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CYBERBULLYING ON TRIAL: THE COMPUTER FRAUD AND ABUSE ACT AND *UNITED STATES V. DREW*

*Sarah Castle**

INTRODUCTION

Bullying. The experience is a common one among people throughout the world: a bully on the playground or in a school, in the cafeteria at lunch or waiting for the buses after school. The bigger children taunt and tease the smaller, pointing out weaknesses, flaws, or simple differences. This bullying is nothing new to society, and parents throughout the generations have worked to assist their children in surviving this adolescent turmoil.¹ However, as the Internet and social networking websites in today's society expand, the playground in the school yard and the lunch time cafeteria are no longer the only venues for this kind of teasing to take place.² The new avenue for children to attack one

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¹ See DIANE MASTROMARINO, *THE GIRL'S GUIDE TO LOVING YOURSELF* 14 (2003) ("In every school there is at least one bully. Someone who thinks they are more powerful than most. Someone who puts other people down to make themselves feel bigger.").

² See, e.g., *Alberta Schools Have New Tool to Combat Cyberbullying*, AIRDRIE ECHO, Nov. 19, 2008, at 29; Anastasia Goodstein, *How Health Sites Can Reach Youth; Young People Want Reliable, Easily Understood Health Advice Online. Here's What a Survey Says They Hope to Find*, BUSINESS WEEK ONLINE, Nov. 20, 2008, <http://www.businessweek.com/technology/content/>

another has become known in the blogosphere as “cyberbullying.”³ Cyberbullying takes many forms and frequently includes postings on social networking pages, harassing emails or instant messages, and spreading of private and potentially embarrassing information.⁴ Parents are left in a quandary as to how they can protect their children from the severe emotional wreckage that cyberbullying causes in children.⁵ One scholar has described the change with clear precision: “[t]he Internet is the bully’s new sandbox; the keyboard, the latest torture device.”⁶ Unfortunately, the law has not fully caught up with the rapid technological developments in bullying and harassment. As a result, cyberbullying generally rests in a legal void, where few laws restrict the behavior of bad actors.⁷

The case of Megan Meier and her suicide after she received abusive statements that were part of a MySpace hoax⁸ is a tragic

nov2008/tc20081118_877679.htm; *Kayte Inside the School Gate: Coordinator of ECHO-Backed Anti-Bullying Charity Bullybusters Kayte Eaton Gives Her Weekly Insight into the War Against Bullies*, LIVERPOOL DAILY ECHO, Nov. 25, 2008, at 25; Janet Kornblum, *Bullying Devastates Lives; Victims Suffer Until They Find Way to Heal*, USA TODAY, Nov. 19, 2008, at 11B (“[C]yberbullying has taken center stage among many in the psychological community . . .”).

³ See Lauren Collins, *Annals of Crime: Friend Game: Behind the Online Hoax that Led To a Girl’s Suicide*, NEW YORKER, Jan. 21, 2008; WiredKids, Inc., STOP Cyberbullying, www.stopcyberbullying.org (last visited Apr. 18, 2009) (“[A] Program of Parry Aftab and the Wired Safety Group, wiresafety.org [to combat cyberbullying].”).

⁴ Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 866–67 (2008).

⁵ Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 279 (2008) (“[W]hat are parents supposed to do to protect their children from the emotional wreckage that such comments can cause in the life of an adolescent?”).

⁶ Gretchen Voss, *Cyberbullying on the Rise Amongst Teens*, BOSTON MAG., Jan. 2006.

⁷ Erb, *supra* note 5, at 260 (“[T]he use of cyberbullying as a new means of harassing one’s peers has fallen into a virtual ‘no-man’s-land’ of legal liability.”).

⁸ Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*,

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example of the problems encountered in this arena. Megan Meier was a thirteen-year-old girl living in Dardenne Prairie, Missouri, when she suffered a vicious hoax perpetrated by her neighbors through a fraudulently created profile on MySpace.⁹ After the fictitious profile of an attractive sixteen-year-old boy had been used to cultivate a close relationship with her, the communications turned mean, eventually ending in a message that drove Megan to commit suicide.¹⁰ Her death became the focus of a media storm a year later when it was publicly released that her adult neighbor had been intimately involved in the plot.¹¹ This Comment discusses the issues surrounding online cyberbullying, and the California federal jury in *United States v. Drew* that returned a guilty verdict¹² for Lori Drew, the adult perpetrator of the hoax of which Megan Meier was the victim.¹³

This Comment argues that the prosecution of Lori Drew was a proper use of the felony provision of the federal statute commonly known as the Computer Fraud and Abuse Act¹⁴ (hereinafter “CFAA”) to punish the fraudulent and tortious conduct at issue in cases similar to *United States v. Drew*. Part I discusses the inadequacy of traditional and more recent school-focused anti-bullying laws in dealing with cyberbullying, and its increase in both frequency and severity in recent years. Part II examines the especially egregious factual background of the Meier case. Part III lays out the potential for the CFAA to combat severe cyberbullying and the controversy surrounding its application. Part IV argues that the California court’s application of the felony provision of the

N.Y. TIMES, Nov. 28, 2007, at A23.

⁹ See Howard Breuer, *Woman Convicted of Misdemeanors in MySpace Suicide Case*, PEOPLE.COM, Nov. 26, 2008, <http://www.people.com/people/article/0,,20243080,00.html?xid=rss-topheadlines>.

¹⁰ See *id.*

¹¹ Kim Zetter, *Lori Drew Not Guilty of Felonies in Landmark Cyberbullying Trial*, THREAT LEVEL—WIRED BLOGS, Nov. 26, 2008, http://blog.wired.com/27bstroke6/lori_drew_trial/index.html.

¹² See, e.g., Scott Glover, *Cyber-Bully Verdict is Mixed; Woman in MySpace Case is Found Guilty on Three Misdemeanors*, L.A. TIMES, Nov. 27, 2008, at A1.

¹³ *Id.*

¹⁴ 18 U.S.C. § 1030 (2008).

CFAA is proper under the law for extreme instances of cyberbullying like the Drew/Meier case.

I. FROM BULLYING TO CYBERBULLYING

The term “cyberbullying” is now commonly used to describe bullying that utilizes electronic means, whether it is by email, text messages, or social networking sites.¹⁵ The only real distinction between cyberbullying and traditional bullying is that cyberbullying takes place over the Internet.¹⁶ Just as verbal bullying on the playground can have harmful mental effects on children, cyberbullying is as, if not more, harmful to the mental and personal development of children, especially those in their teens.¹⁷ With the launch of major social networking sites in 2003 such as MySpace,¹⁸ the potential for harm is much greater in magnitude because of the greater number of people affected by fraudulent or abusive behavior and the practical reality that the average Internet user does not have the resources to verify the identity of an online acquaintance.

Unfortunately, when children are threatened through postings on the Internet, such cyberbullying may not rise to the level of statutorily defined harassment.¹⁹ Numerous bullying and harassment statutes protect children when they are threatened and intimidated in person.²⁰ Most recently, state legislatures have

¹⁵ Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1218 (2003).

¹⁶ *Id.* at 1219.

¹⁷ *See id.* at 1216–17.

¹⁸ Nick Douglas, *MySpace: The Business of Spam 2.0 (Exhaustive Edition)*, VALLEYWAG, Sept. 11, 2006, <http://valleywag.com/tech/myspace/myspace-the-business-of-spam-20-exhaustive-edition-199924.php>.

¹⁹ *See Erb, supra* note 5, at 259.

²⁰ *See, e.g.*, Harassment, Intimidation, and Bullying Policy, ALASKA STAT. § 14.33.200 (2008); Antibullying Policies, ARK. CODE ANN. § 6-18-514 (2008); Board of Education, Specific Powers and Duties, Safe Schools, COLO. REV. STAT. § 22-32-109.1 (2008); Policy on Bullying Behavior, CONN. GEN. STAT. § 10-222d (2008); School Bullying Prevention, DEL. CODE ANN. tit. 14, § 4112D (2008); Bullying and Harassment Prohibited, FLA. STAT. § 1006.147

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passed anti-bullying statutes²¹ that aim to protect students seeking an education from the kind of intimidation and harassment that would otherwise inhibit the learning process.²² These statutes generally only address direct peer-to-peer cyberbullying.²³ In contrast, some forms of cyberbullying involve postings that are not even directly communicated to the student being harassed,²⁴ or in some cases involve fraudulent representations of identity by the speaker,²⁵ as was the case in the tragic suicide of Megan Meier.²⁶

(2008); Policies to Prohibit Bullying of Student by Another Student, GA. CODE ANN. § 20-2-751.4 (2008); Student Harassment, Intimidation, Bullying, IDAHO CODE ANN. § 18-917A (2008); Harassment and Bullying Prohibited, IOWA CODE § 280.28 (2008); Student Code of Conduct, LA. REV. STAT. ANN. § 416.13 (2008); School Board Policy, Prohibiting Intimidation and Bullying, MINN. STAT. § 121A.0695 (2008); School District, Development and Adoption of Bullying Prevention and Education Policy, NEB. REV. STAT. § 79-2,137 (2008); School Bullying Prevention Act, OKLA. STAT. tit. 70, § 24-100.3 (2008); Mandatory Policy on Harassment, Intimidation and Bullying, OR. REV. STAT. § 339.356 (2007); Local School Districts to Adopt Policies Prohibiting Harassment, S.C. CODE ANN. § 59-63-140 (2008); Harassment, Intimidation or Bullying, TENN. CODE ANN. § 49-6-1014 (2008); *see also* PAUL BOCH, CYBERSTALKING: HARASSMENT IN THE INTERNET AGE AND HOW TO PROTECT YOUR FAMILY 165 (2004).

²¹ The details of Megan Meier's tragic suicide in October 2006 were first publicized in a newspaper article a year after her death. Within months of that article's publication, legislators in her home town of Dardenne Prairie and surrounding St. Charles county worked to create a specific cyberbullying statute. *See* Joel Currier, *Cyberbullying Emerges as a New Threat*, ST. LOUIS POST-DISPATCH, Nov. 30, 2007, available at 2007 WLNR 23786674; Maag, *supra* note 8.

²² Erb, *supra* note 5, at 259.

²³ *Id.* (“[T]he use of cyberbullying as a new means of harassing one's peers has fallen into a virtual ‘no-man's-land’ of legal liability.”).

²⁴ The Megan Meier Foundation—Resources, <http://www.meganmeierfoundation.org/resources/> (last visited Nov. 30, 2008) (“The ‘bash board’ is the nickname for an online bulletin board, or virtual chat room, where teenagers can go to anonymously write anything they want, true or false, creating or adding mean-spirited postings for the world to see.”).

²⁵ In First Amendment expression vernacular, the term “speaker” is often used to refer to all forms of expression, not just oral communications by a live person. *See, e.g.,* Cohen v. California, 403 U.S. 15, 18 (1971) (discussing differentiation between conduct and “speech”).

²⁶ *See* Kim Zetter, *Prosecution: Lori Drew Schemed to Humiliate Teen*

Both adults and children are at risk of cyberbullying. Secondary school aged children, like those in Megan's age group, are particularly susceptible to subtle coercive pressures like peer pressure, especially surrounding matters of social convention.²⁷ As a result, the types of statements made to or about them have a greater impact than they would on a mature adult. According to one scholar, "[b]ullying manifests a wide range of emotional harm, from low self-esteem, anxiety, and depression to social withdrawal"²⁸ These harms have been shown to remain beyond adolescence, where "some longitudinal studies show serious long-term effects into adulthood."²⁹ Additionally, the cyberbullying "phenomenon is not limited to children, though is more commonly referred to as cyber stalking or cyber harassment when perpetrated by adults towards adults."³⁰ This is a particularly troubling aspect of the danger that cyberbullying poses to both children and adults around the world. Where emails can be forwarded across the country and back in a matter of seconds and are accessible from any location with a computer and Internet access, the bullying no longer stops upon safe entry into a student's home,³¹ and is often unseen by parents of children who are suffering such a fate.³² Still, public awareness of cyberbullying and

Girl, THREAT LEVEL—WIRED BLOGS, Nov. 25, 2008, http://blog.wired.com/27bstroke6/lori_drew_trial/index.html.

²⁷ Lee v. Weisman, 505 U.S. 577, 593 (1992) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").

²⁸ Servance, *supra* note 15, at 1216.

²⁹ *Id.* at 1217.

³⁰ Report from the Assam Tribune through HT Syndication, *Cyber Bullying*, HINDUSTAN TIMES, Sept. 21, 2008, available at 2008 WLNR 25162862.

³¹ Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 773 (2008).

³² For example, in Sam Lesson's case, following his suicide family members reported that they were unaware any of the harassment he faced was taking place. It was not until after his death, when they checked his Bebo web page, that they learned he had been suffering from cyberbullying for months. *Social Networking Website Bebo Blamed for the Death of a 13-Year-Old Boy*,

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concern for its effect on children has exploded in recent years,³³ especially with the media attention received by cases such as that of Megan Meier.

It is this emotionally devastating harm on children at a very fragile age that led federal prosecutors in California to bring federal charges³⁴ against Lori Drew,³⁵ the adult woman who helped create a fraudulent profile on MySpace to impersonate a teenage boy. The fake profile was used to reach out and form a close relationship with Megan Meier. It was this same fake profile that ultimately conveyed the message which pushed Megan to commit suicide.³⁶ This suicide and subsequent federal prosecution has drawn mainstream attention to cyberbullying³⁷ and has brought

DIGITAL J., June 14, 2008, <http://www.digitaljournal.com/article/256115>.

³³ See Sameer Hinduja & Justin W. Patchin, *Personal Information of Adolescents on the Internet: A Quantitative Content Analysis of MySpace*, 31 J. ADOLESCENCE 126 (2008).

³⁴ Indictment at 1, United States v. Drew, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

³⁵ Lori Drew, who was forty-seven years old at the time of Megan's death, is the adult mother of Sarah Drew, Megan's classmate and on-again, off-again friend. The Drew family lived four houses down the street from Megan in the fall of 2006 when this incident occurred. At the time of her suicide, Megan's parents had transferred her to a Catholic school, resulting in Megan and Drew's daughter drifting apart. It was after this drift that the Drews heard Megan had been spreading rumors about Sarah Drew. The fake MySpace profile was set up to "gain Megan's confidence so that they could find out whether Megan was saying anything bad about Sarah." *Inside the Megan Meier Hoax: Teen Witness Gave Behind-the-Scenes Account of MySpace Suicide Case*, THESMOKINGGUN.COM, May 15, 2008, at 1, <http://www.thesmokinggun.com/archive/years/2008/0515082ashley1.html> (citing report of private investigator hired by Meier family to uncover the story behind "Josh Evans"); see Government's Opposition to Defendant's Motion to Dismiss the Indictment for Failing to State a Claim at 4-7, United States v. Drew, No. 2:08-CR-00582 (C.D. Cal. Aug. 12, 2008).

³⁶ See Guy Adams, *Woman Faces Jail After Guilty Verdicts in 'Cyber-Bully' Case; Housewife Pretended to Be Boy of 16 as She Sent Online Taunts to Depressed Teenager*, INDEPENDENT (London), Nov. 27, 2008, at 4.

³⁷ Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws be Created?*, 9 N.C.J.L. & TECH. 323, 327 (2008); see also WiredKids, Inc., STOP Cyberbullying, www.stopcyberbullying.org (last visited Apr. 24, 2009) (containing a link for the "Megan Pledge," a campaign

cyberbullying to the forefront of legal discussion surrounding the Internet.³⁸

Much of the current regulation dealing with cyberbullying has focused on student-against-student cyberbullying that may or may not be punished by school officials in the school forum.³⁹ The issue presented in *United States v. Drew*, however, was somewhat novel because it did not involve entirely peer-to-peer cyberbullying. As a result, even the up-to-date regulations that address cyberbullying were inapplicable to hold Drew liable for her actions in the Meier case. Drew's actions involved bullying by an adult, but not against another adult; rather, against a middle school student, who the adult knew had a long history of suffering from depression and attention deficit disorder.⁴⁰ Yet this is not the situation generally covered by minor online-predator type regulations, which target pedophiles and sexual harassers for their attacks on young victims.⁴¹ It is more serious in nature than adult-to-adult bullying because of the fragile state of the teenage psyche. Instead, this conduct falls somewhere in between much of the current regulation.⁴² It does not fit within the general scope of cyber

asking teens to pledge that they will not be involved in cyberbullying as a direct result of Megan Meier's death).

³⁸ See, e.g., Law Blog, <http://blogs.wjs.com/law> (last visited Apr. 24, 2009) (providing concurrent information on the trial of Lori Drew in a legal blog maintained by The Wall Street Journal); Above the Law—A Legal Tabloid, <http://abovethelaw.com> (last visited Apr. 24, 2009) (“News, Gossip, and Colorful Commentary on Law Firms and the Legal Profession.”); The Volokh Conspiracy, <http://volokh.com> (last visited Apr. 24, 2009) (providing extensive blogging by Drew's co-counsel and The George Washington University Law School Professor Orin Kerr); Threat Level—Wired Blogs, <http://blog.wired.com/27bstroke6/> (Apr. 24, 2009) (providing up to date commentary on the trial of Lori Drew in a law-related blog maintained by Wired.com).

³⁹ See, e.g., Erb, *supra* note 5, at 259.

⁴⁰ Collins, *supra* note 3.

⁴¹ BOCII, *supra* note 20, at 112.

⁴² Although the facts as presented by the witnesses in *United States v. Drew* were often in conflict, it has been generally accepted that Ms. Drew was, at the very minimum, acutely aware of the hoax being perpetrated against Megan. See, e.g., Kim Zetter, *Jurors Wanted to Convict Lori Drew of Felonies, but Lacked Evidence*, THREAT LEVEL—WIRED BLOGS, Dec. 1, 2008,

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stalking inquiries, as Ms. Drew's intent was not similar in kind to the intent of pedophiles.⁴³ Nor can this situation be purely referred to as mere peer-to-peer bullying. The involvement of an adult, not just in an anonymous context but in an intentional and fraudulent context, changes the atmosphere of the case. If the harassment of Megan Meier had been entirely the conduct and design of a slighted thirteen-year-old neighbor, it might still seem reprehensible, but not quite so heinous as it appears when a forty-seven-year-old mother was the primary instigator involved. It is this type of fraudulence that changes the contours of the case; this same fraudulence is the driving force behind the potential applicability of the CFAA to Ms. Drew's actions.

The story of Megan Meier has been widely reported, commented and written on.⁴⁴ The federal trial of her harasser has received even wider media attention.⁴⁵ The case involved the creation of a false profile on the popular "social-networking" site MySpace,⁴⁶ which is operated by Fox Interactive Media, Inc. based

<http://blog.wired.com/27bstroke6/2008/12/jurors-wanted-t.html> ("Kunasz said because the testimony of so many witnesses contradicted each other it was hard to determine who did what with the 'Josh Evans' account. She found the testimony of Ashley Grills and Sara Drew to be non-credible and said it as [sic] 'very obvious' that Sarah Drew was coached extensively . . ."). Some witnesses testified that Ms. Drew took pleasure in the hoax, while others testified that she either typed messages to Megan herself, or dictated messages for her co-conspirators to send to Megan. While the true facts of what happened during that month in the fall of 2006 may never be determined, no one has alleged that Drew was entirely unaware of the scheme. *See, e.g.*, Government's Trial Memorandum at 2-7, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Nov. 8, 2008) ("[A] few days after [Megan's] death, [Drew] told a friend that [] she was afraid that the death had something to do with the MySpace profile they created and that, as a result, she deleted the evidence from her computer and just wanted it all gone. She nonetheless acknowledged that she was trying to get information from [Megan].").

⁴³ *Cf.* BOCII, *supra* note 20, at 107-36 (focusing entirely on the cyber stalking habits of pedophiles and predators while omitting libelous content from inquiry in the chapter dealing with threats to young people).

⁴⁴ *See, e.g., supra* note 38.

⁴⁵ *See, e.g., Adams, supra* note 36, at 4; Breuer, *supra* note 9; Glover, *supra* note 12, at A1.

⁴⁶ <http://www.myspace.com> [hereinafter MySpace].

in Beverly Hills, California.⁴⁷ MySpace, much like Facebook,⁴⁸ LinkedIn,⁴⁹ and Friendster,⁵⁰ is a social networking site “that lets you meet your friends’ friends.”⁵¹ Following the launch of MySpace in 2003,⁵² and later Facebook on college campuses in 2004,⁵³ students’ ability to quickly and effortlessly communicate has exploded. The basic premise of social networking sites is to allow people the ability to quickly and immediately share their lives and keep up to date with friends and family.⁵⁴ In an increasingly global world, social networking has provided a ready medium for friends to stay in touch, even when they live across the world from each other. Unfortunately, it has also provided a ready medium for harmful activity.

Historical accounts of cyberbullying began to amass around 2004,⁵⁵ coinciding with the advent of social networking sites⁵⁶ and

⁴⁷ Indictment at 3, United States v. Drew, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

⁴⁸ <http://www.facebook.com> (last visited Apr. 24, 2009).

⁴⁹ <http://www.linkedin.com> (last visited Apr. 24, 2009).

⁵⁰ <http://www.friendster.com> (last visited Apr. 24, 2009).

⁵¹ MySpace, *About Us*, <http://www.myspace.com/index.cfm?fuseaction=misc.aboutus> (last visited Apr. 24, 2009).

⁵² Douglas, *supra* note 18.

⁵³ About Facebook, <http://www.facebook.com/facebook> (last visited Apr. 24, 2009).

⁵⁴ *See id.* (“Founded in February 2004, Facebook is a social utility that helps people communicate more efficiently with their friends, family and coworkers. The company develops technologies that facilitate the sharing of information through the social graph, the digital mapping of people’s real-world social connections. Anyone can sign up for Facebook and interact with the people they know in a trusted environment.”).

⁵⁵ *See* Sameer Hinuja & Justin W. Patchin, *Offline Consequences of Online Victimization: School Violence and Delinquency*, 6(3) J. SCHOOL VIOLENCE 89, 91 (2007) (citing 2004 study results that thirty percent of seventeen-year-old and younger students surveyed had been victims of cyberbullying, eleven percent had cyberbullied themselves, and forty seven percent had witnessed cyberbullying).

⁵⁶ A search of LexisNexis.com ‘all news’ database results in 716 hits for various formulations of the term “cyber bully” prior to 2006, more than 400 of which are since the beginning of 2005. The first instance of a form of the term cyber bully does not appear in that database until late 1995, with only twenty-

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have exploded since that time.⁵⁷ Writers in the blogosphere have called *United States v. Drew* a “landmark”⁵⁸ trial, with some even stating that this was the first cyberbullying trial in American history.⁵⁹

Megan Meier is not the only one to have suffered from a cyberbullying attack and she has not been the only person to have an overwhelming emotional reaction after suffering from cyberbullying.⁶⁰ Recent incidents of cyberbullying-related deaths have been increasing, as has the public’s attention to the issue.⁶¹

II. THE CASE OF MEGAN MEIER

The reports surrounding the case of Megan Meier make it sound as if the hoax started innocently enough.⁶² A mother, Lori Drew, created an online profile to determine whether Megan, a thirteen-year-old student, was spreading false rumors or malicious statements about her own daughter.⁶³ Though the two girls were longtime friends,⁶⁴ their relationship had soured following Megan’s transfer to a different school.⁶⁵ Lori Drew, in

one results prior to the beginning of 2000.

⁵⁷ Hinduja & Patchin, *supra* note 33, at 126.

⁵⁸ Zetter, *supra* note 11.

⁵⁹ Associated Press, *Dead Teen’s Mom Testifies in Internet Suicide Case*, CNN.COM, Nov. 20, 2008, <http://www.cnn.com/2008/CRIME/11/20/internet.hoax.ap/index.html> (“Prosecutors said it’s the nation’s first cyberbullying trial . . .”).

⁶⁰ For example, within weeks of Megan’s death, a thirteen-year-old boy in England committed suicide following cyberbullying on the social networking site Bebo. *Kerry’s Facebook Hell*, GLOUCESTER CITIZEN, June 30, 2008, at 4.

⁶¹ See Cyberbullying—National Crime Prevention Council, <http://www.ncpc.org/cyberbullying> (last visited Feb. 21, 2009) (providing information regarding the National Crime Prevention Council’s recent campaign of public service announcements working to prevent and combat cyberbullying).

⁶² Government’s Trial Memorandum at 4, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Nov. 8, 2008).

⁶³ Collins, *supra* note 3.

⁶⁴ *Id.*

⁶⁵ See Maag, *supra* note 8 (“At one time, Lori Drew’s daughter and Megan had been ‘joined at the hip,’ . . . and when Megan changed schools she told the

collaboration with her then-thirteen-year-old daughter and a then-eighteen-year-old employee, created the fictitious profile of an attractive sixteen-year-old boy who they named “Josh Evans.”⁶⁶ According to some news reports, however, there is a darker twist to that innocent beginning, including that the profile was “carefully chosen to exploit Megan’s vulnerabilities”⁶⁷ and displayed characteristics that appeared specifically tailored to attract Megan’s interest.⁶⁸ Using this profile, Drew, her daughter, and the employee proceeded to contact Megan,⁶⁹ fostering a relationship between the fictitious “Josh” and Megan that lasted more than a month.⁷⁰

On a Monday afternoon, while her mother was out taking a sibling to a doctor’s appointment,⁷¹ everything about the relationship changed.⁷² After weeks of chatting, flirting, and generally becoming close, “Josh suddenly turned mean He called Megan names, and later they traded insults for an hour.”⁷³ Following a message from “Josh” that he, in essence, did not like the way she treated her friends,⁷⁴ a number of students who were

other girl that she no longer wanted to be friends”).

⁶⁶ Zetter, *supra* note 11 (“The indictment charged that in September 2006 Drew conspired to create the Josh Evans account with her then 13-year-old daughter, Sarah, and a then-18-year-old employee and family friend named Ashley Grills, for the purpose of inflicting psychological harm on Meier.”).

⁶⁷ Collins, *supra* note 3.

⁶⁸ *See id.*

⁶⁹ Indictment at 7–8, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

⁷⁰ Ruedy, *supra* note 37, at 324.

⁷¹ Megan Taylor Meier—The Story, <http://www.meganmeierfoundation.org/story/> (last visited Dec. 1, 2008) (citing Steve Pokin’s article in the *St. Charles Journal* on November 13, 2007).

⁷² Tamara Jones, *A Deadly Web of Deceit; A Teen’s Online ‘Friend’ Proved False, And Cyber-Vigilantes Are Avenging Her*, *WASH. POST*, Jan. 10, 2008, at C01 (“But in the course of two hours on a rainy Monday afternoon, Megan Meier suddenly became a target once more, hounded and publicly humiliated by a teenage mob on the Web, set upon in a virtual Lord of the Cyberflies.”).

⁷³ Maag, *supra* note 8 (reporting on Tina Meier’s recollection of the events leading up to Megan’s death).

⁷⁴ Jones, *supra* note 72.

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all linked to “Josh’s” MySpace webpage sent Megan “profanity-laden messages.”⁷⁵ Later, a fight broke out between Megan, “Josh” and another girl online.⁷⁶ During the fight, “Josh” told Megan, “in substance, that the world would be a better place without [Megan] in it.”⁷⁷ Megan replied that “Josh Evans” was “the kind of boy a girl would kill herself over.”⁷⁸ Megan ran sobbing to her bedroom, and within an hour of the fight her mother found her hanging from a belt tied to her closet.⁷⁹ She died in the hospital the next day.⁸⁰

It took nearly a year for Drew’s involvement in the case to come to light.⁸¹ In the initial aftermath of Megan’s death, Drew told a child in her neighborhood who may have had access to the “Josh” account to “keep her mouth shut . . . stay off the MySpace [and] avoid accessing the Josh Evans account.”⁸² It was not until six weeks after Megan’s death, during a meeting with grief counselors and another neighbor, that the Meiers learned “Josh Evans” was a hoax.⁸³ At the request of FBI agents investigating the case, the Meiers did not publicly discuss Drew’s involvement in their daughter’s death for a year after it initially happened.⁸⁴

It was not until a story was published in a local newspaper that reports of the incident began to surface in the national news media.⁸⁵ Although the local paper’s initial story about Megan’s death and the MySpace hoax did not name Drew, her name and address were published by Internet bloggers outraged by the

⁷⁵ Maag, *supra* note 8.

⁷⁶ Collins, *supra* note 3.

⁷⁷ Indictment at 8, United States v. Drew, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

⁷⁸ Dan Slater, *MySpace: “You’re the Kind of Boy a Girl Would Kill Herself Over”*, LAW BLOG—WSJ.COM, Nov. 21, 2008, <http://blogs.wsj.com/law/2008/11/21/myspace-youre-the-kind-of-boy-a-girl-would-kill-herself-over/>.

⁷⁹ Maag, *supra* note 8.

⁸⁰ Ruedy, *supra* note 37, at 324; Jones, *supra* note 72.

⁸¹ Maag, *supra* note 8.

⁸² Government’s Opposition to Defendant’s Motion to Dismiss the Indictment for Improperly Delegating Authority at 6, United States v. Drew, No. 2:08-CR-00582 (C.D. Cal. Aug. 12, 2008).

⁸³ Maag, *supra* note 8.

⁸⁴ *Id.*

⁸⁵ See Jones, *supra* note 72.

events.⁸⁶ The story was subsequently picked up by the national news media.⁸⁷

III. PUNISHING CYBERBULLYING: BULLYING REGULATIONS AND THE CFAA

As one writer noted, “it is more difficult to prosecute bullies under anti-harassment or anti-stalking statutes due to the mens rea requirement in criminal proceedings . . . [and] [t]hus, criminal statutes do not offer victims of cyberbullying a viable option to seek redress against their harassers.”⁸⁸

Although state prosecutors determined there was no crime with which they would be able to charge Drew,⁸⁹ federal prosecutors later stepped in and brought criminal charges against her.⁹⁰ United States Attorney Patrick O’Brien stated that Lori Drew “chose to use a computer illegally in order to hurt a little girl” and that she “clearly knew it was mean” to be involved in these acts.⁹¹ The prosecution’s involvement in the case comes from an understandably emotional vantage point:

[i]f Drew was “so upset that Megan Meier had called her daughter . . . a lesbian,” he said, she could have simply gone to Meier’s mother to complain about it, and “we wouldn’t be here” now. Similarly, if she’d “let 13-year-old girls work out” their problems on their own, Meier might

⁸⁶ *Id.*

⁸⁷ Not without irony, the media attention has led Drew to be the subject of cyber harassment herself. *Id.*

⁸⁸ Erb, *supra* note 5, at 276.

⁸⁹ Maag, *supra* note 8 (“But a St. Charles County Sheriff’s Department spokesman, Lt. Craig McGuire, said that what Ms. Drew did ‘might’ve been rude, it might’ve been immature, but it wasn’t illegal.’”). As noted in a recent Arizona State Law Journal article, “material on web sites may be considered offensive and abhorrent, but will rarely rise to the level of criminal or civil liability.” Erb, *supra* note 5, at 260.

⁹⁰ *See* United States v. Drew, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

⁹¹ Zetter, *supra* note 26.

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not be dead.⁹²

This emotional reaction may have led prosecutors to seek out a novel approach to holding Drew responsible for her actions.

Prosecutors ultimately charged Drew with violating the CFAA.⁹³ Passed in 1984, the CFAA prohibits various types of hacking of government and other protected computers.⁹⁴ In the past, this law has been reserved for prosecution of cyberhacking crimes,⁹⁵ and is described by the American Bar Association's Data Security Handbook⁹⁶ as falling into the category of "laws governing unauthorized access and intrusions into computers and networks (hacking attacks)"⁹⁷ In Lori Drew's case, federal attorneys used the CFAA to prosecute her for accessing MySpace through fraudulent means,⁹⁸ and using such access to engage in tortious conduct.⁹⁹ The MySpace terms of service require that registrants provide information that is "truthful and accurate."¹⁰⁰ The tortious conduct at issue in this case was intentional infliction

⁹² *Id.*

⁹³ 18 U.S.C. § 1030 (2008).

⁹⁴ *See generally* CHARLES DOYLE, COMPUTER FRAUD AND ABUSE LAWS: AN OVERVIEW OF FEDERAL CRIMINAL LAWS 40 (2002).

⁹⁵ *See, e.g.*, United States v. Sablan, 92 F.3d 865, 867–69 (9th Cir. 1996); Shurgard Storage Ctrs. v. Safeguard Self Storage, 119 F. Supp. 2d 1121, 1123 n.2 (W.D. Wash. 2000) (citing United States v. Czubinski, 106 F.3d 1069, 1078–79 (1st Cir. 1997)); YourNetDating v. Mitchell, 88 F. Supp. 2d 870, 872 (N.D. Ill. 2000); Edge v. Prof'l Claims Bureau, 64 F. Supp. 2d 115, 119 (E.D.N.Y. 1999); Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 926, 932–37 (E.D. Tex. 1999); Am. Online v. LCGM, 46 F. Supp. 2d 444, 450–51 (E.D. Va. 1998).

⁹⁶ ABA SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, ABA SECTION OF ANTITRUST LAW: DATA SECURITY HANDBOOK 123 (2008). This handbook, developed by The American Bar Association's Antitrust Law section, provides a fifty state survey of computer and privacy related state law for use by businesses needing to comply with data security regulations. *See id.*

⁹⁷ *Id.*

⁹⁸ Among other reasons, Drew violated the terms of service by failing to provide accurate information during the registration process. MySpace.com Terms of Use Agreement, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Apr. 24, 2009) [hereinafter MySpace.com TOU].

⁹⁹ *See* Collins, *supra* note 3.

¹⁰⁰ MySpace.com TOU, *supra* note 98.

of emotional distress, whereby Drew engaged in a series of acts designed to embarrass or humiliate Megan Meier.¹⁰¹ They also charged her with engaging in a conspiracy to violate the CFAA. Each of the three charges for violating the CFAA “allege[] that the access was for the purpose of intentionally inflicting emotional distress on [Megan]”¹⁰² As the government’s proposed jury instructions reveal, its theory of the case required as one of the elements of a CFAA violation that Drew’s access was for the purpose of furthering the intentional infliction of emotional distress.

In enacting the CFAA,¹⁰³ legislators were working to enact an omnibus criminal statute that would address issues of computer crimes without requiring the law to be amended every time a new technology is introduced into the market.¹⁰⁴ The existing statute was designed to be broad and adaptable to changes in technology without the need for constant and time burdened alterations of the criminal code.¹⁰⁵ Therefore, it should be entirely appropriate to apply the statute in situations that could not have been articulated when it was enacted.

Additionally, an indictment of this kind did not attempt to criminalize the mere violation of a website’s terms of service. Rather, Drew was charged with violating the MySpace terms of

¹⁰¹ Indictment at 5–6, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

¹⁰² Press Release, United States Attorney’s Office for the Central District of California, Missouri Woman Indicted on Charges of Using MySpace to ‘Cyber-Bully’ 13-Year-Old Who Later Committed Suicide (May 15, 2008), *available at* www.usdoj.gov/usao/cac/pressroom/pr2008/063.html.

¹⁰³ 18 U.S.C. § 1030 (2008).

¹⁰⁴ S. REP. NO. 104-357 (1996) (“As intended when the law was originally enacted, the Computer Fraud and Abuse statute facilitates addressing in a single statute the problem of computer crime, rather than identifying and amending every potentially applicable statute affected by advances in computer technology.”).

¹⁰⁵ *Id.* (“As computers continue to proliferate in businesses and homes, and new forms of computer crimes emerge, Congress must remain vigilant to ensure that the Computer Fraud and Abuse statute is up-to-date and provides law enforcement with the necessary legal framework to fight computer crime.”).

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service,¹⁰⁶ which caused her access to be unauthorized, and then using that unauthorized access to obtain information that she then used to engage in intentional tortious conduct.¹⁰⁷ Without each step in that process, it would not be possible to prosecute her under the felony provisions of this statute.¹⁰⁸ Unless someone has engaged in the kind of activity that would be punishable under other areas of the law, there cannot be a felony prosecution under this statute.

The provisions of the CFAA under which Drew was charged¹⁰⁹ criminalize “intentionally accessing” a “protected computer” for the purpose of obtaining information, and using that information in furtherance of any tortious act.¹¹⁰ The term “protected computer” was broadly defined to encompass any computer used in interstate commerce that could properly be regulated under Congress’ commerce clause power.¹¹¹

¹⁰⁶ MySpace.com TOU, *supra* note 98.

¹⁰⁷ Indictment at 9, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

¹⁰⁸ *See infra* note 110.

¹⁰⁹ Indictment at 1, *Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

¹¹⁰ Lori Drew has been charged under two sections of the CFAA. The first provision, 18 U.S.C. § 1030(a)(2)(C), provides in relevant part as follows:

(a) Whoever—

(2) Intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(C) Information from any protected computer if the conduct involved an interstate or foreign communication[.]

18 U.S.C. § 1030(a)(2)(C).

The second provision, 18 U.S.C. § 1030(c)(2)(B)(ii), provides in relevant part as follows:

(c) The punishment for an offense under subsection (a) or (b) of this section is—

(2)(B) A fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph if—

(ii) The offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State[.]

18 U.S.C. § 1030(c)(2)(B)(ii).

¹¹¹ “The term protected computer means a computer which is used in

Federal jurisdiction in California was premised on the fact that MySpace servers are located in California.¹¹² As interpreted by the criminal indictment returned in the Drew case, “[a] server is a centralized computer that provides services for other computers connected to it via a network” which can be “configured so that its sole task is to support a World Wide Web site” and is then “known simply as a web server.”¹¹³ Each communication would have gone through the MySpace servers and therefore would have been transmitted across interstate borders. As a result, in the context of this case, the web server fits within the definition of a protected computer.¹¹⁴ Because Drew was located in Missouri when accessing the website housed on the server located in California, the communication qualified as within interstate commerce.¹¹⁵ As noted by the American Bar Association Data Security Handbook, “[t]his broad definition of ‘protected computer’ means that virtually any computer crime comprising the two main elements of the CFAA (unauthorized access or access in excess of authorization, and damage or loss) will constitute a violation of the statute, and may be alleged in a complaint with applicable facts.”¹¹⁶ The language of the statute was drafted with a broad purpose in mind in order to encompass a range of conduct. The breadth of conduct is to be determined as technology advances, but the language demonstrates a motivation to consider all computers within the reach of Congress to be of a protected nature.

The major issues facing the prosecution of Lori Drew were whether the CFAA *can* and *should* be applied in the case of

interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.” 18 U.S.C. § 1030(e)(2)(B).

¹¹² Indictment at 9, *Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

¹¹³ *Id.* at 2–3.

¹¹⁴ DOYLE, *supra* note 94, at 21.

¹¹⁵ See Indictment at 3, 4, 6, *Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

¹¹⁶ ABA SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, *supra* note 96, at 124.

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extreme cyberbullying.¹¹⁷ As one practitioner's manual notes, "[t]he CFAA targets outside hackers and malicious insiders who attempt to gain unauthorized access to or exceed the scope of their authorized access to 'protected computers.'"¹¹⁸ This description does not on its face imply the application of such a statute to a situation like the one presented here. However, as Charles Doyle noted in reviewing the CFAA, section 1030(a)(2) "covers more than governmental computers . . . [it] covers three types of information—information of the federal government, consumer credit or other kinds of financial information, and information acquired through interstate or foreign access."¹¹⁹ Doyle also noted that the provisions "clearly contemplate some criminal, tortious, or financially advantageous purpose beyond the computer-trespassing-and-obtaining-information misconduct outlawed in the paragraph generally."¹²⁰ The government's theory of the case as initially presented in the indictment required a connection between the trespass-like provisions and the tortious conduct.

The intention requirement is clear in that "[t]he offender must have 'intentionally' gained access."¹²¹ Drew's actions were intentional in this case, given that she assisted in the creation of a fraudulent profile that went beyond mere "innocent" changes or omissions to protect personal privacy, rising to the level of intentional fraud.

At first blush, the issue of cyberbullying would seem to be a First Amendment issue. After all, it involves the expression of words and thoughts through an historically unregulated medium. This view, however, is misguided. The First Amendment at its core

¹¹⁷ See Defendants Motion to Dismiss Indictment for Failure to State an Offense, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. July 23, 2008); Defendant's Motion to Dismiss Indictment for Vagueness, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. July 23, 2008); Defendant's Motion to Dismiss Indictment for Unconstitutional Delegation of Prosecutorial Power, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. July 23, 2008).

¹¹⁸ ABA SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, *supra* note 96, at 124.

¹¹⁹ DOYLE, *supra* note 94, at 16.

¹²⁰ *Id.* at 19.

¹²¹ *Id.* at 118.

protects fundamentally political expression that is a cherished part of American democracy.¹²² Cyberbullying, on the other hand, is not the expression of personal or philosophical ideology. Rather, it involves attacks on the character and person of another. These attacks are not the type of speech the Supreme Court has found to enjoy First Amendment protection.¹²³ As a result, cyberbullying should be regulated in the same way that in-person communications are regulated under harassment and school bullying statutes. As one scholar states, “[m]any times in cyberbullying cases, lawyers and judges get caught up in constitutional legalese and forget that they are dealing with the narrow issue of hateful and harassing speech”¹²⁴ This classification of the conduct as falling into the unprotected area of harmful speech puts a greater point on the charges. Drew is not being prosecuted for protected First Amendment speech; rather, she is being prosecuted for engaging in speech that the Supreme Court has routinely rejected for protection due to its complete lack of First Amendment speech value.¹²⁵

Drew claimed a number of pre-trial defenses. Along with arguing that the elements of the crime had not been pled with sufficient evidentiary particularity, she argued that the application of the statute was unconstitutionally vague and lacked required notice under principles of due process.¹²⁶

In defense, Drew set forth several arguments. First, she argued that the statute was unconstitutionally vague because the terms “access” and “authorization” were not defined.¹²⁷ As a result, she

¹²² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position . . .”).

¹²³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹²⁴ Erb, *supra* note 5, at 283.

¹²⁵ *See, e.g., Chaplinsky*, 315 U.S. at 571–72 (rejecting protection for speech at issue because it fell within the “fighting words” exception).

¹²⁶ Defendants Motion to Dismiss Indictment for Vagueness at 9, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. July 23, 2008) (“The application of § 1030 does not give the required ‘fair warning.’ The terms in the statute are vague, and a reasonable person could never know whether their conduct violates the statute.”).

¹²⁷ *See id.*

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maintained that this application of CFAA section 1030 “does not give the required ‘fair warning.’ [A] reasonable person could never know whether their conduct violates the statute.”¹²⁸ This argument implies that the statute is vague because it is unclear what limitations, if any, are placed on the website’s “Terms of Service” in order to limit the potential liability of a would-be term violator.¹²⁹ Drew in defense also asserted that this was an impermissible use of the CFAA because it had never been used previously to prosecute cyberbullying.¹³⁰ Last, Drew contended that there was a lack of due process hinging on the fact that “few if any people read [the terms of service] in the first place.”¹³¹

A facial challenge to the statute in this instance is improper because the necessary terms “access” and “authorized” are “not so imprecise that people of common intelligence must guess at their meaning. Both can—and have been—applied in a common sense fashion such that the statute itself places individuals on notice of prohibited conduct and is sufficiently definite to protect against arbitrary enforcement.”¹³²

When the CFAA was enacted, cyberbullying was an unknown phenomenon.¹³³ The legislature was attempting “to create an

¹²⁸ *Id.*

¹²⁹ *Id.* at 11 (questioning whether “all TOS violations [are] enough to render the accessing unauthorized,” and whether “the terms of the TOS [have to] be reasonable”).

¹³⁰ *Id.* at 12 (“The government, in its zeal to charge Lori Drew with *something, anything*, has tried to criminalize everyday, ordinary conduct: wayward or misuse of a social network website. After this statute has been on the books 22 years, the government has chosen to indict only Lori Drew for this type of alleged conduct, proving that this is arbitrary enforcement of §1030.”) (emphasis in the original); *see also id.* at 17 (“[D]efendant claims that the fact that section 1030 has not been previously used to address cyberbullying prov[es] that this is arbitrary enforcement.”) (internal quotation marks omitted).

¹³¹ *Id.* at 12.

¹³² Government’s Opposition to Defendant’s Motion to Dismiss the Indictment for Vagueness at 2, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Aug. 12, 2008).

¹³³ *Id.* at 21 (“[D]efendant ignores that the unusual nature of the charge is a product of the unique nature of the crime. Cyberbullying itself is a recent phenomenon.”).

omnibus criminal statute to address cyber-related crimes”¹³⁴ without having to amend the law to combat “every potentially applicable statute affected by advances in computer technology.”¹³⁵ Drew’s reliance on an historical argument in relation to this statute was therefore misguided. Indeed, cyberbullying is a recent phenomenon that would not have otherwise been frequently prosecuted under this statute.¹³⁶ Additionally, the acts undertaken by Lori Drew are unique in their circumstances.¹³⁷ As a result, it is unsurprising that this was the first CFAA application to the circumstance of cyberbullying. Drew’s reliance on this lack of prosecution as a signal of the propriety of the current charges misses the point, and fails to take into account the recent history of the Internet, social networking, and cyberbullying in general.

Drew’s argument that the statute fails under a due process challenge ignores a basic principle in American legal society: While it may be the case that few people read the terms of any contract to which they are subjecting themselves, as the old maxim goes, *ignorantia juris non excusat*—ignorance of the law excuses no one.¹³⁸ In other words, ignorance of the law has never been considered to be an excuse for a federal crime. As one juror noted in the days following the verdict in the Drew case, “[t]he thing that really bothered me was that [Drew’s] attorney kept claiming that nobody reads the terms of service . . . I always read the terms of service. If you choose to be lazy and not go through that entire agreement or contract of agreement then absolutely you should be held liable.”¹³⁹

¹³⁴ *Id.* at 20.

¹³⁵ *Id.* at 21.

¹³⁶ *Id.*; see also Hinduja & Patchin, *supra* note 33, at 126.

¹³⁷ See Zetter, *supra* note 11.

¹³⁸ *Ignorantia juris non excusat*, translated literally, means ignorance of the law excuses no one. BLACK’S LAW DICTIONARY 337 (3d Pocket ed. 2006).

¹³⁹ Zetter, *supra* note 42.

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IV. DESPITE THE MIXED RESULTS IN *UNITED STATES V. DREW*, THE CFAA REMAINS AN IMPORTANT TOOL TO PUNISH EGREGIOUS CASES OF CYBERBULLYING

Critics of the jury verdict in *United States v. Drew* rightly point out that the verdict—convicting Drew on multiple misdemeanor counts—raises serious concerns. According to the judge’s reading of the misdemeanor provisions, anyone who violates a website’s terms of service is potentially criminally liable. This reading of the CFAA is too broad, and raises the specter of litigation for too many people because the misdemeanor provisions of the CFAA do not require intent in order for a perpetrator to be found guilty of Internet fraud. The CFAA’s felony provision, however, sufficiently limits liability only to rare cases such as Lori Drew’s calculated and premeditated manipulation of Megan Meier. The felony provision requires the prosecution to prove the accused’s intent to commit tortious conduct. The provision undoubtedly applied in the Drew case, where it was clear that the Internet fraud took place to attack the emotional well-being of an impressionable young girl. In such cases, the CFAA’s felony provision should apply to send the strong message that our society refuses to condone such abhorrent behavior.

In the indictment, prosecutors charged Lori Drew with three counts of violating the CFAA that “were charged as felonies, based on allegations that the ‘unauthorized access’ was for the purpose of causing emotional harm to Megan.”¹⁴⁰ The judge, however, gave jurors the additional option of finding Lori Drew guilty of “misdemeanors if they found no such intent, determining instead that Drew was only trying to obtain information about the girl.”¹⁴¹ Based on the instructions as provided by the judge, the verdict returned by the jury seems to suggest that it did not believe Drew was responsible for intentional infliction of emotional distress, but rather it held her responsible only for accessing a protected

¹⁴⁰ Zetter, *supra* note 11.

¹⁴¹ *Id.*; see also Jury Instructions, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Nov. 26, 2008).

computer without authorization.¹⁴² The government's proposed instructions did not charge the crime as such. Each of the three CFAA counts were alleged to have occurred with specific intent, and thus Drew's actions clearly fell within the tortious conduct proscribed by the statute.¹⁴³ If this verdict is to stand without requiring a finding of the intentional infliction of emotional distress to find a violation of the CFAA, the widely expressed fears that the statute creates overbroad criminal liability may be substantiated. As has been noted by at least one legal scholar in this area, if the statute were to criminalize the mere violation of a website's terms of service, it could potentially lead to widespread liability.¹⁴⁴

While the jury rejected the felony charges against Drew,¹⁴⁵ it returned convictions on three lesser counts included in the CFAA.¹⁴⁶ The misdemeanor charges, although not explicit in the

¹⁴² Jury Instructions, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Nov. 26, 2008); Zetter, *supra* note 11 ("The misdemeanor conviction implies that the jury believed Drew gained unauthorized computer access to MySpace's computer system, but did not do so to intentionally inflict emotional distress on Megan.").

¹⁴³ The proposed instructions regarding the CFAA violation stated as follows:

In order for the defendant to be found guilty of [the CFAA charges], the government must prove each of the following elements beyond a reasonable doubt: First, the defendant intentionally accessed a computer without authorization or in excess of authorization[;] Second, the defendant's access of that computer involved an interstate or foreign communication; Third, by accessing the computer without authorization or in excess of authorization, the defendant obtained information from a protected computer; and Fourth, the accessing of the computer without authorization or in excess of authorization was in furtherance of a tortious act in violation of the laws of any State.

Government's Supplemental Proposed Jury Instructions at 5, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Nov. 10, 2008).

¹⁴⁴ See Orin Kerr, *What Does the Lori Drew Verdict Mean?*, VOLOKH CONSPIRACY, Nov. 26, 2008, <http://volokh.com/posts/1227728513.shtml>.

¹⁴⁵ Zetter, *supra* note 11 ("The jury unanimously rejected the three felony computer hacking charges that alleged the unauthorized access was part of a scheme to intentionally inflict emotional distress on Megan.").

¹⁴⁶ *Id.*

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indictment, provide that a person may be in violation of the CFAA if that person gains unauthorized access to a protected computer without authorization with the intent to obtain information.¹⁴⁷

In finding Drew guilty of the misdemeanor charges but acquitting her of the federal felony, the jurors' determination implies that she was guilty of violating the MySpace terms of service yet was not guilty of using the information obtained through that access to engage in tortious conduct.¹⁴⁸ Orin Kerr, co-counsel for Drew, convincingly asserts that one reading of this result is that "it is a federal crime to intentionally violate the Terms of Service on a website, and that it becomes a more serious crime—a felony rather than a misdemeanor—if the Terms of Service are violated to further a criminal or tortious act."¹⁴⁹

This lesser included charge that was presented as an option to the jury is rightfully causing concern in the legal community.¹⁵⁰ Applying the misdemeanor provisions of the CFAA to actions similar to those of Lori Drew implicate such a broad scope for liability that it is hard to believe this is what Congress originally intended.¹⁵¹ For this reason, criticisms that the jury instructions directing the jury to find Lori Drew guilty of misdemeanors without intent to cause the tortious harm are quite compelling. That anyone could be criminally liable for violating terms of service is a disturbing precedent.

That said, the felony provision requiring intentional infliction of emotional distress remains appropriate to punish extreme cyberbullying. By requiring intentional infliction of emotional distress, the statute is in essence requiring a much higher standard of culpability, virtually insuring that the provisions will only apply

¹⁴⁷ See *id.* ("[J]urors found Drew guilty only of three counts of gaining unauthorized access to MySpace for the purpose of obtaining information on Megan Meier . . .").

¹⁴⁸ See *id.* ("The misdemeanor conviction implies that the jury believed Drew gained unauthorized computer access to MySpace's computer system, but did not do so to intentionally inflict emotional distress on Megan.").

¹⁴⁹ Kerr, *supra* note 139.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

to cases of extraordinary and shocking behavior.¹⁵² This is the kind of behavior cyberbullying can—and did—involve in Megan’s case. If a perpetrator’s culpability does not rise to that level, the CFAA may not be applicable; however, when the behavior rises to such a level, a perpetrator should be prosecuted under the CFAA felony provisions.

The indictment in the Drew case alleged violations of the statute on the felony level, with Lori Drew’s use of MySpace to inflict emotional distress on Megan Meier being an essential element of the crime. As the government alleged in the indictment, Lori Drew and her accomplices

knowingly conspired and agreed with each other intentionally to access a computer used in interstate and foreign commerce without authorization and in excess of authorized access and, by means of an interstate communication, obtain information from that computer to further a tortious act, namely, intentional infliction of emotional distress, in violation of 18 U.S.C. §§ 1030(a)(2)(C), (c)(2)(B)(2).¹⁵³

The tortious conduct by an adult at issue in this case is an important and noteworthy element that is instrumental in limiting the scope of liability under this statute. It cannot be denied that, without more, mere violation of a term of service in an Internet click-to-agree contract should not be criminalized. However, the same cannot be said of using a computer to fraudulently engage in tortious conduct. The crime charged was never alleged without the intentional infliction of emotional distress as a necessary element, and a conviction should not have been returned without such a finding.

Cyberbullying poses a greater threat than bullying alone because of its reach into the lives of adolescents. Thus, it makes sense that the use of a computer in conjunction with the tortious

¹⁵² As the prosecution noted in its proposed jury instructions, the element of intentional infliction of emotional distress is defined as requiring that “the defendant’s intended conduct [was] extreme or outrageous.” Government’s Proposed Jury Instructions at 52, *United States v. Drew*, No. 2:08-CR-00582 (C.D. Cal. Nov. 10, 2008).

¹⁵³ Indictment at 5–6, *Drew*, No. 2:08-CR-00582 (C.D. Cal. May 15, 2008).

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conduct should be penalized to a greater extent than might be appropriate for the tortious conduct alone, or even for the unauthorized access alone.¹⁵⁴ When combined, these two elements open a door for conduct that has the potential to cause devastating harm, the greatest example of which is Megan's case.

Overall, the precise contours of this initial application of the CFAA to cyberbullying may have resulted in a confused jury and a mixed result,¹⁵⁵ yet it remains that the CFAA is an important and accessible medium to punish especially egregious cases of cyberbullying. In this case, the application of the felony provision of the CFAA to Lori Drew was appropriate for the actions she was alleged to have committed. As news reports both before and after the trial indicated, the situation involved here was not only egregious, but also relatively rare.¹⁵⁶ The rarity of the situation demonstrates that this charge is unlikely to result in crushing liability because there are few instances of people engaging in equally egregious conduct. However, given the severity of the harm that this conduct is more than likely to cause, it is appropriate that an actor such as Drew is prosecuted to the full extent of the law.

¹⁵⁴ See, e.g., Hinuja & Patchin, *supra* note 32, at 92 ("That is, youth who reported being bullied or bullying others in real life in the previous six months were each 2.5 times more likely to be bullied or to bully others, respectively, on the Internet.").

¹⁵⁵ News reports in the aftermath of the verdict suggested that the factual determination regarding the intentional infliction of emotional distress may not have been what the jurors intended. Steven Pokin, a reporter from Megan's hometown, questioned a juror as he was leaving the courtroom. "I ask[ed] if he and his fellow jurors concluded that Drew never intended to harass Megan. 'I am not sure about that' he says." Steven Pokin, *Pokin Around: No Victors and No Joy In the City of Angels*, SUBURBAN J., Nov. 29, 2008, available at <http://suburbanjournals.stltoday.com/articles/2008/11/30/stcharles/news/1130stc-pokin0.prt>.

¹⁵⁶ Associated Press, *supra* note 58 ("Prosecutors said it's the nation's first cyberbullying trial . . ."); Dan Slater, *Lori Drew Pleads Not Guilty in MySpace Suicide Case*, LAW BLOG—WSJ.COM, June 17, 2008, <http://blogs.wsj.com/law/2008/06/17/lori-drew-pleads-not-guilty-in-myspace-suicide-case/>.

Although there are a number of facts, even after the trial, that remain in dispute,¹⁵⁷ the conduct at issue involved intentional and overt acts whose purpose was to torment a child known to already be suffering from mental difficulties. From a public policy perspective, it is important to send a message that conduct like this is not acceptable in a civilized society. Just as school-yard bullies are not tolerated in school yards when their words cross the line from expression to harmful and threatening speech, cyberbullies should not be tolerated when their Internet actions cross the equivalent line. The actions of Lori Drew and her co-conspirators crossed that line. The MySpace hoax perpetrated against Megan Meier that ultimately led to her tragic and premature death derogates the civilized society in which we live and must not be tolerated.

CONCLUSION

The rate of cyberbullying is increasing, and the conduct is unlikely to end at any time in the near future. There are devastating effects on children, as the examples in this Note display. It is therefore increasingly important that the conduct is addressed, the real and substantial harms are acknowledged, and a remedy is fashioned. Whether that remedy should be through criminal prosecution under the CFAA or another statute passed independently by the legislature is a debate that will continue. Either way, the problem of cyberbullying must be addressed.

Children will undoubtedly never stop being faced with bullies, but in the case of cyberbullying the danger is much greater. Children do not have a safe haven to escape the attacks. It was once the case that bullies could be escaped when the child reached the safe confines of home. However, the Internet knows no bounds. Parents telling their children to just simply not go online, or ignore the teasing, will never be a sufficient protection because children today have grown up with the Internet as an integral part

¹⁵⁷ See Jones, *supra* note 72 (“Accounts of the hoax by the Drews and Ashley Grills would later change so often and so drastically that the county prosecutor eventually issued a two-page list of facts and disputed facts, and conceded to reporters that getting the real truth was impossible by now.”).

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of their lives. The Internet is increasingly part of not just children socializing with one another and learning important life skills that will aid them in growing into adults, it is also an important tool in the classroom. Universities and law schools are utilizing tools like “Twen”¹⁵⁸ and “Blackboard”¹⁵⁹ to facilitate the learning process. If it is not already the case, it will not be long before high school, middle school and even elementary school students will do much of their at-home learning on the Internet. Telling children to ignore the Internet banter of their classmates will be entirely ineffective when they are required to be connected online for purposes of education.

In what is hopefully a small fraction of cases, where the facts are similar to those of Megan Meier’s, the CFAA provides an important and proper remedy for these kinds of special, extreme, and tragic harms. While some may argue that the CFAA sets a dangerous precedent to free speech rights of all citizens, they are missing the point. The words conveyed by Lori Drew and others were not of the valued, cherished kind of expression that is a fundamental part of our democracy. Rather, they were hurtful, malicious, ad hominem attacks against a young and emotionally fragile child. Restricting these types of activities does not impinge upon the rights of anyone to speak in a free society. Instead, it protects the weak and fragile members of our society who may not be able to protect themselves.

¹⁵⁸ Lawschool.westlaw.com—The most comprehensive Web site for law school students and faculty, <http://lawschool.westlaw.com/twen> (last visited Mar. 14, 2008). This website, maintained by West Group, provides a tool for professors to share documents, syllabi, and comments with their classes. It is also a ready forum for student discussion that may or may not be monitored by the professor.

¹⁵⁹ The LexisNexis Law School Home Page, <http://www.lexis.com/lawschool> (last visited Mar. 14, 2009). This is the LexisNexis equivalent of Westlaw’s “Twen,” discussed *supra* note 158.