Jennifer L. La Fayette *Legislative Service Commission*

Sub. S.B. 8

125th General Assembly
(As Passed by the Senate)

Sens. Austria, Amstutz, Jacobson, Spada, Harris, Mumper, Randy Gardner, Prentiss, Miller, DiDonato, Fedor, Stivers, Herington, Goodman, Carey, Roberts, Brady, Schuring, Armbruster, Schuler, Coughlin, Carnes, Dann, Fingerhut, Hagan, Robert Gardner, Mallory, Nein

BILL SUMMARY

- Specifically includes the posting of messages through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device as an activity that may constitute the "pattern of conduct" that is an element of the offense of "menacing by stalking."

- Modifies the definition of "mental distress" that is an element of the offense of "menacing by stalking" to clarify that any mental illness or condition that would normally require psychiatric treatment is "mental distress" whether or not any person requested or received psychiatric treatment.

- Adds a new cyberstalking-type prohibition to the offense of "menacing by stalking" that prohibits a person, through the use of any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system, from posting a message with purpose to urge or incite another to commit a violation of the prohibition that currently constitutes the offense.

- Provides that: (1) the offense of "menacing by stalking" does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic

method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection, and (2) a person providing access or connection to or from an electronic method of remotely transferring information not under that person's control is not liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information it believes is, or will be sent, in violation of either prohibition constituting the offense.

- Specifies that the provisions described in the preceding dot point do not: (1) create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its service of any information it believes is, or will be sent, in violation of either prohibition except as otherwise provided by law, or (2) apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of either prohibition constituting the offense of "menacing by stalking" or who knowingly advertises the availability of material of that nature.

- Provides that the fourth degree felony penalty for the offense of "menacing by stalking" applies to a violation of the new prohibition if, as a result of the violation of that prohibition, a third person induced by the offender's posted message engaged in a specified type of threatening conduct to the victim.

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CONTENT AND OPERATION

Existing law

Menacing by stalking--prohibition

Existing law prohibits a person, by engaging in a "pattern of conduct" (see below), from knowingly causing another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. A violation of the prohibition is the offense of "menacing by stalking." (R.C. 2903.211(A).)

Existing law defines the following terms, for use in the offense of "menacing by stalking" (R.C. 2903.211(D)):

(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity may constitute a "pattern of conduct."

(2) "Mental distress" means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment.

(3) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in R.C. 2133.21, "emergency facility person" is the singular of "emergency facility personnel" as defined in R.C. 2909.04, and "public official" has the same meaning as in R.C. 2921.01.

Menacing by stalking--penalties

Under existing law, the offense of menacing by stalking is penalized as follows (R.C. 2903.211(B)):

(1) Except as provided in (2) or (3), below, it is a misdemeanor of the first degree;

(2) It is a felony of the fourth degree if any of the following applies: (a) the offender previously has been convicted of menacing by stalking or aggravated trespass, (b) in committing the offense, the offender made a threat of physical harm to or against the victim, trespassed on the land or premises where the victim

lives, is employed, or attends school, or caused serious physical harm to the premises where the victim resides, to the real property on which that premises is located, or to any personal property located on that premises, (c) the victim of the offense is a minor, (d) the offender has a history of violence, or of other violent acts, toward the victim or any other person, (e) while committing the offense, the offender had or controlled a deadly weapon, (f) at the time of the commission of the offense, the offender was the subject of a protection order issued under R.C. 2903.213 or 2903.214, regardless of the identity of the person to be protected under the order, or (g) prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

(3) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties it is: (a) subject to clause (b), a felony of the fifth degree; or (b) if the offender previously has been convicted of an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

Operation of the bill

The bill modifies the offense of "menacing by stalking" in five ways: (1) it specifically includes the posting of messages through the use of any electronic method of remotely transferring information, as an activity that may constitute the "pattern of conduct" that is an element of the offense, (2) it modifies the definition of "mental distress" that is used in the prohibition that currently constitutes the offense, (3) it expands the offense to specifically prohibit certain types of conduct involving cyberstalking related to an electronic method of remotely transferring information (certain existing offenses, not in the bill, currently prohibit other types of conduct that also might be considered as constituting cyberstalking--see **COMMENT**), (4) it enacts exemptions from the offense in specified circumstances that pertain to the provision of access or connection to or from an electronic means of remotely transferring information, and (5) it modifies the penalty provisions for the offense to reflect the new prohibition referred to in (3), above.

Inclusion of computer-related message posting as activities that may constitute a pattern of conduct

Regarding the definition of "pattern of conduct" that applies to the offense of "menacing by stalking," the bill expands the portion of the definition that identifies certain types of actions or incidents that may constitute a pattern of conduct to specifically include within that portion of the definition *the posting of messages through the use of an electronic method of remotely transferring information, including, but not limited to a "computer," "computer network," "computer program," "computer system," or "telecommunications device"* (see "***Definitions added by the bill***," below, for definitions of the terms in quotation marks). The bill does not change the portion of the definition that sets forth the general meaning of the term (i.e., "two or more actions or incidents closely related in time," etc.). Thus, under the bill, the definition of "pattern of conduct" reads as follows (R.C. 2903.211(D)(1); the language added by the bill is in italics):

--"Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, or emergency medical services person of any authorized act within the public official's, firefighter's, rescuer's, or emergency medical services person's official capacity, *or the posting of messages through the use of an electronic method of remotely transferring information, including, but not limited to a computer, computer network, computer program, computer system, or telecommunications device*, may constitute a "pattern of conduct."

Definition of "mental distress"

Regarding the definition of "mental distress," the bill clarifies that any mental illness or condition that would normally require psychiatric treatment is "mental distress," *whether or not any person requested or received psychiatric treatment*. Thus, under the bill, "mental distress" means: (1) any mental illness or condition that involves some temporary substantial incapacity, or (2) any mental illness or condition that would normally require psychiatric treatment, *whether or not any person requested or received psychiatric treatment*. (R.C. 2903.211(D)(2).)

Related to this, the bill specifies that the state does not need to prove in a prosecution of a person charged with menacing by stalking that a person requested or received psychiatric treatment in order to show that the person was caused mental distress as described in clause (2) of the preceding paragraph (R.C. 2903.211(E)).

Expansion of offense to specifically prohibit certain types of conduct involving computer-related cyberstalking

The bill adds a new prohibition to the offense of "menacing by stalking," to specifically prohibit certain types of conduct involving cyberstalking related to an electronic method of remotely transferring information. Under the bill, in addition to the conduct prohibited under existing law, a person also is prohibited from posting a message, through the use of any electronic method of remotely transferring information, including, but not limited to, any "computer," "computer network," "computer program," or "computer system," with purpose to urge or incite another to commit a violation of the prohibition that currently constitutes the offense (i.e., with purpose to urge or incite another, by engaging in a pattern of conduct, to knowingly cause a third person to believe that the person engaging in the pattern of conduct will cause physical harm to the third person or cause mental distress to the third person) (R.C. 2903.211(A)(2)).

A violation of the new prohibition is the offense of "menacing by stalking" and is subject to the penalties described below in "***Penalties under the bill***" (R.C. 2903.211(B)).

Exemptions under the bill from the prohibitions

The bill enacts exemptions from the existing prohibition and the new prohibition that constitute the offense of menacing by stalking. Under the bill, the section containing the prohibitions does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. The bill also provides that, in addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control is not liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of either prohibition. (R.C. 2903.211(F)(1).)

The bill specifies that the provisions described in the preceding paragraph do not (R.C. 2903.211(F)(2) and (3)):

(1) Create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its

service of any information that it believes is, or will be sent, in violation of either prohibition except as otherwise provided by law.

(2) Apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of either prohibition or who knowingly advertises the availability of material of that nature.

Penalties under the bill

The bill revises the penalties for menacing by stalking, when it is committed in violation of the existing prohibition or the new prohibition. Under the bill, as under existing law, the offense generally is a misdemeanor of the first degree, and is a felony of the fourth degree or fifth degree in specified circumstances. The bill adds language that revises some of the circumstances in which the offense is a felony of the fourth degree. Under the bill (R.C. 2903.211(B)):

(1) Except as provided in (2) or (3), below, unchanged from existing law, the offense is a misdemeanor of the first degree;

(2) The offense is a felony of the fourth degree if any of the following applies (the bill's added language is indicated in italics): (a) the offender previously has been convicted of menacing by stalking or aggravated trespass, (b) in committing the offense *under either the existing prohibition or the new prohibition*, the offender made a threat of physical harm to or against the victim, *or, as a result of an offense committed under the new prohibition, a third person induced by the offender's posted message made a threat of physical harm to or against the victim*, (c) in committing the offense *under either the existing prohibition or the new prohibition*, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, *or, as a result of an offense committed under the new prohibition, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school*, (d) the victim of the offense is a minor, (e) the offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person, (f) while committing the offense *under the existing prohibition*, the offender had a deadly weapon on or about the offender's person or under the offender's control (the bill specifies that *this clause does not apply in determining the penalty for a violation of the new prohibition*), (g) at the time of the commission of the offense, the offender was the subject of a protection order issued under R.C. 2903.213 or 2903.214, regardless of whether the person to be protected under the order is the victim of the offense or another person, (h) in committing the offense *under either the existing prohibition or the new prohibition*, the offender caused serious physical harm to the premises at which the victim resides, to the real property on

which that premises is located, or to any personal property located on that premises, *or, as a result of an offense committed under the new prohibition, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises*, or (i) prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

(3) Unchanged from existing law, if the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, the offense is either a felony of the fifth degree or, if the offender previously has been convicted of an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

Definitions added by the bill

The bill adds the following definitions for use in the offense of "menacing by stalking" (R.C. 2903.211(D)(5) to (8)):

(1) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any message or information, whether truthful or untruthful, about an individual, and whether done under one's own name, under the name of another, or while impersonating another (R.C. 2903.211(D)(7), enacted by the bill).

(2) "Third person" means, in relation to conduct as described in the new prohibition enacted in the bill, an individual who is neither the offender nor the victim of the conduct (this term is not used in the new prohibition but is used in the penalty provisions as they relate to a violation of the new prohibition) (R.C. 2903.211(D)(8), enacted by the bill).

(3) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature (R.C. 2903.211(D)(6), by cross-reference to existing R.C. 2913.01).

(4) "Computer network" means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities (R.C. 2903.211(D)(6), by cross-reference to existing R.C. 2913.01).

(5) "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data (R.C. 2903.211(D)(6), by cross-reference to existing R.C. 2913.01).

(6) "Computer system" means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks (R.C. 2903.211(D)(6), by cross-reference to existing R.C. 2913.01).

(7) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem (R.C. 2903.211(D)(6), by cross-reference to R.C. 2903.01).

COMMENT

The following existing offenses, not in the bill, currently prohibit types of conduct that might be considered as constituting a type of cyberstalking:

(1) R.C. 2917.21(A) prohibits a person from knowingly making or causing to be made a "telecommunication" (see below), or knowingly permitting a telecommunication to be made from a "telecommunications device" (see below) under the person's control, to another, if the caller does any of the following: (a) fails to identify the caller to the recipient of the telecommunication and makes the telecommunication with purpose to harass or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient, (b) *describes, suggests, requests, or proposes that the caller, the recipient of the telecommunication, or any other person engage in sexual activity, and the recipient or another person at the premises to which the telecommunication is made has requested, in a previous telecommunication or in the immediate telecommunication, that the caller not make a telecommunication to the recipient or to the premises to which the telecommunication is made*, (c) *during the telecommunication, commits the offense*

of "aggravated menacing," (d) knowingly states to the recipient of the telecommunication that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telecommunication is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged, (e) *knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises*. Providers of a telecommunications service or information service, and officers, employees, and agents of a telecommunications service or information service are exempt, in specified circumstances, from this prohibition. As used in R.C. 2917.21, "telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method; and "telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

A violation of this prohibition is the offense of "telecommunications harassment." A violation based on the conduct described in clause (1), (2), (3), or (5) is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense. A violation based on the conduct described in clause (4) of this section generally is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense, but if the violation results in "economic harm" (defined in the section) of $500 or more but less than $5,000, it is a felony of the fifth degree, if the violation results in economic harm of $5,000 or more but less than $100,000, it is a felony of the fourth degree, and if the violation results in economic harm of $100,000 or more, it is a felony of the third degree.

(2) R.C. 2917.21(B) prohibits a person from making or causing to be made a "telecommunication" (see (1), above), or permitting a telecommunication to be made from a "telecommunications device" (see (1), above) under the person's control, *with purpose to abuse, threaten, or harass another person*. A violation of this prohibition also is the offense of "telecommunications harassment." It is a

misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(3) R.C. 2903.21 prohibits a person from knowingly *causing another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family*. A violation of this prohibition is the offense of "aggravated menacing." Generally, the offense is a misdemeanor of the first degree. However, if the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, it is a felony of the fifth degree or, if the offender previously has been convicted of an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, it is a felony of the fourth degree.

(4) R.C. 2903.22 prohibits a person from knowingly *causing another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family*. A violation of the prohibition is the offense of "menacing." Generally, the offense is a misdemeanor of the fourth degree. However, if the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, it is a misdemeanor of the first degree or, if the offender previously has been convicted of an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, it is a felony of the fourth degree.

(5) R.C. 2913.49 prohibits a person from: (a) *obtaining, possessing, or using any "personal identifying information"* (see below) *of any living or dead individual with the intent to fraudulently obtain credit, property, or services or avoid the payment of a debt or any other legal obligation*, or (b) *creating, obtaining, possessing, or using the personal identifying information of any living or dead individual with the intent to aid or abet another person in violating clause (a)*. A violation of either prohibition is the offense of "taking the identity of another." Generally, the violation is a misdemeanor of the first degree. However, if the value of the credit, property, services, debt, or other legal obligation involved in the violation or course of conduct is $500 or more and less than

$5,000, it is a felony of the fifth degree, if the value of the credit, property, etc., involved is $5,000 or more and less than $100,000, it is a felony of the fourth degree, and if the value of the credit, property, etc., involved is $100,000 or more, it is a felony of the third degree.

As used in this section, "personal identifying information" includes, but is not limited to, the following: the name, address, telephone number, driver's license, driver's license number, commercial driver's license, commercial driver's license number, state identification card, state identification card number, social security card, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, money market account number, mutual fund account number, other financial account number, personal identification number, password, or credit card number of a living or dead individual.

HISTORY

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