

3-1-2008

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Recommended Citation

Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created*, 9 N.C. J.L. & TECH. 323 (2008).Available at: <http://scholarship.law.unc.edu/ncjolt/vol9/iss2/6>

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**REPERCUSSIONS OF A MYSPACE TEEN SUICIDE:
SHOULD ANTI-CYBERBULLYING LAWS BE CREATED?**

*Matthew C. Ruedy*¹

In 2006, thirteen-year-old Megan Meier met a teenage boy named Josh Evans on the social networking website MySpace. The two had an amicable relationship until Josh began making derogatory comments to Megan. The correspondence ultimately resulted in her suicide. Months later, "Josh" was revealed to be the collective creation of forty-seven-year-old Lori Drew, her teenage daughter, and her part-time employee, Ashley Grills. Megan's suicide has pushed forward legislation for the criminalization of cyberbullying, which can be defined as action or behavior on the Internet intended to hurt or harass another person. This Comment discusses the issues and challenges associated with creating cyberbullying laws, from the decision to create such laws in the first place, to the difficult First Amendment restrictions posed by the "true threat" and "imminent incitement" doctrines.

I. INTRODUCTION

Megan Meier was a thirteen-year-old girl in Dardenne Prairie, Missouri, who, like many of her peers, had a profile on the social networking website MySpace.² She was a middle school student afflicted with depression and attention deficit disorder.³ Megan described herself in the following way on her MySpace profile:

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² MySpace, <http://www.myspace.com> (last visited Jan. 27, 2008) (online social network with over 100 million members worldwide); see Betsy Taylor, *Mom: Web Hoax Led Girl to Kill Herself*, ABC NEWS, Nov. 16, 2007, <http://abcnews.go.com/TheLaw/wireStory?id=3879037> (on file with the North Carolina Journal of Law & Technology). See generally *Deadly Cyberbullying*, CNN.COM, Nov. 17, 2007, <http://www.cnn.com/video/#/video/us/2007/11/17/tuchman.mo.myspace.suicide.cnn?iref=videosearch> (on file with the North Carolina Journal of Law & Technology).

³ See Taylor, *supra* note 2.

“M is for Modern. E is for Enthusiastic. G is for Goofy. A is for Alluring. N is for Neglected.”⁴ With her parents’ approval, Megan began corresponding with a sixteen-year-old named Josh Evans.⁵ Through a series of tragic events, Megan’s online interactions with Josh on MySpace would push her to commit suicide and shock the nation.

Megan met Josh in September 2006 through her MySpace profile and started an amicable online relationship that lasted over a month.⁶ However, her relationship with Josh changed abruptly on October 15, 2006, when he wrote statements on her MySpace profile such as, “the world would be a better place without you.”⁷ Later that night, Megan’s mother found her hanging from her closet;⁸ she died the next day.⁹

The story of Megan’s suicide was tragic, but six weeks after her death, the circumstances surrounding her suicide took a strange and appalling turn. Megan’s parents discovered that “Josh” never actually existed. “Josh” was initially reported as an online alias for forty-seven-year-old Lori Drew, the mother of one of Megan’s friends who lived four houses away from the Meiers.¹⁰ Drew created the alias to find out how Megan felt about her daughter.

Naturally, there was strong public outrage once the story of Megan’s suicide caught national attention on news reports and

⁴ See Steve Pokin, *Poking Around: A Real Person, A Real Death*, ST. CHARLES J., Nov. 13, 2007, http://stcharlesjournal.stltoday.com/articles/2007/11/24/news/sj2tn20071110-1111stc_pokin_1.i1.txt (on file with the North Carolina Journal of Law & Technology).

⁵ *Id.*

⁶ See P.J. Huffstutter, *Frontier Justice in an Online World*, SEATTLE TIMES, Nov. 23, 2007, http://seattletimes.nwsources.com/html/nationworld/2004030463_suicide23.html (on file with the North Carolina Journal of Law & Technology).

⁷ Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23.

⁸ *Id.*

⁹ See Pokin, *supra* note 4.

¹⁰ See Maag, *supra* note 7. Drew had previous knowledge of Megan’s use of anti-depressants. *Id.*

Internet websites a year after her death.¹¹ Drew's name was not released in the initial reports, provoking a Web blogger to search out the fake boyfriend's identity and post Drew's name on her blog.¹² Soon after Drew's identity was revealed, "readers and other bloggers followed by finding and posting her husband's name, the family's address and phone number, a cell phone number, the name of the family's advertising company, and the names and phone numbers of clients with whom they worked."¹³ The public's outrage stemmed not only from Drew's lack of moral judgment, but also from the fact that she would escape criminal prosecution because she did not break any current laws by her Internet communications with Megan.¹⁴

Months after the initial reports that Drew was "Josh Evans" on MySpace, Ashley Grills, Drew's part-time employee, admitted that she had created the "Josh Evans" account along with Drew and Drew's daughter.¹⁵ Grills admitted that she was the one who wrote the final message: that the "world would be a better place without you."¹⁶ Grills alleged that Drew wrote messages to Megan as "Josh Evans" only a "couple times."¹⁷

¹¹ See Maag, *supra* note 7. "That an adult would plot such a cruel hoax against a 13-year-old girl has drawn outraged phone calls, e-mail messages and blog posts from around the world." *Id.*

¹² Blogger Sarah Wells identified Lori Drew as the owner of the fake MySpace account through a police report concerning an altercation between Drew and Megan's father when he destroyed her foosball table "in anger and grief." Kim Zetter, *Cyberbullying Suicide Stokes the Internet Fury Machine*, WIRED, Nov. 21, 2007, http://www.wired.com/politics/onlinerights/news/2007/11/vigilante_justice (on file with the North Carolina Journal of Law & Technology).

¹³ *Id.*

¹⁴ See Maag, *supra* note 7. "[A] St. Charles County Sheriff's Department spokesman, Lt. Craig McGuire, said that what Ms. Drew did 'might've been rude, it might've been immature, but it wasn't illegal.'" *Id.*

¹⁵ See Steve Pokin, *MySpace Hoax Co-Creator Says Drew Wrote Some Messages*, ST. CHARLES J., Apr. 3, 2008, <http://stcharlesjournal.stltoday.com/articles/2008/04/03/news/sj2tn20080403-0404stc-meier0.iil.txt> (on file with the North Carolina Journal of Law & Technology).

¹⁶ See *id.*

¹⁷ See *id.*; see also Jonann Brady, *Exclusive: Teen Talks About Her Role in Web Hoax That Led to Suicide*, ABC NEWS, Apr. 1, 2008, <http://abcnews.go>.

Regardless of who wrote the various statements to Megan as “Josh Evans,” the story brings up the issue of protecting children online from online cyberbullying. “Cyberbullying” is a term used to describe “use of the Internet, cell phones, or other technology to send or post text or images intended to hurt or embarrass another person.”¹⁸ Cyberbullying has traditionally dealt with the victimization of minors.¹⁹ Cyberbullying can occur anywhere online, including “Internet websites, chat rooms, anonymous electronic bulletin boards, instant messaging, and other web devices.”²⁰ Statements amounting to cyberbullying do not have to be sent directly to the victim. Indirect activities, such as posting a rumor on a public message board, can also be acts of cyberbullying. Although the term cyberbullying is sometimes used interchangeably with the term cyberstalking, the two behaviors are

com/GMA/Story?id=4560582&page=1 (on file with the North Carolina Journal of Law & Technology) (“Grills has testified to a grand jury that Lori Drew, the 47-year-old mother of one of Meier’s friends, was actively involved in creating the account and wrote some of the messages to Meier—a charge that Drew and her attorney deny.”). 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. For the purpose of clarity in this Comment, the statements made on the fake MySpace profile by Drew, her daughter, and Grills will be described as though they were made by “Josh Evans.”

¹⁸ Janis Wolak & Kimberly Mitchell, *Does Online Harassment Constitute Bullying? An Exploration of Online Harassment by Known Peers and Online-Only Contacts*, 41 J. ADOLESCENT HEALTH S51, S51-52 (2007). A universal definition for cyberbullying has not yet been developed, so for the purposes of this Comment, Wolak & Mitchell’s definition will be used.

¹⁹ See Jon Swartz, *Schoolyard Bullies Get Nastier Online*, USA TODAY, Mar. 6, 2005, at A1.

²⁰ Renee Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1218 (2003) (citing Lisa Guernsey, *Telling Tales Out of School*, N.Y. TIMES, May 8, 2003, at G1).

different, as cyberstalking often includes credible threats both online and offline,²¹ while cyberbullying usually does not.

Megan's suicide has brought the issue of creating anti-cyberbullying laws to the nation's attention. Megan's hometown, Dardenne Prairie, Missouri, passed an anti-cyberbullying law in response to her suicide.²² Similarly, the Pennsylvania legislature

²¹ For example, California's stalking statute covers cyberstalking. The pertinent sections of California Penal Code § 646.9 read as follows:

- (a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

....

- (g) For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as 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. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat."
- (h) For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

CAL. PENAL CODE § 646.9 (West 2007).

²² Dardenne Prairie passed a law making cyberharassment a misdemeanor punishable by up to ninety days in jail and/or a \$500 for each violation. *See* DARDENNE PRAIRIE, MO., MUNICIPAL CODE § 201.030 (2007); Scott Glover &

has planned to propose an anti-cyberbullying law in direct response to Megan's death.²³ Regardless of whether the Pennsylvania law passes, legislators everywhere must be cautious in choosing whether to make cyberbullying a crime. Currently, a gap exists between federal and state laws against cyberstalking.²⁴ The introduction of cyberbullying laws will only further complicate the challenges associated with prohibiting such behavior on the Internet.

This Comment discusses the issues related to the potential criminalization of cyberbullying as well as the subsequent issues and challenges stemming from making such laws. Part II introduces the concept of cyberbullying and its prevalence among minor children. Part III looks at current computer crime laws and the origins of anti-cyberbullying laws. Part IV presents newly proposed anti-cyberbullying laws. Finally, Part V discusses how the First Amendment relates to, and restricts, any potential anti-cyberbullying laws.

II. CYBERBULLYING

The term "bullying" brings up connotations of a schoolyard playground where one child imposes mental or physical abuse on another. Yet, as evidenced in Megan's case, "cyberbullying" can occur anywhere and by anyone, regardless of age. Cyberbullying has the potential to have a far greater impact than traditional bullying because of the public nature of the Internet and the ease of distribution of information.²⁵ The dangers of cyberbullying on the

P.J. Huffstutter, *Cyber Bully Case Lands in L.A.*, L.A. TIMES, Jan. 9, 2008, at B1, B8; see also *infra* notes 55–57 and accompanying text.

²³ See Cristina Rouvalis, *Teen's Suicide Spurs Cyberbully Law*, PITTSBURGH POST-GAZETTE, Dec. 5, 2007, at A5 ("The suicide of a Missouri teenage girl, devastated after being bullied by a phantom boy over the Internet, may give Pennsylvania legislators the impetus to push through cyberbullying and cyber-identify theft laws.").

²⁴ See Naomi Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness and Current State of Federal Laws*, 72 MO. L. REV. 125 (2007) (discussing the gap between federal and state laws for protection against cyberstalking by comparing current federal laws and statutes from states and the District of Columbia).

²⁵ See Servance, *supra* note 20, at 1219.

Internet are exacerbated by the anonymous nature of the Internet, as people are “more likely to communicate messages on the Internet that they would not say to another person’s face.”²⁶

Internet use is exceptionally prevalent among teenagers. According to a 2002 study, ninety-seven percent of teenagers between ages twelve and eighteen use the Internet in some form.²⁷ The study also showed that the average teenager was online for over eleven hours per week.²⁸ A separate study revealed that forty-five percent of teenagers have a personal cell phone, and one-third communicated through text-messaging.²⁹

A recent study by Dr. Robin Kowalski and Dr. Susan Limber evaluated the frequency of cyberbullying among middle school students.³⁰ The study surveyed a sample of middle school students and found that eleven percent had been victims of Internet bullying during the months prior to the study.³¹ The study also showed that seven percent had served as both the bully and the victim on different occasions,³² and four percent reported being only bullies on the Internet.³³ Roughly half of the victims did not know the identity of their cyberbully.³⁴ In a separate study, researchers

²⁶ Robin M. Kowalski & Susan Limber, *Electronic Bullying Among Middle School Students*, 41 J. ADOLESCENT HEALTH S22, S23 (2007) (citing J.W. Patchin & S. Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148 (2006)).

²⁷ See *id.* at S22 (citing UCLA CTR. FOR COMMC’N POLICY, UCLA INTERNET REPORT: SURVEYING THE DIGITAL FUTURE—YEAR THREE (2003), <http://www.digitalcenter.org/pdf/InternetReportYearThree.pdf> (on file with the North Carolina Journal of Law & Technology)).

²⁸ See UCLA CTR. FOR COMMC’N POLICY, *supra* note 27.

²⁹ See Kowalski & Limber, *supra* note 26, at S22 (citing AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS AND TECHNOLOGY: YOUTH ARE LEADING THE TRANSITION TO A FULLY WIRED MOBILE NATION (2005), http://www.pewInternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf (on file with the North Carolina Journal of Law & Technology)).

³⁰ See *id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

found that cyberbullying peaked in middle school and declined in high school.³⁵

The Internet provides gateways for new social interactions but also gives bullies new avenues and techniques to harass others. Social networking websites like MySpace allow users to send messages to each other with a simple click of a mouse. Minors are especially at risk of being victimized on social networking websites because communications are not restricted unless a parent or guardian steps in to supervise the online activity. MySpace only requires that a user be fourteen years of age and does not require parental approval.³⁶ MySpace does reserve the right to terminate the membership of a person who harasses or advocates the harassment of another,³⁷ yet MySpace explicitly states that it “assumes no responsibility for monitoring the MySpace Services for inappropriate content or conduct.”³⁸ MySpace also warns teens, parents, and educators about the dangers of cyberbullying,³⁹ but ultimately it is the responsibility of both the teenage users and their parents to safeguard against the dangers of online activity.

³⁵ See Kirk R. Williams & Nancy G. Guerra, *Prevalence and Predictors of Internet Bullying*, 41 J. ADOLESCENT HEALTH S14, S20 (2007).

³⁶ See MySpace.com Terms of Use Agreement (Apr. 11, 2007), <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (on file with the North Carolina Journal of Law & Technology). MySpace reserves the right to terminate any membership without warning, if they believe you are under the age of fourteen. *Id.* Megan Meier was only thirteen when she committed suicide, which brings up the ancillary issue of whether social networking websites should do more to verify the ages and the identities of their users. MySpace did reach an agreement with attorney generals from forty-nine states to help protect children on its website, including the formation of a task force to address the issue of ways to verify user ages. See Anne Barnard, *MySpace Agrees to Lead Fight to Stop Sex Predators*, N.Y. TIMES, Jan. 15, 2008, at B3.

³⁷ See MySpace.com Terms of Use Agreement, *supra* note 36.

³⁸ *Id.*

³⁹ See MySpace Safety for Teens, http://www.myspace.com/index.cfm?fuseaction=cms.viewpage&placement=safety_pageteens (last visited Feb. 19, 2008) (on file with the North Carolina Journal of Law & Technology). MySpace provides tips from <http://www.cyberbully411.com> for dealing with harassing online activity: ignore the person, block or delete the person, log-off the website, change your information, or talk to adults. *Id.*

Clearly, the frequency of Internet use by minors combined with the popularity of social networking websites can lead to a potential high frequency of cyberbullying. Any minor using the Internet may be subject to cyberbullying through any facet of the Internet: websites, instant messaging, blogs, chat rooms, online video games, message boards, social networks, or other areas of the Internet. Cyberbullying has generally been associated with the victimization of minors, yet the term has evolved to include adults as well.⁴⁰ Due to the unclear definition of cyberbullying, any potential regulation of cyberbullying should address whether protection should extend only to minors or to Internet users of all ages.

III. CURRENT COMPUTER CRIME LAWS

The nation has reacted strongly to Megan's suicide, demanding that Lori Drew be prosecuted for her actions.⁴¹ The federal government and most states do not recognize cyberbullying as a separate crime. Although federal laws that protect people from harassment across interstate borders exist, prosecutors are forced to try to fit cyberbullying behavior into current harassment and stalking statutes. The fit achieved is tenuous at best. A summary of current communications and computer crime laws is helpful in determining the boundaries of any potential cyberbullying laws.

The criminalization of interstate threats has been codified in 18 U.S.C. § 875(c), which states: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."⁴² This statute has been used primarily against threats conveyed over the telephone,⁴³ but it has been expanded to

⁴⁰ See, e.g., Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51 (2005) (discussing cyberbullying among law students on campuses).

⁴¹ See Maag, *supra* note 7 ("Many people expressed anger because St. Charles County officials did not charge Ms. Drew with a crime.").

⁴² 18 U.S.C. § 875(c) (2000).

⁴³ See, e.g., *United States v. Freeman*, 176 F.3d 575 (1st Cir. 1999). The defendant was convicted of violating 18 U.S.C. § 875(c) for calling a missing children's reporting hotline numerous times, stating that he had been sexually

prosecute cyberstalkers.⁴⁴ In Megan's case, the statements made by "Josh Evans" would not meet the requirements of subsection (c) of this statute because they were not coupled with a threat to harm or kidnap. The statements did not directly threaten to harm Megan, but rather preyed upon her fragile mental state. This type of "indirect" cyberbullying is even more difficult to combat because the determination of whether a statement constitutes an actual "threat" may be subjective and depend primarily on the victim.⁴⁵

Additionally, there are federal statutes designed to prohibit harassment using non-Internet media. Most notably, 47 U.S.C. § 223 prohibits obscene or harassing phone calls through interstate communications.⁴⁶ Specifically, § 223(a)(1)(C) prohibits anyone from making "a telephone call or utiliz[ing] a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications."⁴⁷ This statute may apply to cyberstalking e-mails but is deficient because it does not include all possible types of Internet stalking behavior.⁴⁸ Although § 223(a)(1)(C) may

abusing his stepdaughter and threatening to kill her. The calls turned out to be a prank. The defendant did not even have a stepdaughter. *Id.*

⁴⁴ See, e.g., *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). The defendant was charged under 18 U.S.C. § 875(c) for posting a fictitious statement about violence against women on an Internet newsgroup. The defendant was eventually acquitted because the court found that the communications did not contain a threat under 18 U.S.C. 875(c). *Id.* at 1496; see also Goodno, *supra* note 24 (discussing current federal and state cyberstalking laws, the use of 18 U.S.C. § 875(c) as a cyberstalking law, and the *Alkhabaz* case).

⁴⁵ "The appropriate standard for determining if a defendant's communication constitutes a 'threat' is 'whether [the defendant] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made.'" *Freeman*, 176 F.3d at 578 (citing *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997)).

⁴⁶ See 47 U.S.C. § 223 (2000).

⁴⁷ *Id.* § 223(a)(1)(C).

⁴⁸ "[T]he statute would only be triggered when the cyberstalker sends an e-mail directly to the victim. Thus, the amended statute is inadequate to deal with behavior where the cyberstalker indirectly harasses or terrorizes his victim

not apply to all forms of harassment and stalking on the Internet, the basic behavior prohibited on the telephone is essentially cyberbullying behavior when the statements are made on the Internet. The fact that behavior of this nature is already illegal when communicated over phone lines provides strong support for the criminalization of such cyberbullying behaviors on the Internet.

In Megan's case, Drew, her daughter, and Grills used a computer without disclosing their identities and with the express intent to harass Megan with the communications. Section 223(a)(1)(C) could serve as a "blueprint" for potential anti-cyberbullying laws, since cyberbullying may occur either actively, with the victim participating in the communications, or passively, with the victim reading the communications only after being sent or posted on the Internet.⁴⁹

Although few jurisdictions currently have specific anti-cyberbullying laws, a number of states, such as California, have passed anti-cyberstalking laws.⁵⁰ These laws are a positive step but do not completely alleviate the need for anti-cyberbullying laws. The anti-cyberstalking laws fail to govern situations where harmful statements are made but do not rise to the level of stalking or harassment. Although California's anti-cyberstalking law may not readily apply to cyberbullying,⁵¹ other states have passed cyberstalking laws that may be more applicable to cyberbullying. Washington's cyberstalking statute states:

- (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party:
 - (a) Using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act;

by posting messages on a bulletin board, creating a Website aimed at terrorizing his victim, or encouraging third parties to harass the victim." Goodno, *supra* note 24, at 150.

⁴⁹ *Id.*

⁵⁰ See CAL. PENAL CODE § 646.9 (West 2007). For the relevant text of the California statute, see *supra* note 21.

⁵¹ See § 646.9.

- (b) Anonymously or repeatedly whether or not conversation occurs; or
- (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household.⁵²

The Washington statute could potentially apply to cyberbullying because it includes communications that are intended to “embarrass” as one of the prohibited actions.⁵³ Cyberbullying typically results in the victim’s embarrassment. Yet the inherent problem with using the term “embarrass” is that it is much more subjective and difficult to characterize when compared to the traditional definitions of harassment or intimidation. Regardless, the term “embarrass” could be used in cyberbullying statutes for cases that involve communications that are not clearly harassment or intimidation.

The alteration of state statutes concerning stalking, harassment, or cyberstalking to include potential acts of cyberbullying could be an easier way of creating anti-cyberbullying protections. The “piggybacking” of these statutes should be coupled with a precise definition of the terms used in the statute in order to be clear about what exactly is prohibited.⁵⁴ In states that have weaker laws

⁵² WASH. REV. CODE § 9.61.260 (2004). Hypothetically, if such a statute had been present in Missouri during the events leading to Megan’s suicide, it is a closer call as to whether Drew could have been prosecuted under this statute. “Josh Evans” did accuse Megan of being a “slut,” which could be interpreted to be aimed at embarrassing or tormenting Megan. *See Parents: Cyber Bullying Led to Teen’s Suicide*, ABC NEWS, Nov. 19 2007, <http://i.abcnews.com/GMA/Story?id=3882520&page=1> (on file with the North Carolina Journal of Law & Technology).

⁵³ Relatively few stalking or cyberstalking statutes from other states include the term “embarrass.” Most state statutes focus on communications that are “true threats” or contain obscene language. *See, e.g.*, VA. CODE ANN. § 18.2-152.7:1 (2007) (“If any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act, he shall be guilty of a Class 1 misdemeanor.”).

⁵⁴ California’s cyberstalking statute deals with “credible threats” and has a provision that states, “Constitutionally protected activity is not included within the meaning of ‘credible threat.’” § 646.9(g). This provision is significant in light of the First Amendment challenges that will be discussed in Part V.

against cyberstalking and cyberharassment, it may be beneficial to either strengthen their existing laws or to create laws that specifically prohibit cyberbullying.

IV. CREATION OF ANTI-CYBERBULLYING LAWS

A few anti-cyberbullying laws have already been created as a direct result of Megan's story. Dardenne Prairie passed a city ordinance outlawing cyberstalking and cyberharassment.⁵⁵ Violating the ordinance is a misdemeanor, punishable by a maximum fine of \$500 and up to ninety days in jail.⁵⁶ Although the ordinance does not make a specific provision for cyberstalking and cyberharassment actions against minors, it is clear that lawmakers intended the ordinance to be enforced for these purposes, given that it was passed as a direct result of Megan's suicide.⁵⁷ The ordinance's silence on bullying and harassing

⁵⁵ Ordinance 1228, codified in the city's municipal code, states:

1. A person commits the offense of cyber-harassment if he/she, with intent to harass, alarm, annoy, abuse, threaten, intimidate, torment or embarrass any other person, . . . transmits or causes the transmission of an electronic communication, or knowingly permits an electronic communication to be transmitted from an electronic communication device under the person's control to such other person or a third party:
 - a. using any lewd, lascivious, indecent or obscene words, images or language, or suggesting the commission of any lewd or lascivious act;
 - b. anonymously or repeatedly whether or not conversation occurs; or
 - c. threatening to inflict injury on the person or property of the person communicated with or any member of his or her family or household.

DARDENNE PRAIRIE, MO., MUNICIPAL CODE § 201.030 (2007). For the purposes of this ordinance, "electronic communication" includes, inter alia, "electronic mail, Internet-based communications, pager service, and electronic text messaging." *Id.*

⁵⁶ See Joel Currier, *Net Harassment Now a Crime*, ST. LOUIS POST-DISPATCH, Nov. 22, 2007, at B1.

⁵⁷ See Nina Kult, *Online Harassment Now a Crime*, ST. CHARLES J., Nov. 26, 2007, http://stcharlesjournal.stltoday.com/articles/2007/11/26/news/sj2tn20071125-1125ofm_darde_1.ii1.txt (on file with the North Carolina Journal of Law & Technology). As Kult observes:

behaviors regarding minors reiterates a major issue faced when creating cyberbullying laws: whether to prohibit such behavior when minors bully minors, when adults bully minors, or both.

Vermont's state legislature addressed this issue when it passed an anti-cyberbullying law in 2004,⁵⁸ responding in part to another teen suicide.⁵⁹ The Vermont statute requires schools to create disciplinary policies regarding bullying, encompassing both on and off campus bullying among school children.⁶⁰ While the Vermont law is a significant step toward preventing and reporting minor-to-minor cyberbullying in and around schools, it does not protect minors if the bully has no tie to a school in their area. For example, the statute does not protect against anonymous cyberbullying, nor does it prevent cyberbullying by minors in other areas of the country. Further, this statute does not punish adults who bully minors, as in Megan's case.

Laws requiring schools to adopt anti-cyberbullying disciplinary policies are a move in the right direction, but raise the question of when, if ever, criminal sanctions should be imposed. Disciplining or suspending an adolescent student from school for local cyberbullying action is completely different from imposing criminal penalties (even if only applied to instances when adults

The board's decision to create and approve such an ordinance came a year after the death of 13-year-old Megan Meier, who died Oct. 17, 2006, after she hanged herself in her bedroom closet. She did so after an exchange of harsh comments with a boy named Josh Evans, who had befriended Megan on the online social networking site MySpace.

Id.

⁵⁸ See VT. STAT. ANN. tit. 16, § 1161a(a)(6) (2007).

⁵⁹ See generally In Memory of Ryan Patrick Halligan, <http://www.ryanpatrickhalligan.org> (last visited Feb. 2, 2008). After Ryan's suicide, his family successfully lobbied for the Vermont anti-cyberbullying law. *Id.*

⁶⁰ See tit. 16, § 11(a)(32)(A)–(C). The statute provides:

Bullying means any overt act or combination of acts directed against a student by another student or group of students and which:

- (A) is repeated over time;
- (B) is intended to ridicule, humiliate, or intimidate the student; and
- (C) occurs during the school day on school property, on a school bus, or at a school-sponsored activity, or before or after the school day on a school bus or at a school-sponsored activity.

Id. (internal quotation marks omitted).

bully minors). In criminalizing new activities, one concern that must be addressed is making sure the behavior in question warrants criminal liability.⁶¹

On the subject of creating new crimes in the context of computers and the Internet, Professor Susan Brenner suggests legislatures have at least two options: “(1) we can use existing principles to define new crimes that encompass [the] kind of misconduct; or (2) we can devise new principles for imposing liability such as a distinct law of cybercrimes.”⁶² Some courts interpreting computer crime laws have analogized the action or behavior in cyberspace to a physical “real world” equivalent,⁶³ which follows Brenner’s first option. A general example of this would be to analogize the spreading of computer viruses on the Internet to the “real world” equivalent of vandalism.⁶⁴ Using this approach, legislators could analogize minor-to-minor cyberbullying to simple schoolyard bullying. Unless the bullying escalated to harassing or stalking behavior, mere words stated in a schoolyard would hardly be illegal. In Megan’s case, if Drew had made the same statements to her in the “real world,” although socially reprehensible, they would not be illegal.⁶⁵ Just because an online behavior is analogized to a legal “real world” behavior does not necessarily imply that the online version should also be legal. This

⁶¹ See Susan Brenner, *Is There Such a Thing as “Virtual Crime”?*, 4 CAL. CRIM. L. REV. 1 (2001), <http://www.boalt.org/bjcl/v4/v4brenner.pdf>. This article suggests “wait[ing] to see how crime in cyberspace evolves before committing ourselves to the adoption of cybercrime laws.” *Id.* ¶ 129.

⁶² See *id.* ¶ 113.

⁶³ See *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. Rptr. 2d 1559, 1567 (Ct. App. 1996) (holding that signals generated by computers used to access a telephone company’s system were sufficient to support a finding of liability for trespass to personal property); see also *State v. McGraw*, 480 N.E.2d 552, 554 (Ind. 1985) (suggesting in dicta that the unauthorized use of a computer was more of a trespass than a conversion). The *McGraw* court noted, “We find no distinction between Defendant’s use of the City’s computer and the use, by a mechanic, of the employer’s hammer or a stenographer’s use of the employer’s typewriter, for other than the employer’s purposes. Under traditional concepts, the transgression is in the nature of a trespass . . .” *McGraw*, 480 N.E.2d at 554.

⁶⁴ See Brenner, *supra* note 61, ¶ 71–73.

⁶⁵ The conclusion that Drew’s communications to Megan would not be illegal assumes that the statements would not rise to the level of harassment or stalking.

distinction between “real world” and “cyber world” behaviors shows that analogies of computer crimes to traditional crimes are not always valid and illustrates the utility of following Professor Brenner’s second option to create a distinct law of cybercrimes.⁶⁶

Megan’s suicide has already spurred new legislation for cybercrimes.⁶⁷ As tragic as her suicide was, legislatures must take a step back and look at whether cyberbullying should be illegal. To do otherwise could lead to a “knee-jerk” reaction to her story, making her the poster child to push the legislation through. If cyberbullying were universally criminalized without adequate consideration, legislatures may eventually regret prohibiting this behavior. Legislatures must also consider whether the proposed anti-cyberbullying laws could have unintended consequences, such as widening the scope of illegal activities on the Internet, and thus unintentionally criminalizing non-criminal activities, essentially creating a domino effect.

A handful of states passed cyberbullying laws in 2007,⁶⁸ yet these laws only dealt with cyberbullying in schools. A number of states, including Missouri⁶⁹ and Pennsylvania,⁷⁰ currently have pending legislation concerning the criminalization of cyberbullying. The Missouri bill would make it a felony when a person twenty-one years old or older harasses a person seventeen years old or younger, punishable by up to four years in prison and up to a \$5,000 fine.⁷¹ The task force proposing the law has opted

⁶⁶ See Brenner, *supra* note 61, ¶ 113.

⁶⁷ See DARDENNE PRAIRIE, MO., MUNICIPAL CODE § 201.030 (2007); *see also supra* note 55 and accompanying text.

⁶⁸ See Abbott Koloff, *States Push for Cyberbully Controls*, USA TODAY, Feb. 7, 2008, at 3A; *see also State Action on Cyber-Bullying*, USA TODAY, Feb. 7, 2008, http://www.usatoday.com/news/nation/2008-02-06-cyber-bullying-list_N.htm (on file with the North Carolina Journal of Law & Technology).

⁶⁹ See *Missouri Proposes Web Harassment Law*, CBS NEWS, Jan. 8, 2008, <http://www.cbsnews.com/stories/2008/01/08/tech/main3689775.shtml#ccmm> (on file with the North Carolina Journal of Law & Technology).

⁷⁰ See Rouvalis, *supra* note 23 (“The suicide of a Missouri teenage girl, devastated after being bullied by a phantom boy over the Internet, may give Pennsylvania legislators the impetus to push through cyberbullying and cyber-identify theft laws.”).

⁷¹ See *Missouri Proposes Web Harassment Law*, *supra* note 69.

to expand its current harassment law to include “any communication.”⁷² The policy rationale for using the term “any communication” is so that the law “picks up technology now and picks up technology in the future.”⁷³ An all-inclusive provision such as this is particularly dangerous, as it would be unwise to criminalize communications prior to their inception. Even if the law were to apply only to current technology, legislators may not want to apply such harassment laws to “any communications,” as this could result in unintended consequences. One example is online video games, where it is commonplace for adults and adolescents alike to “trash talk” to each other. Under a broad interpretation of “any communications,” this “trash talk” could be construed as harassing behavior, even though the statements were made in the innocent context of a video game.

V. POTENTIAL FIRST AMENDMENT RESTRICTIONS ON ANTI-CYBERBULLYING LAWS

Any law dealing with the prohibition of cyberbullying must fit within the framework of the First Amendment. Under the current view of the U.S. Supreme Court, lower courts have typically used one of two cases to evaluate threatening speech: *Watts v. United States*,⁷⁴ where the speech in question resembled a “true threat,” or *Brandenburg v. Ohio*,⁷⁵ where the speech in question incited others to commit some unlawful action.⁷⁶ The alteration of these two standards to conform to the nature of the Internet has been proposed previously in various ways.⁷⁷ There have already been

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 394 U.S. 705 (1969).

⁷⁵ 395 U.S. 444 (1969).

⁷⁶ See Leigh Noffsinger, Comment, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1215 (1999).

⁷⁷ See, e.g., John Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425 (2002). Cronan proposes that “[t]he Internet incitement standard should consider four primary factors: (1) imminence from the perspective of the listener; (2) content of the message; (3) likely audience; and (4) nature of the issue involved.” *Id.* at 455; see also Scott Hammack, Note, *The Internet Loophole:*

legislative measures taken to address cyberbullying, with more planned in the future.⁷⁸ The analysis of potential anti-cyberbullying laws will be conducted under these current doctrines due to these legislative measures and the extreme unlikelihood that the Supreme Court will significantly modify the *Brandenburg* or *Watts* doctrines before such legislation is passed. Because any anti-cyberbullying law would restrict free speech, potential anti-cyberbullying laws must comply with the exceptions to First Amendment protection articulated in both *Watts* and *Brandenburg*.

A. *True Threats under Watts and Planned Parenthood*

In *Watts v. United States*, the defendant challenged a conviction under 18 U.S.C. § 871(a) for “knowingly and willfully . . . [making a] threat to take the life of or to inflict bodily harm upon the President of the United States.”⁷⁹ The Court inevitably found that the defendant’s statements were not a “true threat,” but “political hyperbole.”⁸⁰ The Court recognized that “true threats” should not be afforded the protection of the First Amendment, and

Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement, 36 COLUM. J.L. & SOC. PROBS. 65 (2002). Hammack concludes that:

Continued adherence to the courts’ current approach to true threats and incitement will allow the Internet to become a prominent weapon of terror, while simultaneously permitting the restriction of benign speech. A hybrid test composed of both an objective and subjective element[] will help ensure that the Internet will not become such a weapon.

Id. at 102; see also Jordan Strauss, *Context is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 SW. U. L. REV. 231, 263–68 (2003) (proposing a functionalist rule for the “true threats” doctrine, encompassing four factors: (1) whether a target is specifically identified; (2) whether a reasonable speaker would know that his communication was threatening; (3) whether a reasonable recipient would regard the statement as threatening; and (4) whether the communication would foreseeably reach the target of the threat).

⁷⁸ See *supra* Part IV.

⁷⁹ See *Watts v. United States*, 394 U.S. 705, 705 (1969). The defendant was at a political rally and stated “I have already received my draft classification . . . I am not going. If they ever make me carry a rifle the first man I want to get in my sights is [President] L.B.J.” *Id.*

⁸⁰ *Id.* at 708.

stated: "What is a threat must be distinguished from what is constitutionally protected speech."⁸¹

Even though the *Watts* Court recognized that "true threats" are not protected under the First Amendment, the Court declined to create a test or criteria applicable to other cases.⁸² As such, lower courts have created tests for determining whether speech rises to the level of a "true threat."⁸³ Because there is no uniform test in lower courts for true threats under *Watts*, the approach used by the Ninth Circuit in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*⁸⁴ will be used to illustrate how the "true threat" doctrine can be implemented.

In *Planned Parenthood*, the American Coalition of Life Activists ("ACLA"), an anti-abortionist group, created a "Dirty Dozen" poster, listing the names and addresses of doctors who perform abortions.⁸⁵ The ACLA offered a \$5,000 reward for "information leading to the arrest, conviction and revocation of license to practice medicine."⁸⁶ Within a year, the ACLA had compiled lists of doctors, clinic employees, politicians, judges and other supporters of abortion, calling the list the "Nuremberg Files."⁸⁷ Information about the doctors and abortion supporters was eventually posted on a website, which encouraged others to supply additional names and information.⁸⁸ The website tracked the names of doctors and other supporters that had been victimized

⁸¹ *Id.* at 707.

⁸² See Noffsinger, *supra* note 76, at 1216.

⁸³ *Id.* For a comprehensive description of the split in circuit courts dealing with the "true threat" doctrine, see Strauss, *supra* note 77, at 248. "Currently, the First, Second, Fourth, Sixth, Eighth, and Ninth Circuit Courts of Appeal have developed their own standards for unprotected threats." *Id.*

⁸⁴ 290 F.3d 1058 (9th Cir. 2002) (en banc). For expanded discussions of this case and the "true threat" doctrine, see Hammack, *supra* note 77, and Strauss, *supra* note 77.

⁸⁵ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists (Planned Parenthood I)*, 244 F.3d 1007, 1012 (9th Cir. 2001), *aff'd in part, vacated in part, and remanded*, 290 F.3d 1058 (9th Cir. 2002) (internal quotation marks omitted).

⁸⁶ *Planned Parenthood I*, 244 F.3d at 1012.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1013.

by anti-abortion terrorists, “striking through the names of those who had been murdered and graying out the names of the wounded.”⁸⁹

Upon rehearing the case en banc, the Ninth Circuit found the website and its communications were a “true threat,” undeserving of First Amendment protection.⁹⁰ The court articulated an objective “true threat” analysis: “Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”⁹¹

Further, the court stated, “[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.”⁹² The person making the alleged threat does not need to intend to, or be able to carry out the threat;⁹³ the person only needs to intentionally or knowingly communicate the threat.⁹⁴ Under the *Planned Parenthood* version of the “true threat” doctrine, the above requirements must each be weighed before speech is found to be a “true threat” and therefore not protected by the First Amendment.

The nature of the website in *Planned Parenthood* essentially constitutes cyberstalking. The website could even be argued to be an extreme version of cyberbullying,⁹⁵ as its users saw the website’s threatening message along with the personal information of doctors and supporters of abortion. Regardless, *Planned Parenthood* recognizes that some communications on the Internet

⁸⁹ *Id.*

⁹⁰ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists (Planned Parenthood II)*, 290 F.3d 1058, 1085–86 (9th Cir. 2002) (en banc).

⁹¹ *Id.* at 1074 (citing *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990)).

⁹² *Id.* at 1075 (quoting *Orozco-Santillan*, 903 F.2d at 1265).

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ The court, however, did not categorize the website as either cyberstalking or cyberbullying in this instance.

can qualify as “true threats” and be stripped of First Amendment protection. Furthermore, the case shows that Internet communications can be “true threats” regardless of the location of the source of the communications.⁹⁶

In Megan’s case, “Josh Evans” posted comments such as, “the world would be a better place without you.”⁹⁷ Although the statements caused emotional distress and embarrassment, neither Drew, nor her daughter, nor Grills ever posted threats of violence or physical harm to Megan. An objective reasonable person would not likely foresee the statements made in association with Megan’s suicide as a serious expression of intent to harm or assault. “Josh’s” statements clearly would not constitute a “true threat” under the *Planned Parenthood* approach. Cases of cyberbullying like Megan’s fail to reach the level of stalking or harassment required to pass the “true threat” doctrine. Any legislation aimed at these lesser acts of cyberbullying will not likely pass the “true threat” test and thus will violate the First Amendment. For these “lower level” acts of cyberbullying, legislators would be best served by attempting to create a special exception based solely on acts of cyberbullying by adults to minors, similar to the special protections afforded to minors under statutory rape and child pornography statutes.⁹⁸

Although the statements by “Josh Evans” would not be a “true threat” under the *Planned Parenthood* approach, some instances of cyberbullying could potentially survive under this “true threat” doctrine. For example, suppose an adult posted “I’m going to kill you” on a minor’s MySpace page.⁹⁹ Suppose further that this minor lived in the same neighborhood as the adult. This

⁹⁶ The website had information about doctors and supporters from across the country, making them targets nationwide. This shows that the source of the communication does not necessarily have to be geographically near the potential victim.

⁹⁷ See Maag, *supra* note 7.

⁹⁸ It is unclear whether such an exception would pass muster under the First Amendment, but such drafting may be the only viable option for lesser forms of cyberbullying which are not harassment, stalking, or “true threats.”

⁹⁹ For purposes of this hypothetical, assume that the communication was a one-time online communication that does not rise to the level of cyberstalking or cyberharassment.

communication could be determined to be a “true threat” if a reasonable person could foresee that the statement would be interpreted by the minor as a serious expression of intent to harm or assault. Arguably, this could be found, especially in light of the close proximity of the individuals. Although this scenario is oversimplified, it illustrates how acts of cyberbullying might fit within this “true threat” framework. Accordingly, laws could focus on these extreme acts of cyberbullying and thus potentially could be made so that they do not violate the First Amendment. However, since the “true threat” approach in *Planned Parenthood* is far from universally accepted among circuit courts, legislatures will have a much more difficult task tailoring anti-cyberbullying laws.

B. *Incitement under Brandenburg v. Ohio*

In *Brandenburg v. Ohio*, the Supreme Court set the modern standard for determining if speech qualifies as incitement.¹⁰⁰ In this case, the Court reversed the conviction of a Ku Klux Klan leader under the Ohio Criminal Syndicalism statute for making hateful statements at a televised rally.¹⁰¹ The Court articulated an exception to First Amendment protection of free speech, stating:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁰²

Brandenburg has been interpreted to have three requirements: “(1) express advocacy of law violation; (2) the advocacy must call for immediate law violation; and (3) the immediate law violation must be likely to occur.”¹⁰³

The obvious difficulty in applying the *Brandenburg* standard to cases of cyberbullying is the element of “imminent lawless action.”

¹⁰⁰ See Cronan, *supra* note 77, at 429.

¹⁰¹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Cronan, *supra* note 77, at 429.

¹⁰² *Brandenburg*, 395 U.S. at 447.

¹⁰³ Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (1994).

Individuals can contact other people over the Internet by sending and posting messages through numerous means. A person could hypothetically “incite” an illegal action hours, days, or even years after placing the statement or posting on the Internet. This delay of incitement would presumably frustrate the purpose of the imminent incitement standard of the *Brandenburg* doctrine.

In Megan’s case, “Josh Evans” never told her to commit suicide or inflict any physical harm on herself. If “Josh’s” statements were analyzed under the *Brandenburg* test, the comments would retain First Amendment protection because there was no speech directed to incite or produce an imminent illegal action. Although Megan received hurtful statements from “Josh Evans,” and her tragic suicide was spurred on by these statements from the fake MySpace profile, Megan was not legally incited to kill herself. Accordingly, if an anti-cyberbullying law encompassed scenarios like Megan’s, it would not likely survive any challenge under the First Amendment if analyzed under the *Brandenburg* doctrine.

In light of the difficulties of applying the *Brandenburg* test to cyberbullying, if legislatures hope to protect children from adults on the Internet, they would be best served by strengthening their cyberstalking and cyberharassment laws, or modifying their current stalking and harassment laws to encompass cyberstalking and harassment.

VI. CONCLUSION

Although some progress has been made on the issues of cyberbullying, the creation of anti-cyberbullying laws outside the school context is yet to be determined. Legislators should be cautious in deciding to create anti-cyberbullying laws, and should take care not to overstep the bounds of the First Amendment. Under the current interpretation of the incitement doctrine in *Brandenburg*, anti-cyberbullying laws will likely not be upheld if challenged as a violation of the First Amendment. However, if an anti-cyberbullying law were to be interpreted by the applicable court under the *Watts* “true threat” doctrine, the validity of anti-cyberbully laws would be much more likely. Nevertheless,

legislators will be forced to tailor anti-cyberbullying laws in light of the “incitement” and “true threat” doctrines, unless the Supreme Court implements changes.¹⁰⁴ Regardless of whether anti-cyberbullying laws are created, parents should ultimately set limits online and monitor the activity of their children in order to protect them from cyberbullying and the other dangers of the Internet.

¹⁰⁴ See sources cited *supra* note 77.