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PROSECUTING THE MEAN GIRLS: THE VIABILITY OF USING EXISTING STATE CRIMINAL LAWS TO COMBAT CYBERBULLYING

Anna Tse*

I. Introduction

Sticks and stones may break my bones but names…names will never hurt me. Or at least that was how the saying goes. Bullying has gone on in school yards, behind the bleachers, or in the cafeteria for generations. But the ridiculed and the humiliated can always run home and seek refuge behind closed doors. This generation, however, no longer has that luxury.

The conflict all started when, Amanda Marcuson, 14, of Birmingham, Michigan, had a pencil case filled with makeup stolen from her.[1] The perpetrators were a group of eighth grade girls from her new school, so she reported them to school officials.[2] That evening, as soon as Amanda got home, instant messages started popping up on her home computer calling her a tattletale and liar.[3] And when she tried to defend herself by stating "You stole my stuff!" the taunting only got worse.[4] An instant response appeared on a little box on the screen, it read "stuck-up bitch," followed by a series of malicious and offensive epithets.[5] After Amanda's mother took her computer away, the instant messages continued to pour in through her cell phone until it reached 50 messages, which was its capacity.[6]

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1 Amy Harmon, Internet *Gives Teenage Bullies Weapons to Wound From Afar*, N.Y. TIMES, April 26, 2004, http://www.nytimes.com/2004/08/26/us/internet-gives-teenage-bullies-weapons-to-wound-from-afar.html?pagewanted=all&src=pm.

2 *Id*.

3 *Id*.

4 *Id*.

5 *Id*.

6 *Id*.

This incident is just one example of how technology has changed the scope of bullying. The pervasiveness of the usage of technology in teenagers' lives means that bullying is no longer confined to school grounds and instead has breached the walls of their homes via the internet.[7] Cyberbullies can relentlessly berate their quarry utilizing a number of different venues and mediums in cyberspace. Teenagers have previously congregated in chat rooms, but in recent years they have been drawn to social networking websites (such as Faceebook and MySpace) and video-sharing websites (such as YouTube.com).[8] Young people can also extend their reach into each other other's lives using instant messages via the Internet and text messages via cell phones.[9] This increased connectivity allow embarrassing messages, videos, pictures, rumors and gossip to go viral within seconds at the simple click of a button.

Megan Meier was a middle school student who suffered from depression and low self-esteem.[10] Students at her school would frequently make fun of her weight.[11] She was thirteen years old when she started a new middle school and within a few months, she lost twenty pounds, joined the volleyball team and had a new group of friends.[12] Like any other thirteen year old, she had a MySpace profile. Under her parent's watchful supervision, she befriended a sixteen year old boy named Josh Evans in September 2006.[13] The friendship with Josh was amicable with the occasional innocent flirting.[14] Then suddenly, Josh became mean and publicly

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7 Harmon, *supra* note 1.; *See generally* Sameer Hinduja and Justin W. Patchin, *Overview of Cyberbullying in White House Conference on Bullying Prevention*, (March 10, 2011), *available at:* http://www.stopbullying.gov/references/white_house_conference/index.html.

8 Hinduja, *supra* note 7.

9 *Id*.

10 Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, November 28, 2007, http://www.nytimes.com/2007/11/28/us/28hoax.html.

11 *Id*.

12 *Id*.

13 *Id*.

14 *Id*.

published messages of him calling her "fat" and a "slut" for others to read.[15] He told Megan that he longer wanted to be associated with her and included in his message "I don't know if I want to be friends with you any longer because I hear you're not nice to your friends."[16] Megan pleaded with Josh until she received one last final message from Evans that states, "The world would be a better place without you. Have a shitty rest of your life."[17] On October 16, 2006, Tina Meier, found her daughter hanging from a belt inside her closet.[18]

The extent of the Megan Meier tragedy was uncovered several weeks later when the Meier family was informed that Josh Evans was really Megan's former best friend and her mother, Lori Drew.[19] The purpose of creating this fictional character was to "mess with Megan."[20] Drew claimed that her original intent was to investigate how Megan truly felt about her daughter. Though there was no evidence to suggest that Drew intended to cause Megan's death, it was reasonably foreseeable for Drew to recognize the emotional harm her actions can cause Megan, considering Drew was aware that Megan had suffered with problems relating to depression in the past.[21]

In many ways, the Megan Meier tragedy is an aberration.[22] Mothers are not supposed to bullying other teenagers with their adult friends. However, Megan's story is not limited to just an example of what harms adults can cause children over the Internet; it is a case study on

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15 ABCNews.go.com, *Parents: Cyber Bullying Led to Teen's Suicide*, November 19, 2007, http://abcnews.go.com/GMA/story?id=3882520&page=1#.TutUyPLqKBo ,

16 *Id*.

17 Kim Zetter, *Prosecutor: Lori Drew Intended to 'Prey' on Girl's Psyche,* WIRED, November 19, 2008, http://www.wired.com/threatlevel/2008/11/lori-drew-place/.

18 ABCNews.go.com, *supra* note 15.

19 *Id*.

20 Maag, *supra* note 10.

21 *Id*.

22 Christopher Maag, *When the Bullies Turned Faceless,* N.Y. TIMES, December 16, 2007, http://www.nytimes.com/2007/12/16/fashion/16meangirls.html?pagewanted=all.

cyberbullying and society's subsequent response.[23] Since the Megan Meier tragedy, many states have taken steps to either create statutes that specifically target cyberbullying or expand existing criminal statutes to compass electronic communications.[24] As of July 2010, fives states have adopted legislation that criminalizes cyberbullying directly and thirty states have adopted some legislation that prohibited electronic harassment.[25] However, imprecise definitions of what constitutes cyberbullying and imperfect language in statutes may render some of these additions unconstitutional for vagueness or for being overbroad. With an understanding of this possible pitfall, this Note begins, in Section II, seeking to define cyberbullying and how it can be distinguished from cyberharassment and cyberstalking. Section III will then explore the viability of prosecuting cyberbullying utilizing state harassment statutes and the various elements that must be proven by the state. Section IV analyzes important state court decisions involving the prosecution of cyberbullies or related conduct. Finally, Section V acknowledges the practical concerns and limitations in imposing criminal sanctions.

II. Defining and Distinguishing Cyberbullying from Cyberharrassment and Cyberstalking

A. Cyber-victimization

Scholars have struggled with defining the various forms of cyber victimization, which contributed to the difficulty of formulating solutions to the problem. Cyberstalking, cyberharassment, and cyberbullying are common terms used to describe similar behaviors with slight distinctions, primarily with the ages of the parties and the severity and sophistication of the

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23 *Id.*

24 Kate E. Schwartz, Note, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 410 (2009)

25 Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (July 2010), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf.

activity involved.[26] Cyberbullying typically refers to students or juveniles, but it is unclear as to whether the culprit, the victim or both, have to minors.[27] Some scholars and commentators view cyberbullying as the Internet counterpart to the traditional schoolyard bullying, presupposing that both parties are minors.[28] However, as noted by the United States Computer Emergency Readiness Team, association affiliated with the United States Department of Homeland Security, though cyberbullying often occurs in schools or are within a school setting, cyberbullying "can affect any age group" and the conduct of the perpetrators "can range in severity from cruel or embarrassing rumors to threats, harassment, or stalking."[29]

Cyberstalking and cyberharassment is generally used to describe actions associated with adults, however, it may also include activities that take place in schools.[30] Some commentators attempted to distinguish cyberstalking from cyberbullying by stating that cyberstalking involves credible threats.[31] However, other commentators also suggest that cyberstalking includes "the use of electronic communications to stalk or harass another individual," thus, cyberstalking embodies characteristics of cyberharassment where a credible threat is not necessary.[32] Despite these nuanced and often contradicting distinctions, all three terms are often used interchangeably.[33]

The overlapping and inconsistent definitions between various terms would discourage the creation of additional redundant terminology. Instead, clear and consistent definitions should be

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26 *Id*. at 410.

27 *Id*.

28 *Id*.

29 *Id* at *411*, *citing*, Mindi McDowell, United States Computer Emergency Readiness Team, National Cyber Alert System, Cyber Security Tip ST06-005, Dealing with Cyberbullies, http://www.us-cert.gov/cas/tips/ST06-005.html, (last visited December 15, 2011).

30 *Id*. at *411*.

31 *Id*.

32 *Id*.

33 *Id*. at 409.

attached to specific behaviors that society is trying to discourage that are committed by individuals of a certain age and the victims of the harm inflicted are also within a particular age group. Cyberbullying should be a term reserved to describe harassing conduct between minors. This concise demarcation of the definition of cyberbullying will allow scholars and legislators alike to utilize specific criminal statutes to deter the continuation of such behavior and to show that there are real and serious consequences to these young individual's actions.

B. Honing in the Definition: Addressing Cyberbullying among Minors Specifically

Bullying is an unfortunate behavior of human beings that has existed for generations. Our own personal memories are littered with experiences of being teased or doing some teasing of our own at the playground. This generation of young people, however, is able to utilize technology to expand the reach of their taunting and thus, exacerbating its potential mental, physical and emotional harm.[34] According to a study conducted by the University of California at Los Angeles Center for Communication Policy in 2002, 97% of teenagers between twelve and eighteen use the Internet and the average teenager was online for more than eleven hours per week and a separate study showed 45% of teenagers have personal cell phones and 33% communicated via text-messaging.[35] Armed with new devices and gadgets, adolescents are now able to utilize the Internet(via social networking sites and instant messaging) and cell phones (via text messages) to "harass, threaten, humiliate or otherwise hassle their peers."[36] This behavior has been labeled "cyberbullying," which is defined as "willful and repeated harm inflicted

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[34] *See generally* Harmon, *supra* note 1.

[35] Matthew C. Ruedy, Note: *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created*, 9 N.C. J. L. & Tech. 323, 329 (2008), citing UCLA Ctr. For Commc'n Policy, UCLA Internet Report: Surveying the Digital Future- Year Three (2003), http://www.digitalcenter.org/pdf/InternetReportYearThree.pdf.

[36] Hinduja, *supra* note 7

through the use of computers, cell phones and other electronic means."[37] Traditional bullying and cyberbullying can be distinguished in three categories.

First, in bullying that occurs in the cybersphere, the victim may not be able to identify who the perpetrator is.[38] The use of screen names and email addresses allow cyberbullies to insulate their identities with a cloak of anonymity. Second, rumors, taunts, and other offensive actions can be published on the Internet and made available to anyone and can possibly go viral within a few seconds. The rapid dissemination of messages gives the victim the perception that "everyone is in on the joke."[39] Third, sending hurtful and offensive messages are easier when the sender is physically removed from the receiver.[40] The lack of face-to-face interpersonal communication means the sender can avoid seeing the response of the receiver and may be able to perceive their actions as "not being a big deal" because they did not witness the effect of their actions.[41] Furthermore, the ease in one's ability to transmit hurtful and offense messages diminishes the amount of a time an individual has to reasonably think about their actions before committing it.[42] These messages sent during "fits of rage" may result in perpetual humiliation for the receiver long after the sender has calmed down and reassessed their emotions.[43]

The advent of new technologies has enhanced the effects of bullying. The ease of making negative and abusive comments on the Internet, without the threat or fear of immediate retaliation, have made bullying more rampant and offensive in the cybersphere than in the

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37 *Id*.

38 *Id*.

39 *Id*.

40 *See* Hinduja, *supra* note 7, *(*"It is often easier to be cruel using technology because cyberbullying can be done from a physically distant location, and the bully doesn't' have to see the immediate response by the target. In fact, some teens simply might not recognize the serious harm they are causing because they are sheltered from the victim's response.")

41 *Id*.

42 Schwartz, *supra* note 24, at 413.

43 Schwartz, *supra* note 24, at 414

physical realm and have also amplified the effects on the victims.[44] Contemporary news stories have revealed tragic stories of teenagers who have developed severe depression, anxiety, low self-esteem and in some cases have taken their own lives, due to incessant taunting and harassment over the Internet.[45] Recent research involving approximately 2000 middle school students from populous school districts in the United States found that 20% of the students have seriously thought about attempting suicide.[46] Though all forms of bullying was cited as a significant factor for the increase in suicidal ideation, victims of cyberbullying were twice as likely to have actually attempted suicide compared to students who were not cyberbullied.[47] Studies complied by the United States Secret Service in 2002 also found that cyberbullying contributes to deadly school violence such as school shootings.[48] Another report revealed that close to "60% of boys who were bullies in school were convicted of at least one crime by the age of 24."[49]

In response to the growing concern of cyberbullying, both federal and state legislatures have promulgated measures aimed at "educating minors about safe online behavior."[50] Many states have also passed statutes calling for greater oversight by school officials over online activities of its students including anti-cyberbullying programs and other anti-bullying measures in school settings.[51] As noble as these efforts are; it falls short in deterring cyberbullying and

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44 *See generally* Schwartz, *supra* note 24, at 412- 414

45 Schwartz, *supra* note 24, at 413.

46 Sammer Hinduja, Ph.D and Justin W. Patchin, Ph.D, *Cyberbullying Research Summary: Cyberbullying and Suicide,* ARCHIVES OF SUICIDE RESEARCH, 14(3), 206-211 (2010).

47 *Id*.

48 Kevin Turbert, Note: *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying,* 33 Seton Hall Legis. J. 651, 657 (2009).

49 *Id*.

50 Schwartz, *supra* note 24, at 422, citing Protecting Our Children Online Act, H.R. 6145, 110th Cong. (2008).

51 Avni Mehta, *The Law's Response to Cyberbullying,* 35 CHAMPION 18, 21 (2011)

fails to provide meaningful redress for those who victimized.[52] School district codes are often unclear as to what authority teachers actually over students' cellphones and computers and ensuing conduct, especially if it occurs off-school grounds.[53] Assigning criminal liability to activities that we already recognized as crimes if they were not committed in the cyberworld is the next step in preventing the continued proliferation of bullying on the Internet.

C. Criminalizing Cyberbullying

Many states have passed anti-bullying laws with the rise of what some psychologists called "cyberbullicide," "suicide directly or indirectly influenced by experiences with online aggression."[54] Vermont's state legislature passed an anti-bullying law in 2004, partly in response to a local's teen's suicide.[55] The Vermont statute requires schools to implement policies to address and discipline bullying behavior that occurs both on and off school campus between minor students.[56] Though the statute is significant step in protecting children, it does not protect a victim where the bully is not a part of the school system or resides in another state.[57] The Vermont statute also places the onus of enforcing the statute on school administrators, which begs the question, what happens when school officials fail to act appropriately or dismiss the aggressive behavior of cyberbullies.[58]

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52 *See generally* Jan Hoffman, *How Should Schools Handle Cyberbullying?*, N.Y. TIMES, June 27, 2010, http://www.nytimes.com/2010/06/28/style/28bully.html?pagewanted=all.

53 Jan Hoffman, *How Should Schools Handle Cyberbullying?*, N.Y. TIMES, June 27, 2010, http://www.nytimes.com/2010/06/28/style/28bully.html?pagewanted=all.

54 Hinduja, *supra* note 45.

55 Ruedy, *supra* note 34, at 336.

56 *Id*.

57 *Id*.

58 *See generally Id*.

Legal commentators, such as Renee Servance[59], notes that speech off-campus may be beyond the reach of school officials and infringe upon the role of parents.[60] Students, who send harassing messages to other students within their own homes on their own personal computers via social networking websites not affiliated with their schools, may be beyond the reach of school's authority. Pursuing criminal charges against minors will resolve the issue surrounding the limitations on schools' authority and assign responsibility directly to the minor and his or her parents.[61] It is essential for not only young people to recognize that there are serious repercussions to their actions and poor judgment but for their parents to recognize the realities of the situation as well. If statutes assigns fines and possible detention for individuals found guilty of violating criminal statutes, parents may be forced to take notice and monitor their children's activities.[62] Minors may also reevaluate their behavior once they realize that their actions may result in criminal charges that can affect their future.

Civil sanctions may be able to offer victims of cyberbullying some redress.[63] However, civil remedies alone are not necessarily an appropriate way to resolve issues relating to cyberbullying. Those harmed may be able to file a defamation claim for libel. However, as one commentator noted, defamed students who wants to bring a libel suit will have to address the defense that the derogatory comments were true.[64] Other claims may be possible such as intentional infliction of emotional distress or in the case of a school setting, possibly negligent supervision. Regardless of the number of potential civil claims that may be raised and its

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59 Renee Servance, J.D., University of Wisconsin, (2004), was a public school teacher for ten years before starting her law school, her scholarship brings additional insights on the operations of schools and classrooms and the devastating impact of bullying on students.

60 Schwartz, *supra* note 24, at 428

61 *Id*.

62 *Id*.

63 *See generally* Schwartz, *supra* note 24, at 426 ("the primary civil remedy available for cruel and insulting speech is a defamation action, or one of its subsets0 libel or slander").

64 *Id*.

likelihood of success, pursuing a civil action is a very costly endeavor.[65] Many families may not have the financial resources to pursue a law suit.[66] Furthermore, how can we deter future acts of cyberbullying? Liability resulting from a civil law suit may provide the victim with monetary compensation but it may not have any impact on the behavior of the perpetrator or those who act in the same matter.[67] Cyber victimization can be best handled through criminal prosecutions, where the goal is to discipline the wrong doer and deter further culpable behavior by the individual and others.[68]

III. Prosecuting Cyber-bullying using existing state harassment statutes

A. Utilizing Existing Laws

Following incidents of teenage suicide associated with cyberbullying, state legislatures rushed to implement new laws in response to the tragedies.[69] Some commentators have criticized these new regulations to be reactive and possibly unconstitutional.[70] Parents, students and legislatures can all agree that some sort purposeful action must be taken.[71] However, instead of instituting new, duplicative, or overbroad laws, some scholars recommend prosecutors and legislators to review and modify existing penal codes and apply it to extreme cases of cyberbullying.[72] Paul Butler, law professor at George Washington University School of Law, stated, "We should have a sense of history and understand that our criminal laws are usually broad and able to be adapted to change in technology and change in social norms. Technology is

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65 *Id*.
66 *Id*.
67 Schwartz, *supra* note 24, at 427
68 *Id*.
69 Mehta, *supra* note 48, at 21
70 *See* Mehta, *supra* note 48, at 19 (UCLA Professor Eugene Volokh commented that "in the absence of any clear definition of what cyberbullying is, the proposals to modify existing criminal laws end up being too broad and unconstitutionally broad.")
71 Mehta, *supra* note 48, at 21
72 *Id*.

going to evolve; there will always be new ways to commit crimes, but that doesn't mean that we need to come up with a new criminal law for every technological development."[73] Professor Butler opinioned that our criminal laws are flexible enough to take into account what are really existing offenses perpetrated on different mediums.[74]

Currently, most states do not have specific criminal cyberbullying laws; in order to impose criminal liability prosecutors utilize existing harassment laws.[75] Harassment was deemed a criminal offense approximately a century ago when it became apparent that the telephone can be used for less than legitimate reasons.[76] States concerned about the harm inflicted on women and children who received calls from individuals who exhibit "vulgar, profane, obscene or indecent language" created the crime of "telephone harassment."[77] Over the years, some states have broadened their harassment statutes which covered only obscene and threatening calls to more general harassing conduct such as "anonymous or repeated telephone calls that are intended to harass or annoy."[78]

Delaware's harassment statute, for example, defines harassment to mean "to harass another person by insulting, taunting or challenging them or engaging in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to cause a reasonable person to suffer substantial emotional distress."[79] The "substantial emotional distress" element is satisfied using an objective "reasonable person standard."[80] The inquiry is whether or not a reasonable person would deem the conduct exerted

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73 *Id*.
74 *Id*.
75 Susan W. Brenner and Megan Rehberg, *"Kiddie Crime"? The Utility of Criminal Law in Controlling Cyberbullying,"* 8 FIRST AMEND. L. REV. 1, 15 (2009)
76 *Id*. at 16.
77 *Id*. at 16
78 *Id*.
79 *Id*. at 21.; DEL. CODE ANN. TIT. 11, § 1311(a)(1) (2007).
80 *Id*.

will result in "an objectively ascertainable harm."[81] Thus, by incorporating an objective standard in the statute, the imposition of criminal liability will not be based upon a "self-diagnosed psychic injury" or on the subjective idiosyncratic emotional tendencies of a person.[82]

We can analyze the usage of harassment statutes such as Delaware's as it relates to both direct and indirect cyberbullying that does not rise to the level of credible threat but may inflict severe emotional distress in a minor-to-minor bullying context. It is important to note that there are typically two cyberbullying situations.[83] In direct cyberbullying, the bully communicates directly with the victim via email, instant messaging or text messaging and intends to cause direct harm to the victim. An example of direct cyberbullying would be if a "mean girl"[84], Regina, sends another girl, Cady, a message calling her a "slut" or "ugly" and continues to send her other taunting and offensive messages. Indirect cyberbullying is when the bully does not communicate directly with the victim but instead posts messages about the victim on public forums such as MySpace, Facebook, or on a website or blog.[85]

In order for a harassment claim to move forward, the actions must be directed to a specific victim. Further, the prosecutor must be able to prove beyond a reasonable doubt that the cyberbully had the purposeful intention (mens rea) of acting in such a manner to cause harm to another person (actus reus) and that the person actually suffered harm as a result of the

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81 *Id.*

82 *Id.* at 22.

83 *Id.* at 24.

84 "Mean Girls" is an American comedy-drama released in 2004 based in part on the non-fiction book *Queen Bees and Wannabees* by Rosalind Wiseman about high school female social cliques and its impact on the girls within and in and around the peripheral of the hierarchy.; *Mean Girl Definition*, URBANDICTIONARY.COM, http://www.urbandictionary.com/define.php?term=mean%20girls (last visited December 10, 2011) ("Girls who are bullies and use 'girl aggression' (nasty comments, trickery, deceit, excluding people from events, spreading rumors…) to manipulate other girls. They will use text messaging, AIM, email, three-way calling, and any other weapon at their disposal to achieve these goals.").

85 Brenner, *supra* note 71, at 31

cyberbullying's course of conduct.[86] Harassment requires the perpetrator to have acted intentionally, purposely or willfully in a course of conduct directed at a specific victim and intended to cause the harm proscribed in the statute whether it may be substantial emotional distress or emotional stress, some states permit harm that "harasses or annoys" the victim.[87] It must also be established the bully did inflict the harm.

Satisfying these elements, except in extreme cases, will be difficult, providing a restraint in prosecuting situations where youngsters' feelings were merely hurt or simply does not rise to the level that calls the initiation of a criminal action.[88] Regardless, proving these elements will be challenging. A prosecutor may be able to establish the requisite harm suffered by the victim, however, establishing the casual nexus between the bully's intent and the harm suffered is critical to a criminal prosecution predicated on direct cyberbullying.[89] Most statutes contain an element that with the support of empirical evidence, a jury may be able to reasonably infer intent by reviewing the perpetrator's willful course of conduct targeting the victim.[90] Thus, a prosecutor may be able to use the cyberbully's incessant and persistent bombarding of tormenting messages to demonstrate and support the inference that the perpetrator was acting in a manner where not only did she know it will harm the victim, she intended to cause such harm.[91] Notice, however, that the harassment claim is only viable if there were multiple messages. It would be nearly impossible to establish the inference needed if there was only one message sent regardless of how offensive or traumatizing it may be.[92] The alleged bully might argue that it was an isolated incident where the bully was acting immaturely during a fit of rage

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86 *See Generally*, Brenner, *supra* note 71, at 25
87 *Id*.
88 *Id*. at 26.
89 *Id*.
90 *Id*.
91 *Id*. at 27.
92 *Id*.

and anger and does not support the inference of persistent and calculated action that is needed to satisfy the elements of harassment.[93] The age of the alleged cyberbully will most likely also be a factor in determining whether or not the requisite intent exists.[94] When an adult engage in a persistent pattern of behavior, we are more inclined to reasonably infer that this type of behavior exhibits intent to cause some of sort of harm.[95] However, a minor, may lack the maturity to appreciate the consequences of her actions. The age of the cyberbully and intellectual maturity is significant, making the inquiry very fact sensitive.[96]

Harassment statutes make it a crime to "harass" or "annoy" without resulting in emotional distress would make it easier to sustain a harassment charge.[97] However, Courts have found such statutes unconstitutional, voiding it for vagueness, indicating that "conduct that may be annoying to some may not be annoying to others."[98] Statutes that include limiting conditions such as "for no legitimate purpose" or harm requirements that goes beyond simply harassing or annoying the victim can avoid being struck down for vagueness.[99] In such statutes that have a lesser requirement for harm, prosecutors may successfully maintain an action for harassment if she can demonstrate that the cyberbully acted with "specific intent to inflict proscribed harm" and that the action has no legitimate purpose.[100]

Scenarios where there are more than one cyberbullies operating in concert in targeting one victim may make it easier to allow the inference of intent especially if the prosecutor can

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93 *Id.*

94 *Id.*

95 *Id.*

96 *Id., See* Harmon, *supra* note 1 ("Psychologists say the distance between and victim on the Internet is leading to an unprecedented- and often unintentional- degree of brutality, especially when combined with a typical adolescent's lack of impulse control and underdeveloped empathy skills.").

97 Brenner, *supra* note 71, at 28.

98 *Id.;* Coates v. Cincinnati, 402 U.S. 611, 614 (1971)(Supreme Court invalidated a city ordinance that made it a crime for three or more persons to assemble on a public sidewalk to conduct themselves in manner that would be annoying to persons passing by. The statute was void for vagueness as conduct that "annoys some may not annoy others.").

99 Brenner, *supra* note 71, at 29.

100 Brenner, *supra* note 71, at 30.

show that they working together to achieve the common goal of inflict increased emotional harm onto the victim.[101] However, if each cyberbully, operated independently, each element of harassment, mens rea, actus reus and harm would have be established for each perpetrator.[102]

Prosecuting indirect cyberbullying poses a different set of challenges. In cases of indirect bullying, two distinct issues arise first, to what degree the communications of the cyberbully were directed at the victim and second to what degree the cyberbully intended those messages to be seen by others and for that to have negative impact on the victim.[103] Ohio Court of Appeals in State v. Ellison found that harassment is a specific intent crime which requires the defendant to possess the specific intent to harass a particular person.[104] The lack of direct communication to the victim dispels any inference of intent to harass. The Court of Appeals further explained that the burden is not met by establishing the defendant either knew or should have known that the victim would have seen the comments she posted.[105] The defendant also claimed that the purpose of her post was purely informational, thus also negating the "no legitimate purpose" element.[106] Even if there was no legitimate purpose, it would be difficult to move forward with a harassment charge if there is no direct contact between the cyberbully and the victim.[107] When a cyberbully posts malicious comments on a webpage, for example, that the victim cannot access, it is difficult to prove that her actions were to harass that person.[108] The spreading of cruel and nasty rumors are not crimes. When one mean girl authors vicious and tasteless comments on her

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101 *Id*.
102 *Id*.
103 Brenner, *supra* note 71, at 31.
104 State v. Ellison, 900 N.E.2d 228, 230 (Ohio Ct. App. 2008).
105 *Id*.
106 *Id*. at 231.
107 *Id*.
108 *Id*.(Court found the State's position that the defendant had the intent to harass complainant untenable, as the defendant never communicated with the complainant directly despite opportunities to do so, and the defendant legitimately believed that she was warning others of the complainant's questionable behavior.)

virtual "burn book"[109] about the victim, where only her cohorts have access and it is unlikely the victim would see the comments, the mean girl's actions does not satisfy the definition of harassment. However, the Court did decline to hold that the lack of direct communication is an automatic bar to a harassment claim, which is significant, since the Court here broadly defines dissemination.[110] Thus, the door is open for potential harassment claims where an individual posts disparaging comments about another for no legitimate purpose and her conduct would insinuate her intentions to cause substantial emotional harm to the target.

IV. State Prosecutions of Cyberbullies or Cyberbullying Behavior

The nation's response to the increased incidents of cyberbullying and its related harms to the youth population have been varied and in some cases haphazard. Some jurisdictions, as explained above, have used existing criminal laws to prosecute the most egregious instances of cyberbullying. Although, a few states have had limited success, many courts hesitated to expand the meaning of harassment.

A. New Hampshire

Pursuant to New Hampshire's criminal code, harassment is the defined as the following:[111]

A person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person:

(a) Makes a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose or without disclosing his or her identity and with a purpose to annoy, abuse, threaten, or alarm another; or

(b) Makes repeated communications at extremely inconvenient hours in offensively coarse language with a purpose to annoy or alarm another; or

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109 *Burn Book Definition*, UrbanDictionary.com, http://www.urbandictionary.com/define.php?term=burn%20book (last visited December 10, 2011) ("taken from the movie *Mean Girls, a* profane book used to describe people that you have utmost distaste for. Contains a picture, name, and reasons for [the] entry").

110 Ellison at 230.

111 R.S.A. § 644: 4 (2011)

(c) Insults, taunts or challenges another in a manner likely to provoke a violent or disorderly response or

(d) Knowingly communicates any matter of a character tending to incite murder, assault, or arson; or

(e) With the purpose to annoy or alarm another, communications any matter containing any threat to kidnap any person or to commit a violation of *RSA 633;* or a threat to the life or safety of another; or

(f) With the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected.

In February 2009, a New Hampshire woman, Rachel K's, daughter ran away from home.[112] In attempt to locate her daughter's whereabouts, she logged onto her daughter's AOL Instant Message account.[113] The defendant, Alex C, a juvenile, initiated conversation with Rachel K.[114] After realizing that he was not conversing with Rachel K's daughter, he began to send Rachel K a serious of messages using offensive and coarse language. For a period of thirty seven seconds, the defendant sent the message "fatsass" to Rachel K seventeen times, he proceeded to call Rachel K a "stuppppid c**t."[115] For another four minutes, the defendant sent Rachel K an additional twenty one instant messages.[116] The defendant was charged with committing the offense of harassment, specifically RSA 644:4 I(b). The juvenile defendant did not contest his messages to Rachel K possess no other purpose other than to annoy her and that it contained offensively language.[117] However, he argued that his conduct does not constitute as "repeated communications" within the meaning of the statute. The juvenile defendant contends

112 In re Alex C., 13 A.3d 347, 348 (N.H. 2010)
113 *Id*.
114 *Id*.
115 *Id*. at 349.
116 *Id*.
117 *Id*. at 350.

that statute prohibits a "pattern of separate instant message conversations and not multiple comments made within a single AIM conversation."[118]

The Supreme Court of New Hampshire, analyzed the meaning of "repeated communications" within *RSA 644:4* using the plain and ordinary meaning of the phrase within the context of the statute, found repeated communications to mean the "renewed, frequent, or constant imparting of a message by any method of transmission."[119] The actions of the defendant in this case were found to fall squarely into the meaning of repeated communications in the *RSA 644:4*. The New Hampshire legislature in amending the statute to include "electronic transmissions via a computer" intended for the statute to cover new forms of communication.[120]

What is important to note about New Hampshire's harassment statute is that it does not require the victim to suffer substantial harm. However, it does require the prosecutor to prove beyond a reasonable doubt that the defendant sent the messages with the intent to annoy or alarm. The communication between the parties must also be direct. The statute does not appear to address indirect communication such as one party posting negative comments about another on a public forum. Nevertheless, in the cyberbullying context, In re Alex C, sets important precedent in the viability of prosecuting minors for cyberbullying behavior (i.e. berating the victim through a serious of instant messages using profane and crude language).

B. New York

Pursuant to New York Penal Code § 240.30, aggravated harassment in the second degree is defined as:[121]

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she:

1. Either

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118 *Id*.
119 *Id*. at 351.
120 *Id*.
121 NY CLS Penal §240.30 (2011)

(a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or

(b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm; or

2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or

3. Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct; or

4. Commits the crime of harassment in the first degree and has previously been convicted of the crime of harassment in the first degree as defined by section 240.25 of this article within the preceding ten years.

5. For the purposes of subdivision one of this section, "form of written communication" shall include, but not be limited to, a recording as defined in subdivision six of section 275.00 of this part.

Aggravated harassment in the second degree is a class A misdemeanor.

In People v. Munn, the New York Criminal Court, addressed the issue of whether or not New York's Penal Law prohibited harassment on the Internet, specifically if posting harassing and threatening messages on a newsgroup is prohibited by §240.30.[122] The defendant allegedly posted a message on an Internet newsgroup, which stated "Please kill Police Lt. Steven Biegel, all other NYPD cops, and all of their adult relatives and friends."[123] After reading the message, Lt. Biegel was alarmed and was fearful for his personal safety.[124] The Court determined that in order for communications via Internet to satisfy §240.30, two criteria must be met.[125] One, the communication must be one initiated by electronic or mechanical means… or be a written form

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122 People v. Munn, 688 N.Y.S.2d 384, 385 (Crim. Ct. Queens County 1999)

123 *Id*. at 384.

124 *Id*.

125 *Id*. at 385.

of communication.[126] Second, the communication must have been directed at the victim.[127] The posting on the newsgroup page met the first criterion in that it is written communication to the individuals who are subscribers to the newsgroup.[128] It is also open to the public. The Court also concludes that the message was one directed at the complainant here because his name was included in the message.[129] The fact that the complainant's name was in the message transformed the message from being one addressed to the general public to one addressing Lt. Biegel specifically.[130] The Court found that there was sufficient evidence to establish the charge of aggravated harassment in the second degree.[131]

Though the defendant in this case was not a minor and the case did not involve a cyberbullying scenario, it presented a novel issue to New York State trial courts involving threatening messages posted on Internet forums and whether or not the State's current harassment statute includes threats made in cyberspace. The *Munn* Court's decision suggests that individuals can be prosecuted for posting or inciting violence toward another on virtual message boards and the usage of the complainant's name is the equivalent of direct communication to the target. Under this rationale, only cyberbullies who post threatening comments, which cause the target to fear for this or her life, can be held criminally liable under New York's aggravated harassment statute. Often, comments made by teenage cyberbullies would not rise to this level, thus, New York's harassment statute will only have limited applicability to combating cyberbullying in the state.

C. Ohio

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126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*

Ohio's Penal Code § 2917.21 defines telecommunications harassment as:[132]

(A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following:

(1) Fails to identify the caller to the recipient of the telecommunication and makes the telecommunication with purpose to harass or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient;

(2) Describes, suggests, requests, or proposes that the caller, the recipient of the telecommunication, or any other person engage in sexual activity, and the recipient or another person at the premises to which the telecommunication is made has requested, in a previous telecommunication or in the immediate telecommunication, that the caller not make a telecommunication to the recipient or to the premises to which the telecommunication is made;

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(4) Knowingly states to the recipient of the telecommunication that the caller intends to cause damage to or destroy public or private property, and the recipient, any member of the recipient's family, or any other person who resides at the premises to which the telecommunication is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

(5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises.

(B) No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person.

(C) (1) Whoever violates this section is guilty of telecommunications harassment.
(2) A violation of division (A)(1), (2), (3), or (5) or (B) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense.

(3) Except as otherwise provided in division (C)(3) of this section, a violation of division (A)(4) of this section is a misdemeanor of the first degree on a first offense and a felony of the fifth degree on each subsequent offense…

In State v. Ellison, the Ohio Court of Appeals reversed the lower court's decision in finding that the defendant did not violate telecommunications harassment statute under R.C. 2917.21(B).[133] The prosecution failed to establish that the defendant intended to harass, when

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132 O.R.C. Ann. § 2917.21 (2011)

133 Ellison at 229.

she possessed a legitimate purpose for posting her message on the Internet and she also did not communicate directly with the complainant.[134]

The defendant, Ripley C. Ellison and the complainant, Savannah Gerhard were childhood friends, however, a falling out occurred while the girls were in seventh grade.[135] Ellison's younger brother accused Gerhard of molesting him.[136] The allegations were dismissed after an investigation conducted by Hamilton County Department of Job and Family Services because there was not evidence enough to substantiate the claim.[137] While the girls were in high school, Ellison posted on her MySpace page a picture of Gerhard and indicated Gerhard had molested a little boy.[138] The settings to Ellison's MySpace page was also set to public as opposed to private; thus, allowing an unrestricted number of people to view her profile.[139] However, Ellison has never communicated with Gerhard directly, in fact, Gerhard found out about the MySpace page through 3rd parties.[140]

The Court of Appeals, in analyzing R.C. 2917.21, found that the legislation's use of the word "dissemination" illustrated its intent to define telecommunications broadly, thus direct contact is not required in order to establish a telecommunication exchange has occurred between two parties.[141] For conduct to rise to the level of criminal harassment it must have served no legitimate purpose.[142] The prosecution must also prove that the defendant intended to harass, the burden is not met by establishing the defendant must have known or should have know that her

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134 *Id*.
135 *Id*.
136 *Id*.
137 *Id*.
138 *Id*.
139 *Id*.
140 *Id*.at 231.
141 *Id*.
142 *Id*.

conduct would be found harassing by the target.[143] In this case, despite the fact that posting rumors about Gerhard substantiated the allegation of harassment, Ellison argued that her remarks served the legitimate purchase of warning others of what Ellison believed to be was Gerhard's criminal behavior.[144] Thus, the court held that Ellison could not have violated the telecommunications harassment statute. Justice Painter commented in his concurring opinion that a nonthreatening comment posted on the Internet, however annoying, is not a crime.[145]

The *Ellison* Court did not bar the prosecution of indirect communications by broadly defining the term "dissemination" in the telecommunications statute. However, the opinion appears to severely limit the statute's application in many cyberbullying contexts. The Court appears to decline to find criminal liability for nonthreatening comments made on the Internet. Furthermore, the element of "no legitimate purpose" provides a potent affirmative defense for the accused in that the defendant can cite to some legitimate reason for her conduct and thus completely undermine the state's case.

D. Other States & Local Governments

1. Dardenne Prairie, MO

Pursuant to the Municipal Code of the City of Dardenne Priare[146], a person commits the offense of cyber-harassment if he/she:

B.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 and under circumstances not constituting harassment as described in Subsection (A) of this Section, 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 (3rd) party:

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143 *Id*.

144 *Id*.

145 *Id*. at 231 (Painter, J. concurring)("But posting an annoying-but nonthreatening-comment on a website is not a crime under this statute…The First Amendment would not allow punishment for making a nonthreatening comment on the Internet, just as it would not for writing a newspaper article, positing a sign, or speaking on the radio.")

146 Dardenne Prairie, MO., Municipal Code §210.030(B) (2007)

B.1.a. Using any lewd, lascivious, indecent or obscene words, images or language or suggesting the commission of any lewd or lascivious act;

B.1.b. Anonymously or repeatedly whether or not conversation occurs; or

B.1.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.

B.2. No person shall make or cause to be made an electronic communication, or permit an electronic communication to be made from an electronic communications device under the person's control, with the intent to harass, alarm, annoy, abuse, threaten, intimidate, torment or embarrass any other person either by the direct action of the person initiating the communication or through the actions of a third (3rd) party, which third (3rd) party actions are instigated, initiated, prompted or brought about by the person's communication.

Megan Meir's hometown, Dardenne Prairie passed a city ordinance which specifically prohibited cyberstalking and cyberharassment in response to Meagan's suicide.[147] Violators of the ordinance can be punished by fine of a maximum of $500.00 and up to ninety days in jail and it is a misdemeanor offense.[148] The statute, however, did not address whether or not it is enforceable against minors. But if we take into consideration the circumstances that promoted the passage of the statute, the death of Megan and the issue of cyberbullying by minors and adults on the internet, it can be inferred that the lawmakers intended the ordinance to be applied to the actions of minors as well.[149] This misdemeanor offense coupled with a fine and threat of a jail sentence may be a significant deterrent to individuals. To date, it is unknown if any individual has been charged with violating Dardenne Prairie's cyberharassment statute.

2. Idaho:

Section § 18-917A of Idaho's Penal Code on Student harassment, Intimidation and Bullying states:[150]

(1) No student shall intentionally commit, or conspire to commit, an act of harassment, intimidation or bullying against another student.

(2) As used in this section, "harassment, intimidation or bullying" means any intentional gesture, or any intentional written, verbal or physical act or threat by a student that:

(a) A reasonable person under the circumstances should know will have the effect of:

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147 Ruedy, *supra* note 34, at 335.

148 *Id*.

149 *See generally* Ruedy, *supra* note 34, at 336.

150 Idaho Code § 18-917A (2011).

(i) Harming a student; or
(ii) Damaging a student's property; or
(iii) Placing a student in reasonable fear of harm to his or her person; or
(iv) Placing a student in reasonable fear of damage to his or her property; or
(b) Is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.

An act of harassment, intimidation or bullying may also be committed through the use of a land line, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network.

(3) A student who personally violates any provision of this section may be guilty of an infraction.

In 2009, the Idaho legislature amended its Penal Code to include the crime "Student Harassment, Intimidation and Bullying."[151] Violators of §18-917A are guilty of an infraction.[152] This statute expressly covers the abusive actions of minors toward another of the peers that may not rise to the level of a physical threat that is communicated over the internet.[153] Local newspaper, Idaho Press- Tribune applauded the new law but recommends a more in-depth analysis of the new statute to ensure only the intended targeted offensive conduct will be penalized and that it will not unduly burden free speech on the Internet.[154] At the time this note was written, there are no published cases involving this provision of the Idaho code.

IV. Practical Concerns and Limitations on Imposing Criminal Liability

Modern societies' penal systems, including that of the United States, has evolved markedly from the theories of Code of Hammurabi where the mantra "an eye for an eye" holds true and the goal is to retaliate against the person that committed an egregious and heinous

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151 Jessica P. Meredeith, Note: *Combating Cyberbullying: Emphasizing Education over Criminalization*, 63 Fed. Comm. L.J. 311, 334 (2010).

152 Idaho Code § 18-917A(3) (2011).

153 Meredeith, *supra* note 146, at 334 (Idaho State Representative, Stephen Hartgen, structured the new legislation to penalize Internet harassment rather than anonymity alone. Representative Hartgen originaly proposed having Internet posters sign their online comments and blogs with their real names; his suggestion was largely criticized and subsequently rejected.)

154 Meredeith, *supra* note 146, at 334.

wrong against one's person or property.[155] Though the cataloging of those crimes has changed little (physical harms such as murder and assault have been consistently outlawed), modern society now includes a vast array of regulatory crimes and various degrees of severity.[156] Furthermore, model penal philosophies now focus more on what was the harm inflicted and the character of the perpetrator as well as any mitigating factors (age, self-defense, and other extenuating circumstances) before seeking to impose a just and fair sentence.[157]

In our attempts to protect our children from the harms of cyberbullying, we must be mindful that imposing criminal sanctions on certain offenses can have serious ramifications for the offender as well. Recent laws and legislations involving cyberbullying have been criticized to be knee-jerk reaction to recent tragedies.[158] As a result laws are passed that are vague, overbroad, unconstitutional as it may violate the First Amendment, and does not fully consider the damaging effects of criminalizing a teenager. Does a sixteen year old who taunted another sixteen year old deserved to be hauled into family court for harassment? What kind of lasting psychological impacts would being arrested have on an otherwise harmless sixteen year old? How much discretion should prosecutors have in determining which crimes are serious enough to prosecute? What can we do to ensure consistent prosecutions? Do prosecutors' offices even have the resources to handle these types of crimes? Will criminal sanctions be a sufficient deterrence or will be another toothless tiger?

The reality is that by utilizing the Internet and by being a participant in cyber social networks we are exposing ourselves to the rest of the cyber world and simultaneously decreasing

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155 Brenner, *supra* note 71, at 79.
156 Brenner, *supra* note 71, at 80.
157 *Id*.
158 *See generally* Schwartz, *supra* note 24, at 416.

our expectations of privacy.[159] We are more vulnerable to the whims, jealousies, and cruelty of others and this is perhaps a lesson teenagers today must also learn and understand.[160] Drafters of the Restatement of Torts noted that the "law cannot take cognizance of insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[161] We cannot impose criminal sanctions every time someone's feelings are hurt. There is an obvious inherent danger to premising criminal liability on the subjective vagaries of putative victims. Considering how unclear and imprecise some state and municipalities' definition of harassment is, there is room for abuse of the statute to limit freedom of speech rights for both children and adults.

V. Conclusion

Federal, state and local governments should be commended for the work and progress they have made in drawing attention to the issue of cyberbullying. It was essential for legislators, scholars, school administrators and judges to recognize that cyberbullying is no longer just silly horseplay among kids and that the mental, emotional and psychological harm suffered by these young victims will have an everlasting impact on their lives. The problem of cyberbullying among youngsters is perhaps best handled first by school administrators, but that requires the development and enforcement of clear and concise anti-bullying policies in schools with specific enforcement strategies. School principals and teachers should work with local police departments and prosecutors' offices in the event bullying incidents escalate to the point where it does implicate the penal code. Parents and teachers should also be vigilant in detecting signs of cyberbullying and offer support to the victims. Legislators must ensure that the penal code outlaws the specific conducts that they are trying to deter without violating other constitutional

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159 *See* Brenner, *supra* note 71, at 42.

160 *Id*.

161 Brenner, *supra* note 71, at 83, citing *Restatement (Second) of Torts § 46* cmt. d (1965).

rights. Finally, criminal sanctions should be the option of last resort, reserved for egregious conduct regardless of the age of the perpetrator. However, prosecutors should not hesitate to make criminal charges as it sends a message that certain behavior is not only unacceptable, it is criminal.