

# High-Tech Words Do Hurt: A Modern Makeover Expands Missouri's Harassment Law to Include Electronic Communications\*

Missouri Revised Statute § 565.090<sup>1</sup>

## I. INTRODUCTION

Megan Meier was 13 years old when she committed suicide on October 16, 2006.<sup>2</sup> Afterwards, it came to light that she was the victim of “a cruel cyber hoax” that began as a MySpace friendship with a 16 year-old boy named Josh Evans.<sup>3</sup> Soon after the two teenagers became friends, Josh began insulting Megan in various ways.<sup>4</sup> For instance, on October 15, 2006, Josh sent a message saying “I don’t know if I want to be friends with you any longer because I hear you’re not nice to your friends.”<sup>5</sup> Megan’s father claimed that he saw another message from Josh sent on October 16, 2006, that said “th[is] world would be better off without [you].”<sup>6</sup> That evening, Megan committed suicide.<sup>7</sup>

Six weeks after Megan’s death, her family received the shocking news that Josh Evans did not exist.<sup>8</sup> Instead, they learned that “Josh Evans” was the creation of a neighborhood mom, Lori Drew, who wanted to see if Megan

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1. MO. REV. STAT. § 565.090 (Supp. 2008).

2. *Parents: Cyber Bullying Led to Teen’s Suicide*, ABC NEWS, Nov. 19, 2007, <http://abcnews.go.com/GMA/Story?id=3882520&page=1> [hereinafter *Parents*].

3. *Id.* “MySpace is a free online community composed of personal profiles aimed foremostly at a younger membership. A MySpace profile typically includes a digital photo and in-depth information about personal interests.” Wise Geek, What Is MySpace?, <http://www.wisegeek.com/what-is-myspace.htm> (last visited Mar. 24, 2009).

4. *Parents*, *supra* note 2. Josh’s profile began posting bulletins that everyone could see that called Megan, *inter alia*, a “slut” and “fat.” *Id.*

5. *Id.*

6. *Mom: MySpace Hoax Led to Daughter’s Suicide*, FOX NEWS, Nov. 16, 2007, <http://www.foxnews.com/story/0,2933,312018,00.html> [hereinafter *MySpace Hoax*].

7. *Parents*, *supra* note 2.

8. *Id.*

would say anything negative about Drew's daughter.<sup>9</sup> Despite Josh Evans' deceitful actions, no state charges were brought against any individuals involved in Megan's death.<sup>10</sup> This is because the behavior that prompted Megan to commit suicide was not a criminal act under Missouri law.<sup>11</sup> Sending harassing messages through electronic communications, such as the ones that led to Megan's death, is called cyberbullying. Further, one commentator recently coined suicide as a result of being bullied online as "Bullycide."<sup>12</sup> The Meier incident and others have put pressure on the Missouri Legislature to make internet harassment and cyberbullying a crime by amending § 565.090 of the Missouri Revised Statutes.<sup>13</sup>

This Article will examine, *inter alia*, whether actions that qualify as cyberbullying could be considered harassment when done in person. More specifically, Part II of this Article will provide an explanation of cyberbullying, discuss the application of Missouri harassment law before the recent amendments, and detail relevant First Amendment issues as they pertain to harassment statutes. Part III will review Missouri's recently amended harassment statute, Missouri Revised Statute § 565.090. Further, Part III will explore the effectiveness of current and pending federal statutes that might prosecute cyberbullies. Part IV will discuss the likely issues that a court must resolve in order to apply the revised statute. Lastly, this article will argue that having an effective federal cyberbullying law is essential to punishing and preventing harassment by electronic means.

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9. *Myspace Hoax*, *supra* note 6. Later on, it came to light that several people were involved in the hoax against Megan. Jonann Brady, *Exclusive: Teen Talks About Her Role in Web Hoax That Led to Suicide*, ABC NEWS, Apr. 1, 2008, <http://abcnews.go.com/GMA/Story?id=4560582&page=1>. One article that discussed whether laws should be passed to regulate cyberbullying nicely stated the circumstances surrounding the MySpace hoax and are repeated as follows:

Other than the final message, who made specific statements to Megan as "Josh Evans" is unclear at the time of this writing. Regardless of the identity of the author of specific messages to Megan, the underlying cyberbullying behavior remains intact in the combination of three possible scenarios: (1) Lori Drew was an adult who victimized Megan, (2) Drew's daughter was one of Megan's peers who victimized her, and/or (3) Ashley Grills was an acquaintance of Megan who victimized her.

Matthew C. Ruedy, Comment, *Repercussions of a MySpace Suicide: Should Anti-Cyberbullying Laws be Created?*, 9 N.C. J.L. & TECH. 323, 325 n.17 (2008). To preserve clarity, this Note will adopt the approach taken in the Ruedy comment, in that "the statements made on the fake MySpace page . . . will be described as though they were made by 'Josh Evans.'" *Id.*

10. However, as discussed *infra*, she was eventually charged under federal statutes. *See infra* text accompanying notes 122-24.

11. *Parents*, *supra* note 2.

12. BRENDA HIGH, BULLYCIDIE IN AMERICA: MOMS SPEAK OUT ABOUT THE BULLYING/SUICIDE CONNECTION (2007).

13. *See infra* Part III.A.

## II. LEGAL BACKGROUND

### A. What Is Cyberbullying?

Bullying is when someone takes repeated action in order to control another person.<sup>14</sup> With the widespread use of the Internet in the United States, a new form of bullying has emerged called “cyberbullying.”<sup>15</sup> “‘Cyberbullying’ is when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies, or mobile phones.”<sup>16</sup> While typical cases of cyberbullying focus on young people, adults can also be involved in such behavior. In fact, Missouri law prohibits both adults and juveniles from committing such acts, and punishes the former more harshly.<sup>17</sup>

People often confuse the terms cyberbullying and cyberstalking. However, the two are different because “cyberstalking often includes credible threats both online and offline, while cyberbullying usually does not.”<sup>18</sup> In addition, cyberstalking is dealt with through stalking laws,<sup>19</sup> while cyberbullying is covered in harassment laws.

14. Stop Bullying Now, So What is Bullying?, <http://stopbullyingnow.hrsa.gov/index.asp?area=whatbullyingis> (last visited Mar. 31, 2009).

15. Ruedy, *supra* note 9, at 329 (discussing the “frequency of cyberbullying among middle school students”).

16. Stop Cyberbullying, What Is Cyberbullying, Exactly?, [http://www.stopcyberbullying.org/what\\_is\\_cyberbullying\\_exactly.html](http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html) (last visited Mar. 24, 2009).

17. *See* MO. REV. STAT. § 565.090 (Supp. 2008) (stating that harassment is a misdemeanor unless it is “[c]ommitted by a person twenty-one years of age or older against a person seventeen years of age or younger,” in which case it is a felony). When a distinction is needed, the cyberbullying of a child by an adult will be called “felony cyberbullying.”

18. Ruedy, *supra* note 9, at 327.

19. Senate Bills 818 & 795 addressed this in addition to cyberbullying by amending Missouri’s stalking statute, MO. REV. STAT. § 565.225 (Supp. 2008), to include all forms of communication. The relevant sections of this statute state:

1. As used in this section, the following terms shall mean:

(1) “Course of conduct”, a pattern of conduct composed of two or more acts, which may include *communication by any means*, over a period of time . . . ;

(2) “Credible threat”, a threat communicated with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety, or the safety of his or her family, or household members . . . ;

(3) “Harasses”, to engage in a course of conduct directed at a specific person that serves no legitimate purpose, that would cause a reasonable person under the circumstances to be frightened, intimidated, or emotionally distressed.

According to a recent study by the National Crime Prevention Council (NCPC), forty-three percent of teens were victims of cyberbullying in the last year.<sup>20</sup> Over eighty percent of teens claim that cyberbullying takes place because the perpetrator finds humor in it.<sup>21</sup> Other reasons for cyberbullying include friends pressuring each other to cyberbully and ignorance of the “negative impact it may have on the victim.”<sup>22</sup> Cyberbullies can be peers, neighbors, or even anonymous individuals,<sup>23</sup> but most of the time the perpetrators know their victims.<sup>24</sup>

### B. Harassment in Missouri Before Cyberbullying

Both Missouri and other states that have criminalized cyberbullying have done so by amending existing harassment laws to include electronic communications.<sup>25</sup> Prior to this amendment, however, many cases permitted Missouri courts to examine the harassment statute’s validity. As such, analyzing these harassment cases is necessary as they will demonstrate the types of challenges that courts will face in the future when defendants argue that the new language affects the settled validity of the statute.

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2. A person commits the crime of stalking if he or she purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person.

3. A person commits the crime of aggravated stalking if he or she purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person, and:

(1) Makes a credible threat . . . .

*Id.* (emphasis added). While cyberstalking and cyberbullying have some similarities, the scope of this law summary will be on cyberbullying and the law prohibiting it. For an excellent analysis of how Missouri’s stalking statute might be interpreted, see generally Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 175-77 (2007). For an example of a neighboring state’s criminalization of cyberstalking, see 720 ILL. COMP. STAT. ANN. 5/12-7.5 (West 2003).

20. National Crime Prevention Council, Stop Cyberbullying Before It Starts 1, <http://www.ncpc.org/topics/by-audience/parents/bullying/cyberbullying/cyberbullying.pdf> (last visited Mar. 24, 2009). An alarming addition to this statistic is that thirty percent of those victims wanted to seek revenge against their cyberbully. *Id.* at 2.

21. *Id.* at 1.

22. *Id.*

23. National Crime Prevention Council, Cyberbullying, <http://www.ncpc.org/topics/by-audience/parents/bullying/cyberbullying/> (last visited Mar. 24, 2009).

24. *Id.* When cyberbullies do remain anonymous, it “can add to a victim’s insecurity.” *Id.*

25. See, e.g., ALA. CODE § 13A-11-8 (LexisNexis 1977), amended by ALA. CODE § 13A-11-8 (LexisNexis Supp. 2008); ALASKA STAT. § 11.61.120 (2002), amended by ALASKA STAT. § 11.61.120 (2006).

As interpreted by Missouri courts, harassment includes the use of “coarse language offensive to one of average sensibility.”<sup>26</sup> Several elements factor into determining harassment, including where the statement was made, who made it, to whom it was made, and the speaker’s intention.<sup>27</sup> The perpetrator’s intention can be, and often is, proven by circumstantial evidence.<sup>28</sup> Further, intent to harass can be found when repeated contact is made with the victim, regardless of whether the victim has asked the harasser to cease contact.<sup>29</sup> The Missouri Court of Appeals upheld this principle in the case of *State v. Creech*.<sup>30</sup> In this case, the defendant made repeated calls to the victim, inquiring about sex, after the victim rejected the defendant’s advances.<sup>31</sup> The Missouri Court of Appeals affirmed the defendant’s conviction for harassment, noting that the defendant’s calls created “intent to disturb.”<sup>32</sup> In making this determination, the court noted that the defendant’s actions are judged as a whole, instead of only after he was told to stop.<sup>33</sup>

Similarly, in *State v. Koetting* the same court affirmed the defendant’s harassment conviction.<sup>34</sup> Koetting made repeated threatening calls to the victim’s house, as many as twelve over a thirty-six day period.<sup>35</sup> At one point, Koetting even threatened to “knock [the victim’s] head off.”<sup>36</sup> The court found this behavior unacceptable because “[c]oarse language directed specifically to an average person is likely to be offensive.”<sup>37</sup> In addition, the court noted that protecting a private recipient from unwanted communication is a compelling government interest.<sup>38</sup> The location of the calls was important because the offensive character of the statements increases when in the privacy of a person’s home.<sup>39</sup>

These cases give insight into factors a court might look at when applying the amended harassment statute to cyberbullying. These factors

26. *State v. Yeargain*, 926 S.W.2d 883, 887 (Mo. App. S.D. 1996) (citing MO. REV. STAT. § 565.090 (1994), amended by MO. REV. STAT. § 565.090 (Supp. 2008)).

27. *Id.* at 888. Many of the interpretations of the Missouri harassment statute, before it was recently amended, include actions by telephone and letter. *E.g.*, *State v. Chavez*, 165 S.W.3d 545, 549 (Mo. App. E.D. 2005).

28. *Chavez*, 165 S.W.3d at 549 (citing *State v. Rafaeli*, 905 S.W.2d 516, 518 (Mo. App. E.D. 1995)).

29. *State v. Creech*, 983 S.W.2d 169, 171 (Mo. App. E.D. 1998) (“We do not agree that the State needs to establish that the victim told the [harasser] to stop . . . .” (citing *State v. Mallory*, 886 S.W.2d 89, 91 (Mo. App. W.D. 1994))).

30. 983 S.W.2d 169.

31. *Id.* at 170.

32. *Id.* at 171.

33. *See id.*

34. 691 S.W.2d 328, 333 (Mo. App. E.D. 1985).

35. *Id.* at 330.

36. *Id.* at 330.

37. *Id.* at 331.

38. *Id.* (citing *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736-37 (1970)).

39. *Id.* (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

include the intent of the perpetrator, the characteristics of the victim, and the location of the communication. Also, a court might engage in a constitutional analysis if the validity of the statute is challenged.

### C. Constitutional Background

Any law that restricts speech, no matter how socially unacceptable that speech is, must pass the protections of the First Amendment to the United States Constitution.<sup>40</sup> However, the First Amendment's free speech protection has exceptions, most notably that the government may proscribe some categories of expression as long as the restriction is consistent with the Constitution.<sup>41</sup> The following is a discussion of speech that may be regulated and other free speech concerns implicated by criminalizing cyberbullying.

#### 1. True Threats

Judicial interpretation of the First Amendment allows a state to proscribe "true threats."<sup>42</sup> In *Virginia v. Black*, the United States Supreme Court held that "true threats" include "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."<sup>43</sup> Because of the nature of "true threats," the Court held that they can be proscribed because the government should be able to "[protect] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."<sup>44</sup>

Despite the holding in *Black*, the United States Supreme Court has failed to provide exhaustive guidance on what constitutes a "true threat." Nevertheless, the circuit courts have followed two predominant approaches in evaluating whether a statement reaches such a level.<sup>45</sup> The first approach, which has been adopted by the Eighth Circuit, is whether a reasonable *recipient* would have interpreted the statement as a serious expression of

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40. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *see also* *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

41. *Black*, 538 U.S. at 358 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

42. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

43. *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708).

44. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

45. *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc) (citing *United States v. Fulmer*, 108 F.3d 1486, 1490-91 (1st Cir. 1997)).

intent to harm or injure another.<sup>46</sup> The second view is whether a reasonable *speaker* would foresee that the target would interpret his or her statement(s) as a serious expression of intent to harm or injure.<sup>47</sup> Neither approach requires that the speaker intend to carry out the threat or even that the speaker is capable of carrying it out.<sup>48</sup> However, for the speaker of the threat to be punished under either approach, he or she must have intentionally or knowingly communicated the statement in question to the object of the threat or to a third party.<sup>49</sup>

## 2. Fighting Words and Offensive Speech

It is clear that cyberbullies offend, hurt, and depress their victims through online communications. Yet, a speaker cannot be punished for offending others when the speaker is merely trying to persuade others as to his viewpoint.<sup>50</sup> However, in *Cantwell v. Connecticut*, the United States Supreme Court refused to protect persuasive speech, regardless of the speaker's intent, when the speech "provoke[d] violence and disturb[ed] . . . good order."<sup>51</sup> Further, while the use of profanity or indecent and abusive language is not determinative in finding "fighting words," this type of language may add to the speech being labeled as such.<sup>52</sup> Fighting words are not protected by the First Amendment because "epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."<sup>53</sup> Therefore, because this speech is not protected by the First Amendment, it can be abridged by laws.<sup>54</sup> In addition, subsequent rulings have provided factors for determining when speech constitutes fighting words which include whether the statement is a provocative personal

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46. *Doe*, 306 F.3d at 622. Factors that the court suggested in determining how a reasonable recipient would view an alleged threat were:

- 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

*Id.* at 623 (citing *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996)).

47. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

48. *Doe*, 306 F.3d at 625 n.3 (citing *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc)).

49. *Id.* at 624 (citing *United States v. Crews*, 781 F.2d 826, 831-32 (10th Cir. 1986)).

50. *See Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

51. *Id.* at 309.

52. *See id.*

53. *Id.* at 309-10.

54. *Id.* at 310.

insult,<sup>55</sup> a face-to-face utterance,<sup>56</sup> has a direct tendency to cause immediate violence<sup>57</sup> and is directed at an individual or discernable group.<sup>58</sup>

While the United States Supreme Court permits fighting words to be proscribed, courts have been reluctant to silence speech that is merely offensive.<sup>59</sup> Both the context and location of offensive speech factor into the determination of whether the potentially offensive speech can be proscribed.<sup>60</sup> Highlighting this point, many courts allow speech that pervades one's home to be more readily proscribed than speech that occurs out in public because the home is a sanctuary for its owner.<sup>61</sup> In turn, individuals within their homes are considered captive audiences and cannot avert their ears as they could in a public place.<sup>62</sup> However, some courts have extended this heightened right to places beyond the home.<sup>63</sup> Therefore, it is important to determine the boundaries a court might set in regards to electronic communications and captive audiences.

### 3. Anonymous Speech and the Internet

The Internet may have an effect on how anonymous speech is regulated. While the internet provides a vast forum for people to communicate their views, it is also easy to harass, annoy, and engender fear anonymously.<sup>64</sup> Several United States Supreme Court decisions have commented on a right to anonymous speech. The leading case, *McIntyre v. Ohio Elections Commission*, set forth two reasons for protecting anonymous speech: (1) anonymity encourages some authors who may be reluctant to enter the marketplace of ideas to do so without fear of retaliation, and (2) an "author generally is free to decide whether or not to disclose his or her true identity."<sup>65</sup>

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55. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

56. See *id.* at 573.

57. See, e.g., *id.*

58. See, e.g., *Cohen v. California*, 403 U.S. 15, 20 (1971).

59. See *id.* at 21 ("[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."); see also *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("[W]e expect individuals simply to avoid speech they do not want to hear . . .").

60. See *Frisby*, 487 U.S. at 484; *FCC v. Pacifica Found.*, 438 U.S. 726, 749 n.27 (1978); *Cohen*, 403 U.S. at 21.

61. *Cohen*, 403 U.S. at 21 (citing *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970)).

62. *Id.*

63. E.g., *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (stating that an individual's choice to reject unwanted speech is also available in "confrontational settings").

64. See Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1556, 1558 (2007).

65. 514 U.S. 334, 341-42 (1995).

While anonymous speech was traditionally protected, with the ease of anonymous harassment on the Internet, it is important to determine when it can be regulated. Because this is an emerging issue and one that is distinct from traditional forms of communication, the United States Supreme Court has not provided a solid approach to this issue.<sup>66</sup> Lower courts, therefore, will likely continue to hold that anonymous speech on the Internet should only be protected if it does not fall into a category outside the protections of the First Amendment, such as true threats or fighting words.<sup>67</sup>

#### 4. Vagueness and Substantial Overbreadth

Many legislatures, including Missouri's, have enacted statutes that criminalize cyberbullying. In formulating these criminal laws, constitutional due process requires that the laws be sufficiently clear so that a "person of ordinary intelligence [is given] a reasonable opportunity to know what is prohibited, so that he may act accordingly."<sup>68</sup> If a statute fails this standard, the law is void-for-vagueness.<sup>69</sup> Further, in determining if a law is void, a court "looks at what a person of 'common intelligence' would 'reasonably' understand the statute to proscribe, not what the particular defendant understood the statute to mean."<sup>70</sup> This objective inquiry is undertaken in order to prevent law enforcement from making "arbitrary and discriminatory" decisions in enforcing laws in order to satisfy their own interest.<sup>71</sup> Thus, it is essential to determine if new cyberbullying laws give potential cyberbullies sufficient notice of the criminal nature of their behavior as determined by an objective standard.

In addition to the void-for-vagueness doctrine, the Supreme Court also requires that laws not be substantially overbroad.<sup>72</sup> Under this doctrine, a law is invalid if it limits a substantial amount of protected speech whether in the current case or in future applications.<sup>73</sup> In other words, the court must determine "whether a government restriction of speech that is arguably valid

66. Lidsky & Cotter, *supra* note 64, at 1538.

67. Eugene Volokh, *Annoying Anonymous Speech Online*, THE VOLOKH CONSPIRACY, Jan. 10, 2006, <http://volokh.com/posts/1136923654.shtml>.

68. *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

69. *Id.* at 929.

70. *Id.* at 930 (quoting *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963)).

71. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (alteration in original) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974))).

72. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

73. *Id.* at 800 n.19.

as applied to the case at hand should nevertheless be invalidated to avoid the substantial prospect of unconstitutional application elsewhere.”<sup>74</sup> When challenging a statute as overbroad, the plaintiff is not limited to arguing the personal harms he or she has suffered but may also argue the rights of third parties are being impinged upon by the law.<sup>75</sup> However, for the challenging party to succeed in this third-party argument, there must be a “realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.”<sup>76</sup> In order to prevent unnecessary restriction on speech, newly enacted statutes criminalizing cyberbullying should be narrowly tailored.

Due to the emergence of cyberbullying, and its ability to cause serious injury, Missouri amended its harassment statutes to include electronic communications. However, since state boundaries do not limit the Internet, federal anti-harassment statutes may also be necessary to sufficiently curb the problem. Additionally, statutes that prohibit the behavior of cyberbullies must comport with the aforementioned constitutional requirements.

### III. RECENT DEVELOPMENTS

#### A. *Missouri Revised Statute § 565.090*

In November of 2007, then-Missouri Governor Matt Blunt created an “Internet Harassment Task Force” to strengthen the state’s harassment and stalking statutes to include Internet communications.<sup>77</sup> The task force helped draft Senate Bills 818 and 795.<sup>78</sup> Senator Scott Rupp, the bill’s sponsor, said that “[w]e want to make it very clear that people who pursue, harass, or contact people in these unsolicited ways are going to be held accountable for their heinous actions.”<sup>79</sup> On June 1, 2008, Missouri Governor Matt Blunt signed into law Senate Bill 795, which went into effect August 28, 2008.<sup>80</sup> Within the bill, existing Missouri Revised Statute § 565.090 was rewritten to

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74. *Id.* (quoting John Calvin Jeffries Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 425 (1983)).

75. *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 38 (1999).

76. *Taxpayers for Vincent*, 466 U.S. at 801 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)).

77. Press Release, Matt Blunt, Governor of Mo., Gov. Blunt Enacts Legislation to Safeguard Missourians from Internet Harassment (Nov. 20, 2007) (on file with author).

78. *Id.*

79. *Id.*

80. Act to Repeal Sections 160.261, 565.090, and 565.225, RSMo, and to Enact in Lieu Thereof Three New Sections Relating to Crimes of Harassment, with Penalty Provisions, 2008 Mo. Laws 812; see also Elizabeth Perry, *Blunt Signs Cyberbullying Bill*, ST. CHARLES J., July 1, 2008, available at <http://stcharlesjournal.stltoday.com/articles/2008/07/09/news/sj2tn20080701-0702stc-blunt0.ii1.txt>.

cover instances of harassment by “electronic communication.”<sup>81</sup> Then-Governor Blunt said that “[t]his new law will ensure that we have the protections and penalties needed to safeguard Missourians from Internet harassment.”<sup>82</sup>

In adopting the new law, many adjustments were made to Missouri Revised Statute § 565.090 to make it an effective tool in preventing online bullying. For example, instead of limiting harassing contact to writing and by telephone, the statute now uses broader language such as “when communicating,” “any electronic communication,” and “communicates.”<sup>83</sup> Further, the bill extended the potential ways to commit the crime of harassment from four to six.<sup>84</sup> The first section of the amended statute kept a “true threat” clause, but adds a *mens rea* element by stating that a person is in violation of the statute if he or she “[k]nowingly communicates a threat to commit any felony to another person.”<sup>85</sup> Also, a harm requirement was added by requiring that the threat must “frighten[], intimidate[], or cause[] emotional distress” to the victim.<sup>86</sup> This provision mirrors what would constitute a true threat as defined by the United States Supreme Court and would therefore likely survive a constitutional inquiry on this ground.<sup>87</sup> What remains to be seen are the limits this law will have as it pertains to punishment of cyberbullying.

Next, the legislature altered the second provision of paragraph one of § 565.090. This provision applies when a person “uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm.”<sup>88</sup> This is the same standard as used for “fighting words.”<sup>89</sup> In order for “fighting words” to be proscribed, courts must first determine when an online communication puts someone in a position to fear violence.<sup>90</sup> If the communication places an individual in such a position, it can then be limited or punished.<sup>91</sup> Thus, the

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81. See MO. REV. STAT. § 565.090.1(3) (Supp. 2008); see Press Release, *supra* note 77.

82. Press Release, *supra* note 77.

83. MO. REV. STAT. § 565.090.1(2)-(4).

84. *Id.* § 565.090.1(1)-(6).

85. *Id.* § 565.090.1(1) (emphasis added).

86. *Id.*

87. See *supra* Part II.C.1.

88. MO. REV. STAT. § 565.090.1(2).

89. See *supra* Part II.C.2.

90. See *supra* Part II.C.2.

91. See *supra* Part II.C.2. It bears noting again that courts are hesitant to censure or limit speech that is merely offensive. See *supra* note 59 and accompanying text. Further, “the exception for fighting words requires a certain immediacy, which is not present with regard to media violence.” Abby L. Schloessman Risner, Comment, *Violence, Minors and the First Amendment: What Is Unprotected Speech and What Should Be?*, 24 ST. LOUIS U. PUB. L. REV. 243, 251 (2005).

effectiveness of this provision turns not on the provision itself, but on the facts applied to it.

The bill's third provision prohibits anonymous contact, as it did before the statute was amended, but now includes contact made by "electronic communication."<sup>92</sup> This provision also requires *mens rea* for harm, similar to the first provision.<sup>93</sup> The effectiveness of the cyberbullying statute hinges on this third factor because of the assumption that anonymous speech can be proscribed only if it falls into a regulated category.<sup>94</sup> Since this provision requires someone to "knowingly frighten[], intimidate[], or cause[] emotional distress" it incorporates "true threat" or "fighting words" standards and would likely survive constitutional challenges.<sup>95</sup>

The fourth provision is a new addition to the statute.<sup>96</sup> The main purpose of this provision is to require "reckless" intent instead of actual knowledge in certain circumstances.<sup>97</sup> The provision applies, and therefore recklessness is required as it pertains to harm, only if the harasser "[k]nowingly communicates with another person who is, or who purports to be, seventeen years of age or younger."<sup>98</sup> The lower reckless standard does not apply if the victim is over the age of seventeen. This provision could be constitutionally justified by proving that the government has a compelling interest in protecting children from harmful speech due to children's impressionable minds.<sup>99</sup> However, the United States Supreme Court has not clearly articulated the principle underlying this interest or whether it applies to more than just violent and sexually explicit speech.<sup>100</sup> Even so, the overwhelming interest of shielding minors from harm makes it likely that protecting children from reckless intimidation or emotional distress is constitutional.

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92. MO. REV. STAT. § 565.090.1(3) ("Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication. . . .").

93. *Id.*

94. Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 123 (1996) ("Because a substantial amount of expressive activity on the Internet is associational, any broad regulation of anonymity on the Internet is likely to be unconstitutional.").

95. MO. REV. STAT. § 565.090.1(3).

96. *See* MO. REV. STAT. § 565.090.1(4).

97. *Id.*

98. *Id.*

99. *See* *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth."). "Even the Court's staunchest defenders of First Amendment rights have often adopted this position." Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 594 (2005) (citing *Pope v. Illinois*, 481 U.S. 497, 513 (1987) (Stevens, J., dissenting)).

100. *See* Garfield, *supra* note 99, at 594 ("Even *Ginsberg v. New York*, the Court's seminal decision upholding child-protection censorship, offers only a superficial explanation for why the censorship is allowed.").

The fifth provision of the amended statute adds an intent requirement, but it is a stricter requirement than what is required in the fourth provision.<sup>101</sup> The term “unwanted” is added as well.<sup>102</sup> In full, the section states that one “commits the crime of harassment if he or she . . . [k]nowingly makes repeated unwanted communication to another person.”<sup>103</sup> The United States Supreme Court has affirmed the constitutional validity of statutes that prohibit persons from continuing unwanted communication.<sup>104</sup> These statutes are validated because there is a compelling government interest in protecting people from harassing contact.<sup>105</sup> The addition of the term “unwanted” to this provision resurrects the question of whether the harassment begins only after the harasser has been told to stop.<sup>106</sup>

The sixth and final element of the first paragraph of the statute is a catch-all provision based on the language “engages in any other act.”<sup>107</sup> Also, this last provision provides that “such person’s response to the act is one of a person of average sensibilities considering the age of such person,”<sup>108</sup> which seems to advocate a type of “reasonable recipient approach.”<sup>109</sup> The inclusion of this phrase indicates that in applying this catch-all provision, a court must look at what the speaker foresaw the reaction of the victim to be.<sup>110</sup>

In light of these six provisions and with this statutory construction, several potential challenges could be raised against the validity of this statute. First, the general language of the statute, “purpose to frighten, intimidate, or cause emotional distress,” may be constitutionally vague.<sup>111</sup> However, *State v. Koetting* held that “[t]he terms ‘purpose,’ [and] ‘frighten’ . . . are words of common usage and definition and a person of ordinary intelligence would know by reading the statute that if he acts with the purpose of upsetting

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101. MO. REV. STAT. § 565.090.1(5).

102. *Id.*

103. *Id.*

104. *See* Rowan v. U.S. Post Office Dep’t, 397 U.S. 728, 736-37 (1970).

105. *Id.*

106. *See infra* Part IV.

107. MO. REV. STAT. § 565.090.1(6). The second paragraph of § 565.090 increases the crime to a class D felony if the perpetrator is at least twenty-one and the victim is seventeen or younger. MO. REV. STAT. § 565.090.2(1). Further, it makes this crime a class D felony for repeat offenders of this law or any jurisdiction’s law similar to it. *Id.* § 565.090.2(2). Finally, the third paragraph waives the statute for “law enforcement officers conducting investigations.” *Id.* § 565.090.3.

108. *Id.* § 565.090.1(6).

109. *See supra* notes 45-46 and accompanying text.

110. *See supra* notes 45-46 and accompanying text.

111. *See* MO. REV. STAT. § 565.090.1(6); *see also* State v. Koetting, 616 S.W.2d 822, 824 (Mo. 1981) (en banc) (stating this argument as one of the defendant’s unsuccessful points on appeal).

another, he subjects himself to criminal liability.”<sup>112</sup> The *Koetting* court also held that the part of the provision that forces an actor to consider the reaction of an individual with “average sensibility” was not vague.<sup>113</sup> In doing so, it said courts should take a totality of the circumstances approach and “[e]xamine[] th[e] language in light of the conduct with which [a person] [is] charged.”<sup>114</sup>

The language “purpose to frighten, intimidate, or cause emotional distress”<sup>115</sup> also gives rise to an argument that the provision is substantially overbroad.<sup>116</sup> *Koetting* held, however, that “[b]ecause the statute applies only to protect the privacy of persons within their own homes, the statute is not overbroad.”<sup>117</sup> In light of the fact that this statute now applies to a broader channel of communication (the Internet) than it did before, the overbreadth argument may be resurrected in order to determine whether a person’s online profile page or e-mail is as private as his or her home telephone line.<sup>118</sup>

Prior to this statute’s amendment, Missouri law did not punish cyberbullying. The bare bones Missouri Revised Statute § 565.095 limited harassment to telephones and writing.<sup>119</sup> However, after Senate Bill 795 passed, the section now amply protects Missourians, especially minors, from online harassment.<sup>120</sup> Still, Missouri courts resolved several constitutional challenges to the statute before its recent amendments. Therefore, it is likely

112. *Koetting*, 616 S.W.2d at 825. In this case the court was analyzing a constitutional challenge to the Missouri harassment statute before its most recent amendments. *Id.* at 823. That statute read as follows:

1. A person commits the crime of harassment if for the purpose of frightening or disturbing another person, he

(1) Communicates in writing or by telephone a threat to commit any felony; or  
 (2) Makes a telephone call or communicates in writing and uses coarse language offensive to one of average sensibility; or  
 (3) Makes a telephone call anonymously; or  
 (4) Makes repeated telephone calls.

2. Harassment is a class A misdemeanor.

*Id.* at 824 (quoting MO. REV. STAT. § 565.090 (1978) (amended 2008)).

113. *Id.* at 826 (construing §565.090.1(2)).

114. *Id.*

115. MO. REV. STAT. § 565.090.1(6).

116. *See Koetting*, 616 S.W.2d at 826.

117. *Id.* at 827.

118. *See infra* Part IV.

119. MO. REV. STAT. § 565.090 (2000), amended by MO. REV. STAT. § 565.090 (Supp. 2008).

120. MO. REV. STAT. § 565.090.1(4) (Supp. 2008) (“A person commits the crime of harassment if he or she . . . [k]nowingly 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 . . . .”); *see also* Press Release, *supra* note 77.

new challenges will arise and need to be addressed in order to determine the validity of the revisions.

### B. Cyberbullying as a Federal Crime

Despite her egregious actions, Missouri officials were unable to charge Lori Drew with a crime.<sup>121</sup> However, after creatively interpreting the federal Computer Fraud and Abuse Act,<sup>122</sup> federal officials charged her with conspiracy and unauthorized access of a computer.<sup>123</sup> In other words, they charged her for “criminally trespass[ing] onto MySpace . . . in a way that violated MySpace’s Terms of Service (TOS).”<sup>124</sup> The three essential points of this particular TOS were: 1) provide accurate registration information; 2) do not promote abusive conduct; and 3) do not harass or harm other people.<sup>125</sup> Drew’s actions would have been a felony if the government proved that she violated the MySpace TOS to further a criminal or tortious act.<sup>126</sup> In this case, the criminal or tortious act would be the intentional infliction of emotional distress on Megan, with the suicide as proof.<sup>127</sup> However, if jurors did not think that Drew accessed the MySpace website to inflict emotional distress or mentally disturb Megan, the jurors could find Drew guilty of a misdemeanor charge of unauthorized access to a protected computer.<sup>128</sup> On

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121. Deirdre Shesgreen, *Hulshof Moves to Criminalize Cyberbullying*, ST. LOUIS POST-DISPATCH, May 23, 2008, at A2, available at <http://www.stltoday.com/stltoday/news/stories.nsf/washington/story/BC8E1292B126AC3386257452000CDF96?OpenDocument>.

122. 18 U.S.C. § 1030 (2006).

123. Shesgreen, *supra* note 121.

124. Orin Kerr, *The MySpace Suicide Indictment – And Why It Should Be Dismissed*, THE VOLOKH CONSPIRACY, May 15, 2008, <http://volokh.com/posts/1210889188.shtml>.

125. See MySpace.com, Terms of Use Agreement §§ 1, 7.1, 8.2 (June 15, 2006), <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Mar. 25, 2009). Since the servers for MySpace are located in California, prosecutors were given jurisdiction there. In turn, that is where Lori Drew faced trial. Kerr, *supra* note 124.

126. Kerr, *supra* note 124.

127. Robert Patrick & David Hunn, *Lori Drew Cyber-bullying Case Reach Trial*, ST. LOUIS POST-DISPATCH, Nov. 18, 2008, at A1, available at <http://www.stltoday.com/stltoday/news/stories.nsf/stlouiscitycounty/story/B80D079D8AD6AD1586257505001283E4?OpenDocument>. The trial began on November 18, 2008. *Id.* A week before it began in California, U.S. District Court Judge George Wu decided that the jury would hear evidence of Megan’s suicide. *Id.* He made this decision because, otherwise, it would be difficult for the jurors to understand how there was an element of emotional distress. *Id.* Additionally, the standard of proving such an element is lowered if the actor “knows the victim is vulnerable, or if the two are in a relationship that would cause a more severe impact.” *Id.* Prosecutors claim such in the instant case. *Id.*

128. *Id.*

November 26, 2008, the jury took exactly that route, and convicted Lori Drew of three misdemeanor charges of computer fraud.<sup>129</sup> In other words, the jury did not think Drew meant to inflict emotional distress on Megan Meier.

Lori Drew's trial and verdict raise the issue of whether prosecution of cyberbullies would be more effective under a new proposed federal law or under the existing Computer Fraud and Abuse Act. The new proposed federal law is the Megan Meier Cyberbullying Prevention Act<sup>130</sup> and was introduced in the aftermath of Megan Meier's suicide in an attempt to explicitly make cyberbullying a federal crime.<sup>131</sup> In short, the new section to Chapter 41 of Title 18, United States Code, punishes electronic communications when the communicator has "inten[t] to coerce, intimidate, harass, or cause substantial emotional distress to [a] person."<sup>132</sup> This language is strikingly similar to the language in the amended Missouri harassment statute<sup>133</sup> and, therefore, the proposed legislation will likely pass constitutional muster.<sup>134</sup> However, this bill has yet to be voted on by the House and Senate, and it was referred to the Subcommittee on Crime, Terrorism, and Homeland Security on July 28, 2008.<sup>135</sup>

The recent developments in Missouri's harassment law give insight into how state legislatures are attacking the problem of cyberbullying. However, current federal laws do not give federal prosecutors sufficient tools to enable them to punish cyberbullies for the emotional harm such actors cause. Also, a law that provides federal prosecutors with the tools to take such action would ensure that cyberbullies who send messages across state lines cannot escape punishment simply because of gaps in state law. The following discussion examines these issues and will show how Missouri courts are going to have to revisit challenges to the constitutional validity of § 565.090.

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129. Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES, Nov. 26, 2008, at A25, available at [http://www.nytimes.com/2008/11/27/us/27myspace.html?\\_r=1](http://www.nytimes.com/2008/11/27/us/27myspace.html?_r=1). The jury was deadlocked on the conspiracy charge, and a mistrial was declared on that charge. *Id.* Also, this conviction is currently under review by the judge, and if it is upheld, defense counsel will be appealing to the Ninth Circuit Court of Appeals. Orin Kerr, *What Does the Lori Drew Verdict Mean?*, THE VOLOKH CONSPIRACY, Nov. 26, 2008, <http://volokh.com/posts/1227728513.shtml>. It should be noted that Orin Kerr was on Lori Drew's legal team for this trial. *Id.*

130. H.R. 6123, 110th Cong. (2008).

131. OpenCongress, H.R. 6123, <http://www.opencongress.org/bill/110-h6123/show> (last visited Mar. 25, 2009).

132. *Id.*

133. See MO. REV. STAT. § 565.090.1(6) (Supp. 2008).

134. Refer to *supra* Part III.A of this law summary for a discussion of the Missouri statute's constitutional validity.

135. OpenCongress, *supra* note 131 (click on "Show All Actions").

## IV. DISCUSSION

In overhauling state law, the Missouri legislature ensured that cyberbullies will have to face prosecution for harassment under § 565.090. More importantly, Missouri Senate Bill 795 modernizes the protection afforded to the state's citizens. This update was necessary because the Internet is now used as a major means of communication, especially among minors.

While the new Missouri law is a step in the right direction, what remains to be seen is how far courts will extend the criminalization of cyberbullying. In order to determine the limits of this new law, courts will have to determine how captive one is to communications made online. The context and location of offensive speech is important in determining if it can be proscribed. Obviously, much of the reason words written online are so damaging is that they are permanent and visible to third-parties. On the other hand, communications by cyberbullies are fairly easy to ignore in some instances because of certain features that come with most interactive websites and instant messengers. These features include blocking certain individuals from contacting another person or even seeing one's online profile. In addition, depending on the online website, an individual can restrict access to his or her profile page or friends list or limit who can write publicly on his or her page. Despite the fact that individuals choose to go online and are afforded options to protect their privacy, courts may have to turn to whether the victim was really "captive" to the harmful communication.<sup>136</sup>

While limiting one's online availability by blocking unknown users, preventing strangers from writing on one's wall, and other provided tools, cyberbullies are constantly evolving and developing new tactics to torment their victims.<sup>137</sup> Outside of a victim's website or page, cyberbullies can still write online about their victim, whether on a separate webpage or on the cyberbully's own profile.<sup>138</sup> While this type of harassment may be punishable under the amended Missouri statute,<sup>139</sup> critics argue that the amended harassment statutes are too restrictive.<sup>140</sup> In other words, these critics think that going beyond the one-on-one idea of the old telephone harassment statutes violates the First Amendment because "in a one-to-many

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136. See *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988). In other words, the court will have to determine whether the communication is inherently offensive and intrusive. *Id.* at 486.

137. Make a Difference for Kids, Cyberbullying: Common Cyberbullying Tactics, <http://www.makeadifferenceforkids.org/cyberbullying.html> (last visited Mar. 25, 2009).

138. *Id.*

139. MO. REV. STAT. § 565.090.1(6).

140. Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 414.

context, a message that's annoying, even intentionally so, to one person may indeed be valuable to others."<sup>141</sup> However, the solution to this criticism, as it pertains to § 565.090, is that the Missouri statute does not use language such as "annoy" in constructing the statute.<sup>142</sup> Instead, the statute restricts itself to previously regulated speech using words such as "frighten," "threat," and "intimidate."<sup>143</sup> Regardless, courts will eventually have to clear this matter of terminology.

Critics of a statute that criminally punishes speech that takes place at a "third-party" webpage may be swayed by analyzing certain websites where cyberbullying is rampant. For instance, *thedirty.com* is a website that allows people to send in pictures of others.<sup>144</sup> Once a picture is posted, the webmaster makes a demeaning comment and then allows others to comment as well. Typically these comments are rude, insulting, and anonymous. One post reads as follows: "[Jane] is a nasty slut and has no reason to brag about herself when she's disgusting and fat. She has no teeth and fried hair."<sup>145</sup> This post is one of many in regards to the corresponding picture, and is far less vulgar than some of the others.<sup>146</sup> Are these comments criminal cyberbullying? It is likely that this and the other communications under this picture would cause a reasonable person to be "frighten[ed], intimidat[ed], or . . . emotional[ly] distress[ed]."<sup>147</sup> Further, most of the comments under this picture are anonymous. Also, someone made a comment that the girl everyone was talking about was a minor.<sup>148</sup> A court might hold that this constitutes knowledge that the victim is a minor, thereby making it a felony. A person making the demeaning comments might argue that he or she had no reason to believe she was truly a minor. Regardless, it seems clear that this example is at least a misdemeanor violation of the new law. However, it will take actual charges and prosecution to determine what type of speech

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141. *Id.* (contending that the word "annoy" can be overbroad in applying the statute to new age technology).

142. *See* MO. REV. STAT. § 565.090.

143. *Id.*

144. *The Dirty*, <http://www.thedirty.com> (last visited Apr. 5, 2009). The website is organized by cities and colleges, including some in Missouri. Once you go to an area's link, it has page after page of pictures that were sent to the website by random people who may or may not know the individuals in those pictures. However, due to the direct language accompanied by each picture, it seems most of those who submit the pictures know the people in them.

145. *Id.* I have chosen not to cite the exact post where this language comes from in order to prevent the further exposure of this victim. In addition, I have altered the name used in the comment.

146. *Id.* The main comment under the picture of the victim is so vulgar I have chosen not to include it in this article. However, by visiting the website one can find language similar and worse under other pictures with minimal effort.

147. *See* MO. REV. STAT. § 565.090.1(4).

148. *See* *The Dirty*, *supra* note 144.

Missouri is ready to proscribe.<sup>149</sup> When these criminal charges do happen, the location of the speech may also be a decisive factor in court.

One of the few current laws to prosecute cyberbullying on the federal level, as evidenced by the Lori Drew indictment<sup>150</sup> and her trial, is 18 U.S.C. § 1030. To have a stronger chance at conviction, a law more tailored to cyberbullying is required. The proposed Megan Meier Cyberbullying Prevention Act is such a law. This proposed law will prevent federal prosecutors from convoluting other laws, such as 18 U.S.C. § 1030, in an attempt to criminalize behavior that is not the cause of the victim's suffering.<sup>151</sup> Generally, the cause of the harm is the actual harassing communications written online by the cyberbully which are directed at or concern the victim.<sup>152</sup>

Beyond the need for a law that punishes cyberbullies for the emotional harm they cause, a federal law is necessary to prevent jurisdictional challenges that hinder prosecution.<sup>153</sup> Because the Internet crosses state lines and international borders, jurisdictional problems are bound to arise.

149. It would be efficient for law enforcement if website operators track the IP addresses of the anonymous perpetrators so that those individuals can be easily identified. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 117 (2009). However, if the website does not do this, the persons could still be identified within sixty days of the communication by the ISP addresses. *Id.* at 118. If this does not work, it leads to a deeper discussion of whether the website operator should be held liable or criminally responsible for a third-party's communications. For such a discussion see *id.* at 117-25.

150. Indictment at 9, *United States v. Drew*, No. CR, (C.D. Cal. Feb. 2008), <http://i.cdn.turner.com/cnn/2008/images/05/15/my.space.drew.indictment.pdf> (last visited Mar. 25, 2009).

151. See Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1599 (2003). "Because Internet users routinely ignore the legalese that they encounter in contracts governing the use of websites . . . broad judicial interpretations of unauthorized access statutes could potentially make millions of Americans criminally liable for the way they send e-mails and surf the Web." *Id.* Therefore, a cyberbully's act of violating the terms of service is what is criminal and not the actual communications which are harmful to the victim. See *id.* at 1598-99.

152. See generally Robin M. Kowalski, *Cyber Bullying*, PSYCHIATRIC TIMES, Oct. 1, 2008, <http://www.psychiatrictimes.com/display/article/10168/1336550?pageNumber=2> (discussing the harmful effects of cyberbullying and how to treat victims). The article also states that cyberbullying results in increased absences and lower grades in school. *Id.* Senate Bill 818 & 795 also addressed this issue by amending MO. REV. STAT. § 160.261. Act to Repeal Sections 160.261, 565.090, and 565.225, RSMo, and to Enact in Lieu Thereof Three New Sections Relating to Crimes of Harassment, with Penalty Provisions, 2008 Mo. Laws 812. However, a discussion of this statute is outside the scope of this law summary. For a discussion of such issues see Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213.

153. See Goodno, *supra* note 19, at 129.

Therefore, in some cases, no single state could prosecute an interstate message. For instance, imagine if a cyberbully were in a state that does not criminalize cyberbullying but sends a message to a child in Missouri, a state that does criminalize cyberbullying. This would create a conflict as to whether the laws of the sender's state or the victim's state apply.<sup>154</sup> Without a uniform federal law on the issue, state officials are burdened with the task of prosecuting cyberbullying cases "because it may require collecting evidence from many jurisdictions."<sup>155</sup>

Now that Missouri prosecutors are able to charge those that harass others through electronic means, cyberbullies may think twice before engaging in injurious communication in this state. It seems inevitable, however, that the newly amended statute will be challenged on First Amendment grounds. When this happens, a court will have to determine if § 565.090 retained its pre-amendment constitutional validity.<sup>156</sup> Beyond the scope of Missouri's laws, proposed federal legislation would solve current weaknesses in federal law and prevent criminals from escaping prosecution due to conflicts in state law or lack of state resources.

## V. CONCLUSION

With the passage of Senate Bills 818 and 795, Missouri took a giant leap forward in protecting individuals, especially minors, from the new form of harassment known as cyberbullying. However, it is likely that when a cyberbully is prosecuted under the provisions of this statute, its constitutional validity will be challenged. When that happens, hopefully the court will clarify or reaffirm the amendments so that their validity and reach become clear. Also, with the enactment of federal laws, cyberbullies can be prosecuted easier when their actions take place across state lines. Therefore, it is important that the Megan Meier Cyberbullying Protection Act pass and become federal law. Finally, while the statute now in place was too late to prevent the suicide of Megan Meier, hopefully it can deter any similar tragic event. Cyberbullies have now been clearly warned that when they prey upon others online their actions will be prosecuted to the fullest extent of the law.

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154. *Id.*

155. *Id.* at 130 (citing U.S. DEP'T OF JUSTICE, 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (1999), available at <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm>).

156. *See supra* Part II.B.