

Memorandum in Support

SECTION ON WOMEN IN THE LAW

Women #2

June 17, 2019

S. 2636
A. 231

By: Senator Krueger
By: M. of A. Braunstein

Senate Committee: Codes
Assembly Committee: Codes
Effective Date: 1st of November next succeeding
the date upon which it shall have
become a law

AN ACT to amend the penal law, in relation to including contacts via text, email or other electronic communication in the definition of the offense of aggravated harassment in the second degree.

LAW AND SECTIONS REFERRED TO: Section 240.30 of the penal law.

The Women in Law Section (WILS) supports this bill, which would amend the penal law definition of aggravated harassment in the second degree by including contacts via text, email or other electronic communication, with the suggestions noted below.

BACKGROUND

“Cyberstalking,” which is not specifically defined in the New York Penal Code, generally means the abuse or misuse of technology to stalk or harass someone.¹ “Online harassment,” also not defined in the New York Penal Code, is generally defined as “abusive behavior that happens online (through email, messaging, social media, dating sites, and other platforms).² The Stalking Prevention, Awareness and Resource Center (a project funded by the Office on Violence Against Women, U.S. Department of Justice) reports that nearly 1 in 6 women and 1 in 17 men have experienced stalking victimization at some point in their lifetime.³ One in 4 women and 1 in 14 men have described feeling “a little fearful,” “somewhat fearful,” or “very fearful” when reporting a stalking incident.⁴ One in 4 victims have reported being stalked through some form of technology.⁵

¹ *Abuse Using Technology* (Mar. 15, 2017), <https://www.womenslaw.org/about-abuse/abuse-using-technology/all#node-26981>.

² *Id.*

³ *Stalking Fact Sheet*, https://www.stalkingawareness.org/wp-content/uploads/2019/01/SPARC_StalkngFactSheet_2018_FINAL.pdf.

⁴ *Id.*

⁵ *Id.*

While cyberstalking and online or “cyber” harassment may include some of the same behaviors, it is important to distinguish the two terms. New York’s laws against stalking, like the majority of other anti-stalking laws in the U.S., normally require, among other things, a “course of conduct,” *i.e.* several incidents of alleged stalking and proof that the alleged victim asked such individual to stop.⁶ Cyber harassment, however, may include broader types of punishable behavior and/or a single incident of harassment.⁷

Subdivision 1, parts (a) and (b) of New York Penal Law §240.30 define aggravated harassment in the second degree to include communicating or causing communications, anonymously or otherwise, “by telephone, by computer or other electronic means.”⁸ In contrast, New York Penal Law §240.30(2) makes it unlawful for a person “[w]ith intent to harass or threaten another person, he or she makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.”⁹ §240.30(2) limits harassment to telephone communications only, which has been strictly applied by the courts in New York.¹⁰ Additionally, §240.30(1)(a) and 1(b) require that the communications amount to a “true threat,” which the New York courts have interpreted as communications “that convey[] a clear and unambiguous message that the recipient could not help but understand as a threat of future violence” in order to sufficiently allege harassment in the second degree under those sections.¹¹ This requirement excludes the use of §240.30(1) for cyber harassment that does not reach the level of a “true threat,” but nevertheless is conduct harmful to the recipient and her family.¹² Aggravated harassment in the second degree is a Class A Misdemeanor.¹³

⁶ *Abuse Using Technology* (Mar. 15, 2017), <https://www.womenslaw.org/about-abuse/abuse-using-technology/all#node-26981>.

⁷ *Id.*

⁸ *See* N.Y. Penal Law §§240.30(1)(a) and 240.30(1)(b).

⁹ N.Y. Penal Law §240.30(2) available at <https://www.nysenate.gov/legislation/laws/PEN/240.30>.

¹⁰ *See e.g. People v. Spruill*, 20 N.Y.S. 3d 295 (Crim Ct New York County)(2015) (noting that Section 240.30, “by its very terms, covers only ‘telephone calls.’”) *See also People v. Bamba*, 841 N.Y.S. 2d 220 (Crim Ct New York County)(2007)(dismissing an email message because “it was not a telephone call, which is a necessary element of the offense.”)

¹¹ *See People v. Spruill*, 20 N.Y.S. 3d 295.

¹² *See id.* (Defendant made numerous telephone calls and sent text messages to his wife, from whom he was separated, which included: “calls of [Defendant] ranting about how much [I] am no good, and that [I] am a bitch, and the only thing that was good for me worth having was the ass whopping that he gave me...he continues to fill my phone with all types of degrading things, name calling and he threatened to take everything away from me like our kids and house.” *Id.* The court dismissed the charges under §240.30(1)(a) and 1(b) because the statements were not threats at all or, in the case of the last statement, did not constitute a true threat of physical harm to the recipient or a member of her family.)

¹³ N.Y. Penal Law §240.30 (5).

ANALYSIS

This bill amends the Penal Law to treat electronic communications with intent to harass or threaten another person under the same standard as telephone calls.¹⁴ Specifically, the bill amends Subdivision 2 of §230.40 to include “contacts via text, email or other electronic communication” (referred to herein as “Electronic Communications”) in the definition of aggravated assault in the second degree.¹⁵

LEGISLATIVE INTENT

The New York State Legislature’s primary goal in proposing this legislation is to update the law to incorporate new methods of aggravated harassment through use of new technology.¹⁶ In its Memorandum of Support of Legislation, the Legislature specifically references an incident where multiple people received unsolicited anonymous text messages from the same individual containing sexually graphic images.¹⁷ Under the existing law, the offense could only be treated as harassment in the second degree, a violation, and charges could only be brought if law enforcement witnessed the violation.¹⁸ Because a law enforcement officer did not witness the violation, no charges were brought against the individual. By updating the law, the legislature’s goal is to “help protect New Yorkers from [] new forms of harassment” and “provide law enforcement with greater ability to address new forms of harassment.”¹⁹

THE NEW LAW WOULD HELP ACHIEVE THE GOAL OF THE LEGISLATURE, BUT MORE COULD BE DONE TO PROTECT NEW YORKERS FROM FUTURE FORMS OF TECHNOLOGY USED TO HARASS

By updating the law to include Electronic Communications, the bill would improve the law to cover a crime that has resulted in harassment of multiple individuals at the same time and with the benefit of total anonymity afforded by technology and the Internet.²⁰ Further, the new law would protect New Yorkers from new forms of harassment even if such harassment occurs in a single incident, but nevertheless leaves the victim feeling

¹⁴ See A00231 (S02636), 2019-2020 Reg. Sess. (N.Y. 2019).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See e.g. Sharon Otterman, *Sending Lewd Nudes to Strangers Could Mean a Year in Jail*, THE NEW YORK TIMES (Nov. 30, 2018), available at <https://www.nytimes.com/2018/11/30/nyregion/airdrop-sexual-harassment.html>. (This article dealt with incidents of “cyber flashing” in New York City, where individuals received unsolicited and unwanted images of male genitalia via AirDrop on their iPhones. AirDrop allowed the perpetrator to use his phone to anonymously send images to multiple people within a certain proximity, e.g. a subway car. While these incidents resulted in proposed amendments to local New York City law not discussed here, it provides an example of how harassment has become easier, more widespread and more anonymous through electronic devices.)

concerned, fearful and violated.²¹ Section 240.30(2) has been interpreted by the courts as including a single incident.²² Adding Electronic Communications to the existing law may help to curtail the instances of harassment, particularly sexual harassment, before offenders can repeatedly threaten their victims or have the opportunity to victimize more individuals.²³

However, victims' advocacy groups have advised lawmakers to consider crafting a more "open-ended" list of methods of harassment when revising harassment laws to include electronic communications.²⁴ For example, Montana's statute on the offense of stalking includes "harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication as defined in 45-8-13, *or any other action, device or method.* (emphasis added).²⁵ The New York State legislature might consider this more open-ended approach to capture any new or future technology without having to amend the law. In that same respect, the New York Legislature might also consider adding the following highlighted language, to hold individuals who exploit the anonymity of technology accountable for harassment: "[w]ith intent to harass or threaten another person, he or she, **anonymously or otherwise**, makes a telephone call or contacts via text, email or other electronic communication, whether or not a conversation ensues, with no purpose of legitimate communication."²⁶

NEW YORK COURTS HAVE UPHeld THE CONSTITUTIONALITY OF 240.30(2) AS NOT INFRINGING UPON FREEDOM OF SPEECH

Section 240.30(2) has been challenged in New York courts as violating an individual's First Amendment right to freedom of speech. However, the courts have upheld the statute, before and after its last amendment in 2014, as constitutional. In *People v. Dixon*, the court considered and dismissed a First Amendment challenge to the pre-amendment language of §240.30(2).²⁷ The court in *Dixon* upheld the constitutionality of §240.30(2)

²¹ See *id.* (Women who had been "cyber-flashed" described feeling "extremely violated" and concerned for younger women and girls with the AirDrop app who might be sent such images.)

²² See e.g. *People v. Williams*, 45 Misc.3d 1202(A) (Crim Ct New York County (2014)), [People v. Olivo, 6 Misc.3d 1034\(A\), 800 N.Y.S.2d 353 \(Crim. Ct. N.Y. County 2005\)](#) and *People v. Coyle*, 186 Misc.2d 772, 719 N.Y.S.2d 818 (Dist Ct Nassau County 2000) (holding that a single telephone call was sufficient for a prima facie case under 240.30(2) so long as such call showed the requisite intent).

²³ See Rhitu Chatterjee, *A New Survey Finds 81 percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018)(discussing the "national prevalence of sexual harassment" in the U.S.).

²⁴ See *Stalking Technology Outpaces State Laws* (originally published in the Stalking Resource Newsletter Vol. 3., No. 2 (Summer 2003), available at <https://victimsofcrime.org/our-programs/past-programs/stalking-resource-center/stalking-laws>).

²⁵ See Mont. Statute 45-5-220(1)(b). See also 45-8-213(4)(defining broadly "electronic communication" as "any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system."

²⁶ Cf. Sections 240.30(1)(a) and 230.40(1)(b) which makes a person guilty of aggravated assault in the second degree through communications "initiated anonymously or otherwise."

²⁷ See *People v. Dixon*, 997 N.Y.S. 2d 100 (2014). Before July 23, 2014, Section 240.30(2) made it unlawful for a person "with intent to harass, annoy, threaten or alarm another person, make a telephone

because the statute did not “proscribe pure speech” but rather “proscribe[d] conduct.”²⁸ Further the court in *Dixon*, in upholding the constitutionality of §240.30(2), cited the “right to be let alone,” as recognized by the U.S. Supreme Court in *Rowan v. Post Office Department*²⁹ and held applicable to §240.30(2).³⁰ Finally, the Court in *Dixon* rejected the argument that §240.30(2) was vague and overbroad because “no purpose of legitimate communication” could be defined.³¹

CONCLUSION

Amending N.Y. Penal Law Section 240.30(2) to include text, email and other electronic communications will protect New Yorkers from new and potentially pervasive forms of harassment committed through the abuse and misuse of technology. Based on the foregoing, the NYSBA’s Women in Law Section **SUPPORTS** the enactment of this legislation.

call, whether or not a conversation ensues, with no purpose of legitimate communication.”

²⁸ See *id.* (quoting *People v. Shack*, 86 N.Y.2d 529, 658 N.E.2d 706, 634 N.Y.S.2d 660 (1995)).

²⁹ 397 U.S. 728 (1970).

³⁰ See *People v. Dixon*, 86 N.Y.2d 529 (quoting *People v. Shack*, [t]hus, to the extent Penal Law § 240.30(2) limits a caller’s right to free speech, it permissibly subordinates that right to the recipient’s right to be free of unwanted telephone calls. The statute is narrowly drafted and furthers the State’s compelling interest in protecting its citizens from persons who employ the telephone, not to communicate, but for other unjustifiable motives.”

³¹ See *id.* Cf. *People v. Golb*, 23 N.Y.3d 455 (2014). In *Golb*, the court held that Section 240.30(1)(a) was unconstitutionally vague and overbroad because it criminalized “in broad strokes, any communications that has the intent to annoy.” 240.30(1)(a) was subsequently amended to address this decision and, though not challenged in *Golb*, 240.30(2) was amended to remove the intent to annoy or alarm.