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Criminal Liability and Social Media: Can a 'Like' Be a Crime?

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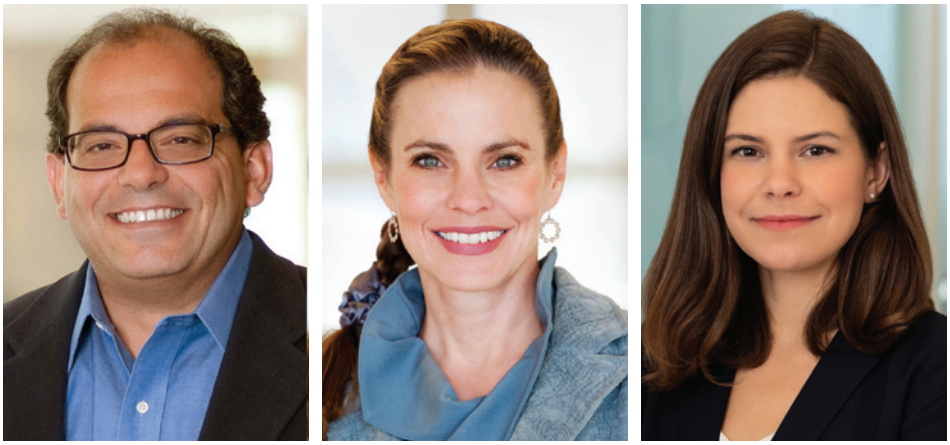
In 2017, Massachusetts teen Michelle Carter was convicted of involuntary manslaughter for having urged her boyfriend, via text messages, to commit suicide, see *Commonwealth v. Carter*, 115 N.E.3d 559 (Mass. 2019), petition for cert. docketed sub nom. *Carter v. Massachusetts*, U.S. (July 11, 2019). The case, which has been appealed to the U.S. Supreme Court, set off a firestorm of debate about the circumstances under which text messaging and social media use should lead to liability.

What if, for example, Carter had encouraged her boyfriend to commit suicide by publicly posting comments on social media, or by texting her thoughts to a group of classmates, as opposed to messaging him privately? What if someone had "liked" her post encouraging him to end his life?

The circumstances under which electronic communications will cross the line from protected free speech to illegal conduct are fact-specific and quickly evolving.

In the school context, offensive posts may constitute cyberbullying. In California, students can be expelled or suspended for bullying by any "electronic act," which is broadly defined and specifically includes posting to social media, even if the post occurs off-campus. Bullying, cyber or otherwise, is defined as any "severe or pervasive" conduct directed at another student that could be reasonably predicted to substantially and detrimentally affect her physical or mental health, substantially interfere with her academic performance or other school activities, or otherwise place her in reasonable fear of harm, Cal. Edu. Code Section 48900(r).



(l-r) Amr Razzak, Stacy Kray and Kelsey Merrick, with Skadden, Arps, Slate, Meagher & Flom.

Such conduct might also be punishable as cyberharassment under the state penal code. Cyberharassment is defined as electronic communications about another person with the intent to place that person in "reasonable fear" for her safety or the safety of her immediate family, see Cal. Pen. Code Section 653.2. In addition, offensive or inflammatory communications may also violate other laws that don't have the internet or social media use as their primary focus, such as laws prohibiting hate crimes.

A recent case involving an Instagram account and students at a Bay Area high school highlights the sometimes blurry boundaries between free speech and potentially illegal conduct.

In March 2017, the Albany Unified School suspended several high school students based on their involvement with a private Instagram account that posted racist content (including drawings and photos) specifically targeting African-American classmates and teachers. Only one of the students posted directly on the Instagram account. The rest liked or commented on existing posts. Although the account was private, it was shown to students who had not been invited to the account and news of the account spread to other students and eventually school officials.

The suspended students sued the school district in federal district court for violating their First Amendment rights to free speech.

In a November 2017 summary judgment ruling, the court applied the test laid out in *Tinker v. Des Moines*, a seminal 1969 case addressing free speech in public schools, to determine whether each student's Instagram involvement was protected free speech or instead

could be punished by the school in *Shen v. Albany Unified School District*, (N.D. Cal. Nov. 29, 2017). Under *Tinker*, school speech may be disciplined if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

The court held that the original Instagram poster's speech was clearly not protected speech and, therefore, that the school district could punish the student for posting the content.

The court quickly dispensed with arguments that the speech could not be punished because it occurred off-campus, finding that there was a nexus between the school and the speech (in that the poster and followers were all students, the posts depicted fellow classmates, and some of the photos were taken on campus) and also that it was reasonably foreseeable that the speech would reach the school and create a risk of substantial disruption (for similar reasons).

The court found that the fact that the account was "private" and the original poster controlled access to it irrelevant, noting that the U.S. Court of Appeals for the Ninth Circuit and other appellate courts do not focus on a student's subjective intent to keep content private. "In addition, it is common knowledge that little, if anything, posted online ever stays a secret for very long, even with the use of privacy protections."

As for the likers and commenters, the court found that most, but not all, could be punished. Those punishable included a student who commented "yep," a student who commented with three laughing emojis, and a student who liked almost all of the posts. Those protected by the First Amendment included a student who only followed the account, and another who commented "Pls tell me who's the owner of this amazing account."

In the court's view, posts, comments and likes were all potentially punishable. Rather than focusing on the mode of interaction with the content, the court focused on whether the reaction indicated approval of the offensive content that specifically targeted the students, who, the court noted, "were upset precisely because others" "supported" the posts with their likes and comments.

Moreover, the court found the students' motivations for posting irrelevant. The court stated, "some of the plaintiffs have tried to minimize their culpability by saying that their likes were made casually and thoughtlessly. But a plaintiff's subjective state of mind is irrelevant. Under *Tinker*, the inquiry is whether the speech at issue interfered with the rights of other students to be secure and let alone."

Although the students in *Shen* were not criminally charged, such online conduct could also potentially be punishable as a crime.

Under California law, it is a hate crime to willfully interfere with someone's civil rights by threat of force based on a protected characteristic such as race,see Cal. Pen. Code Section 422.6. (It is also a federal hate crime to willfully interfere with certain federally protected rights. 18 U.S.C. Section 245.) However, unlike the bullying statute, California's hate crime statute only applies to speech that credibly threatens violence, something the court did not consider in *Shen*. Similarly, California's cyberharassment statute requires an intent to harm, another element not considered in *Shen*.

In situations where online conduct relates back to an underlying crime, the conduct could also result in accomplice liability. Under California law, a person who aids and abets a crime is also guilty of the crime itself, and aiding and abetting applies to situations where the accomplice is not physically present but has advised or encouraged the commission of the crime.

It is unclear how accomplice liability might apply to likes and similar participation in social media forums. However, accomplice liability has been used to punish social media posters who, motivated by the desire for likes and online popularity, broadcast the commission of a violent crime.

In 2016, Ohio teen Marina Lonina was charged with rape and other crimes after she livestreamed her friend's sexual assault on the social media app Periscope. According to the prosecutor, Lonina kept filming because she "got caught up" in all the likes she was receiving in real time. Lonina pleaded to obstruction of justice in 2017 and was sentenced to nine months in prison. Relatedly, in 2017, California enacted AB 1542 to stiffen penalties for both attackers and accomplices that videotape a violent felony. AB 1542, or Jordan's Law, was a response to a horrific physical attack on California teen Jordan Peisner that was recorded by the assailant's girlfriend and uploaded to social media, where it went viral. The girlfriend was not charged with a crime, but she was sued by Jordan's father who alleged that she, the assailant and another teen intended to post the attack on Snapchat to "achieve notoriety and social media popularity." Jordan's Law is meant to discourage "social media motivated attacks."

Laws regulating cyberspeech are still evolving. But the Albany case, and others like it, demonstrate that posting offensive content online, even in forums that are designated as private, can potentially have serious legal consequences.

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