters **what** post says. Presumably a person who obsessively posts flattering material about a person is not at risk. But a person who posts negative material about someone is at risk.

Second, unlike “stalking” laws, this statute isn’t limited to people who send messages **TO** someone. It makes it a crime to post **ABOUT** someone.

Third, it doesn’t require the posts be false. Presumably a person can “harass” someone by posting true information.

All of that, in the plaintiffs’ view, violates the First Amendment (except that the plaintiffs don’t contest the part of the statute that prohibits threats). Here’s the gist of their complaint:

25. The terms “abusing” and “harassing” are not defined by the statute. Ohio courts interpreted “abuse” as a synonym for “mistreat,” and have interpreted “harass” as meaning “to annoy or torment repeatedly and persistently.” *State v. Dennis*, No. 1-97-42, 1997 WL 691448 at * 2 (Unreported App. Oct. 30., 1997) (reading “purpose of being abusive, threatening, annoying, or harassing” as meaning a “purpose to mistreat another person, to express a threat to another person, to irritate another, or to persistently torment”); *State v. Dart*, No. 23955, 2010 WL 4703406, * 4 (Ohio Ct. App. Nov. 19, 2010) (defining “harass”).

26. As a result, even public criticisms of government officials could, under the contested statute, be subject to criminal prosecution and punishment if they are seen as intended “to mistreat” or to persistently annoy.

So, thin skinned politicians could use this statute as a tool to shut down critical commentary. The statute exempts the “mainstream media” but not the average joe with an internet connection.

The case is brand new, and we’ll see how it progresses, but I think the plaintiffs have a pretty solid argument. The statute’s terms are at a minimum a little vague and the risk of sweeping in protected speech is real. Ohio has a “Menacing by Stalking” statute that includes electronic communications that are truly threatening. And a person genuinely aggrieved would have civil remedies. Not sure anyone will really miss this statute if a court throws it out.