

Combating Cyberbullying: Emphasizing Education over Criminalization

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I. INTRODUCTION

A new form of cyberbullying, or bullying that takes place on the Internet,¹ emerged in 2006 when Lori Drew used the online social networking tool MySpace to harass Megan Meier, a resident of Dardenne Prairie in suburban St. Louis.² Thirteen-year-old Megan's story is unique because Drew was an adult—the mother of another preteen girl.³ The cyberbullying began when Drew used MySpace to create a fictitious profile for a sixteen-year-old named “Josh Evans” on September 20, 2006.⁴ It ended a few weeks later when Megan hanged herself in her closet in response to Josh's suggestion that the world would be a better place without her.⁵

In addition to the fact that Drew's example involved an adult bullying a minor, this situation is unique because Drew's actions were criminally prosecuted in federal court.⁶ Since Drew's use of MySpace to create a fake profile and harass another member violated the MySpace Terms of Service, she was prosecuted for violating the Computer Fraud and Abuse Act (CFAA).⁷

1. For more definitions and effects of cyberbullying, see *What Is Cyberbullying?*, NATIONAL CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (last visited Nov. 13, 2010) (“Some examples of ways kids bully online are [s]ending someone mean or threatening emails, instant messages, or text messages . . . [and t]ricking someone into revealing personal or embarrassing information and sending it to others Often kids say things online that they wouldn't say in person, mainly because they can't see the other person's reaction.”).

2. Steven Pokin, *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, STLTODAY.COM, (Nov. 11, 2007, 11:00 AM), http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt. At the time of Pokin's reporting, “[t]he single mother . . . requested that her name not be used.” *Id.* Her identity was later revealed to be Lori Drew. See David Frey, *Better Laws Are Needed to Prosecute Cyberbullies*, N.Y.L.J., Oct. 13, 2009.

3. Frey, *supra* note 2.

4. See Pokin, *supra* note 2; Frey, *supra* note 2.

5. Pokin, *supra* note 2.

6. United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (ruling on Drew's Fed. R. Crim. P. 29(c) motion).

7. 18 U.S.C. § 1030 (2006). See also Drew, 259 F.R.D. at 451-53 (discussing the procedural posture of the case).

Though Lori Drew was the adult perpetrator of one of the most extreme examples of cyberbullying, the fact that no criminal law specifically prohibited her behavior does not justify stretching the CFAA or passing new legislation that defines cyberbullying as a new crime. However, federal legislation that combats cyberbullying through educational initiatives would have a positive impact. This Note will define and introduce extreme examples of cyberbullying in Part II. In Part III, this Note will focus on the criminal prosecution and acquittal of Lori Drew in response to her extreme cyberbullying actions. Part IV will examine how public outcry in response to extreme cyberbullying incidents has prompted both state and federal legislators to take action, including proposals to impose criminal sanctions against cyberbullying. Considering the positive and negative effects of the efforts to combat cyberbullying so far, this Note will argue in Part V that prevention through education will be the most effective solution. Since educational efforts do not include the possible negative consequences of imposing criminal anticyberbullying sanctions, increased Internet safety educational efforts address cyberbullying positively, by empowering educators with the necessary tools to inform students and parents about how to use ever-changing technology wisely and safely.

II. DEFINING CYBERBULLYING

Minors' general innocent and naïve nature, when combined with the environment of the Internet, creates a fertile atmosphere for bullying, especially since parents can be ignorant of their children's behavior and the dangers involved.⁸ In describing the practical effects of these dangers, David Frey, Staten Island assistant district attorney and chief of the computer and technology investigations unit, noted, "[u]nfortunately, many people have trouble living by [the Golden] rule, and when being unkind is taken to the Internet, police and prosecutors are often called on to step in. Welcome to the world of cyberbullying."⁹

In a seemingly positive way, the Internet has increased the available forms of communication to include email, instant messaging, and similar forms of messaging through social networking sites.¹⁰ These communication avenues allow instant connection to friends and

8. Frey, *supra* note 2 ("[B]ullies are underage and likely too immature to have thought about the results of their actions, and often their parents have no idea the behavior is occurring.").

9. *Id.*

10. See generally Perry Gattegno, *Nearly One in Ten Children Say they Have Been Bullied Through Electronic Means Such as Computers and Cell Phones*, MONTANA'S HEALTHY LIVING (July 22, 2010), http://www.montanashalthyiving.com/health_20090722_briefcyberbully.html.

acquaintances, but as a result, “[s]ocial networking sites like MySpace, Facebook, and Twitter have gone from Internet destinations to personal essentials.”¹¹ While the benefits of this increased technology include increased speed of communication, a particularly unique and potentially dangerous aspect of this technology is its tolerance (and even encouragement) of anonymity.¹² Another danger is that online communication is particularly accessible to children, and even more tailored toward younger users than adults in some cases.¹³

While more research is necessary on children’s motivations for cyberbullying,¹⁴ studies have found that between eight percent of teenagers¹⁵ and eighteen percent of middle school students have been victimized by this behavior.¹⁶ Cyberbullying seems to be most prevalent among girls (both in roles as bullies and victims), beginning in the sixth and seventh grades.¹⁷ Though a relatively modern phenomenon, its effects among victims include “higher rates of absenteeism, low self-esteem, suicidal thoughts, drug and alcohol use and illness.”¹⁸ More so than schoolyard bullying, cyberbullying has a particularly pervasive presence so, “[f]or some kids who are targeted at school and out of school, it can be a nightmare. They don’t feel like they have a break,” said Patricia Agatston, the coauthor of *Cyber Bullying: Bullying in the Digital Age*.¹⁹

In one of the earliest publicized examples of the dangerous results of cyberbullying, Ryan Halligan committed suicide on October 7, 2003, at age

11. *Id.*

12. *See, e.g., id.*; Associated Press, *Lawyer Claims Parodies, Pranks at Risk in Dead Sea Scrolls Case*, FIRST AMENDMENT CENTER (Nov. 6, 2009), <http://www.firstamendmentcenter.org/news.aspx?id=22283>.

13. *See* Gattegno, *supra* note 10; Richard Vivian, *Internet Safety Book Distributed to Parents*, ORANGEVILLE BANNER, June 2, 2009 (“With more kids being online, they know more about the Internet than we do. We have to make sure parents have a very good knowledge about the Internet on how to protect their children.”) (internal quotation marks omitted).

14. Gattegno, *supra* note 10 (“Stephen Russell, director of the Frances McClelland Institute for Children, Youth & Families at the University of Arizona, Tucson, . . . said more research is needed on what lies beneath the bullying.”).

15. *Id.*

16. Donna Winchester, *Cyberbullying on the Rise*, ST. PETERSBURG TIMES, Mar. 3, 2009, at 1B (“18 percent of students in Grades 6-8 said they’ve been cyberbullied at least once in the past two months. 11 percent of students . . . said they had cyberbullied another person at least once.”).

17. *Id.*

18. Emily Anderson, *School, Police Keep Tabs on Cyber Bullying*, THE DAILY SENTINEL, September 30, 2009 (“The Centers for Disease Control and Prevention has recognized cyber bullying as an emerging risk to youth health because it can be so hard on kids emotionally and mentally that it sometimes leads to depression, anxiety and even physical ailments.”).

19. *Id.* (internal quotation marks omitted).

thirteen,²⁰ the same age at which Megan Meier took her own life. Ryan did so in part because some of his schoolmates committed a prank against him in a form of online bullying.²¹ Ryan's father, John Halligan, recalls that Ryan "loved being on-line," but that he followed the house rules John set about Internet safety.²² Leading up to his suicide, Ryan had been teased at school and the summer before he entered eighth grade when "a classmate pretended to be interested in him romantically [and] then forwarded his instant message responses to all of her friends."²³ When the school year began and he approached her in person, "she told him he was just a loser and that she did not want anything to do with him."²⁴

Similar to John Halligan's rules for his son's Internet access, Megan Meier's mother, Tina, monitored Megan's Internet use.²⁵ Though hesitant because Megan admitted not knowing "Josh Evans," Tina allowed her to accept his MySpace friend request at Megan's continuous pleas such as, "but look at him! He's hot! Please, please, can I add him?"²⁶ Both Meiers were unaware the account had actually been created by Lori Drew, the mother of one of Megan's former friends, whose intent was to discover what Megan was posting about her daughter.²⁷ Once accepted as a "friend," Drew used the fake account to take advantage of Megan's vulnerabilities and make her believe Josh had a crush on her.²⁸ Megan did fall for the crush, but less than a month after it began, Josh told her, "[t]he world would be a better place without [her in it]."²⁹ After receiving that message on October 16, 2006, Megan hanged herself in her closet.³⁰ While Megan had received counseling for depression before the cyberbullying began, her mother Tina blames the cyberbullying for pushing her over the edge.³¹

More recently, in January 2009, California student Hail Ketchum

20. RYAN'S STORY, <http://www.ryanpatrickhalligan.org/> (last visited Nov. 13, 2010) [hereinafter Ryanpatrickhalligan.org].

21. *Id.*

22. *Id.* ("No IMing/chatting with strangers[;] [n]o giving any personal information (name/address/phone) to strangers[;] [n]o sending pictures to strangers[;] [n]o secret passwords").

23. Anderson, *supra* note 18; *see also* Ryanpatrickhalligan.org, *supra* note 20 ("She said she was only joking on-line. He found out that her friends and her thought it would be funny to make him think she liked him and to get him to say a lot of personal, embarrassing stuff. She copied and pasted there [sic] private IM exchanges into ones with her friends. They all had a good laugh at Ryan's expense.").

24. Ryanpatrickhalligan.org, *supra* note 20.

25. Pokin, *supra* note 2.

26. *Id.* (internal quotation marks omitted).

27. *Id.* *See also* Frey, *supra* note 2.

28. Pokin, *supra* note 2.

29. *Id.*

30. *Id.*

31. *Id.*

settled a lawsuit with Corona del Mar High School and the Newport-Mesa Unified School District over a video posted on Facebook, the social networking website.³² The video was posted by three other students who “graphically described raping [Ketchum] in the back of a pickup truck.”³³ More than 600 students viewed the video before it was removed.³⁴ While Ketchum found the video itself disturbing even though no actual rape occurred, the lawsuit arose out of the fact that when notified of the online harassment, the school “administrators did little to deal with [the video posters].”³⁵ As part of the settlement, the school district is required to institute harassment- and discrimination-prevention training for students and faculty as administered by the Anti-Defamation League.³⁶ The district was also required to apologize to Ketchum, who was represented by the ACLU in the lawsuit because the Facebook video stirred up issues of sexism and homophobia surrounding the school’s production of the musical, *Rent*.³⁷

The experiences of Hail Ketchum, Ryan Halligan, and Megan Meier show varied, though similarly severe examples of bullying that was, arguably, more extreme because it occurred via the Internet. The fact that more than 600 students were quickly able to view the video harassing Ketchum, just as countless friends of Ryan Halligan’s bully were able to read the embarrassing messages she forwarded, represents the speed and reach of Internet communications. That unique, but significant factor clearly distinguishes cyberbullying from other forms.

While factors distinguishing cyberbullying from other types of bullying do exist, the 2008 Internet Safety Technical Task Force was unable to determine with certainty that bullying is generally on the rise as a result of cyberbullying.³⁸ It is difficult to establish whether cyberbullying is actually creating an opportunity for entirely new bullies, or whether

32. Brianna Bailey, *The Political Landscape: Rep. Cites CdM Incident in Talk on Cyber-Bullying*, THE DAILY PILOT, Oct. 13, 2009, http://articles.dailypilot.com/2009-10-13/news/dpt-landscape100109_1_cyber-bullying-corona-del-democrat-boxer; Seema Mehta, *O.C. School District, ACLU Settle Suit over ‘Rent’*, L.A. TIMES, Sept. 10, 2009, at 3.

33. Bailey, *supra* note 32.

34. Mehta, *supra* note 32.

35. Patricia Cohen, *Settlement Reached in California High School ‘Rent’ Case*, N.Y. TIMES ARTSBEAT (Sept. 10, 2009), <http://artsbeat.blogs.nytimes.com/2009/09/10/settlement-reached-in-california-high-school-rent-case/#more-35857>.

36. Mehta, *supra* note 32.

37. Cohen, *supra* note 35.

38. Larry Margasak, *House Members Seek Ways to Stop Internet Bullying*, ASSOCIATED PRESS, Sept. 30, 2009. Led by John Palfrey of Harvard Law School, the Internet Safety Technical Task Force brought together twenty-nine companies, child advocacy groups, and academics. *Id.*

bullying is “just shifting venues” from the schoolyard to the Internet.³⁹

Whether or not bullying is simply shifting venues, these extreme examples of a new kind of bullying have brought the issue to the forefront of the public’s attention. In response, state laws have been amended to address cyberbullying through varying methods,⁴⁰ and federal legislation is currently pending.⁴¹ While this type of bullying ranges from inappropriate to morally reprehensible, the challenge of drafting a law that would foresee and include all future cyberbullying crimes, without infringing upon the guarantees of the First Amendment,⁴² seems unlikely to be overcome. It is also important to consider factors such as federal versus state regulation and cyberbullying done by minors as compared to that done by adults. To most effectively combat cyberbullying, community efforts and legislation need to focus on educating children and parents on Internet safety.

III. UNITED STATES V. DREW

Lori Drew, the aforementioned cyberbully of Megan Meier, was atypical not only because she was an adult bullying a minor, but also because Drew’s actions were criminally prosecuted in federal court.⁴³ In response to the public outcry that followed the story of Drew and Meier, a federal prosecutor indicted Drew in May 2008 for a felony violation of the CFAA.⁴⁴

A. Legal Cause of Action

Since Drew’s use of MySpace to create a fake profile and harass another member violated the MySpace Terms of Service (TOS), she was prosecuted for a felony violation of the CFAA.⁴⁵ The CFAA prohibits exceeding authorization of a computer and “obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act.”⁴⁶ The cause of action in the case relied on the theory that Drew exceeded her authorization when she violated the TOS with the intent

39. *Id.* (internal quotations omitted).

40. *See, e.g.*, ARK. CODE ANN. § 6-18-514 (LexisNexis 2010); MO. REV. STAT. § 565.090 (2010).

41. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009); Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009); Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009); SAFE Internet Act, S. 1047, 111th Cong. (2009).

42. U.S. CONST. amend. I.

43. *United States v. Drew*, 259 F.R.D. 449, 449 (C.D. Cal. 2009).

44. *United States v. Drew*, 2008 WL 2078622 (C.D. Cal. May 15, 2008).

45. *Drew*, 259 F.R.D. at 451.

46. *Id.* at 456 (citing 18 U.S.C. § 1030(a)).

to cause emotional distress to Megan Meier—a tortious act.

1. The Computer Fraud and Abuse Act

Congress passed the Computer Fraud and Abuse Act of 1986⁴⁷ (CFAA) to establish “additional penalties for fraud and related activities in connection with access devices and computers.”⁴⁸ The theory behind the prosecution of Lori Drew hinged on the fact that the CFAA prohibits exceeding authorization of a computer to commit an offense in furtherance of a tortious act.⁴⁹

In order to prove a felony violation of the CFAA in a case such as Drew’s, the prosecution must first prove that the defendant committed a tortious act. Drew was charged with using MySpace to commit the tort of intentional infliction of emotional distress in violation of state law.⁵⁰ The elements of the tort are the same in both California (the home state of MySpace) and Missouri (the home state of Drew and Megan Meier). The conduct at issue must be “extreme or outrageous,” and cause “extreme emotional distress.”⁵¹ At trial, the jury acquitted Drew of felony CFAA violations, but found her guilty of a misdemeanor CFAA violation.⁵²

In overturning the jury’s decision that Drew was guilty of a misdemeanor under the CFAA, Judge Wu focused on the other prong of a CFAA violation—computer use exceeding that for which a user is authorized. As a result of his analysis, Wu found that “there is nothing in the legislative history of the CFAA which suggests that Congress ever envisioned such an application of the statute” as to include a cause of action for cyberbullying.⁵³ Judge Wu postulated that, had he upheld the conviction, criminal CFAA violations would include a “lonely-heart” misrepresenting his or her physical characteristics on a dating website or an “exasperated parent” messaging friends about purchasing Girl Scout cookies because both are examples of seemingly innocent actors whose conduct is technically barred by the TOS.⁵⁴ In this case, that concern over possible misuses of the CFAA overrode the threat to children posed by the

47. 18 U.S.C. § 1030 (2006).

48. 132 CONG. REC. D710 (1986).

49. 18 U.S.C. § 1030 (prohibiting accessing a computer without authorization or in excess of authorization and obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act).

50. *Drew*, 259 F.R.D. at 451.

51. *Id.* at 452 n.3.

52. *Id.* at 452–53; *see also* 18 U.S.C. § 1030(a)(2)(C), (c)(2)(A) (setting forth that if “the offense was committed in furtherance of any criminal or tortious act” it could qualify for felony charges punishable by imprisonment of up to five years).

53. *Drew*, 259 F.R.D. at 451 n.2.

54. *Id.* at 466.

cyberbullying.

2. The MySpace Terms of Service

Institutional terms of service represent a common form of regulation applicable to Internet users.⁵⁵ In terms of cyberbullying, the theory that the MySpace Terms of Service (TOS) established the first line of safety for its users set the stage for the criminal prosecution of Lori Drew.⁵⁶ The fact that TOS provide standards and that those standards have repercussions for users who violate them serves as an example of a type of institutional safeguard that currently exists online.

MySpace is a social networking website that can be accessed by anyone with an Internet connection, who then has access to individual users' profiles, varying with each user and age group.⁵⁷ As distinguished from the general public of Internet users, MySpace allows any users older than fourteen to become members of its site once they register.⁵⁸ Registration requires users to submit personal information, choose a password, and "agree to the MySpace Terms of Service and Privacy Policy" by checking a box.⁵⁹ As Judge Wu noted in *United States v. Drew*, "[a] person could become a MySpace member without ever reading or otherwise becoming aware of the provisions and conditions of the MySpace terms of service by merely clicking on the 'check box' and then the 'Sign Up' button without first accessing the 'Terms' section."⁶⁰ The actual text of the TOS is located on a different page, access to which requires the optional and affirmative step of clicking a hyperlink.⁶¹ This practice varies among websites, as others "compel visitors to read their terms of service by requiring them to scroll down through such terms before being allowed to click on the sign-on box or by placing the box at the end of the 'terms' section of the site."⁶²

Becoming a member of MySpace allows members to create a profile on which they can post photographs and communicate with other

55. *See, e.g., id.* at 453 n.8.

56. *See id.* at 451.

57. *Id.* at 455.

58. *Id.* at 454.

59. *Id.* at 453 (internal quotations omitted). *But see* Pokin, *supra* note 2 ("MySpace has rules. A lot of them. There are nine pages of terms and conditions. The long list of prohibited content includes sexual material. And users must be at least 14. 'Are you joking?' Tina asks. 'There are fifth-grade girls who have MySpace accounts.' As for sexual content, Tina says, most parents have no clue how much there is. And Megan wasn't 14 when she opened her account. To join, you are asked your age but there is no check.") (emphasis added).

60. *Drew*, 259 F.R.D. at 453.

61. *Id.*

62. *Id.* at 453 n.8.

members.⁶³ For adults over the age of eighteen, the default setting allows any Internet user to view their profile, although they can adjust the privacy setting to limit access to allow only members or “friends,” a smaller, more exclusive group.⁶⁴ Once a profile has been limited to the “private” setting, other users must send that user a friend request for approval and access to profile information.⁶⁵ The private setting is the default for users who are under the age of eighteen.⁶⁶ Although the only means for verifying users’ ages is their acceptance of the TOS, it is noteworthy that MySpace had stricter privacy settings for minors than for its adult members.⁶⁷ MySpace even went a step further for its youngest users, as friend requests to members between ages fourteen and sixteen require users to enter that friend’s email address.⁶⁸ If one does not agree with the TOS, the only option is to leave the website and discontinue service.⁶⁹

In 2006, acceptance of the MySpace TOS required users to warrant: “(a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information; (c) you are 14 years of age or older; and (d) your use of the Services does not violate any applicable law or regulation.”⁷⁰ Among other material, the TOS also prohibited posting anything that “harasses or advocates harassment of another person[,] . . . promotes illegal activities[,] . . . [or] includes a photograph of another person that you have posted without that person’s consent.”⁷¹ MySpace reserved the right to change the TOS at any time and take legal action against any member who engaged in a prohibited activity.⁷² This provision likely decreases the value of the TOS as a contract with users, since it would require users to review the TOS every time they log into the site.⁷³

At trial, the vice president of customer care at MySpace testified that the sheer volume of 400 million MySpace accounts made it nearly impossible to determine which accounts were in violation of the TOS.⁷⁴ That is not to say MySpace takes a completely hands-off approach to

63. *Id.* at 453.

64. *Id.* at 455.

65. *Id.*

66. *Id.*

67. *See id.* at 454–55.

68. *Id.* at 455.

69. *Id.* at 454.

70. *Id.* (citing MySpace’s Terms of Service).

71. *Id.* (internal quotation marks omitted).

72. *Id.* at 454.

73. *Id.*; *see also* *Harris v. Blockbuster, Inc.*, 622 F. Supp. 2d 396, 398 (N.D. Tex. 2009) (holding clause in the “Terms and Conditions” of Blockbuster Online was unenforceable because it could be modified “at any time”).

74. *Drew*, 259 F.R.D. at 454–55.

regulating its users' activities. In addition to the privacy settings in place, MySpace also established specialized departments, such as "parent care," to handle cyberbullying and underage users.⁷⁵ Another safety feature of the MySpace site was its warning to users that "information provided by other MySpace.com Members (for instance, in their Profile) may contain inaccurate, inappropriate, offensive . . . material."⁷⁶ Such a warning conceivably raises questions about the type of activity that may be common on MySpace and similar sites, as well as MySpace's corporate responsibility to make this warning clear and obvious.

Practically speaking, the repercussions for violating the MySpace TOS involve MySpace contacting law enforcement directly only in rare circumstances.⁷⁷ More likely, MySpace would simply warn the violative users that their actions might warrant involvement of law enforcement or the removal of the offensive profile from the MySpace site.⁷⁸

B. *Lori Drew's Prosecution and Acquittal*

Likely considering children's innocence and reliance on adults,⁷⁹ proponents of cyberbullying regulation argue that actions such as Lori Drew's require "[m]ore formal interdiction" than simply school discipline because "an adult is the bully."⁸⁰ It was in response to such arguments, that the federal prosecutor indicted Drew for violating the CFAA,⁸¹ which prohibits "obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act."⁸² At trial, the jury was instructed:

if they unanimously decided that they were not convinced beyond a reasonable doubt as to the Defendant's guilt as to the felony CFAA violations of 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(B)(ii), they could then consider whether the Defendant was guilty of the "lesser included" misdemeanor CFAA violation of 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(A).⁸³

75. *Id.* at 455.

76. *Id.* at 454.

77. *Id.* at 455.

78. *Id.*

79. *See* DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 78 (2d ed. 2004) ("Children are thought to merit paternalism both because they have not yet developed the cognitive capacity to make intelligent decisions in the light of relevant information about themselves and the world, and because they are prone to emotional inconstancy . . .").

80. Frey, *supra* note 2.

81. *United States v. Drew*, 2008 WL 2078622 (C.D. Cal. May 15, 2008).

82. *Drew*, 259 F.R.D. at 452.

83. *Id.* at 452–53 (citations omitted).

The jury's finding suggests it agreed with the general public's reaction⁸⁴ that Drew deserved to be punished for her actions, but could not agree unanimously that she was guilty of felony charges beyond a reasonable doubt.⁸⁵ It acquitted Drew of felony CFAA counts, but found her guilty of misdemeanor CFAA violations.⁸⁶

Although federal prosecutors in Los Angeles filed a notice to appeal Wu's dismissal,⁸⁷ they effectively closed the case when they announced they would not seek appeal as of November 20, 2009.⁸⁸ Orin Kerr, a leading advocate and scholar on computer crime law,⁸⁹ had planned to contribute to Drew's defense at the appellate level,⁹⁰ and he believed that recent Ninth Circuit decisions rejecting a broad interpretation of the CFAA would make the government's success on appeal highly unlikely.⁹¹ Similarly, Drew's lead counsel, Dean Seward, emphasized that since an appellate decision would have a broad, national effect, he was confident that the Ninth Circuit would have affirmed Wu's decision given the opportunity.⁹² Tina Meier, Megan's mother, was not surprised by the prosecutors' decision, but she stressed, "[j]ust because nothing happened legally doesn't mean [Drew] didn't do anything wrong."⁹³

It seems clear that Drew's actions were morally reprehensible, but the fact that no law at the time specifically prohibited her behavior does not justify stretching the intentions and language of the CFAA to convict her of a crime. As will be explained further, expanding the law to criminalize Drew's behavior would open the gates to imposing punitive sanctions excessively, and serve as an example of overcriminalization.⁹⁴ Conversely,

84. See generally Pokin, *supra* note 2, at comments.

85. *Drew*, 259 F.R.D. at 453.

86. *Id.* at 451, 452–53 (finding Drew guilty of misdemeanor charges of accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information in violation of 18 U.S.C. §§ 1030(a)(2)(C), 1030(c)(2)(A)).

87. Kim Zetter, *Prosecutors Set Stage to Appeal Lori Drew Ruling*, WIRED.COM (Sept. 28, 2009), <http://www.wired.com/threatlevel/2009/09/drew-appeal-notice/>.

88. Nicholas J.C. Pistor, *U.S. Drops Its Case Against Lori Drew*, ST. LOUIS POST-DISPATCH, Nov. 22, 2009, at A2.

89. *Faculty Profile of Orin S. Kerr*, THE GEORGE WASHINGTON UNIV. LAW SCH., <http://www.law.gwu.edu/Faculty/profile.aspx?id=3568> (last visited Nov. 13, 2010).

90. Zetter, *supra* note 87.

91. *Id.*

92. Wendy Davis, *Drew Case May Go to Higher Court*, ONLINE MEDIA DAILY (Sept. 28, 2009), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114431.

93. Pistor, *supra* note 88.

94. See, e.g., *Cyberbullying and Other Online Safety Issues for Children: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Harvey A. Silverglate, Attorney) [hereinafter Silverglate Statement]; Zetter, *supra* note 87.

noncriminal, educational solutions to the issue are much less problematic approaches to protecting children from cyberbullying.

IV. CRIMINALIZING CYBERBULLYING THROUGH LEGISLATION

In another form of response to public outcry, legislators have introduced, and in some cases passed, laws that attempt to directly prohibit cyberbullying. If drafted as intended and passed, these laws would prevent behavior such as Lori Drew's and criminalize it in some instances. Bills have been proposed at both the state and federal level, and they vary greatly by their intent and scope.

For example, within seven months of Ryan Halligan's suicide, Vermont Governor Jim Douglas signed the Vermont Bully Prevention Act. While the Act amended Vermont laws to emphasize the seriousness of bullying, it makes no mention of cyberbullying specifically.⁹⁵

Similarly, in September 2009, Linda Sanchez, representative from California, referred to Hail Ketchum's experience as an example of the reason for her proposed federal anticyberbullying law:⁹⁶

If Bobby posts a video . . . on his Facebook page that harasses and threatens to rape and kill Ashley, that video isn't private. It is not buried on Bobby's profile page somewhere. It is public. It appears when any of Bobby's Facebook friends log in, right up there in front of their home page so they can't miss it. And this story isn't just hypothetical. It happened to a brave young woman named Hail Ketchum Wiggins, who lives in southern California near my congressional district. Similar bullying incidents are happening everyday to young people across our Nation.⁹⁷

A. State Cyberbullying Laws

The states' approaches to legislating to prevent cyberbullying have varied greatly. As of July, 2010, five states have adopted legislation against cyberbullying specifically, and thirty have adopted legislation prohibiting electronic harassment.⁹⁸ Soon after the details of Megan Meier's story broke, her home state legislature amended the Missouri statutes to criminalize cyberbullying in 2008.⁹⁹ Previously, the Missouri law against

95. See 16 VT. STAT. ANN. § 11 (2010).

96. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

97. *Cyberbullying and Online Safety for Children: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 22 (2009) (statement of Rep. Linda T. Sanchez, Member, H. Comm. on the Judiciary) [hereinafter Statement of Rep. Sanchez].

98. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (July 2010), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf; see, e.g., ARK. CODE ANN. § 6-18-514 (2009); MO. REV. STAT. § 565.090 (2009).

99. See MO. REV. STAT. § 565.090 (2009).

harassment required the offensive communication to be in writing or to have occurred over the telephone.¹⁰⁰ Since the amendment of the law, anyone who does the following is guilty of harassment, a class A misdemeanor, which is punishable by up to one year of imprisonment:¹⁰¹

(3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or *any electronic communication*; or (4) *Knowingly communicates* with another person who is, or who purports to be, *seventeen years of age or younger* and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person.¹⁰²

Notably, the amended Missouri statute upgrades the crime of harassment to a class D felony, which is punishable by up to four years of imprisonment,¹⁰³ if the perpetrator is at least twenty-one years of age and the victim is seventeen or younger, or if the perpetrator is a repeat offender of this section.¹⁰⁴

When analyzing a similar proposed law in Idaho, the *Idaho Press-Tribune* described the Missouri amendment as “a simple, reasonable way to deal with the issue.”¹⁰⁵ In an effort to prevent online harassment, Stephen Hartgen, Idaho state representative, initially proposed a requirement for Idaho Internet posters to sign online comments and blogs with their real names.¹⁰⁶ The suggestion was “roundly criticized” though, in part because “it would have been a legal nightmare to enforce.”¹⁰⁷ Hartgen proposed new legislation in September 2009, modeled after the Missouri law because it targets cyberbullies by penalizing Internet harassment rather than anonymity alone.¹⁰⁸ “The general concept is a good one,” as noted by the *Idaho Press-Tribune*, “[b]ut there are some questions that should be asked about the specifics.”¹⁰⁹ An analysis of whether the regulation is enforceable and will criminalize only the targeted offensive conduct is necessary not only for the proposed Idaho legislation but also all similar legislation intended to target Internet speech.

In 2007, the Arkansas Legislature placed the main burden of

100. MO. REV. STAT. § 563.910 (1999). See also Editorial Bd., *Online Harassment Bill Has Potential*, IDAHO PRESS-TRIB. (Sept. 17, 2009), <http://idahoptv.org/idreports/showEditorial.cfm?StoryID=42468>.

101. MO. REV. STAT. § 558.011 (2009).

102. *Id.* § 565.090 (emphasis added).

103. *Id.* § 558.011.

104. *Id.* § 565.090.

105. IDAHO PRESS-TRIB., *supra* note 100.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

preventing cyberbullying on public schools.¹¹⁰ It addressed cyberbullying by amending its requirement for schools to establish antibullying policies to specifically prohibit bullying committed through “an electronic act that results in the substantial disruption of the orderly operation of the school or educational environment.”¹¹¹ The law defines bullying in relevant part as “the intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student . . . that causes or creates a clear and present danger of: (i) [p]hysical harm. . . .”¹¹² The policies required by the law can also apply to bullying that occurs among students away from school as long as it can be proven that the bullying is “intended for the purpose of disrupting school.”¹¹³

The debate that has followed the amended Arkansas law represents some of the most compelling viewpoints and relevant considerations legislatures should consider when crafting proposals to discourage online harassment. “Each state has their own laws, and some are trying to adopt and adapt different things to them,” said Tina Meier, Megan’s mother. “You hope it’s enough, but sometimes when you get that case in, if it’s not strong enough, that’s where there’s issues.”¹¹⁴ Meier described the amended Arkansas law as “wonderful,” but she said it does not go far enough to address the problem of cyberbullying.¹¹⁵ While Meier suggested there might be extreme cyberbullying situations that would not be covered by this law, it is difficult to conceive a cyberbullying law that would be able to foresee all future cyberbullying crimes.

The sponsor of the Arkansas law, Shirley Walters, former state representative, told the *Arkansas News* that she “agrees that an outright ban on cyberbullying would help protect children, but crafting a law that did not infringe on First Amendment rights would be difficult.”¹¹⁶ She also said that her bill faced challenges from a freedom of speech perspective, so the legislatures worked with the ACLU and constitutional law experts to carefully craft a bill that would withstand constitutional scrutiny.¹¹⁷

Despite the shortcomings of state cyberbullying laws, state legislators have responded more successfully to the issue of cyberbullying than those at the federal level.

110. See generally John Lyon, *State’s Cyberbullying Law Too Limited, Advocate Says*, ARKANSAS NEWS (Oct. 13, 2009), <http://arkansasnews.com/2009/10/13/state’s-cyberbullying-law-too-limited-advocate-says/>; ARK. CODE ANN. § 6-18-514 (2009).

111. ARK. CODE ANN. § 6-18-514(b)(2)(B)(i) (2009).

112. *Id.* § 6-18-514(a)(3)(A).

113. *Id.* § 6-18-514(b)(2)(b)(ii).

114. Lyon, *supra* note 110 (internal quotation marks omitted).

115. *Id.*

116. *Id.*

117. *Id.*

B. *The Megan Meier Cyberbullying Prevention Act*

Although children's rights are traditionally considered a state issue,¹¹⁸ the Internet poses an enforcement challenge for cyberbullying laws. Even though states have passed anticyberbullying laws,¹¹⁹ it seems unreasonable for every Internet user to be aware of each locality's rule. Since all Internet activity involves interstate commerce,¹²⁰ the cyberbullying issue is prime for federal legislation. A federal law would also fit the trend that children's rights have become increasingly federalized over the course of the twentieth century.¹²¹ Thus, if any law can prove to be effective, it should be a federal law.

In an effort to take action on the national front, Rep. Linda Sanchez sponsored H.R. 1966: The Megan Meier Cyberbullying Prevention Act (Cyberbullying Prevention Act).¹²² Sanchez named the bill in honor of Megan Meier, whose bully would "never be punished for her outrageous behavior."¹²³ The bill proposes to amend Chapter 41 of title 18 of the United States Code to include a section on cyberbullying.¹²⁴ This section would make it a crime to "cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior."¹²⁵ The criminal punishment could include a fine, imprisonment of up to two years, or both.¹²⁶ The bill defines *electronic means* to cover a variety of communication via emerging technologies "including email, instant messaging, blogs, websites, telephones, and text messages."¹²⁷

In her testimony on the bill before the Subcommittee on Crime, Terrorism, and Homeland Security, Sanchez focused on how Missouri statutes at the time did not provide prosecutors with a law under which they could charge Lori Drew for her actions against Megan Meier.¹²⁸ In explaining the need for a federal cyberbullying law, Sanchez emphasized that "[c]yberbullying is always mean, ill-mannered, and cruel, but some

118. See Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 11 (2004) ("One barrier to the constitutionalization of children's rights lies in federalism concerns. Federal courts are reluctant to interfere with state regulation, deeming children's interests both local and private. Children's rights are perceived as part of family law, the paradigmatic turf of the states.").

119. See, e.g., ARK. CODE ANN. § 6-18-514 (2009); MO. REV. STAT. § 565.090 (2009); 16 VT. STAT. ANN. § 11 (2009).

120. *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam).

121. See, e.g., Ezer, *supra* note 118, at 11.

122. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

123. Statement of Rep. Sanchez, *supra* note 97, at 23.

124. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

125. *Id.*

126. *Id.*

127. *Id.*

128. Statement of Rep. Sanchez, *supra* note 97, at 22–23.

cyberbullying is so harmful that it rises to the level of criminal behavior.”¹²⁹ Sanchez also pointed to the pervasiveness of cyberbullying as a distinguishing factor from other forms of harassment,¹³⁰ although it has not been empirically proven that bullying is generally on the rise as a result of cyberbullying.¹³¹

1. Avoiding Overcriminalization: Carefully Criminalizing Only Criminal Acts

Harvey A. Silverglate, an attorney with experience in criminal defense and civil liberties, also testified before the Subcommittee.¹³² He spoke on behalf of the libertarian Cato Institute and focused mainly on the risks associated with the proposed bill,¹³³ raising the same issues of overbreadth and vagueness that Judge Wu considered when he dismissed Drew’s criminal CFAA conviction.¹³⁴ According to Silverglate’s testimony, bills that attempt to address “socially unhealthy curtailments,” such as cyberbullying, are “often born of good intentions,” but tend to produce “unintended consequences, including excessive and unfair prosecutions as well as the inhibition of the sometimes unruly verbal interactions that are, and should be, the product of a free society.”¹³⁵

These delicate issues require Congress to balance the competing interests of free speech against the interest in preventing cyberbullying against children.¹³⁶ It also raises the question of whether some conduct, such as Drew’s very specific (and hopefully unique) actions towards Megan Meier, can be precisely prevented by law. “[T]he ‘Cyberbullying’ bill creates more problems than it could possibly solve,” Silverglate argued, “especially in view of the fact that existing law is already more than adequate to deal with truly outrageous or dangerous harassment.”¹³⁷ Acknowledging the challenges involved, Sanchez’s focus is “to craft a prohibition on cyberbullying that is consistent with the Constitution,” she said.¹³⁸ “But I also believe that working together for our children, *we can and must do so.*”¹³⁹

The failure to distinguish between cyberbullying done by minors and

129. *Id.* at 22.

130. *Id.*

131. *See* Margasak, *supra* note 38.

132. Silverglate Statement, *supra* note 94, at 56.

133. *See id.* at 59.

134. *United States v. Drew*, 259 F.R.D. 449, 465 (C.D. Cal. 2009).

135. Silverglate Statement, *supra* note 94, at 61.

136. Margasak, *supra* note 38.

137. Silverglate Statement, *supra* note 94, at 69.

138. Margasak, *supra* note 38.

139. *Id.*

that caused by adult perpetrators is one noteworthy distinction between this proposed federal bill and the Missouri law. Silverglate noted that while the claimed purpose of this bill is to “stop ‘cyber bullies’ from causing distress to minors[,] [n]owhere in the language of this proposed legislation, however, can any such assurance be found.”¹⁴⁰ Whether bullying is just part of growing up is debatable, but the Missouri law’s harsher penalties for cyberbullying done by adults against children than cyberbullying among peers is significant.¹⁴¹ Similarly, the Arkansas legislature considered cyberbullying to be a juvenile issue and thus required the schools to create policy to prevent it.¹⁴²

The speed at which technology changes stands as another challenge in regulating cyberbullying.¹⁴³ This consideration plays an important and clarifying role in how laws such as the Cyberbullying Prevention Act should be evaluated; however, it also suggests “there is more need than ever for clear rules of the road.”¹⁴⁴ For instance, it is obvious that “the authors of the First Amendment could not envision Facebook”¹⁴⁵ or MySpace.

2. Safeguarding First Amendment Freedoms

Silverglate also focused much of his opposition of the bill on the fact that criminalization of speech of this kind breaches the constitutional guarantees of the First Amendment.¹⁴⁶ As a result of its broad-sweeping potential, the proposed Cyberbullying Prevention Act has been called “a serious assault on first amendment rights.”¹⁴⁷ In describing the values of free speech, Justice Louis Brandeis argued the founders “believed that

140. Silverglate Statement, *supra* note 94, at 67.

141. See MO. REV. STAT. § 565.090 (2009).

142. Lyon, *supra* note 110.

143. See L. Gordon Crovitz, *You Commit Three Felonies a Day*, WALL ST. J., Sept. 28, 2009, at A21 (“Technology moves so quickly we can barely keep up, and our legal system moves so slowly it can’t keep up with itself.”).

144. *Id.*

145. Travis Crabtree, *Don’t Let Abuses Stifle Innovation on Web*, HOUSTON CHRON., Oct. 4, 2009, at B10.

146. Silverglate Statement, *supra* note 94, at 60–61, 65 (“In a free society, people will be offended, *feelings will be hurt*. Yet separating unsavory speech – even quite clearly disagreeable and offensive speech – from *criminal* conduct is absolutely imperative in a democratic system that celebrates the freedom of expression.”) (emphasis added).

147. Jason Lomberg, *Proposed Bill Targets “Cyberbullying,”* ECNMAG.COM (Oct. 1, 2009, 3:51 PM), <http://www.ecnmag.com/Blogs/ECN-Blog/Proposed-bill-targets-Cyberbullying>. See generally *Cyberbullying Bill on the March*, THINK TANK WEST, <http://thinktankwest.com/american-foreign-policy/cyberbullying-bill-on-the-march> (last visited Nov. 13, 2010) (“The scope of this law is breathtaking. Had a rough breakup with your significant other? Engaged in a flame war on a website’s comment section? We’ve got a law against that, you know.”).

freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”¹⁴⁸ In defense of those values, the First Amendment guarantees the right to discuss and debate “hot-button” political issues, which often involve particularly unpleasant speech.¹⁴⁹ Taken to the extreme, “the [Cyberbullying Prevention Act] would prevent about 99% of political discourse—anyone feeling offended could claim ‘emotional distress.’”¹⁵⁰

Politically motivated speech, both supportive and antagonistic, is one example of expression that plays an accepted and even necessary role in a free and democratic society.¹⁵¹ As support for his argument that this bill appears to be “another chapter of over-criminalization,” Louie Gohmert, representative from Texas, noted that the proposed law could inappropriately criminalize the blogosphere attacks that “mean-spirited liberals” send him and his family regularly.¹⁵²

Similarly, the ACLU has concerns about the bill’s First Amendment implications.¹⁵³ According to Rita Sklar, the executive director of the ACLU of Arkansas, “[w]e think that these kinds of laws can be dangerous in that they seek to limit speech that doesn’t rise to the level of a true threat, in which case (they) would be unconstitutional.”¹⁵⁴ From the other perspective, Tina Meier argues that cyberbullying laws do not violate the First Amendment because these laws target harassing speech that crosses the line of protected speech.¹⁵⁵

Meier is correct that certain categories of speech can cross the proverbial line of social acceptance, beyond which the First Amendment can no longer protect it.¹⁵⁶ However, these categories are narrowly tailored to include only the most extreme and intolerable types of speech.¹⁵⁷ While

148. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

149. Crabtree, *supra* note 145.

150. Lomberg, *supra* note 147.

151. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964).

152. David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED.COM (Sept. 30, 2009, 6:37 PM), <http://www.wired.com/threatlevel/2009/09/cyberbullyingbill> (“[C]ommittee members from the left and the right said they thought the measure was an unconstitutional breach of free speech. ‘We need to be extremely careful before heading down this path,’ Bobby Scott, a Democrat from Virginia and the committee’s chairman, said during the hearing’s opening moment.”).

153. Lyon, *supra* note 110.

154. *Id.* (internal quotation marks omitted).

155. *Id.*

156. *See, e.g., Watts v. United States*, 394 U.S. 705 (1969) (holding that true threats against the life of the President are not protected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (stating that incitement speech is not protected).

157. *See Planned Parenthood of the Columbia/Williamette Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1071–72 (9th Cir. 2002) (en banc) (holding antiabortionist group’s website listing names and addresses of doctors who perform abortions for a reward was

this federal law does not make any true threat application clear, the Missouri cyberbullying law makes it more transparent that the type of speech it is intended to punish must reach the threshold level of a “true threat.”¹⁵⁸ In other arenas of cyberlaw, for example, it is notable that “[c]ivil courts require Web sites to reveal the identities of anonymous posters *only after showing the speech goes beyond* what is protected by the First Amendment.”¹⁵⁹

Taking those considerations into account, Sanchez clarified: “I want the law to be able to distinguish between an annoying chain email, a righteously angry political blog post, or a miffed text to an ex-boyfriend—all of which are and should remain legal; and serious, repeated, and hostile communications made with the intent to harm.”¹⁶⁰ While that spectrum seems to comport with constitutional requirements, whether the proposed text of the bill makes that sufficiently clear inevitably will be up to the courts to decide if the bill is passed into law.

3. Relying on Prosecutorial Discretion

Foreseeability of criminal liability is also an issue worthy of consideration. Through his experience as a defense lawyer, Silverglate noted that overcriminalization (as he classifies this proposed bill) has led many defendants to wonder how they could even be charged “for engaging in conduct that *a reasonable person* would not have believed to lie within the ambit of the criminal law.”¹⁶¹ Exemplifying that danger, under this proposed law, Judge Wu’s previously mentioned examples of the “lonely-heart” and “exasperated parent” would be classified as criminals for fairly common and reasonable activities.

The practical success of the bill, if passed, would depend heavily on how prosecutors apply it when deciding which types of cyber activities to prosecute criminally.¹⁶² Even though the Cyberbullying Prevention Act is intended to provide prosecutors with a tool to criminalize “serious, repeated hostile communications made with the intent to harm,”¹⁶³ it also provides prosecutors with a tool to criminalize hostile speech that takes place in a wide array of online venues,¹⁶⁴ leaving a lot of tailoring to prosecutorial discretion. While Sanchez emphasized that “[p]rosecutors should have a

cyberstalking and thus did constitute a true threat).

158. *Id.* at 1075.

159. Crabtree, *supra* note 145 (emphasis added).

160. Statement of Rep. Sanchez, *supra* note 97, at 31.

161. Silverglate Statement, *supra* note 94, at 59 (emphasis added).

162. *See generally* Kravets, *supra* note 152.

163. Statement of Rep. Sanchez, *supra* note 97, at 23.

164. Kravets, *supra* note 152 (“The methods of communication where hostile speech is banned include e-mail, instant messaging, blogs, websites, telephones and text messages.”).

tool at their disposal” to combat cyberbullying, it has also been argued that “[a] good prosecutor could indict a ham sandwich.”¹⁶⁵

C. *Enforcing Cyberbullying Law*

Just as the legislative debate behind the Cyberbullying Prevention Act involves balancing society’s interest in protecting children against First Amendment guarantees, the public’s response has similarly emphasized the importance of these competing interests.¹⁶⁶

In response to one of the first news articles about Megan Meier’s story, Internet readers posted 948 comments on the *St. Louis Post-Dispatch* website.¹⁶⁷ These posters represented one facet of the community’s outrage that such a tragedy could occur at the hands of an adult. One such poster said in part,

The immaturity of this other “parent” is indescribable. There must be something that can be done to change the law and make this a CRIME! Also the [strength] Megan’s parents have shown by not harming these other parents should be applauded. They are amazing for staying strong and continuing the fight to get JUSTICE FOR MEGAN!¹⁶⁸

David Frey echoed the local community’s outrage as he articulated, “few would disagree that an adult who uses her time to emotionally abuse a 13-yearold [sic] deserves a special place in hell.”¹⁶⁹

Considering our society’s image of children as innocent and in need of adults’ protection,¹⁷⁰ the victimization of a preteen girl elicits sensitive responses and makes the balancing issue even more complex. Travis Crabtree, a lawyer who specializes in online media, noted these conflicting interests: “As the father of a young daughter, I know Web safety is a new area of grave concern for parents and the like. But as a lawyer, I also know

165. *Id.* (internal quotation marks omitted).

166. *See generally* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH (Rutgers U. Press 2007) (2001).

167. Pokin, *supra* note 2.

168. Ashlee Kiefer, Comment to ‘My Space’ Hoax Ends with Suicide of Dardenne Prairie Teen, STLTODAY.COM (Nov. 11, 2007, 2:06 PM), http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt. *See also*, Concerned Citizen, Comment to ‘My Space’ Hoax Ends with Suicide of Dardenne Prairie Teen, STLTODAY.COM (Nov. 11, 2007, 6:11 PM), http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt (“Why are people so mean? What kind of parent makes a phony myspace [sic] page to see what someone might be saying about their kid? It’s easy to do and say terrible things to someone when you are hiding behind a computer screen. This should be a lesson to all people who harass others online. People should have to take responsibility for what they do online. I hope some kind of charges are filed.”).

169. Frey, *supra* note 2.

170. *See, e.g.*, ARCHARD, *supra* note 79, at 46; MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 191 (2005).

legislation or heavy-handed regulation is not the answer.”¹⁷¹ Though it is clear that the likelihood of actually preventing cyberbullying through criminalization needs to be balanced against First Amendment limits, it is incredibly difficult to predict either outcome, especially since both technology and the way in which people use it are constantly evolving.¹⁷²

1. Prosecuting the Practical Joke: Elizabeth Thrasher

As one of the first people charged under the revised Missouri cyberbullying law, forty-year-old Elizabeth Thrasher plans to challenge the it on constitutional grounds.¹⁷³ In August 2009, she was accused of posting photos and personal information about a seventeen-year-old girl on the “Casual Encounters” section of Craigslist after an Internet argument.¹⁷⁴ As a result of Thrasher’s online activity, the teenage girl alerted the local police that she had received harassing phone calls, emails, and text messages from men seeking sexual encounters.¹⁷⁵ Since Thrasher is over the age of twenty-one and her alleged victim was seventeen years or younger, the outcome of her case is pivotal since she could be found guilty of a class D felony,¹⁷⁶ which is punishable by up to four years of imprisonment.¹⁷⁷

Thrasher’s defense attorney, Michael Kielty, called the Missouri cyberbullying law “a terribly crafted statute.”¹⁷⁸ He also emphasized, “I think ultimately it’s going to be found *unconstitutionally overly broad* and vague.”¹⁷⁹ Kielty described the statute as local politicians’ “knee-jerk reaction” to the Megan Meier tragedy, which also occurred in Saint Charles County.¹⁸⁰ Focusing particularly on slippery slope freedom of speech concerns, Kielty contends the law is problematic because his client’s

171. Crabtree, *supra* note 145; *see also* Lomberg, *supra* note 147 (“Let’s make this clear: what Lori Drew did was beyond despicable. Mothers should be the reasonable ones; not hatching elaborate revenge schemes. Drew should be condemned and MySpace should participate in a public relations campaign to raise awareness of cyberbullying. Every effort should be made to punish those responsible. But I’d stop short of overreaching with an ambiguous piece of legislation.”).

172. *See* Crovitz, *supra* note 143.

173. Angela Riley, *Felony Cyberbullying Charge in Missouri Tests New Law*, MO. LAWYERS WEEKLY, Aug. 18, 2009.

174. *Id.*

175. *Id.*

176. MO. REV. STAT. § 565.090.2 (2009). *See also* Lance Whitney, *Cyberbullying Case to Test Megan’s Law*, CNET NEWS (Aug. 28, 2009, 10:00 AM), http://news.cnet.com/8301-13578_3-10320274-38.html (“Is posting a phony, sexually suggestive ad online about another person free speech, an inappropriate prank, or a felony?”).

177. MO. REV. STAT. § 558.011 (West Supp. 2010).

178. Whitney, *supra* note 176.

179. *Id.* (emphasis added).

180. *Id.*

behavior (while admittedly inappropriate) could only qualify as a felony since it occurred in cyberspace.¹⁸¹ Kiely described Thrasher's actions as a "practical joke gone awry," and he plans to fight the prosecution until the statute is ultimately overturned as unconstitutional.¹⁸²

In the opinion of Saint Charles County prosecutor Jack Banas, the Missouri cyberbullying law is not overbroad because it is "drawn narrowly enough to punish people only when they've done something intentional."¹⁸³ He plans to enforce the law as written and defends it on the basis that the amended law does not single out the Internet as a vehicle, but rather expands upon and modernizes the earlier Missouri harassment law that was limited to intimidation by writing or by phone.¹⁸⁴ As to the issue of notice, Banas emphasized, "[w]hether or not the law was common knowledge, I think it was common knowledge that what [Thrasher] did was wrong."¹⁸⁵ Banas also expressed his confidence that if it reaches the appellate court, the statute would withstand constitutional scrutiny because "[f]ree speech does not involve speech directed at someone to intimidate, frighten, or otherwise harass them."¹⁸⁶ A jury trial was set for February 15, 2011.¹⁸⁷

2. Shifting From the Principal's Office to Juvenile Court

Another example of the enforcement of the Missouri law involved a ninth-grade girl in Troy, Missouri, who created a website that included photos, comments, and polls about another girl for the purpose of bullying.¹⁸⁸ She was initially disciplined by the school district, which did not disclose the girl's punishment, but its policy in cases such as this ranges from loss of privileges to expulsion.¹⁸⁹

Although the Missouri law's felony classification would not apply in this case because both parties involved are juveniles, the school district did alert the Lincoln County Sheriff's Department after the victim alerted the

181. *Id.* ("She was arrested and had to post bond for words. No actions, no threats. For words. There's something wrong with that. If it was a newspaper ad, it would not have been criminal. It certainly wouldn't have been a felony. If it was on a street corner or a bathroom wall, it wouldn't have been a felony.").

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (internal quotation marks omitted).

186. *Id.* (internal quotation marks omitted).

187. Case No. 0911-CR04760-01, MISSOURI CASE.NET, www.courts.mo.gov/casenet (last visited Oct. 27, 2010).

188. *Troy, Missouri Girl Allegedly Bullied Another Over Internet*, FOX2 NOW (Oct. 15, 2009), <http://www.fox2now.com/news/ktvi-troy-high-school-internet-bully-101509,0,4805020.story> ("[T]he girl created a Web site with a name that included the other girl's name and explicit language.").

189. *Id.*

principal about the website.¹⁹⁰ Since she could be charged with a class A misdemeanor,¹⁹¹ the suspect was arrested on October 8, 2009, but the juvenile investigators would not disclose whether she was still in custody or if charges would be filed.¹⁹²

V. PREVENTION THROUGH EDUCATION

As introduced earlier, the jurisdictional limitations of state laws make them a weak solution to the problem of cyberbullying. Cyberbullying is not limited to certain states or regions, just as Internet users are not limited by state lines. Federal legislation is more likely to positively affect and combat cyberbullying. However, for the reasons highlighted above, criminalization is not the answer as its likely negative consequences outweigh the possible positive effects.

Contrary to criminalization, increased Internet safety education efforts address cyberbullying in a manner that has proven effective and unlikely to include the negative consequences, such as imposing punitive sanctions too broadly. Empowering educators with the tools to inform students and parents about how to use ever-changing technology wisely is key. Providing information that increases awareness of the risks that lurk online and teaching students to avoid common mistakes—for example, posting too much personal information or not informing a teacher or parent when they come across something dangerous—will better prepare them to utilize the positive aspects of the Internet without becoming victims of the dangers.

A. *Student Internet Safety Act of 2009*

In comparing the Cyberbullying Prevention Act and other bills before Congress, Rita Sklar said the ACLU was in support of educational measures as opposed to an approach that focuses only on punishing bad online behavior.¹⁹³ On June 16, 2009, the House of Representatives unanimously passed H.R. 780, the Student Internet Safety Act, which approaches cyberbullying with education rather than criminal prosecution.¹⁹⁴ As it was described by the Senate, the purpose of the act is “[t]o promote the safe use of the Internet by students, and for other purposes.”¹⁹⁵ If passed, this act would allow local educational agencies to use federal funding to: “(1) educate students about appropriate online

190. *Id.*

191. MO. REV. STAT. § 565.090 (West Supp. 2010).

192. Fox2 Now, *supra* note 188.

193. Lyon, *supra* note 110.

194. Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009).

195. *Id.*

behavior, including interacting with individuals on *social networking* Web sites and in chat rooms; (2) protect students against online predators, *cyberbullying*, or unwanted exposure to inappropriate material; or (3) promote involvement by parents in the use of the Internet by their children.”¹⁹⁶

Since this bill emphasizes education on the possible impacts of negative speech and Internet use, it seems to address the issue of cyberbullying in a practical, positive way, without broaching First Amendment guarantees. In testifying about his support for the bill, Gregario Sablan, delegate from the Northern Mariana Islands, focused his statement on the extent to which the Internet is occupying a larger role in children’s lives.¹⁹⁷ He argued, “it is our responsibility to make sure children are protected from and educated about the numerous online threats in order to maximize the priceless opportunities to advance learning that the digital world provides.”¹⁹⁸ He based his support for the Student Internet Safety Act on its educational programming for both students and parents.¹⁹⁹

B. *Funding Educational Efforts: AWARE and SAFE Internet Acts*

In the same vein, Rep. Debbie Wasserman Schultz filed H.R. 3630, the Adolescent Web Awareness Requires Education Act (AWARE Act) on September 23, 2009.²⁰⁰ Compared to the Student Internet Safety Act, the AWARE Act appropriates specific funding of \$125 million in grants per year²⁰¹ in federal assistance to local educational agencies to support “an age-appropriate, research-based [Internet safety education] program that prevents children from becoming the victims of Internet crime by encouraging safe and responsible use of the Internet.”²⁰² The bill has been referred to the House Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security.²⁰³

196. *Id.* § 2 (emphasis added).

197. *See* 155 CONG. REC. H6766-01 (daily ed. June 15, 2009) (statement of Del. Gregario Sablan).

198. *Id.*

199. *See id*; *see also* 155 CONG. REC. E1521 (daily ed. June 23, 2009) (statement of Rep. Dan Burton) (“[T]he National Center for Missing & Exploited Children recommends that: Parents choose search engines carefully. . . . Parents help kids find information online. . . . Parents talk with their Internet service providers (ISPs) as many offer filters to prevent kids from accessing inappropriate sites.”).

200. Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009).

201. Lyon, *supra* note 110.

202. H.R. 3630 § 3(3).

203. H.R. 3630: *Adolescent Web Awareness Requires Education Act*, GOVTRACK.US, <http://www.govtrack.us/> (follow “Bills & Resolutions” hyperlink; then search “HR 3630”) (last updated July 1, 2010, 6:36 AM).

As a companion bill to the AWARE Act, the Senate introduced the School And Family Education about the Internet Act of 2009 (SAFE Internet Act).²⁰⁴ It was referred to the Committee on the Judiciary on May 14, 2009.²⁰⁵ Its specified purpose is “[t]o promote Internet safety education and cybercrime prevention initiatives.”²⁰⁶ It varies slightly from the similar proposed bills in that it focuses more on background research by requiring the Director of the Bureau of Justice Assistance, with the concurrence of the Secretary of Education and the Secretary of Health and Human Services to complete a study on Internet safety through government grants.²⁰⁷

If passed, these bills would bring attention to cyberbullying as an issue worthy of consideration and research. As discussed earlier, studies on cyberbullying currently conflict,²⁰⁸ so more empirical background research is necessary to fully understand and eliminate this problem facing youth.

Since these two bills focus on educational, preventative measures, they represent a positive legislative step for the same reasons as the Student Internet Safety Act. These proposed measures also illustrate the federal government’s more recent tendency to establish policies local schools must follow in order to receive federal funding.²⁰⁹ However, its funding appropriation represents a double-edged sword in that it makes the bill more likely to be effective, but also more likely to face opposition as the legislature balances its budgetary priorities.

Web Wise Kids is a nonprofit online safety group that favors educational programs due to the constitutional challenges laws criminalizing cyberbullying will likely face.²¹⁰ The organization’s president, Judi Westberg Warren, testified in support of both bills as carefully crafted efforts to combat cyberbullying.²¹¹ After reviewing these measures and the Cyberbullying Prevention Act, she described the AWARE Act as “not overly-prescriptive.”²¹² While she agreed that bullying through harmful speech is wrong, she acknowledged that children

204. SAFE Internet Act, S. 1047, 111th Cong. (2009).

205. *S. 1047: SAFE Internet Act*, GOVTRACK.US, <http://www.govtrack.us/> (follow “Bills & Resolutions” hyperlink; then search “S 1047”) (last updated June 27, 2010, 9:54 PM).

206. S. 1047.

207. *Id.*

208. *See, e.g.*, Gattegno, *supra* note 10; Margasak, *supra* note 38; Winchester, *supra* note 16.

209. *See, e.g.*, Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 888–89 (2006).

210. Margasak, *supra* note 38.

211. *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 47–55 (2009) (statement of Judi Westberg Warren, President of Web Wise Kids) [hereinafter Warren Statement].

212. *Id.* at 52.

have used speech to hurt each other throughout history.²¹³ Keeping that in mind, she wholly endorsed the grant and research elements of the AWARE and SAFE Internet acts because “[p]revention of cyber bullying and educating kids on how to respond to online harassment is paramount.”²¹⁴

Further distinguishing the AWARE and SAFE Internet acts from the Cyberbullying Prevention Act, Warren argued that children should be educated on how to respond to online harassment. She warned against imposing punitive sanctions against children, however, for bullying and youth-to-youth communications.²¹⁵ However, “[e]ducation builds lessons for a lifetime,” so it is important to invest in education and provide educators with the necessary information and tools to teach children to “safely, securely, ethically and effectively use the Internet and a variety of other technologies, especially as it relates to the impact of these technologies on our youth.”²¹⁶

In 2009, Web Wise Kids held meetings with industry leaders and the Obama administration and emphasized the importance of education on Internet safety and increasing parents’ awareness of Internet safety risks.²¹⁷ While increased awareness among parents is important, funding educational efforts in schools is more likely to be effective and thus absolutely indispensable.²¹⁸

C. *Post-Legislative Education Efforts*

Since Megan Meier’s suicide, her mother, Tina, has been traveling as a keynote speaker for the Megan Meier Foundation.²¹⁹ In her speeches, Meier not only urges children to be more wary of cyberbullying, but that they can help to prevent its dangers by treating each other with more kindness.²²⁰ Although her speeches go beyond cyberbullying, she does

213. *See id.* at 54.

214. *Id.*

215. *Id.*

216. *Id.* at 48, 50.

217. *Id.* at 52.

218. *Id.* (noting challenges in focusing educational efforts on parents: “First, parents are simply very busy with work and other priorities. Second, children tend to be more advanced users of technology than parents, making it difficult for the parent to have effective conversations about Internet safety. Third, ensuring outreach and awareness efforts actually reach parents with the most effective messages.”).

219. *Biography of Tina Meier*, THE MEGAN MEIER FOUNDATION, <http://meganmeierfoundation.org/bio/> (last visited Nov. 13, 2010) (“The foundation’s mission . . . is to bring awareness, education and promote positive change to children, parents, and educators in response to the ongoing bullying and cyberbullying in our children’s daily environment.”) (internal quotation marks omitted).

220. Steve Pokin, *Pokin Around: Not the Path She Chose, but the One She’s Determined to Follow*, STLTODAY.COM (Oct. 24, 2009, 3:12 AM), <http://suburbanjournals.stltoday.com/articles/2009/10/26/stcharles/news/1025stc-pokin0.txt>.

encourage parents to monitor their children's Internet activity and to educate themselves about the Internet and modernisms such as text-speak.²²¹

Further shifting the focus from criminalization, Ronald Iannetti of the National Institutes of Health suggests that parental support is the best way to prevent bullying of any kind.²²² A familial support system improves children's self esteem and thus makes them less inclined to degrade others.²²³ In order to increase parental support and understanding of children and the Internet, Meier makes specific recommendations for parents such as visiting netnanny.com and installing Internet monitoring and filtering software to track their children's computer use.²²⁴ Meier's recommendations to students and parents comport with the ACLU's suggestion that education is the key to combating cyberbullying.²²⁵ This approach is also consistent with media literacy programs, which have been heralded by Marjorie Heins,²²⁶ a scholar on censorship who represented the ACLU in *Reno v. ACLU*, in which the Supreme Court held the Communications Decency Act to be an unconstitutional violation of the First Amendment.²²⁷ "An established component of public education in Canada," media literacy programs face challenging content head on by teaching "critical thinking and viewing skills: understanding how TV and movies create their effects, evaluating ideas and images in both fiction and advertising."²²⁸ After evaluating how the law has been applied to protect children from potentially damaging things on the Internet and through other media, Heins argues that a media literacy focus on individual skills, not censorship, is the best resolution.²²⁹

Education was also agreed upon as a positive way to move forward in Corona del Mar High School's settlement with Hail Ketchum.²³⁰ Under the

221. *Id.* (noting that Meier refers parents to netlingo.com, which provides definitions for text-speak). For more information, see NETLINGO: THE INTERNET DICTIONARY, <http://netlingo.com/> (last visited Oct. 27, 2010).

222. Gattegno, *supra* note 10.

223. *Id.*

224. Pokin, *Pokin Around*, *supra* note 220. Net Nanny is a software program that filters content at varying levels determined by parents. *Net Nanny 6.5 New Features*, NET NANNY, www.netnanny.com/products/netnanny (last visited Nov. 13, 2010) ("Net Nanny can block not only pornography, but hate sites, questionable chat rooms and other dangers of the Internet. [Parents] can configure Net Nanny to block online game and gambling sites, and even make it so . . . children can only install and play computer games with parental ratings that [parents] deem appropriate.").

225. Lyon, *supra* note 110.

226. HEINS, *supra* note 166, at 260.

227. 521 U.S. 844 (1997).

228. HEINS, *supra* note 166, at 260.

229. *Id.*

230. Mehta, *supra* note 32.

settlement agreement, the Anti-Defamation League will lead training that will include such topics as what constitutes discrimination and harassment and how students can be harmed.²³¹ Looking ahead, school district spokeswoman Laura Boss hoped “this training program will raise awareness for staff and students and will contribute to an overall positive environment at Corona del Mar High School.”²³²

Web Wise Kids’ Judi Westberg Warren also warned that “[a]ny legislation considered must be careful to avoid criminalizing youth-to-youth communications.”²³³ This noteworthy distinction further suggests that school-imposed disciplinary and educational measures might be most appropriate for preventing and monitoring cyberbullying.

VI. CONCLUSION

As the examples in this Note have shown, cyberbullying is indeed a problem in our society. To varying degrees of severity, it affects the well-being of our children. However, bullying is a social problem that has seemingly always existed throughout history in one form or another. As the extreme examples of Megan Meier, Ryan Halligan, and Hail Ketchum demonstrate, cyberbullying is uniquely dangerous because of the far-reaching capabilities of Internet communications. While cyberbullying can be distinguished on that ground from other forms of bullying and harassment, it is unclear whether there has actually been a measurable increase in the amount of bullying in our society, or if the advents of new technology just make it more visible or traceable.

After the undeniably tragic suicides of Megan Meier and Ryan Halligan, their parents were able to access a clear record of what bullies had said to their children because those hurtful statements had been recorded online. Similarly, that online record and distinction from other forms of harassment led to the indictment and pending prosecution under Missouri law of Elizabeth Thrasher because of statements she intended to be part of a practical joke at the expense of a seventeen-year-old. The pending Thrasher trial serves as an example of how these bills, intended to criminalize cyberbullying, can reach too far and criminalize speech that falls within the protection of the First Amendment.

The methods of harassment and bullying are constantly evolving across venues. In this continuously changing context, it seems nearly impossible for legislatures to continually update criminal codes to serve an effective deterrent role. As this Note has shown, the efforts to criminalize cyberbullying have largely been motivated by the extreme examples such

231. *Id.*

232. *Id.*

233. Margasak, *supra* note 38.

as the Megan Meier story and the public outcry that no law criminalized the hopefully unique behavior of an adult mother harassing a teenage girl anonymously through MySpace. This motive, while altruistic and just in itself, led to proposed state and federal legislation with varying success.

Legislation imposing criminal sanctions for cyberbullying has met criticism that it would lead to overcriminalization, jeopardize First Amendment freedoms, and rely too heavily on prosecutorial discretion. However, the government interest in protecting children from the dangers of cyberbullying would be more realistically served by legislation that increases education and awareness of the risks associated with the Internet among children and parents.

Unlike criminal statutes, educational programming is easily adaptable, and thus is more capable of adjusting to and incorporating changing technology and any associated dangers. Also, the risk of extending too broadly in an educational plan is much lower than enforcing an overbroad criminal law.

Educational efforts do not include the likely negative consequences of imposing criminal anticyberbullying sanctions. On the contrary, the benefits of education on cyberbullying and related issues seem clear. Rather than focusing on where to draw lines in criminalizing behavior of this kind, legislators need to focus on increasing awareness of cyberbullying dangers in order to best prepare children to avoid and deal with cyberbullying and its related technological hazards.