

CYBERBULLYING AND THE FIRST AMENDMENT

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Abstract

Cyberbullying has become a serious issue in recent years. Hardly a week goes by without a news story involving the online victimization of usually a young person at the hands of his or her peers. The most serious cases result in the victims requiring psychological care or counseling, and, in some cases, victims try (and occasionally succeed) in taking their own lives.¹ While any form of bullying is reprehensible, it is very difficult for legislators and judges to create and enforce laws against those who engage in such conduct.² Unlike physical-world bullying, online bullying is a matter of pure speech usually with little to no threat of immediate physical violence.³ The speech involved often revolves around truthful, but painful, commentary on the victim. In the United States, truthful speech is generally protected by the First Amendment.⁴ This Article outlines some of the more significant challenges of the American legal system in framing and enforcing effective legal responses to cyberbullying.⁵ It also situates legal solutions within a broader regulatory context and considers the role of alternative constraints on bullying—such as social norms, market forces, and public education campaigns against bullying.⁶

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¹ See *infra* Part I.

² See *infra* Parts II-III.

³ See *infra* Part II.

⁴ See U.S. CONST. amend. I.

⁵ See *infra* Parts II-III.

⁶ See *infra* Part V.

I. INTRODUCTION

In October 2006, the world's attention turned to the tragic case of Megan Meier, a teenage girl in Missouri who committed suicide as a result of online bullying.⁷ Another high-profile cyberbullying suicide followed in 2010 in New Jersey.⁸ Tyler Clementi, an eighteen-year-old Rutgers student, took his own life after being publicly outed by college roommates.⁹ While these two examples are extreme, the incidence of young people cybervictimizing their peers has skyrocketed in recent years.¹⁰ High school and college students spend much of their time on online social networks such as Facebook,¹¹ as well as texting each other

⁷ See Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1105 (2011) (noting the circumstances leading up to Meier's death).

⁸ Susan M. Swearer, *Five Myths About Bullying*, WASH. POST, Dec. 31, 2010, available at 2010 WLNR 25684729.

⁹ Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, at A1, available at <http://www.nytimes.com/2010/09/30/nyregion/30-suicide.html>.

¹⁰ See Corinne David-Ferdon & Marci Feldman Hertz, Commentary, *Electronic Media, Violence, and Adolescents: An Emerging Public Health Problem*, 41 J. ADOLESCENT HEALTH S1, S1 (2007), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1054-139X/PIIS1054139X07003643.pdf> (recognizing that the number of adolescents bullied using technology has increased); see also Anthony J. Piazza & Meredith Ireland, *A GROWING RISK: Cyberbullying—Covered Under Liability Insurance?*, FOR THE DEF., May 2012, at 56, available at <http://dritoday.org/ftd/2012-05F.pdf> (reporting that the number of cyberbullying reports among teens doubled in 2005 compared to the numbers from 1999 through 2000; and finding that while forty-three percent of teens have reported being the victims of cyberbullying, the percentage “among gay, lesbian, bisexual, or transgendered youth” jumps to fifty-three percent).

¹¹ See AMANDA LENHART ET AL., PEW RESEARCH CENTER, SOCIAL MEDIA & MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 2-3 (2010), available at http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplevels.pdf (reporting that seventy-three percent of teens and seventy-two percent of young adults utilize social networking sites).

constantly.¹² Much of the online commentary is hurtful, often devastatingly so.¹³

While online social networks are attractive because of their immediacy and global reach, they detract from the concept of friendship and civil behavior because they lack true human interaction.¹⁴ People tend to self-censor to a lesser degree online because they are not immediately confronted with the physical reactions of their peers or the physical-world consequences of their behavior.¹⁵ Thus, online communications tend to become more heated and more aggressive much more quickly than physical-world interactions.¹⁶

Horrible as many of these online scenarios may be, they are extremely difficult to regulate, both in terms of drafting effective, valid laws and of enforcing those laws.¹⁷ The challenges for the legal system

¹² See AMANDA LENHART, PEW RESEARCH CENTER, TEENS, SMARTPHONES & TEXTING 10-11 (2012), available at http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf (showing that sixty-three percent of all teens utilize text messaging every day, with a median value of sixty messages sent on a typical day).

¹³ See, e.g., Clay Calvert, Fighting Words in the Era of Texts, IMs and E-mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?, 21 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 20 (2010) (observing the brutal nature online commentary can take on).

¹⁴ See SHERRY TURKLE, ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER 168 (2011) (noting that we have more interactions online, but they are not as deep and complex as physical-world interactions).

¹⁵ See, e.g., Calvert, *supra* note 13, at 20 (commenting on how, in the case of cyberbullying, bullies are not immediately aware of the physical reactions of their victims, making it difficult for the bullies to comprehend the damage that their online actions cause).

¹⁶ E.g., SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 22 (2009) (noting that in traditional bullying situations there is a higher chance the bully will be faced with an immediate consequence, whereas the lack of this immediate response from a cyberbully's victim prevents the cyberbully from realizing when "enough is enough"); Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 852 (2010) (explaining that not punishing or addressing cyberbullying actually perpetuates more bullying as victims seek revenge).

¹⁷ King, *supra* note 16, at 856, 860.

include the fact that many online postings are anonymous or pseudonymous, and it can be difficult for a victim to identify or locate a wrongdoer.¹⁸ All online communications are routed through one or more online intermediaries, such as an online service provider or a social networking platform,¹⁹ and these intermediaries are generally loathe to divulge information about their customers' identities.²⁰ Furthermore, any party filing an action against one of these intermediaries will run into the hurdles that section 230 of the Communications Decency Act raises.²¹ Section 230 provides a fairly broad shield for online service providers with respect to legal liability for the communications initiated by their users.²² Another significant challenge for the regulation of cyberbullying involves the problem of quantifying damages in a meaningful way.²³ The harm involved in bullying is generally psychological, rather than an easily quantifiable sum.²⁴

One of the most significant challenges for the regulation of cyberbullying comes in the form of the First Amendment to the United States Constitution.²⁵ The First Amendment protects speech against

¹⁸ HINDUJA & PATCHIN, *supra* note 16, at 20.

¹⁹ Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 254 (2005).

²⁰ See Jacqueline D. Lipton, *Law of the Intermediated Information Exchange* at 26 (Feb. 15 2012), http://works.bepress.com/jacqueline_lipton/13 (explaining the marketplace pressures placed on intermediaries to keep customers' identification confidential).

²¹ Communications Decency Act, 47 U.S.C. § 230(c) (2006); *see also* King, *supra* note 16, at 853-54 (explaining the immunity given to intermediaries for their "good faith" efforts to monitor their users' commentary).

²² See Lipton, *supra* note 7, at 1132-33 (discussing broad judicial interpretations of section 230 of the Communications Decency Act that provide a wide shield for online intermediaries against liability for communications of their customers).

²³ See generally Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379, 388-99 (2011) (discussing the different tort claims that may be used to adjudicate cyberbullying, accounting for, among other things, the difficulties of emotional harm and foreseeability).

²⁴ King, *supra* note 16, at 851.

²⁵ See *Ashcroft v. ACLU*, 542 U.S. 656, 660-61 (2004) (upholding a preliminary injunction of the Children Online Protection Act due to unconstitutional content-based prohibitions); Lipton, *supra* note 7, at 1106; *see also* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 413 (2011) (stating cyberbullying presents unique First Amendment challenges).

government regulation.²⁶ It is a powerful constitutional guarantee, and it has presented a challenge for American regulators to prohibit or limit truthful speech, even if that speech is potentially harmful.²⁷ While some laws in the United States do effectively regulate speech—notably defamation law,²⁸ copyright law,²⁹ and trademark law³⁰—it has proved to be very difficult to regulate private speech between individuals, which is typically the subject of cyberbullying cases.³¹ The concern is that drafting a law that restricts truthful communications might be the “thin edge of the wedge” in allowing the government to control private communications and ultimately private thoughts.³²

Cyberbullying creates more significant challenges for regulators than even defamation and privacy law.³³ Unlike privacy law, for example, cyberbullying involves no physical trespass on an individual’s soli-

²⁶ See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

²⁷ See, e.g., Patricia Sanchez Abril, *A (My)Space of One’s Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 78-79 (2007) (indicating difficulty in regulating hurtful speech through tort causes of action and implication of First Amendment rights). See generally Julie Hilden, *Is a Defamation Case a Good Remedy for Cyberbullying?*, VERDICT (June 11, 2012), <http://verdict.justia.com/2012/06/11/is-a-defamation-case-a-good-remedy-for-cyberbullying> (stating that prosecutors are wary of criminalizing speech, even hurtful speech, because of First Amendment issues).

²⁸ See generally Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 276-77 (2008) (explaining defamation law in regards to seeking a remedy for use of cruel speech).

²⁹ See generally Adrian Liu, *Copyright as Quasi-Public Property: Reinterpreting the Conflict Between Copyright and the First Amendment*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 384-85 (2008) (explaining that copyright law can regulate speech).

³⁰ See generally Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 384-86 (2008) (indicating the effect that trademark law has on regulating speech).

³¹ See Abril, *supra* note 27 at 78-79; Hilden, *supra* note 27.

³² See King, *supra* note 16, at 865-66 (stating legislators must be careful in drafting cyberbullying laws to not impinge on other forms of protected speech).

³³ See Lipton, *supra* note 7, at 1134-36 (explaining privacy torts and some of the privacy tort applications to online issues).

tude.³⁴ It simply involves hurtful speech.³⁵ Speech is at the heart of First Amendment protection. Without more, a law that simply limits speech is unlikely to be constitutionally valid.³⁶ In fact, in the wake of the Megan Meier suicide, Congress debated federal antibullying legislation but ultimately failed to enact such legislation because of concerns about its constitutionality.³⁷

This Article outlines some of the major challenges legislators and judges face with respect to the regulation of cyberbullying.³⁸ It focuses on First Amendment issues, while also examining some of the incidental problems faced by those tasked with limiting inappropriate online conduct.³⁹ It analyzes the role of online intermediaries—such as online service providers and social networks—within the regulatory matrix.⁴⁰ As these entities are the gateways to all online speech, it may be appropriate for them to face more significant burdens in monitoring that speech or to assist the government in regulating harmful speech.⁴¹ While it is unrealistic to place overly high burdens on those who provide the means for online speech, it may be an appropriate time to redraw the current boundaries and impose higher duties on those who profit commercially from the speech of others.⁴² Finally, this Article considers legal regulation of online bullying within a broader regulatory context, focusing on the role of social norms, market forces, and public education campaigns in constraining inappropriate online conduct.⁴³

³⁴ Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 3 (2007) (“Traditionally, privacy [law] has been inextricably linked to [notions of] physical space.”).

³⁵ Philip T. K. Daniel, Commentary, *Bullying and Cyberbullying in Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti Harassment Legislation*, 268 ED. LAW REP. 619, 624 (West Aug. 18, 2011) (“[C]yberbullying encompasses any activity where a person or people use technology to intimidate, send hurtful messages, or otherwise engage in hostile behavior that has the intent or effect of being harmful.”).

³⁶ See U.S. CONST. amend. I; see generally Abril, *supra* note 27 at 78-79; Hilden, *supra* note 27.

³⁷ Lipton, *supra* note 7, at 1121-22.

³⁸ See *infra* Parts II-III.

³⁹ See *infra* Part IV.

⁴⁰ See *infra* Part III.

⁴¹ See *infra* Part III.

⁴² See *infra* Parts III, V.

⁴³ See *infra* Part V.

II. A PRIMER ON ONLINE BULLYING

One of the most fundamental challenges for the effective regulation of cyberbullying lies in defining exactly what the term means.⁴⁴ In contrast to physical-world bullying—which generally involves face-to-face harassment of an individual—cyberbullying comes in a variety of different forms, not all of which involve direct communications with the victim.⁴⁵ Thus, one key difference between victimizing an individual in the real world and online is that the victim is not always the direct recipient of the threatening or harassing communications.⁴⁶ While the First Amendment has, traditionally, given way in some situations to conduct that involves a credible threat of physical harm directly to the victim,⁴⁷ this is often not the case with cyberbullying.⁴⁸

Online bullying takes a variety of different forms, some of which bear a closer resemblance to physical bullying than others.⁴⁹ The closest analogue to physical bullying would be a harassing taunt directed expressly to the victim via e-mail, text message, or other online media.⁵⁰ However, even these direct communications lack the immedi-

⁴⁴ Kate E. Schwartz, *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) (discussing the problems with creating legal solutions to cyberbullying due to the difficulty in defining the term).

⁴⁵ See Darcy K. Lane, *Taking the Lead on Cyberbullying: Why Schools Can and Should Protect Students Online*, 96 IOWA L. REV. 1791, 1793 (2011) (describing the differences between physical-world bullying and online bullying).

⁴⁶ See Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1643-44 (2009) (noting the Internet's potential for reaching vast amounts of users).

⁴⁷ See, e.g., Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 155 (2007) (surveying constitutionally valid laws that require a credible threat of imminent physical harm).

⁴⁸ *Id.* at 139 (noting that it is often difficult for victims of cyberbullying to establish a credible threat of harm due to the anonymity and unknown location of the culprit).

⁴⁹ Lipton, *supra* note 7, at 1109 (recognizing that physical-world bullying and online bullying can share similar characteristics).

⁵⁰ See Auerbach, *supra* note 46, at 1643 (demonstrating the various mediums used for cyberbullying).

acy and potential imminent threat of physical harm that accompanies physical-world bullying.⁵¹

As with bullying in the physical world, online bullying often takes place within an environment of unpleasant behavior directed at or about a victim.⁵² For example, the case of Megan Meier that resulted in her suicide involved a number of unpleasant text messages and MySpace discussions, but culminated in a spurning message directed to Meier from a fictional “Josh Evans” persona.⁵³ “Josh Evans” was in reality the creation of the mother of one of Meier’s classmates, Lori Drew.⁵⁴ That final communication to Meier—which seems to have been the tipping point that led to her suicide—was similar to a physical-world bullying episode in that it was directed to the victim herself.⁵⁵ However, unlike physical bullying, Lori Drew was able to use a fictional persona to engage in the harmful conduct and was unable to witness the immediate physical reaction to her words on the face of the victim.⁵⁶

The Meier situation exemplifies another problem with effective regulation of online bullying in that it is often difficult to ascertain the true identity or location of the wrongdoer.⁵⁷ Even in cases where the potential defendant can be identified and located, that person’s motives may be more difficult to pin down than in the case of typical schoolyard

⁵¹ Lipton, *supra* note 7, at 1111 (noting that even direct harassing messages to the victim are typically only actionable at law if there is an actual threat to the recipient).

⁵² See Andrew M. Henderson, *High-Tech Words Do Hurt: A Modern Makeover Expands Missouri’s Harassment Law to Include Electronic Communications*, 74 MO. L. REV. 379, 381 (2009) (discussing the various methods bullies use to harass their victims online).

⁵³ King, *supra* note 16, at 846-47 (stating that Megan Meier, a thirteen-year-old girl, committed suicide after an individual on MySpace known as “Josh Evans” sent Meier a number of harassing messages, including a message telling Meier that the world would be better off without her).

⁵⁴ *Id.* at 847.

⁵⁵ *Id.*

⁵⁶ *Id.*; Schwartz, *supra* note 44, at 414 (contrasting physical-world bullies with online bullies by stating that online bullies can easily remain anonymous and do not have to concern themselves with the physical consequences of real interaction).

⁵⁷ Auerbach, *supra* note 46, at 1643-44 (recognizing that victims of cyberbullying often have trouble seeking legal remedies due to the inability to determine the identity of the culprit).

bullying.⁵⁸ In the physical world, students' parents tend not to be involved in the actual bullying conduct, although they may condone or incite their children to be bullies, or at least fail to counsel their children against bullying.⁵⁹ The online environment—with its easy ability to shroud real identity in anonymity or pseudonymity—raises the potential for parents and others who would not usually be involved in actual bullying to become part of the problem rather than part of the solution.⁶⁰

The other difference between online bullying and its physical-world counterpart, as also exemplified by the Meier situation, is that virtual communications have a distancing effect.⁶¹ Some people who engage in online bullying may feel less inhibited in their actions by virtue of distance and anonymity.⁶² Additionally, they may feel more distanced from the impact of their communications.⁶³ Unlike physical bullying, an online bully cannot see the physical and facial responses of the victim.⁶⁴ Wrongdoers may not realize how upsetting a particular communication may be because they cannot see the victim's face.⁶⁵ Thus, Lori Drew may have felt her conduct in creating a fake "Josh Evans" persona, befriending Meier online, and then spurning her was

⁵⁸ Schwartz, *supra* note 44, at 415 (discussing the difficulties that victims of cyberbullying face when attempting to determine whether the received threats are legitimate or if the culprit has the ability to carry out his threats).

⁵⁹ King, *supra* note 16, at 847 (recognizing that although Lori Drew, an adult woman and mother to one of Megan Meier's classmates, chose not to bully Meier in the physical world, she did bully and harass Meier through the Internet).

⁶⁰ Auerbach, *supra* note 46, at 1644-45 (discussing Megan Meier's situation, where Lori Drew was able to harass and bully Meier online without detection due to the anonymity that the Internet provides).

⁶¹ Goodno, *supra* note 47, at 129-30 ("The ability to send anonymous harassing or threatening communications allows a perpetrator to overcome any hesitation, unwillingness, or inabilities he may encounter when confronting a victim in person.").

⁶² *See id.*; Robin M. Kowalski & Susan P. Limber, *Electronic Bullying Among Middle School Students*, 41 J. ADOLESCENT HEALTH S22, S23 (2007), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1054-139X/PIIS1054139X07003618.pdf> (explaining the magnitude of electronic bullying by examining study participants' experiences with electronic bullying as victims and perpetrators).

⁶³ Kowalski & Limber, *supra* note 62, at S23.

⁶⁴ *Id.* (noting that an online bully's inability to see victims' emotional reactions prevents the bully from realizing how upsetting comments are).

⁶⁵ *Id.*

relatively harmless.⁶⁶ She may not have had many physical-world cues about the very real impact of her online conduct.⁶⁷

Some online bullying does not involve communications directed at the victim, but rather involve communications *about* the victim that may occur in many different forums and contexts.⁶⁸ For example, a group of bullies may gather together via text message or on a social networking site such as Facebook to make fun of a victim regardless of whether the victim is aware of the conduct.⁶⁹ In fact, in the early days of the Internet, one of the examples taught by cyberlaw professors and computer sociologists involved private chat rooms where groups of individuals made nasty comments about others who did not have access to the virtual environment in question.⁷⁰ A difficult question arises as to whether any laws are actually broken in such situations.⁷¹

The physical analogue would be people gossiping about a victim out of the victim's earshot.⁷² However, online conduct has the potential to be cut-and-pasted all over the Internet, so it is much more likely that a victim could ultimately access a transcript even when that person is

⁶⁶ See Gov't Trial Mem. at 6-7, *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (No. CR 08-0582-GW) (commenting that Lori Drew stated her purpose for such conduct was to investigate what Meier was saying online, specifically in regard to her own daughter).

⁶⁷ See *id.* at 3-7 (stating that Lori Drew said she created the fake account to play a prank on Meier rather than to cause Meier to commit suicide); Kowalski & Limber, *supra* note 62, at S23.

⁶⁸ See Goodno, *supra* note 47, at 129.

⁶⁹ See, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011) (considering group online bullying when a high school student created a discussion group webpage and invited about one hundred people, of which about two dozen joined and ridiculed a fellow high school student).

⁷⁰ Ann Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 *YALE L.J.* 1639, 1654 (1995) (describing a male-only private chat room where derogatory comments were made about nonparticipating females, which the victims later discovered).

⁷¹ See generally Lipton, *supra* note 7, at 1116-26 (discussing the need for effective criminal legislation in addressing cybervictimization because of the typical inability of such conduct to meet criminal thresholds as framed by existing law).

⁷² Sarah R. Wert & Peter Salovey, *A Social Comparison Account of Gossip*, 8 *REV. GEN. PSYCHOL.* 122, 126 (2004), available at http://heblab.research.yale.edu/pub_pdf/pub33_Wert,Salovey2004Asocialcomparisonaccountofgossip.pdf (evaluating gossip in the context of social comparison theory).

not the intended recipient of the communications.⁷³ One feature of on-line communications is their tendency to become permanent viral records of comments about an individual.⁷⁴ This differs from the physical-world analogue of harmless gossip.⁷⁵ In the physical world, someone could always tell a victim that others were saying hurtful things about her, but she would not be able to access an actual physical transcript of the exact words.⁷⁶ The words would certainly not take on a permanent or global quality as they might online.⁷⁷ In both cases—virtual and physical—there are likely no credible threats of physical harm to the victim because people do not actually direct the words in question at the victim.⁷⁸ Thus, the First Amendment will be a significant barrier to any attempt to regulate speech *about* a person, unless that speech is clearly defamatory.⁷⁹

Other harmful forms of online communications not directed to a victim, but potentially harmful nonetheless, include situations that might be referred to as “puppeting.”⁸⁰ In such cases, a wrongdoer poses *as* the victim online.⁸¹ For example, people have been known to pose

⁷³ King, *supra* note 16, at 850-51.

⁷⁴ *Id.* (highlighting the long-lasting effects of online harassment due to the indefinite lingering of hurtful comments).

⁷⁵ *Id.* at 850.

⁷⁶ *See generally id.* (noting the ability of cyberbullies to ridicule via smear sites that catalogue postings).

⁷⁷ *See id.* at 850; SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CENTER, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE 2 (2010), available at http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf (comparing cyberbullying to traditional forms of bullying and noting cyberbullying rarely involves threats of any physical harm).

⁷⁸ *See id.* (addressing difficulties with authorities taking preventative steps towards cyberbullying because of the usual absence of a significant threat to someone’s physical safety).

⁷⁹ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (addressing the need to protect private individuals from defamatory statements); Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 130 (2009) (discussing the need for a clear test, specifically the balancing test in *Tinker*, to govern cyberbullying so school speech regulations do not violate the First Amendment).

⁸⁰ Lipton, *supra* note 7, at 1115.

⁸¹ *Id.* at 1114; *see, e.g., In re Conduct of Carpenter*, 95 P.3d 203, 228 (Or. 2004) (providing an example of a disciplinary proceeding where a lawyer posed as a local teacher online indicating he was engaging in sexual activity with his students).

as their victims online by posting personal advertisements on services such as Craigslist, suggesting that the victim harbors rape fantasies and giving the victim's personal address and other contact details.⁸² As a result of the advertisements, some women have been physically attacked at their places of residence by third parties thinking they were answering the advertisements and fulfilling the victim's rape fantasies.⁸³ While there is obviously a credible threat of physical harm here, if the victim never sees the advertisement, she will not be aware of the threat until it is too late.⁸⁴

While this author's survey of online bullying conduct is not comprehensive and the scope of cyberbullying is only as narrow as the human imagination, at least it demonstrates that there are significant differences between online conduct and bullying in the physical world.⁸⁵ The Internet can have a disinhibiting effect on conduct⁸⁶ compounded by the fact that a bully can remain anonymous or pseudonymous.⁸⁷ However, despite the serious impact of this conduct on victims, it is extremely difficult for regulators to draft effective laws against online bullying because of the challenge implicit in establishing a credible and immediate threat of physical harm.⁸⁸ In addition, it can be ex-

⁸² Lipton, *supra* note 7, at 1115. See Ben Neary, *Internet Rape Case Jolts Wyoming City*, SEATTLE TIMES, Feb. 6, 2010, http://seattletimes.nwsources.com/html/nation/world/2011000748_apusinternetassault.html; Bill Wallace, *Stalkers Find a New Tool—the Internet/E-Mail is Increasingly Used to Threaten and Harass, Authorities Say*, S.F. CHRON., July 10, 2000, <http://www.sfgate.com/news/article/Stalkers-Find-a-New-Tool-the-Internet-E-mail-2714253.php>.

⁸³ Neary, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ See *supra* notes 44-84 and accompanying text. See generally Goodno, *supra* note 47, at 128-32 (discussing five differences between cyberstalking and offline behavior).

⁸⁶ Lipton, *supra* note 7, at 1114. See generally John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. at 321, 321 (2004), available at http://lacomunidad.elpais.com/blogfiles/apuntes-cientificos-desde-el-mit/71994_Suler.pdf (analyzing the psychological reasons why individuals feel less inhibited while accessing the Internet).

⁸⁷ See Schwartz, *supra* note 44, at 414-15 (discussing the ease with which one can anonymously post harmful messages without repercussions).

⁸⁸ See Interstate Communications Act, 18 U.S.C. § 875(c) (2006); *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997) (holding that defendant's sadistic rape-and-torture story in a chat room about a classmate did not constitute a threat under the Interstate Communications Act); Goodno, *supra* note 47, at 148 (discussing how the

tremely difficult to enforce any such laws against anonymous or pseudonymous defendants.⁸⁹

Often the only way to unmask or locate a potential defendant is to secure the cooperation of an online service provider with access to the wrongdoer's identifying information.⁹⁰ These service providers may be loath to divulge the wrongdoer's identity, except in the most extreme cases, because they have a commercial interest in maintaining the anonymity of their users.⁹¹ Of course, some online service providers—like Facebook and LinkedIn, for example—rely on members utilizing their real identities online.⁹² Their terms of service require people to use their real identities.⁹³ However, this can be very difficult to police in practice.⁹⁴

Interstate Communications Act is not applicable to those whose intentions are to harass or annoy).

⁸⁹ See Goodno, *supra* note 47, at 131 (highlighting the difficulties in locating cyberstalkers).

⁹⁰ See *Cyber Bullying Prevention and Intervention*, AM. HUMANE ASS'N, <http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/cyber-bullying-prevention-and-intervention.html> (last visited Oct. 10, 2012) (highlighting the problems, warning signs, and possible solutions in regard to cyberbullying).

⁹¹ See Lipton, *supra* note 20, at 1360 (identifying the concerns that online intermediaries have in unmasking wrongdoers due to potentially harmful effects to business models); see also *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (discussing the inherent value in websites where individuals can anonymously speak their mind). See generally *Doe v. 2TheMart.com, Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (quoting *Columbia Ins. Co.*, 185 F.R.D. at 578) (explaining the benefits of anonymity on the Internet).

⁹² *What Names Are Allowed on Facebook?*, FACEBOOK, <http://www.facebook.com/help/?faq=112146705538576> (last visited Oct. 10, 2012); *Privacy Policy*, LINKEDIN, http://www.linkedin.com/static?key=privacy_policy (last revised June 16, 2011).

⁹³ *Facebook, Inc. v. MaxBounty, Inc.*, 274 F.R.D. 279, 280 (N.D. Cal. 2011) (“To become a Facebook user an individual must provide his or her real identity.”); LINKEDIN, *supra* note 92.

⁹⁴ See Josh Halliday, Facebook Forced into Revealing Identities of Cyberbullies: Woman Wins High Court Backing After She Received Abusive Messages About Post on The X Factor's Frankie Cocozza, GUARDIAN, June 8, 2012, available at <http://www.guardian.co.uk/technology/2012/jun/08/facebook-revealing-identities-cyber-bullies> (reporting “one of the first cases where an individual has successfully taken legal action against Facebook to reveal the identities of cyberbullies”).

Interestingly, in the Megan Meier scenario, the criminal prosecution ultimately directed at Lori Drew was based on her disregard of an online service provider's contractual terms of service.⁹⁵ In creating the fictional "Josh Evans" person, Lori Drew infringed MySpace's terms of service.⁹⁶ To prosecute Lori Drew, federal prosecutors attempted to utilize provisions of the Computer Fraud and Abuse Act⁹⁷ prohibiting a person from exceeding authorized access to a computer system.⁹⁸ The prosecutors argued that by creating the false persona, Lori Drew had exceeded authorized access to the MySpace service by breaching the terms of service with respect to false identities.⁹⁹ The prosecution was ultimately unsuccessful, and attempts to draft a federal criminal law targeted specifically at online bullying were equally unsuccessful.¹⁰⁰

III. THE ROLE OF ONLINE INTERMEDIARIES

Internet intermediaries—those who enable individuals to access the Internet and communicate digitally—hold a very significant place in the regulation of cyberbullying, and indeed any online conduct.¹⁰¹ Because the Internet is basically a global online communications medium and requires intermediaries of many different stripes to enable all online interactions, regulators of cyberspace have often focused on the legal responsibilities of those parties.¹⁰²

⁹⁵ United States v. Drew, 259 F.R.D. 449, 451 (C.D. Cal. 2009).

⁹⁶ See *id.* at 453-55.

⁹⁷ 18 U.S.C. § 1030(a)(2)(C) (2008); see *Drew*, 259 F.R.D. at 457-62.

⁹⁸ Lipton, *supra* note 7, at 1121 (citing Henderson, *supra* note 52, at 393).

⁹⁹ See *id.*; Scott Michels, *Teen's Mom Testifies in MySpace Hoax Trial*, ABC NEWS, Nov. 20, 2008, <http://abcnews.go.com/TheLaw/story?id=6297275&page=1#.UD6LNdZITEU> (discussing the strategy of federal prosecutors in the Megan Meier case).

¹⁰⁰ Lipton, *supra* note 7, at 1121.

¹⁰¹ See Lipton, *supra* note 20, at 1345 ("Intermediaries are the most effective 'choke points' for enforcing desired norms of behavior online through their own policies, through the enforcement of legal rules, or through a combination of both.").

¹⁰² See *id.* ("Lawmakers are routinely faced with difficult questions involving the regulation of powerful, and often highly innovative, intermediaries Increasingly, Congress has drafted laws aimed specifically at the role of online intermediaries in an attempt to . . . balance technological innovation against the need to protect existing legal rights").

Since the early days of the Internet, Congress has struggled to delineate the appropriate boundaries of online service provider liability for various different classes of conduct.¹⁰³ High profile examples include section 230 of the Communications Decency Act, which provides fairly broad immunity for online service providers with respect to communications initiated by others.¹⁰⁴ Likewise, section 512 of title 17 deals with the limits of liability for online service providers with respect to online copyright infringements.¹⁰⁵ More recently, much debate has surrounded Congress' attempt to enact the Stop Online Piracy Act, which places high burdens on online service providers—including those who provide Internet domain name registries—with respect to international intellectual property infringements.¹⁰⁶

No harmful conduct can take place online without being enabled by at least one, and probably several, online service providers.¹⁰⁷ In order to interact online, people have to sign up for online service providers and then use communications services such as text messaging, e-mail service, social networking sites, and the like, provided by other online service providers.¹⁰⁸ Thus, these intermediaries are in a unique position to monitor and control harmful online conduct.¹⁰⁹ They are generally able to track communications sent over their services.¹¹⁰ They will also typically know the names and locations of their users.¹¹¹

However, it is unrealistic to expect online service providers to take absolute responsibility for communications sent over their sys-

¹⁰³ See *id.* at 1351-53 (discussing the evolution of regulations pertaining to secondary liability of online service providers).

¹⁰⁴ Lipton, *supra* note 7, at 1132.

¹⁰⁵ RAYMOND S. R. KU & JACQUELINE D. LIPTON, *CYBERSPACE LAW: CASES AND MATERIALS* 383-85 (3d ed. 2010) (discussing the enactment and operation of safe harbor provisions of the Copyright Act).

¹⁰⁶ See H.R. 3261, 112th Cong. (2011).

¹⁰⁷ Lipton, *supra* note 20, at 1343-44.

¹⁰⁸ *Id.* at 1343.

¹⁰⁹ *Id.* at 1344.

¹¹⁰ *Id.*

¹¹¹ See *id.* at 1359 (“Internet intermediaries are often the only entity . . . capable of identifying or locating an online wrongdoer . . .”).

tems.¹¹² This would become too costly and difficult for most service providers and, ultimately, would lead to increased costs and less competition and innovation in markets for online services.¹¹³ This is one reason why legislators have generally drafted laws directed at online service providers in a way that significantly limits the legal liability of such providers for the conduct of others.¹¹⁴ Section 230 of the Communications Decency Act in particular has been interpreted by courts as a fairly broad blanket immunity for online service providers with respect to communications initiated by others.¹¹⁵

The downside of limited liability for online service providers is that there is little onus placed on the parties in the best position to curb harmful conduct to take active steps or expend significant resources to do so.¹¹⁶ Short of including vaguely drafted and often unenforced or unenforceable terms of service about appropriate online etiquette, most online service providers will not take a very strict stance against cyberbullying and similar conduct.¹¹⁷

Historically, online service providers have also fought against law enforcement's attempts to seek their assistance in unmasking online wrongdoers.¹¹⁸ A line of court cases since the early days of the Internet

¹¹² See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (noting it would be impossible for service providers to screen each of their millions of postings for possible problems).

¹¹³ See *Mann & Belzley*, *supra* note 19, at 273-74 (discussing the possible effects of imposing gatekeeper liability on online service providers).

¹¹⁴ Robert G. Magee & Tae Hee Lee, *Information Conduits or Content Developers? Determining Whether News Portals Should Enjoy Blanket Immunity from Defamation Suits*, 12 COMM. L. & POL'Y 369, 370 (2007).

¹¹⁵ Lipton, *supra* note 7, at 1132.

¹¹⁶ See Lipton, *supra* note 20, at 1344.

¹¹⁷ See generally *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) ("As precautions are costly, . . . ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1).").

¹¹⁸ See, e.g., *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *1 (Va. Cir. Ct. Jan. 31, 2000), *rev'd sub nom. Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (2001); see also Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 416 (2003); Lyriisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1374 (2009).

demonstrates the judiciary's attempt to formulate a clear set of legal guidelines to delineate situations under which a service provider should be required to unmask a potential defendant, usually in the context of defamation or copyright-related proceedings.¹¹⁹ Striking an appropriate balance between anonymity and unmasking is not an easy task for courts.¹²⁰ While there are good reasons to protect anonymity online, there are also associated harms that anonymity causes.¹²¹ It is very difficult to formulate a bright-line rule for lifting the veil of anonymity from a potential defendant.¹²²

Of course, the question of unmasking an online wrongdoer will only arise in a situation where there is a cognizable legal wrong and where the victim seeks legal redress or presses criminal charges.¹²³ As noted above, many situations arise in which no effective laws exist—or could be drafted—to fit the online wrong.¹²⁴ Thus, outside of traditional defamation or copyright suits, victims of other harms, such as bullying, are often left without a legal remedy.¹²⁵ Even in cases where an online defendant committed a cognizable legal wrong, a victim may be unwilling to proceed in the courts.¹²⁶ Having already suffered the embarrassment and humiliation attached to the bullying, the last thing on the victim's mind may be dragging the whole matter up again and reliving it on the public record in a court of law.¹²⁷ For this reason, any

¹¹⁹ See *Doe I v. Individuals*, 561 F. Supp. 2d 249, 254-56 (D. Conn. 2008); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-81 (N.D. Cal. 1999); *In re Subpoena Duces Tecum to Am. Online*, 2000 WL 1210372, at *2-6.

¹²⁰ See *Doe I*, 561 F. Supp. 2d at 254; *Columbia Ins. Co.*, 185 F.R.D. at 578; Lidsky, *supra* note 118, at 1377-85.

¹²¹ See *Columbia Ins. Co.*, 185 F.R.D. at 578; *In re Subpoena Duces Tecum to Am. Online*, 2000 WL 1210372, at *5-7; Ekstrand, *supra* note 118, at 414; Lidsky, *supra* note 118, at 1389.

¹²² Ekstrand, *supra* note 118, at 424.

¹²³ See *Doe I*, 561 F. Supp. 2d at 255; *Columbia Ins. Co.*, 185 F.R.D. at 579-80; *In re Subpoena Duces Tecum to Am. Online*, 2000 WL 1210372, at *7; Ekstrand, *supra* note 118, at 426.

¹²⁴ See Ekstrand, *supra* note 118, at 427; King, *supra* note 16, at 852; Lipton, *supra* note 7, at 1106.

¹²⁵ See King, *supra* note 16, at 852; Lipton, *supra* note 7, at 1122, 1129.

¹²⁶ See Lipton, *supra* note 7, at 1130, 1133. See generally King, *supra* note 16, at 850-51 (describing reasons why a victim may be unable to proceed).

¹²⁷ See Lipton, *supra* note 7, at 1130, 1133. See generally King, *supra* note 16, at 850-51 (discussing the pain of reliving cyberbullying).

attempt to more effectively regulate online bullying might have to include the possibility of closed legal cases that minimize the harm to the victim or the possibility of allowing a victim to proceed anonymously.¹²⁸

There will also be extreme cases in which the victim is in no position to proceed in litigation because the wrongdoer irreparably damaged the victim psychologically to the extent that the victim is unable to participate in litigation.¹²⁹ Situations where the victim has committed suicide—such as Meier and Clementi¹³⁰—are obvious examples.¹³¹ But in other cases, the online conduct may psychologically damage a victim to the extent that the victim is unable to participate in an action.¹³² For example, the infamous case of the *Star Wars* Kid in Canada—where an embarrassing video of the teenage victim was uploaded and augmented online—led to the hospitalization of the victim in a psychological institution.¹³³

The *Star Wars* Kid example also raises another challenge for the effective regulation of online bullying.¹³⁴ While in many cyberbullying cases the victim knows the bullies from school or some other local activity, in other situations, the bullies are far-flung around the globe.¹³⁵ Many of the individuals who posted taunting, augmented videos of the *Star Wars* Kid did not know the victim and were not in the same jurisdiction as the victim.¹³⁶ The embarrassing video simply attracted them, and they made augmentations and comments to the video online, causing it to go viral.¹³⁷

¹²⁸ See, e.g., *Doe I*, 561 F. Supp. 2d at 250, 257 (allowing plaintiffs to proceed anonymously to protect their privacy and reputations).

¹²⁹ See King, *supra* note 16, at 850-51.

¹³⁰ Foderaro, *supra* note 9.

¹³¹ See King, *supra* note 16, at 851; Lipton, *supra* note 7, at 1104-05.

¹³² See King, *supra* note 16, at 851.

¹³³ See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 44-48 (2007); Jacqueline D. Lipton, "We, the Paparazzi": *Developing a Privacy Paradigm for Digital Video*, 95 IOWA L. REV. 919, 921-22 (2010).

¹³⁴ See SOLOVE, *supra* note 133, at 44-46.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.* at 45-48.

The embarrassing conduct was also not confined to one online service provider, but rather was spread over various providers of online video hosting services.¹³⁸ The viral, international, and permanent nature of online communications raises yet another challenge for the effective regulation of such conduct.¹³⁹ The disinhibiting effect of technology described earlier exacerbates these features of online communications.¹⁴⁰ When not confronted with physical-world evidence of damage done to the victim, many online actors are not sufficiently aware of the physical-world harms they may be causing.¹⁴¹ Additionally, effective regulation could ultimately require global cooperation of governments faced with different constitutional pressures and social customs concerning free speech.¹⁴²

IV. REGULATING ONLINE BULLYING

Legislators charged with regulating harmful online conduct of the kinds described above are faced with an unenviable task, particularly in the United States where First Amendment constraints place significant limitations on legislatures.¹⁴³ As all online bullying is speech by definition, and much of it is truthful speech, the First Amendment seriously hamstrings governments attempting to clamp down on cyberbullying.¹⁴⁴ While it is possible for legislators to tie in a requirement of a credible threat of physical harm to the victim in order to circumvent some of the First Amendment concerns, as noted above, many instances of cyberbullying do not include such a threat, at least as compared to their physical-world analogues.¹⁴⁵

¹³⁸ See *id.* at 44-47.

¹³⁹ See *supra* notes 73-77 and accompanying text.

¹⁴⁰ See *supra* notes 61-62, 86 and accompanying text.

¹⁴¹ See *supra* notes 61-67 and accompanying text.

¹⁴² See Ellen S. Podgor, *Cybercrime: Discretionary Jurisdiction*, 47 U. LOUISVILLE L. REV. 727, 732-33 (2009) (discussing the difficulty of uniform cybercrime regulation between individual countries).

¹⁴³ See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *Reno v. ACLU*, 521 U.S. 844, 849 (1997); Lipton, *supra* note 7, at 1106.

¹⁴⁴ See *supra* notes 25-34 and accompanying text.

¹⁴⁵ See Goodno, *supra* note 47, at 135-39 (discussing the shortcomings of legislation containing a credible threat requirement in addressing cyberstalking).

Another concern for legislators will involve defining precisely what kind of communication the legislation should sanction.¹⁴⁶ It is extremely challenging to create a legal definition of cyberbullying that will neither be overinclusive nor underinclusive.¹⁴⁷ The harm in bullying often depends on the impact on the victim and not on the content of the particular speech.¹⁴⁸ Some victims will respond badly to comments that would not affect others.¹⁴⁹ Calling someone “fat” or “a slut” or “a brownnose” will affect different victims differently, as indeed it would in the physical world.¹⁵⁰

Congress’ attempts in 2008 and 2009 to draft legislation aimed at the Megan Meier situation would have prohibited transmitting a communication “with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person; using electronic means to support severe, repeated, and hostile behavior.”¹⁵¹

This legislation was clearly overbroad with respect to what might potentially have been covered and would have run the risk of chilling online speech if found constitutional, which would have been doubtful on First Amendment grounds in any event.¹⁵² Statutes that hinge on the defendant’s intent are difficult to interpret when the conduct involves simple text messaging devoid of speech inflections and

¹⁴⁶ See Lipton, *supra* note 7, at 1126-28 (discussing several types of communication that legislation should address).

¹⁴⁷ See William Crane, *The World-Wide Jurisdiction: An Analysis of Over-Inclusive Internet Jurisdictional Law and an Attempt by Congress to Fix It*, 11 DEPAUL-LCA J. ART & ENT. L. 267, 271 (2001) (discussing the difficulty of crafting policy that is not overinclusive or underinclusive).

¹⁴⁸ See Aimee Fukuchi, Note, *A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharassment Law*, 52 B.C. L. REV. 289, 303 (2011) (discussing the subjective and objective reasonableness standards relating to the victim’s perception of the conduct).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ H.R. 1966, 111th Cong. § 3(a) (2009); H.R. 6123, 110th Cong. § 3(a) (2008).

¹⁵² See Lipton, *supra* note 7, at 1121-22 (discussing the challenges that legislators face in drafting regulations that stand up to First Amendment scrutiny).

facial expressions.¹⁵³ Online, a prank or joke or sarcastic comment may easily be taken to be something more, or vice versa.¹⁵⁴

An interesting feature of the Megan Meier Cyberbullying Prevention Act is the requirement of repeated behavior.¹⁵⁵ One way for legislators to distinguish bullying from less serious online communications may be to focus on the repetitious nature of the conduct.¹⁵⁶ Someone might more easily excuse a one-time communication as a thoughtless remark than a repeated and systematic online attack against an individual.¹⁵⁷ However, even the legislators' reliance on a repetition requirement is problematic and imprecise in terms of defining conduct worthy of legal sanction.¹⁵⁸ A one-time communication may well be serious enough to cause significant harm to a victim, such as the fake "Josh Evans" comment to Megan Meier that the world would be better off without her.¹⁵⁹ While this comment was made in the context of a series of communications to and about Megan Meier, it was this one significant comment that seems to have most obviously tipped Meier and led to her decision to take her own life.¹⁶⁰

Conversely, a systematic and repeated series of derogatory comments may be nothing more than banter between friends.¹⁶¹ Young people often banter with each other online using derogatory nicknames and other phrases.¹⁶² Thus, a person who was annoyed with a friend for some reason might be able to trump up a charge of cyberbullying based

¹⁵³ See Fukuchi, *supra* note 148, at 306 (discussing the difficulties associated with establishing specific intent in cybercrimes).

¹⁵⁴ See *id.* at 303.

¹⁵⁵ H.R. 6123, 110th Cong. (2008).

¹⁵⁶ Cf. Goodno, *supra* note 47, at 134 (discussing the importance of repetition as an indication of the seriousness of cyberstalking).

¹⁵⁷ See *id.*

¹⁵⁸ Andrew Coffman, *What's the Problem? Defining Cyberbullying*, NAT'L CTR. FOR JUST. AND THE RULE OF LAW (2011), <http://www.olemiss.edu/depts/ncjrl/pdf/CyberbullyingDefined.pdf>.

¹⁵⁹ *Megan Meier's Story*, MEGAN MEIER FOUND., <http://www.meganmeierfoundation.org/megansStory.php> (last visited Oct. 10, 2012).

¹⁶⁰ *Id.*

¹⁶¹ See Matthew C. Ruedy, Comment, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 339 (2008) (discussing innocent "trash talk" during online video game).

¹⁶² *Id.*

on such communications even though the friend did not actually intend or cause any harm.¹⁶³ As noted above, the defendant's intent can be particularly difficult to establish online in the absence of physical, vocal, and facial cues.¹⁶⁴

In the wake of the Megan Meier incident, the Missouri state legislature also took measures to redraft its online harassment laws by including a provision in the state criminal statutes that criminalizes harassment in cases where a defendant:

Without good cause engages in any . . . act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, *and such person's response to the act is one of a person of average sensibilities considering the age of such person.*¹⁶⁵

While similar in scope to the unsuccessful federal legislation, this statute includes a requirement focused on the actual response of the victim to the defendant's online harassment.¹⁶⁶ To satisfy the elements of the crime, the victim must respond to the defendant's action as a person of average sensibilities of her age group would respond.¹⁶⁷ While this requirement may be a step in the right direction and may go some way towards mitigating concerns about harmless banter being inappropriately sanctioned, it will still be difficult in many cases to establish how a person of average sensibilities would respond to particular online conduct.¹⁶⁸

¹⁶³ See, e.g., MASS. GEN. LAWS ANN. ch. 71, § 370(d) (West 2010); N.H. REV. STAT. ANN. § 193F:4(2)(d) (2012) (examples of statutes that punish for false accusations of cyberbullying).

¹⁶⁴ See Calvert, *supra* note 13, at 41.

¹⁶⁵ MO. REV. STAT. § 565.090(1)(6) (2011) (emphasis added).

¹⁶⁶ H.R. 6123, 110th Cong. (2008); MO. REV. STAT. § 565.090(1)(6) (2011).

¹⁶⁷ MO. REV. STAT. § 565.090(1)(6) (2011).

¹⁶⁸ See *State v. Koetting*, 616 S.W.2d 822, 826 (Mo. 1981) (determining that one's "average sensibility" involves looking at the totality of circumstances).

Teenagers in particular may have extremely wide-ranging sensibilities depending on the context.¹⁶⁹ For example, most teenagers would not commit suicide if someone told them that “the world would be a better place without [them],” as in the Megan Meier scenario.¹⁷⁰ However, Meier was not a teenager of average sensibilities.¹⁷¹ She had struggled with a weight problem and with clinical depression for many years when the bullying occurred.¹⁷² Even statutes such as the Missouri model do not take into account circumstances where the most harm occurs—those where the victim is *not* a person of average sensibilities considering her age.¹⁷³

Regardless of First Amendment concerns, it is extremely difficult for legislators to draft statutes that encompass harmful online conduct while protecting innocent, if heated, online communications.¹⁷⁴ When the First Amendment is added into the mix as a concern for legislators, it becomes almost impossible to create effective and constitutionally sound laws for the regulation of cyberbullying.¹⁷⁵ Even where

¹⁶⁹ See KJ Hannah Greenberg, *Suddenly Teens: Communication Sensibilities*, KINDRED COMMUNITY (June 4, 2010), <http://www.kindredcommunity.com/blogs/guests/channie-greenberg/suddenly-teens-communication-sensibilities/p/2103> (discussing the different sensibilities adolescents and teens display throughout maturation).

¹⁷⁰ Megan Meier Found., *supra* note 159; see Sameer Hinduja & Justin W. Patchin, Cyberbullying Research Center, Cyberbullying Research Summary: Cyberbullying and Suicide 1 (2010), available at http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf (stating that a study shows less than twenty-one percent of adolescents reported seriously contemplating suicide).

¹⁷¹ MEGAN MEIER FOUND., *supra* note 159.

¹⁷² *Id.*

¹⁷³ MO. REV. STAT. § 565.090(1)(6) (2011). See generally Lipton, *supra* note 7, at 1128-29 (arguing that, while difficult to apply, the reasonable person standard allows for flexibility in the statute’s application).

¹⁷⁴ See Lipton, *supra* note 7, at 1118-29 (explaining the difficulties faced by federal and state legislatures in drafting criminal and civil statutes to combat online abuses without “inadvertently catch[ing] one-time situations where people have acted uncharacteristically out of anger in the heat of the moment”).

¹⁷⁵ See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 665, 670 (2004) (finding a statute, which imposed criminal penalties on persons posting online content harmful to minors, unconstitutionally overbroad under the First Amendment); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (holding that a statute intended to restrict minors’ access to “indecent” and “patently offensive” content was unconstitutionally vague and overbroad).

legislators could effectively and validly draft such laws, their enforcement would be problematic for the reasons canvassed above.¹⁷⁶ Many victims are not in the position, or are unwilling, to proceed against online wrongdoers for a variety of reasons.¹⁷⁷ They may be physically or psychologically incapacitated as a result of the harm and unable to pursue the wrongdoers through the legal system.¹⁷⁸ Additionally, wrongdoers may be unidentifiable or may be outside the plaintiff's jurisdiction.¹⁷⁹

Despite the difficulties inherent in drafting and enforcing anti-bullying laws for cyberspace,¹⁸⁰ it is probably worthwhile that legislators continue to debate these laws with a view to enacting some legislation aimed at the problem. At the very least, legislative debate focuses the attention of the public on the problem and might encourage parents and teachers to spend more time counseling youth about the dangers of cyberbullying.¹⁸¹ Additionally, Congress can likely enact valid laws tying school funding to programs that educate students about

¹⁷⁶ See *supra* Parts II-III.

¹⁷⁷ See Schwartz, *supra* note 44, at 427 (discussing the barriers to civil litigation faced by cybervictims).

¹⁷⁸ Megan Meier had already committed suicide by the time investigators started looking into Lori Drew's conduct. See Lipton *supra* note 7 at 1105; *supra* notes 50-52 and accompanying text. Additionally, the *Star Wars* Kid sustained severe psychological damage due to cyberbullying, leading to his hospitalization, and rendering him unable to participate in litigation. See *supra* notes 132-36 and accompanying text.

¹⁷⁹ See Lidsky, *supra* note 118, at 1385 (discussing the uncertainty of laws surrounding the unmasking of anonymous defendants); Lipton, *supra* note 7, at 1129-31 (highlighting the challenges of unmasking anonymous online actors and the jurisdictional barriers faced by victims of online abuse).

¹⁸⁰ See Lipton, *supra* note 7, at 1118-29 (discussing the gaps in existing legislation and the difficulties state and federal legislators face in drafting the appropriate legislation because of technological advancements).

¹⁸¹ See, e.g., Yamiche Alcindor, *States Look to Enact Cyberbullying Laws*, USA TODAY (Mar. 19, 2012), <http://www.usatoday.com/news/nation/story/2012-03-18/state-cyberbullying-laws/53626736/1> (discussing proposed and enacted state laws addressing cyberbullying); Kaz Komolafe, *As School Year Starts, States Tackle Teen Cyberbullying*, MCCLATCHY NEWSPAPERS (Aug. 22, 2012), <http://www.mcclatchydc.com/2012/08/22/163153/as-school-year-starts-states-tackle.html> (describing various state laws and approaches to address cyberbullying); see also Lipton, *supra* note 7, at 1141 (examining the importance of the law's interaction with other modalities to combat cybervictimization through public education and emerging social norms).

the harms of bullying.¹⁸² Any laws that legislators enact, whether ultimately constitutionally sound or not, will serve an expressive function.¹⁸³ Such laws will signal to the public that certain online conduct is unacceptable.¹⁸⁴

V. EXTRALEGAL SOLUTIONS

No discussion of cyberbullying is complete without situating possible legal solutions within a broader regulatory context.¹⁸⁵ It is necessary to consider regulation of cyberspace on a broader canvas than just through a lawyer's lens, for several reasons.¹⁸⁶ Obviously, law does not exist in a vacuum. It responds to, and helps shape, social norms and market practices.¹⁸⁷ Additionally, as the previous sections have demonstrated, law is a particularly weak tool with respect to regulating cyberbullying for a variety of practical reasons, including the difficulty of drafting effective law in light of First Amendment concerns.¹⁸⁸

None of this is to suggest that law is irrelevant.¹⁸⁹ There will be situations in which legal solutions are effective against harmful online conduct.¹⁹⁰ Established causes of action, such as defamation, are suc-

¹⁸² *Cf.* *United States v. Am. Library Ass'n*, 539 U.S. 194, 205-06, 211-12 (2003) (applying a lower level of First Amendment scrutiny to funding legislation that required libraries in receipt of government funding to employ filtering software on Internet terminals to restrict access to pornographic material by young people).

¹⁸³ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2034 (1996) (“[L]aw might attempt to express a judgment about the underlying activity in such a way as to alter social norms.”).

¹⁸⁴ *Id.*

¹⁸⁵ See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507-09 (1999) (proposing four methods of behavior regulation in cyberspace: social norms, legal rules, system architecture, and market forces).

¹⁸⁶ Lipton, *supra* note 7, at 1139-41 (highlighting the need for a regulatory approach that would include extralegal modalities due to “the limitations inherent in the legal system”).

¹⁸⁷ Sunstein, *supra* note 183, at 2031-32.

¹⁸⁸ See discussions *supra* Parts II-IV.

¹⁸⁹ See *supra* text accompanying notes 185-88.

¹⁹⁰ See Lipton, *supra* note 7, at 1122-23 (discussing how revisions in Missouri criminal law would be more effective against online harassment in the wake of the Megan Meier suicide).

cessfully argued in cyberspace suits.¹⁹¹ Additionally, it may be possible to regulate cyberspace analogues of conduct that can be prohibited in the physical world because of, say, a credible threat of actual physical harm.¹⁹² Even ineffectual laws can serve an important expressive function.¹⁹³ Whether or not a law is constitutionally valid, its enactment will present a message from the government about what conduct is acceptable in cyberspace.¹⁹⁴ Even when legislators cannot successfully enact a law because of First Amendment concerns, the debate surrounding the bill serves an important public education function.¹⁹⁵

Legislators and judges should continue to be prepared to draft and enforce laws aimed at reducing harmful online behavior and also perhaps to attempt new applications of existing laws—such as the attempt to apply the Computer Fraud and Abuse Act to the Megan Meier/Lori Drew scenario.¹⁹⁶ While the action ultimately failed, it also served a public education function and focused public debate on the problems of cyberbullying.¹⁹⁷ The prosecution's addition of hate crime charges against those involved in Tyler Clementi's suicide exemplifies another

¹⁹¹ *Id.* at 1133-34.

¹⁹² *Id.* at 1126.

¹⁹³ See Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1460 (2007) (asserting that sometimes Congress passes laws that it knows are inconsistent with constitutional principles but nevertheless hopes that the unconstitutional laws will spark judicial inquiry and review).

¹⁹⁴ See *id.* at 1460-61 (discussing congressional tendency to knowingly pass unconstitutional legislation purely for its expressive function).

¹⁹⁵ See Alcindor, *supra* note 181 (highlighting efforts of state legislatures to enact laws that criminalize cyberbullying and discussing First Amendment implications of doing so).

¹⁹⁶ See *United States v. Drew*, 259 F.R.D. 449, 462, 467-68 (2009) (reversing a guilty verdict of three misdemeanor counts upon a motion for acquittal on grounds that violations of a website's terms of service are not actionable under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2)(C), (c)(2)(B)(ii) (2008), under a "void-for-vagueness" doctrine).

¹⁹⁷ See Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES (Nov. 28, 2007), http://www.nytimes.com/2007/11/28/us/28hoax.html?_r=1 (highlighting public outcry over Lori Drew's actions and addressing concern that Lori Drew's actions were not punishable under Missouri state law); Kim Zetter, *Lori Drew Not Guilty of Felonies in Landmark Cyberbullying Trial*, WIRED: THREAT LEVEL BLOG (Nov. 26, 2008, 11:26 AM) <http://www.wired.com/threatlevel/2008/11/lori-drew-pla-5/> (discussing legal reaction to prosecution's attempted use of federal felony statute against Lori Drew for violating MySpace's terms of service).

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novel application of existing law that led to much public debate about cyberbullying.¹⁹⁸

Legal approaches to cyberbullying will also work within the context of a broader regulatory framework that involves social norms, market practices, and public education.¹⁹⁹ These different aspects of social regulation all interact together and intersect with legal solutions.²⁰⁰ Laws inform social and market practices, and vice versa.²⁰¹

In many contexts both in the physical world and online, social norms are more effective than laws.²⁰² Members of a group come to understand the social expectations of belonging to the group and act accordingly for fear of being ostracized.²⁰³ One obvious problem with relying on social norms to regulate cyberbullying, or indeed any form of bullying, is that sometimes the social norms in a particular group favor bullying and other harmful conduct.²⁰⁴ In other words, to be part of the “in” group, the new member of the group has to be prepared to pick on people in the “out” group.²⁰⁵ Peer group pressure can be the most powerful kind of social norm for young people and can often lead to undesirable behaviors such as smoking, drinking, taking drugs, being sexually promiscuous, or engaging in bullying.²⁰⁶

¹⁹⁸ See generally Miranda Leitsinger, *Gay Spying Case: Will Jury Convict for ‘Hate’?*, NBC NEWS (Mar. 14, 2012), http://usnews.nbcnews.com/_news/2012/03/14/10675405-gay-spying-case-will-jury-convict-for-hate?lite (discussing legal and social concern with “bias intimidation” charges in *New Jersey v. Ravi*, where Dharun Ravi was charged with the equivalent of a hate crime because the invasion of privacy crime he committed was against two homosexual males).

¹⁹⁹ Lipton, *supra* note 7, at 1140.

²⁰⁰ *Id.* at 1141.

²⁰¹ *Id.*

²⁰² Gaia Bernstein, *When New Technologies Are Still New: Windows of Opportunity for Privacy Protection*, 51 VILL. L. REV. 921, 944 (2006).

²⁰³ Dorothy L. Espelage, *Bullying in Early Adolescence: The Role of the Peer Group*, EDUC. RESOURCES INFO. CENTER DIG., November 2002, <http://ceep.crc.uiuc.edu/eecearchive/digests/2002/espelage02.pdf>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See *id.* (asserting that peer group pressure is a driving force behind unfavorable behaviors); Matthew S. Fuchs, *Big Tobacco and Hollywood: Kicking the Habit of Product Placement and On-Screen Smoking*, 8 J. HEALTH CARE L. & POL’Y 343, 344 (2005) (referencing research that peer influence can affect smoking among teens);

In closed systems, such as schools and colleges, it may be possible to develop institutional practices to combat such pressures, such as anonymous tip lines for reporting undesirable conduct and the drafting and enforcing of institutional policies targeted at stamping out such practices.²⁰⁷ However, for this to happen, institutions have to be prepared to devote the time and resources required to effectively develop and maintain such systems.²⁰⁸ The government could possibly incentivize these approaches by attaching funding to them.²⁰⁹ Legislation that attaches funding to promoting particular conduct is usually not subject to such close scrutiny under the First Amendment as legislation directed specifically at prohibiting certain kinds of speech.²¹⁰ Groups of concerned parents or alumni of educational institutions might also fund such initiatives.²¹¹

Likewise, online services where bullying is prevalent could adopt and enforce policies against this kind of conduct.²¹² Much bullying takes place on bulletin boards and other kinds of social networking

Nicholas N. King, *New Approaches to Victims' Assistance and Teenage DUI Programs*, PROSECUTOR (Nat'l Dist. Attorneys Ass'n, Alexandria, Va.), Sept./Oct. 1996, at 29, 30 (stating that peer pressure increases the likelihood of teenage alcohol consumption).

²⁰⁷ U.S. Dep't of Health & Human Serv., *Set Policies & Rules*, STOPBULLYING.GOV, <http://www.stopbullying.gov/prevention/at-school/rules/index.html> (last visited Oct. 10, 2012).

²⁰⁸ See generally *id.* (illustrating the time and resources that will be required to develop and maintain said systems).

²⁰⁹ See, e.g., Alexis Huicochea, *Tucson-area Schools Take Aim at Online Bullying*, ARIZ. DAILY STAR (July 30, 2012), http://azstarnet.com/news/local/education/pre-collegiate/schools-take-aim-at-online-bullying/article_3c775650-b45e-523d-91f7-df5d09a3def4.html.

²¹⁰ See *United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12 (2003) (explaining that a lesser standard of review is required where conduct is promoted versus restricted).

²¹¹ See U.S. Dep't of Health & Human Servs., *Community Action Toolkit*, STOPBULLYING.GOV, 28-29, <http://www.stopbullying.gov/prevention/in-the-community/community-action-planning/community-action-toolkit.pdf> (last visited Oct. 10, 2012).

²¹² See generally U.S. Dep't of Health & Human Servs., *Report Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/how-to-report/index.html> (last visited Oct. 10, 2012) (discussing how social media sites and Internet service providers often have terms of service that are violated by cyberbullying).

sites.²¹³ Many of these sites do have policies about appropriate online behavior.²¹⁴ However, not all forums typically enforce these policies.²¹⁵ In many instances, the policies are not particularly transparent, so it is unclear whether or not online service providers are actually enforcing these policies.²¹⁶ In Second Life, for example, a mechanism exists for complaints about the conduct of other avatars in the virtual world.²¹⁷ However, involved members do not receive reports about what kinds of action Second Life may take against a person who has been reported.²¹⁸

Public education campaigns either mounted by the government or by private institutions are another obvious mechanism to regulate online conduct indirectly by making young people aware of the harms that inappropriate online communications can cause.²¹⁹ Outside of formal education campaigns, individual parents might choose to become more involved in monitoring what their children are doing online and counseling them as to appropriate interactions.²²⁰ One of the features of the Megan Meier scenario that was discussed after Meier's suicide was the fact that even though Meier's parents were monitoring her online conduct and required her to tell them who she was communicating with online, her mother felt that she should have paid more attention than she

²¹³ Childnet Int'l, *Cyberbullying: Supporting School Staff*, DIGIZEN.ORG, 2 (2009), available at http://www.digizen.org/downloads/cyberbullying_teachers.pdf.

²¹⁴ See generally U.S. Dep't of Health & Human Servs., *supra* note 212 (discussing the terms and conditions social media sites and Internet service providers have that prohibit cyberbullying).

²¹⁵ See Emily Bazelon, *How Should Facebook and MySpace Handle Cyberbullying?*, SLATE.COM (Mar. 25, 2010), http://www.slate.com/articles/life/bulle/2010/03/how_should_facebook_and_myspace_handle_cyberbullying.html.

²¹⁶ *Id.*

²¹⁷ See JavanTrust, *Complaint Process: Does it Work?*, SECONDLIFE.COM, <http://community.secondlife.com/t5/General-Discussions/Complaint-Process-Does-It-Work/td-p/479320> (last visited Oct. 10, 2012).

²¹⁸ *Id.* (stating that current members are not able to find out if action has been taken against other members who have had reports filed against them).

²¹⁹ See Childnet Int'l, *supra* note 213, at 4.

²²⁰ See generally U.S. Dep't of Health & Human Servs., *Prevent Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/prevention/index.html> (last visited Oct. 10, 2012) (outlining different ways parents can monitor their children's activities online in order to help prevent cyberbullying).

did given her familiarity with and concern for her daughter's fragile psychological state.²²¹

In terms of market forces, the rise of unpleasant online communications and their viral and permanent nature in recent years has given rise to a new field of reputation management companies.²²² These businesses, such as Reputation.com, provide a variety of services, including conducting reputation audits for a customer²²³ and repairing damage to an online reputation by prioritizing positive or neutral information about the individual in search engines over damaging and negative information.²²⁴ While these services cost money and generally have been used by business people and public figures, there is no reason that these reputation management companies could not develop a market sector aimed at repairing the reputations of young people.²²⁵ Additionally, young people could also teach themselves how to conduct reputation audits and deprioritize negative information in search engine results.²²⁶

Of course, reliance on reputation management services does nothing to prevent the bullying conduct from occurring in the first place.²²⁷ These services simply assist an individual in protecting her online reputation after the fact.²²⁸ They also do not wipe out harmful

²²¹ MEGAN MEIER FOUND., *supra* note 159 (“Ron says Tina was as vigilant as a parent could be in monitoring Megan on MySpace. Yet she blames herself.”).

²²² *Supra* note 139 and accompanying text; *see also* Lidsky, *supra* note 118, at 1390 (discussing the function of reputation management companies).

²²³ *See* Lipton, *supra* note 7, at 1142-43 (discussing how reputation management companies provide reputation audit services such as monitoring, policing, and removing negative content).

²²⁴ *Id.* at 1143.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See* Michael Fertik & David Thompson, *Wild West 2.0: How to Protect and Restore Your Online Reputation on the Untamed Social Frontier* 1-14 (2010) (discussing that online reputation management services are generally implemented only after widespread damage is done to an individual's reputation).

²²⁸ *Id.* at 7 (discussing that false claims regarding a business's reputation tend to destroy a business and reduce its revenues; therefore, the role of reputation management companies is more apparent once the damage is done). *See generally* CHARLES J. FOMBRUN, *REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE* (1996) (describing that in general, corporations seek public relations assistance and reputation management after the damage has already occurred).

information shared amongst peers in social networks such as Facebook.²²⁹ Additionally, a victim of online bullying might find an increase in the bullying conduct as she attempts to clear her reputation online.²³⁰ Search engines have typically refrained from engaging in attempts to assist individuals in deprioritizing damaging information in search engine results.²³¹ It may simply be too technologically unwieldy and too costly to ask them to do so, but this is another problem with cyberbullying as compared with its physical-world analogue.²³² While physical-world bullying is transient, inappropriate information posted online is inherently permanent and can be transmitted virally across the globe, thus causing much more significant harm to a victim even absent a credible threat of immediate physical harm.²³³

VI. CONCLUSION

Online bullying has become, and will likely continue to be, a serious problem.²³⁴ While the Internet provides a greater forum for instantaneous global interactions than any previous technology, the potential to create harm through speech is also unprecedented.²³⁵ Young people, in particular, are likely to succumb to the temptation to engage in such conduct because of the distancing effect of the technologies.²³⁶ While bullying in the physical world has always been a problem, the Internet exacerbates the problem by creating disinhibiting effects; global and permanent spread of damaging information; and regulatory difficulties caused by anonymity, globalization of communications, and constitutional restrictions on regulating speech.²³⁷

Governments of the future need to be mindful both of the harms caused by online bullying and the unique challenges of effectively regu-

²²⁹ See FERTIK & THOMPSON, *supra* note 227, at 119.

²³⁰ See *id.* at 140 (discussing the viral and perpetual nature of some online attacks).

²³¹ See *supra* notes 107-16.

²³² See *supra* notes 107-12 and accompanying text.

²³³ See *supra* notes 72-76.

²³⁴ See Lipton, *supra* note 7, at 1104-05 (discussing the high prevalence and potential harm of online bullying).

²³⁵ See *supra* Part I.

²³⁶ See *supra* notes 14-16 and accompanying text.

²³⁷ See *supra* notes 61-65.

lating such conduct.²³⁸ Legislation alone will not be the solution to cyberbullying.²³⁹ Governments will have to work in more creative and cooperative ways with private and educational institutions, and with parents, to develop an intricate regulatory matrix of incentives to prevent bullying and to promote appropriate online conduct, particularly amongst young people.²⁴⁰ The task will be complex, but hopefully not impossible.

²³⁸ *See supra* Part I.

²³⁹ *See supra* Part V.

²⁴⁰ *See supra* Part IV.