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Missouri Recognizes Right to Deliver Unwanted Speech

By Michael L. Nepple and Mark Sableman

The right to be left alone, the right to silence, the right to be free from harassment—such “rights” are often cited as essential counterweights to the cacophony of the communications age and the abusive potential of modern electronic communications. Indeed, the highly publicized case of Megan Meier, the teenage girl driven to suicide by demeaning Facebook messages, has driven legislative attempts to forbid and penalize unwanted communications.

However, as the Missouri Supreme Court found in assessing amendments to the state’s harassment statute inspired by the Megan Meier case, when taken too far, recognition of those interests can interfere with essential First Amendment expressive rights. For our free and open communications system to work, there needs to be, after all, a right to express unwelcome ideas and communications, even to people who would rather not hear them. For those reasons, the court invalidated the broadest provision of Missouri’s harassment law prohibiting “repeated unwanted communications.”

The court’s ruling, based on recognition of the disastrous implications that a strict application of the statute could have for many important communications, may provide useful guidance for other courts construing similar statutes—of which there are many, given state legislatures’ frequent enactment of overbroad legislation in reaction to publicized Internet horror stories. This includes not only the Megan Meier case, but also other highly publicized Internet and social-media incidents, which have led to calls for legislation to protect against cyberharassment. According to the National Conference of State Legislatures:

Many states have enacted “cyberstalking” or “cyberharassment” laws or have laws that

explicitly include electronic forms of communication within more traditional stalking or harassment laws. In addition, recent concerns about protecting minors from online bullying or harassment have led states to enact “cyberbullying” laws. . . . Cyberstalking is the use of the Internet, email or other electronic communications to stalk, and generally refers to a pattern of threatening or malicious behaviors. Cyberstalking may be considered the most dangerous of the three types of Internet harassment, based on a posing credible threat of harm. Sanctions range from misdemeanors to felonies. . . . Cyberharassment differs from cyberstalking in that it is generally defined as not involving a credible threat. Cyberharassment usually pertains to threatening or harassing email messages, instant messages, or to blog entries or websites dedicated solely to tormenting an individual. Some states approach cyberharassment by including language addressing electronic communications in general harassment statutes, while others have created stand-alone cyberharassment statutes. . . . [A third category,] cyberbullying generally refers to electronic harassment or bullying among minors within a school context.

[State Cyberstalking and Cyberharassment Laws.](#)

In this context of legislation driven by popular outcries over unusual cases, free speech concerns about anti-harassment legislation are unlikely to be given much weight in the legislative process. That generally means that it is left to courts to assess and apply constitutional considerations, including free-speech rights. That is what the Missouri Supreme Court did on May 29, 2012, in [State v. Vaughn](#) [PDF], a harassment prosecution that utilized the broad provisions of the Missouri anti-harassment statute after it was amended in 2008 in the wake of the Megan Meier case.

The Alleged Harassment in *Vaughn*

Retha Vaughn's ex-husband, Danny Vaughn, was charged with harassment and burglary. The harassment charge was brought under subsection (5) of the state's revised anti-harassment statute, which prohibits a person from knowingly making "repeated unwanted communication to another person." RSMo. 565.090.1(5). Danny Vaughn was alleged to have made repeated phone calls to his ex-wife "after being told not to call her again." *State v. Vaughn*, No. SC 91670, 2012 WL 1931225, at *1 (Mo. May 29, 2012). The predicate crime for the burglary charge—which requires entering a building with the intent to commit a crime therein—was alleged to be subsection (6) harassment, which prohibits, without good cause, engaging "in any other act" with the purpose to cause, and so causing, a person "to be frightened, intimidated, or emotionally distressed." RSMo. 565.090.1(6).

In the trial court, Danny Vaughn argued that subsections (5) and (6) were overbroad and violated his First Amendment free-speech rights. In the alternative, he argued that the subsections were vague and violated his Fourteenth Amendment due-process rights. The trial court agreed, finding subsections (5) and (6) constitutionally vague and overbroad. The state appealed the dismissal directly to the Missouri Supreme Court, which hears all actions involving the constitutionality of state statutes. Surprisingly, despite the important constitutional issues involved, no amicus briefs were filed in the matter; instead, the court relied solely on the briefing by the parties.

Addressing subsection (5) first, the court noted that, unlike all the other subsections of the anti-harassment statute, it "does not require the conduct to actually harass in any sense of the word," but rather "criminalizes a person who 'knowingly makes repeated unwanted communication to another person.'" *Vaughn*, at *3. The court held subsection (5) to be constitutionally overbroad and provided a few examples to "illustrate the statute's potential chilling effect upon political speech as well as everyday communications":

For instance, individuals picketing a private or public entity would have to cease once they were informed their protestations were unwanted. A teacher would be unable to call a second time on a student once the pupil asked to be left alone. Salvation Army bell-ringers collecting money for

charity could be prosecuted for harassment if they ask a passerby for a donation after being told, 'I've already given; please don't ask again.' An advertising campaign urging an elected official to change his or her position on a controversial issue would be criminalized.

Vaughn, at *3.

The state argued that subsection (5) was constitutional because the speech it prohibited was not entitled to First Amendment protection. According to the state, the challenged speech was not protected because it interfered with other constitutional rights, specifically "the privacy interest in avoiding unwanted communication." The Missouri Supreme Court rejected the state's argument, holding that the right to communicate outweighs the right to be left alone, at least in the public sphere: "[t]he ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at *4, quoting *Cohen v. California*, 403 U.S. 15, 21 (1971). Finding no such substantial privacy interests, the court declared the subsection unconstitutional.

The court next considered the burglary charge, based on an alleged violation of subsection (6) of the statute. To save subsection (6) from the same constitutional concerns as subsection (5), the court adopted a very narrow interpretation, holding that:

Reading the elements of the crime in total, the legislature apparently intended to bar the sort of conduct that causes an immediate reaction of fright, intimidation, or emotional distress . . . Acts that cause immediate *substantial* fright, intimidation, or emotional distress are the sort of acts that inherently tend to inflict injury or provoke violence. Additionally, because the exercise of constitutionally protected acts clearly constitutes "good cause," the restriction of the statute to unprotected fighting words comports with the legislature's intent.

Id. at *5.

By narrowly construing subsection (6) to apply only to unprotected "fighting words" and requiring that the criminalized acts be those that tend to inflict injury or provoke violence, the court invoked the U.S. Supreme

Court's fighting-words jurisprudence from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Fighting words are those "which by their very utterance inflict injury or tend to incite an immediate breach of peace." *Id.* at 571–72. In fact, the Missouri Supreme Court actually adopted the state's suggested interpretation of subsection (6), contained in its opening brief, that the subsection was constitutional because it only proscribed conduct meant to threaten or intimidate, which is not subject to constitutional protection under *Chaplinsky* (regarding "fighting words"), and *Virginia v. Black*, 518 U.S. 343 (2003) (there is no protection for "true threats."). As further discussed below, the court's adoption of a narrow, saving construction for subsection (6) will likely prevent the state from prosecuting a substantial range of cyberbullying activities.

Other States' Anti-Harassment Legislation

The Missouri court's decision to narrowly construe subsection (6) is consistent with other state appellate courts' review of the constitutionality of anti-harassment or cyberbullying statutes. Many state courts have either applied a narrowing construction or interpreted prefatory language as a constitutional safety valve to ensure against invalidity. *See People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999) (adopting narrowing construction); *State v. Button*, 622 N.W.2d 480 (Iowa 2001) (only speech "without legitimate purpose" is criminalized); *Commonwealth v. Welch*, 825 N.E.2d 1005 (Mass. 2005) (narrowing construction), *partially abrogated in O'Brien v. Borowski*, 961 N.E.2d 547 (Mass. 2012); *State v. Asmussen*, 668 N.W.2d 725 (S.D. 2003) (all "constitutionally protected conduct" is not criminalized); *State v. Williams*, 26 P.3d 890 (Wash. 2001) (narrowing construction); *Luplow v. State*, 897 P.2d 463 (Wyo. 1995) ("lawful demonstrations, assembly, or picketing" are not criminalized).

Supreme Court First Amendment Precedents

The understandable quest for criminal accountability that the public often seeks after tragedies such as Megan Meier's death must be tempered with respect for the U.S. Supreme Court's First Amendment precedents. The *Vaughn* decision is consistent with that jurisprudence. In upholding subsection (6), the Missouri Supreme Court specifically narrowed the subsection's potentially unconstitutional application to fighting words only, a type of speech that admittedly

falls outside the First Amendment's protection. Indeed, in recent cases clarifying the areas of unprotected speech, the U.S. Supreme Court has consistently listed fighting words among those categories. *E.g.*, *United States v. Alvarez*, No. 11-210 at *5 (U.S. June 28, 2012). And by striking down subsection (5), the court adopted the U.S. Supreme Court's First Amendment analysis that generally favors the right to free speech, even when the speech is anonymous, unpopular, or vulgar, or when it causes emotional distress.

The ability of bullies to harass their victims via the Internet under the cloak of anonymity makes the crime of harassment easier to carry out, as the harassment can be directly targeted to the victim, and threats to reveal embarrassing personal information to the intended victim's friends, family or coworkers may exacerbate the victim's injuries. Depending on the facts, the anonymity may alternatively serve to insulate the victim from the speaker, diminishing the impact of the crime, or it may cause additional damage because of the inherent uncertainty as to who was saying those terrible things about the victim. Regardless of these legitimate concerns about anonymous or otherwise disguised harassment, cyberbullying statutes must be carefully drafted to respect established First Amendment rights.

For example, the U.S. Supreme Court has long held that one important facet of the First Amendment is the right to speak anonymously. This right goes back to Benjamin Franklin as a young man writing under the pseudonym "Silence Dogood," and it was strongly recognized by the Supreme Court in the turbulence of labor and radical speech in the mid Twentieth Century, when leafletters used anonymity to shield themselves from retaliation from their disfavored advocacy. *Talley v. California*, 367 U.S. 60, 64 (1960) (recognizing that forced identification of the source of speech "would tend to restrict freedom to distribute information and thereby freedom of information"). The Supreme Court gave its modern-era reaffirmation of the right to speak anonymously in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), a decision that has been widely interpreted to protect anonymous Internet speech. In that decision, Justice Stevens offered a hearty defense of anonymous communications:

On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for

a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where “the identity of the speaker is an important component of many attempts to persuade,” *City of Ladue v. Gilleo*, 512 U. S. 43, 56 (1994), the most effective advocates have sometimes opted for anonymity. . . . This tradition is perhaps best exemplified by the secret ballot, the hard won right to vote one’s conscience without fear of retaliation.

Id. at 342–43.

Although not specifically discussed by the court in light of the underlying facts in *Vaughn*, the issue of anonymous speech may arise in future prosecutions under Missouri’s anti-harassment statute, especially given the statute’s implementation in response to a pseudo-anonymous cyberbullying event. Ironically, the court’s decision to restrict the scope of subsection (6) to fighting words likely prohibits its application in Megan Meier-type factual situations where anonymous online speech is at issue. Because the U.S. Supreme Court’s holding in *Chaplinsky* is based on the possibility of immediate, retaliatory violence in response to the use of fighting words, a prosecution based on now-narrowed subsection (6) would likely not succeed because that tort usually requires face-to-face confrontation, which is absent in cyberspace.

Of course, in addition to protecting the right to speak anonymously, the U.S. Supreme Court has historically protected speech where the speaker proposes an unpopular message, such as political speech. In today’s diverse political climate, political speech is all the more likely to disturb or upset some listeners. However, the U.S. Supreme Court has steadfastly noted our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). As the Missouri court correctly recognized in *Vaughn*, protected political speech would have been swept up in the overbroad reach of subsection (5) of Missouri’s anti-harassment statute—a constitutionally unacceptable result.

Finally, the *Vaughn* decision is consistent with the U.S. Supreme Court’s jurisprudence favoring unhindered

speech even when the speaker intends to inflict emotional distress on a particular listener. For example, last term, the Court held that the father of a deceased U.S. Marine could not recover for intentional infliction of emotional distress in his suit against the Westboro Baptist Church and some of its members for picketing his son’s funeral with signs saying things such as “Thank God for Dead Soldiers” and “Fags Doom Nations.” *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). According to the Court, even though the speech caused Snyder “emotional anguish” and “severe depression,” it did not fall within one of the categorical exclusions from First Amendment protection. *Id.* at 1214–15. If the Missouri Supreme Court had not narrowed subsection (6) to fighting words, enforcement of the subsection, which criminalizes any other act that causes a person to be emotionally distressed, would have been contrary to the U.S. Supreme Court’s precedents.

Conclusion

Just as hard cases make bad law in Justice Holmes’ famous pronouncement, headline cases, too, can make bad law. Whatever legitimate concerns may exist with respect to cyberharassment, they are unlikely significant enough to outweigh the important constitutional rights enjoyed by all Americans to express their views, even to those who do not want to hear them. Blanket rules against anonymous, pseudonymous, or unwanted speech would inevitably chill protected speech, as the Missouri Supreme Court properly pointed out in *Vaughn*. The message of *Vaughn* to citizens is that harassment laws cannot inhibit free speech. Its message to legislatures is that they must combat cyberharassment with careful, tailored laws that target conduct, not speech, or that specifically carve out protected speech from their coverage.

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