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Adding Injury to Insult: Injurious Speech on the Internet and Its Implications for the First Amendment

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Adding Injury to Insult: Injurious Speech on the Internet and Its Implications for the First Amendment

by
SHELLY ROSENFELD*

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I. Introduction

The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

–*Weirum v. RKO General, Inc.*¹

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.

–U.S. CONST. amend. I.

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1. *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 40 (Cal. 1975).

Megan Meier, a thirteen-year-old, committed suicide after receiving online MySpace messages from a fictitious boy. Her former friend's parent, Lori Drew, and Drew's employee created a false MySpace account. They pretended to be a boy in order to elicit statements from Meier that might reveal how Meier felt about Drew's daughter.² In this pursuit of gossip, the character began to take on a more human shape in Megan's mind. Meier developed feelings for this fictitious boy. In an attempt to get Meier to stop liking "him," "he" made very cruel statements to Meier, such as "[t]he world would be a better place without you."³ Meier had a history of depression and the hurtful statements from the "boy" led Meier to take her own life. Meier's mom provided a very effective description of cyberbullying: "I know that they did not physically come up to our house and tie a belt around her neck . . . But when adults are involved and continue to screw with a thirteen-year-old—with or without mental problems—it is absolutely vile."⁴ But while Drew and her employee's actions may have pushed Meier over the edge, prosecutors struggled to charge Drew and her employee with a crime.

In fact, the prosecutor's legal theory against Drew was a result of a technicality, "unauthorized access."⁵ Ultimately, prosecutors relied on a provision of the Computer Fraud and Abuse Act.⁶ Drew was charged because, by creating a fake profile, she violated MySpace's Terms of Service. However, a judge threw out the verdict and acquitted her of the three misdemeanor counts of which she had been convicted.⁷ Drew's employee received immunity in exchange for her testimony against Drew.⁸ This case is a prime example of how the criminal courts are largely ineffective in cases involving cyberbullying. The Meier family could have brought a civil suit for injurious speech' on the theory that Drew's speech, through MySpace, caused them severe emotional distress. Thus, the question remains: Why didn't the Meier family pursue civil remedies?

2. LARRY DOWNES, *THE LAWS OF DISRUPTION: HARNESSING THE NEW FORCES THAT GOVERN LIFE AND BUSINESS IN THE DIGITAL AGE* 167 (2009).

3. *Id.* at 168.

4. Lauren Collins, *Friend Game: Behind the online hoax that led to a girl's suicide*, *NEW YORKER* (Sept. 10, 2011), http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_collins#ixzz1XXTFNnXc.

5. DOWNES, *supra* note 2, at 168.

6. Kim Zetter, *Prosecutors Drop Plans to Appeal Lori Drew Case*, *WIRED* (Sept. 10, 2011), <http://www.wired.com/threatlevel/2009/11/lori-drew-appeal>.

7. *Id.*

8. *Id.*

The Computer Fraud and Abuse Act (“CFAA”) provides that a person “who suffers damage or loss by reason of a violation of [18 U.S.C. § 1030(g)] may maintain a civil action against the violator to obtain compensatory damages and injunctive relief . . .”⁹ The best scenario for the family would have been to use a conviction under the CFAA to seek a civil award. Once the charges against Drew were thrown out, however, the Meier family may have decided against proceeding through the civil courts. Another reason may be that the alleged tortfeasor, Drew, did not have money to compensate the Meier family. Even if the Meier’s had a strong case, neither the family, nor its attorney, would be adequately compensated.¹⁰ If this were the situation, an attorney may have declined to represent the family on a contingency basis, despite the media attention the incident received. It is also possible that the Meier family did not have the means to pay an attorney for the costs associated with bringing a civil lawsuit. Moreover, the Meier family may have had difficulty proving causation, which author Alison Virginia King cites as a major challenge in tort law.¹¹ Here, the “boy’s” statements may have been extremely hurtful, but they may not amount to having caused Meier’s death.

To address cyberbullying in cases such as Meier’s, California Congresswoman Linda Sanchez introduced. House of Representatives Bill 1966, the “Megan Meier Cyberbullying Prevention Act” in 2009.¹² The main thrust of the bill is that if someone uses the internet to cause “substantial emotional distress” to another person, they could be fined or sent to prison.¹³ The proposed statute also discusses the psychological toll of cyberbullying. In addition to causing depression and bringing down a student’s grades, cyberbullying can “in some cases lead to extreme violent behavior, including murder and suicide.”¹⁴ The bill’s legislative text cites research on how common cyberbullying can be; more than half of mental health professionals had at least one client with a negative online experience, and most of these clients were minors.¹⁵ The bill

9. *United States v. Drew*, 259 F.R.D. 449, 456 (C.D. Cal. 2009).

10. Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 853 (2010).

11. *Id.*

12. H.R. REP. NO. 111-1966 (2009).

13. *Id.*

14. *Id.*

15. *Id.*

did not specify to what degree the online experience was negative. For example, if two students got into a political argument online and were upset over it, it likely would not qualify as “cyberbullying,” because even if it did cause distress, it would cross over into core freedom of speech territory. While the protection of children, a particularly vulnerable population, is an important factor in considering injurious speech in the digital age, it is also important to balance the values served by the First Amendment. Thus, would the proposed statute, by essentially criminalizing injurious speech, go too far in impinging on free speech protections in the digital sphere?

Injurious speech on the Internet poses some interesting issues. First of all, the speaker can remain anonymous or create a false identity when posting statements online. Anonymity may remove social barriers to writing hurtful language. As in the Megan Meier case, one can pose as someone else to impact the recipient of the messages to a greater degree. Moreover, there are only minimal transaction costs to posting content online, and posting a statement on the web or sending a message to a specific recipient is instantaneous. Once the statements appear online, they have a global reach, meaning the potential damage has a much wider scope. In fact, the speech could cause harm to people that the defendant has never known and did not intend to reach. Thus, the Internet permits the harm to extend further than other, more traditional media, raising international jurisdictional issues, for example, in countries without an equivalent to the First Amendment. I have chosen, however, to focus this paper on both injurious speech on the Internet originating from the United States, and on those from the U.S. who claim to be injured by the speech.

The Megan Meier case is an example of an unsuccessful attempt to use the criminal courts as a forum to hold the alleged perpetrator accountable. Thus, it would be most effective to consider a line of cases that address injurious speech, an area of law that may inform future cyberbullying-related cases. While the Megan Meier case was a criminal case, this paper focuses exclusively on civil cases, where injurious speech is grounds for tort liability. Another reason why it is important to begin a discussion of injurious speech with a case such as Meier’s, is that while it is an especially sympathetic case in favor of cracking down on potentially injurious speech, it is noteworthy that even the judge stated that “there is nothing in the legislative history

of the CFAA which suggests that Congress ever envisioned . . . application of the statute [to cyberbullying].”¹⁶

But the question remains: Is the terrain of the digital world already adequately covered by the territory of injurious speech cases? This paper will examine relevant injurious speech case law in the more traditional media of print and broadcast in cases such as *Hustler Magazine, Inc. v. Falwell*,¹⁷ *Herceg v. Hustler*,¹⁸ *Winter v. G.P. Putnam’s Sons*,¹⁹ *Olivia N. v. National Broadcasting Company*,²⁰ *Weirum v. RKO General, Inc.*,²¹ *Braun v. Soldier of Fortune*,²² and *Rice v. Paladin*.²³ These cases balance the interest in protecting victims who suffer emotional or physical harm with First Amendment free speech concerns, providing the lessons that apply to the digital world in the form of injurious speech on the Internet. Cyberbullying is one example, but we will see how many of the publications or broadcasts easily could have been featured online. This paper explores injurious speech cases involving broadcast or print media, and analyzes the following issues: (1) Can a public figure sue the press for intentionally inflicting emotional distress? (2) Does parody have special First Amendment status? (3) And finally, if a person is physically injured as a result of reading published information, may he or she sue the publisher for damages?

I contend that a “notice and takedown” regime would mitigate the effects of cyberbullying while not overly infringing on the publisher’s First Amendment rights.

II. Emotional Injury

If the First Amendment will protect a scumbag like me, it will protect all of you.²⁴

–Larry Flynt, played by Woody Harrelson
in the movie, *The People vs. Larry Flynt*

16. King, *supra* note 10, at 857.

17. 485 U.S. 46 (1988).

18. 814 F.2d 1017 (5th Cir. 1987).

19. 938 F.2d 1033 (9th Cir. 1991).

20. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

21. 539 P.2d 36 (Cal. 1975).

22. 968 F.2d 1110 (11th Cir. 1992).

23. 128 F.3d 233 (4th Cir. 1997).

24. THE PEOPLE VS. LARRY FLYNT (Columbia Pictures 1996).

The film, *The People vs. Larry Flynt*, cinematically re-created the events surrounding the *Hustler* case, which arose out of a *Hustler Magazine* parody of advertisements for the alcoholic drink, Campari. The real Campari advertisements featured a double entendre of celebrities discussing their “first time,” seemingly at first to describe their first time engaging in sexual relations, but actually referring to the first time trying the drink. *Hustler* magazine’s Campari ad parody, titled “Jerry Falwell talks about his first time,” had the double entendre of discussing the fabricated first times that Falwell, a prominent Evangelical minister of national fame, both had tried Campari, and had sexual relations.²⁵ But Falwell’s fictitious first sexual encounter was especially crude, described as being with his mother in an outhouse: “I [Falwell] never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured ‘what the hell!’”²⁶ Although there was a disclaimer on the page that stated, “ad parody—not to be taken seriously,”²⁷ Falwell did take the matter quite seriously. He sued *Hustler Magazine*’s publisher Larry Flynt in a case which reached the Supreme Court.

The case addressed the issue of whether a public figure can sue the press for intentional infliction of emotional distress. One could argue, as Falwell did, that *Hustler*’s “caricature” of Falwell fundamentally differs from the political cartoons that satirize government officials and elevate political discourse. However, the Court held that it would be one thing if there was a truly effective way of always correctly distinguishing between both—but there is not. “Outrageousness,” the Court noted, is subjective, and it would likely chill free speech if it were up to jurors to decide which speech should be penalized.²⁸ Thus, parody has special First Amendment status. Unpopular speech is inherently more likely to irk jurors, but it is precisely the type of speech the First Amendment should protect.²⁹ The Court invoked the principles behind the First Amendment: the ability to have intense debates about political issues and people who take a prominent role in government or societal conduct. Political debate is bound to lead to criticism of public figures who, by the very nature of their fame, shape events. As in defamation cases, if a public

25. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

26. Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 428 (1988).

27. *Hustler*, 485 U.S. at 48.

28. *Id.* at 55.

29. *Id.* at 57.

figure or public official is negatively portrayed, he can utilize his access to the media to clear his name.³⁰ While the Supreme Court referred to the ad parody as “offensive” to Falwell and “gross and repugnant in the eyes of most,”³¹ the Court refused to deny it the First Amendment’s protection.

In *Hustler*, the Supreme Court held that the First Amendment prevents damage awards to public figures to compensate for emotional distress. “Mr. Flynt’s victory . . . prevented plaintiffs from doing an end run around the First Amendment by claiming they suffered ‘emotional distress.’”³² In other words, even though the speech was “patently offensive and is intended to inflict emotional injury,” the First Amendment protected the speech, since it could not “reasonably have been interpreted as stating actual facts about the public figure involved.”³³ As decided in *N.Y. Times Co. v. Sullivan*,³⁴ if indeed the statement was a false statement of fact that met the actual malice standard, Falwell could sue under libel to seek compensation for injury to his reputation.

The holding in *Hustler* certainly translates well to injurious speech on the web. Unlike Meier, who was a private figure, Falwell had an established reputation. As a result of *Hustler*, if someone publishes offensive material online with the intent to cause a public figure emotional distress, but the public knows that the material did not state actual facts about that person, as in the case of a parody, the public figure cannot receive damages. One of the First Amendment’s gifts is that it protects individuals’ ability to criticize those who have clout, whether their forum is YouTube or the pulpit. Even if the criticism is crude or in poor taste, it is still protected speech, whether in print or on the Internet. *Hustler Magazine*’s ad parody would likely appear online if its publication were to occur today, and the outcome of the case would be the same. Regardless of the fact that Falwell may have suffered emotional distress as a result of the injurious speech, one would certainly realize the satirical efforts illustrated by the contrast between Falwell’s public image as a minister and the ad’s placement, had it been on *Hustler Magazine*’s website.

30. *New York Times v. Sullivan*, 376 U.S. 254, 304–05 (1964).

31. *Hustler*, 485 U.S. at 50.

32. Gloria Steinem, Op-Ed, *Hollywood Cleans Up Hustler*, N.Y. TIMES, Jan. 7, 1997 available at <http://www.feminist.com/resources/artsspeech/media/flynt.htm..>

33. *Hustler*, 485 U.S. at 50.

34. *Id.*

Another case involving *Hustler Magazine* led not to emotional injury, but a physical injury so serious it resulted in death. Diane Herceg sued the magazine for the death of her 14-year-old son, Troy D., who had experimented with autoerotic asphyxiation after reading about it in an article, titled “Orgasm of Death.”³⁵ The issue in *Herceg* was whether the magazine article’s language amounted to incitement to “attempt a potentially fatal act.”³⁶ The court mentioned types of speech that do not have full First Amendment protection: “obscene materials, child pornography, fighting words, incitement of imminent lawless activity, and purposefully-made or recklessly-made false statements of fact such as libel, defamation, or fraud.”³⁷ The only category that the court considered in *Herceg* from the aforementioned list is “incitement of imminent lawless activity.” In that situation, the article would not be protected under the First Amendment, and its text could render the magazine liable for the emotional and psychological injury to the boy’s parents as the result of his death.

However, the court stated the article in *Hustler* did not fit any of these categories. In addition, the court decided that the article did not even amount to advocacy of autoerotic asphyxiation, given that it included a medical description of why it is a life-threatening practice and “the seriousness of the danger of harm.”³⁸ Moreover, even advocacy, as opposed to incitement, is protected under the First Amendment. To further understand what “incitement” really is, it is helpful to consider the court’s example, which it quoted from *Noto v. United States*: “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action.”³⁹ Thus, the Fifth Circuit Court of Appeals ruled in favor of *Hustler Magazine* and against the mother of the boy. “The constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free

35. Brian Graifman, *The Judge Not Chosen and the Hustler Case*, N.Y. TIMES, Aug. 1, 1990, available at <http://www.nytimes.com/1990/08/17/opinion/1-the-judge-not-chosen-and-hustler-case-528190.html>.

36. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987).

37. *Id.* at 1020.

38. *Id.* at 1023.

39. *Id.* (quoting 367 U.S. 290, 297-98 (1961)).

flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.”⁴⁰

The lessons from this case apply to injurious speech on the web. First of all, *Hustler Magazine* is available online, and the article could have easily been featured there. Punishing the magazine because of how a person acted after reading the article could have a chilling effect on speech in the future: “If the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as ‘bad,’ all free speech can be threatened.”⁴¹ Moreover, even if a magazine is restricted to those over 18 years of age, it may be even easier for those in a younger age group to access it online than in person, since the Internet allows for greater anonymity in transactions. In addition, a lot of articles online allow readers to post comments. The article may strongly advocate against autoerotic asphyxiation, but what if the readers write messages extolling the practice? Should the magazine be held accountable because of the readers’ statements? However, there are counterarguments. It seems that if the purpose of the article was to educate about a type of sexual arousal, but just as much to caution against it, perhaps such an activity should not be featured in a magazine that caters to people preoccupied enough with sex to the point they spend money on a magazine dealing with such topics.

Moreover, one could argue that if the article’s purpose was as previously articulated, then *Hustler* likely included “unnecessary detail.”⁴² For example, the dissent mentioned there were detailed descriptions of how to engage in the practice, more than just the basic information. Also, instead of the cautionary warnings in the article being a deterrent to the practice, they were likely even more enticing to the readers, who may think of any potential risks as adding another layer of thrill. While these are noteworthy points, they fail to give strong support for classifying the article in an unprotected speech category, in print or online. Publishing an online article, even with salacious details about this sexual activity, is much different than providing the young man with the rope and directly helping him hang himself. While society does have an interest in protecting teenagers like Troy, holding *Hustler* civilly liable for its words may create

40. *Herceg*, 814 F.2d at 1119.

41. *Id.* at 1024.

42. MARC A. FRANKLIN, DAVID A. ANDERSON, LIDSKY & LYRISSA BARNETT, *MASS MEDIA LAW, CASES AND MATERIALS* 445 (7th ed. 2005).

ambiguous standards which would prevent magazines in print, and now increasingly more online, from disseminating valuable information to the public. These unclear guidelines would end up creating a chilling effect on the First Amendment because authors would be overly cautious of what they publish.⁴³ Perhaps some people who read the *Hustler* article on the web may have been deterred from the practice because the article described the consequences of participation. This article could have also saved a life, and its publication on *Hustler's* website could have targeted precisely the people that would need to hear about these risks.

III. Physical Injury

In *Winter*, mushroom enthusiasts relied on a book's information, became sick from eating unsafe mushrooms, and subsequently brought suit against the publisher.⁴⁴ Two people purchased *The Encyclopedia of Mushrooms*, a book that provided information about picking and cooking mushrooms, among them wild mushrooms. But after the two people ate the mushrooms, they became so ill that they required liver transplants. They brought products liability claims against the publisher. More specifically, the court used a strict liability theory, which involves finding a defendant liable without a finding of culpability, such as intent. The court, however, did not agree to expand the doctrine of strict liability to realms outside of tangible items. The tangible part of the book itself, its cover, binding, or its pages did not harm the plaintiffs in the case. It was the content of the pages, the information provided in the text, which arguably caused harm when the two people relied on it. It would be a dangerous suppression of free speech for courts to regulate content through strict liability theory: "[w]e accept the risk that words and ideas have wings we cannot clip and which carry them we know not where."⁴⁵ If the content of books were subject to strict liability, where would courts draw the line?

Authors would surely be more hesitant to write if they knew their words could be used against them. No publisher would want to finance "how-to" books if there were litigation risks associated with the genre. For example, would any author write a book about learning how to ride a bike if they would be subject to liability any time someone was injured while trying to learn? Moreover, would a

43. *Id.*

44. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

45. *Id.* at 1035.

cookbook publisher finance a cookbook if it were subject to liability if a reader, while following a recipe, was burned because he touched a pan that was too hot? These examples mirror an actual court case where a student sued a textbook publisher because he was injured doing a science project described in the textbook.⁴⁶ But had *Winter* been decided otherwise, we might jeopardize the publication of science textbooks out of an aversion to defending a lawsuit.

The publisher prevailed because the court said it had no duty to investigate the accuracy of contents of the book it published. In fact, the court was so wary of imposing a duty to investigate on the publisher, that it was unwilling to require the publisher to give a warning saying, “the information in the book is not complete,” or “the consumer may not fully rely on it,” or “this publisher has not investigated the text and cannot guarantee its accuracy.”⁴⁷ With regards to the first warning, the court said that the warning would force a publisher to investigate the contents of the book, precisely what it did not want the publisher to do. With regards to the last warning, the court said it was “unnecessary given that no publisher has a duty as a guarantor.”⁴⁸ Although two people became dangerously ill in the short term as a result of relying on the book’s information, the court was more concerned with the long-term health of free speech. “The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories”⁴⁹

The *Winter* ruling has implications for injurious speech on the Internet. *Winter* involved a publisher facilitating the spread of “ideas and information to the public,”⁵⁰ which is what Wikipedia and other encyclopedic resources do via the Internet. Much of the value that the Internet offers is quick access to information that can generally be relied upon in making a basic determination, like whether a snake is poisonous. But even if information comes from a verifiable source, such as a Center for Disease Control website with information about snakes, a person must be careful, because after all, they could be handling a poisonous snake. Surely the Internet would lose much of its robust information sharing properties if, for example, the federal

46. *Id.* (citing *Walter v. Bauer*, 439 N.Y.S.2d 821, 823 (Sup. Ct. 1981)).

47. *Winter*, 938 F.2d at 1035.

48. *Id.* at 1038.

49. *Id.* at 1035.

50. *Id.* at 1037 n.8.

government would have to pay if someone got sick from a snake bite. Is it not better to have such guides available, even if occasionally there is one that needs to be revised? The publication's reach on the web would likely even be larger than its publication in print, so a publisher that has content online could face tremendous liability. The publisher might do a cost-benefit calculation and stay away from providing advice that could possibly lead to injurious outcomes. One way to perhaps guarantee further accuracy would be to require extensive fact checking, but this process would be resource intensive. Books in print or online would take too long to be published and would be too costly for anyone to actually purchase, and hence, use. Implied in *Winter* is a lesson that applies to the Internet: it serves the public much better overall to be able to have access to more content, but the burden to investigate its accuracy should rest with the person who has the most at stake: the user. After all, the First Amendment requires it.

In *Olivia*,⁵¹ there was a copycat sexual assault following the broadcast of a television drama. NBC broadcasted a movie, *Born Innocent*, which featured a scene where a group of girls attacked a young girl in the shower and forcibly used a plunger's handle to "artificially rap[e]" her.⁵² After the movie's broadcast, a group of boys attacked and "artificially raped" a nine-year-old girl with a bottle.⁵³ These boys had seen and talked about that specific scene in the movie before committing the act. The court declined to use the low-threshold negligence standard (i.e., asking whether NBC was negligent in showing the film). Such a standard would surely stifle debates upon public issues that could normally be raised by films that may explore controversial content, and "reduce the U.S. adult population to viewing only what is fit for children."⁵⁴ Instead, the court said the more appropriate test was whether NBC's broadcast incited the boys to act upon their victim. In other words, did NBC, by showing the film, "advocate or encourage violent acts?"⁵⁵

What if *Born Innocent* had been shown online, instead of on television sets? *Olivia*'s lessons are analogous to the issues facing the digital world, because television broadcasts posed "unique and

51. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

52. *Id.* at 891.

53. *Id.*

54. *Id.* at 892.

55. *Id.*

special problems' that hadn't existed in prior free speech cases,"⁵⁶ in the same way that the digital world does today. The First Amendment ensures that government does not have the power to curtail "expression because of its message, its ideas, its subject matter, or its content."⁵⁷ As applied to electronic media, "the First Amendment means that it is the broadcaster that has the authority to make programming decisions."⁵⁸ The court stated that using a negligence theory in such cases would result in holding television stations liable if, for example, a child copied behavior shown on a news program.⁵⁹ In other words, news shows might be prevented from describing a murder that happened in a neighborhood in order to prevent a person from repeating the same crime. Since many of news videos are now featured online, this scenario extends to the digital world. *Born Innocent* was a fictional movie, and it would be entirely unreasonable to hold a movie studio or television network liable if it streamed a movie or television show on the web with a violent scene that someone decided to emulate. That would certainly exclude graphically violent films such as *American History X*, *Silence of the Lambs*, or *Clockwork Orange*. It would also exclude films such as *Saving Private Ryan*, a similarly graphic film about World War II.

The reason that movies such as the one in *Olivia* are given First Amendment protection, according to the court, is to ensure "the free flow from creator to audience of whatever message a film or a book might convey,"⁶⁰ because otherwise they would censor themselves. In fact, the court was so concerned with the specter of potentially censoring a program's content that it would not allow doing so, even if the restriction was designed to protect a child.⁶¹ The court even goes so far as to say that a television network would be more wary of having to pay a damage award than facing a criminal penalty.⁶² The California Court of Appeal stated that the way to deter a copycat rape based on a television broadcast is not to censor the program, but rather to promote education and punish the party responsible for committing the crime.⁶³

56. *Id.* at 891.

57. *Id.*

58. *Id.*

59. *Id.* at 892.

60. *Id.* at 891.

61. *Id.* at 892.

62. *Id.*

63. *Id.*

Just like the Internet has a wide and instantaneous reach, so does the radio, albeit on a smaller scale. In *Weirum*,⁶⁴ a radio host at a station with a large teenage following drove a radio van around the Los Angeles area for a contest in which whoever found him first would win money.⁶⁵ A teenager driving in pursuit of the radio personality negligently ran another driver off the road and killed him.⁶⁶ The issue in the case was whether the radio station owed the decedent a duty of due care.⁶⁷ The California Supreme Court held that the Los Angeles radio station was liable for the wrongful death of the driver. But why hold the broadcaster at fault? After all, the driver caused the accident. The court reasoned, however, that the teenagers' "reckless conduct was stimulated by the radio station's broadcast."⁶⁸ In other words, the broadcaster "was urging listeners to act in an inherently dangerous manner."⁶⁹

The judge, however, narrowed the scope of the ruling so as not to impinge on free speech protections. "[The contest] was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit."⁷⁰ It is evident the contest was designed to have drivers rush on the streets, so much so that they would speed past the other drivers also on the chase. "The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent."⁷¹ This was an invitation to act, to put speed as a first priority on the road. In fact one would be rewarded by being able to appear on the radio and with a monetary prize. Moreover, although the contest was a limited-time-only promotion, the contest was promoted throughout the evening and thus "actively and repeatedly encouraged listeners to speed to announced locations."⁷² In contrast, the scene in *Born Innocent* in the *Olivia* case certainly did not "invite" viewers in any way to use an object such as a plunger handle to sexually assault a young girl.

Weirum affects injurious speech online in several ways. First of all, radio stations stream their broadcasts online, making it possible

64. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 37 (Cal. 1975).

65. *Id.*

66. *Olivia*, 178 Cal. Rptr. at 893.

67. *Weirum*, 539 P.2d at 38.

68. *Olivia*, 178 Cal. Rptr. at 894.

69. *Id.*

70. *Weirum*, 539 P.2d at 41.

71. *Id.* at 47.

72. *Olivia*, 178 Cal. Rptr. at 894.

for drivers on the road to listen via a digital device, such as a smart phone. The crucial difference is, with the Internet, even more people can listen, regardless of whether they are outside the traditional coverage area. Moreover, many promotions involve sending a text message with a specific code to a phone number, encouraging the kind of risky behavior at issue in *Weirum*. Just as in *Weirum*, many radio promotions are very time sensitive, and hosts tend to emphasize the urgency in much the same way today as they did in *Weirum*. The problem is that many listeners are still listening to the radio when they are in their car.⁷³ After all, gone are the days when families would sit around the radio to listen to the broadcasts. Some radio promotions may encourage multitasking on the road. The National Safety Council released a study stating that cell phone calls or text messages account for almost thirty percent of traffic accidents.⁷⁴ AAA mentioned studies that state that texting increases a driver's chance of being in an accident eightfold.⁷⁵ It certainly is foreseeable that calling in to a radio show while driving, or texting while navigating through traffic, could lead to more reckless driving. These are the same concerns the court had in *Weirum*, although concerning different technology. Cell phone use while driving already poses substantial risks and the radio promotions that integrate such digital devices, only work to heighten these risks. Given the National Safety Council's statistic, the relevance of the foreseeability prong as it relates to accidents, like the one in *Weirum*, becomes clear.

IV. Not Fit to Print: Injurious Speech and Printed Media

In *Winter*, two people followed the instructions of a mushroom encyclopedia and became dangerously ill, but could not prove the publisher liable for the content upon which they relied. In *Rice*, however, the publisher of a *Hit Man* book was found liable for causing the deaths of three people killed by a contract murderer.⁷⁶ The killer not only used a large number of instructions described in the book, but also followed the methods identically in his

73. Arbitron Study, *The Road Ahead Media and Entertainment in the Car*, slide 38, http://www.arbitron.com/downloads/The_Road_Ahead_2011.pdf.

74. Ashley Halsey III, *28 Percent of Accidents Involve Talking, Texting on Cellphones*, WASH. POST (Jan. 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/12/AR2010011202218.html>.

75. Automobile Association of America, *In the Driver's Seat: New Auto Club Study Shows Texting While Driving Is On the Rise* (April 27, 2010) (on file with Hastings Communications and Entertainment Law Journal).

76. *Rice v. Paladin Enter.*, 128 F.3d 233 (4th Cir. 1997).

perpetration of the crime. The man hired a contract killer, James Perry, to kill his ex-wife, his eight-year-old quadriplegic son, and the son's nurse.⁷⁷ The purpose of the killing was for the man to be able to collect the \$2 million dollar settlement that had been awarded the boy as a result of his injuries. The court held that the book did not contain speech protected by the First Amendment. The book included specific instructions on creating a murder weapon, executing the murder, and techniques to disguise the cause of death:

Using your six inch, serrated blade knife, stab deeply into the side of the victim's neck and push the knife forward in a forceful movement. An ice pick can . . . be driven into the victim's brain, through the ear, after he has been subdued. The wound hardly bleeds at all, and death is sometimes attributed to natural causes.⁷⁸

The publisher's wrongdoing here is hardly clearcut. According to *Winter* and *Braun*, a publisher is not required to investigate the contents of what he prints. However, Paladin Press "*stipulated* that it specifically targeted the market of murderers, would-be murderers, and other criminals for sale of its murder manual."⁷⁹ Paladin admitted that it catered to people that would actually act upon the descriptive instructions in the text. "Paladin has *stipulated both* that it had knowledge and that it intended that *Hit Man* would immediately be used by criminals and would-be criminals in the solicitation, planning, and commission of murder and murder for hire."⁸⁰ The Fourth Circuit Court of Appeals asserted there was not even a shred of material that contained any information that championed the values of free speech that the First Amendment celebrates. Rather, the text in the 130-page book was more like a set of specific steps instructing potential criminals how to get ready for, perpetrate, and conceal a murder.⁸¹ Furthermore, the book was not merely a set of dry instructions; it actually allayed concerns that one considering committing murder might have, such as how they would feel after committing the act.⁸² The text made these people feel better about

77. *Id.* at 239.

78. *Id.* at 236–37.

79. *Id.* at 266.

80. *Id.* at 248.

81. *Id.* at 256.

82. *Id.* at 252.

going through with their intentions.⁸³ And Paladin *stipulated* that, through publishing and selling *Hit Man*, it ‘assisted’ Perry in the perpetration of the brutal triple murders.⁸⁴ It was precisely the book’s content, coupled with Paladin’s stark and comprehensive stipulations, which in the court’s words, were an “almost taunting defiance”⁸⁵ that fueled the court to have rule against Paladin and for Rice with no hesitation.

However, broadcasters and other publishers joined in support of Paladin, arguing that holding a publisher civilly liable for the acts of a third party would conflict with the First Amendment.⁸⁶ This, they argued, could subject any magazine, book or film to liability. The concern was articulated further by saying that anytime someone watches a news report, for example, the broadcaster would be worried about a copycat crime, and surely it would be unreasonable for the nightly news to stop reporting on murders. The court, however, effectively distinguished the present case:

In the ‘copycat’ context, it will presumably *never* be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-à-vis the use intended, not, as here, used precisely as intended.⁸⁷

The court also mentioned that in most cases there will not be such strong evidence in addition to the text itself, such as in the present case, where the publisher admits to having purposefully sold the text to help others commit a crime, “aid[ing] and abet[ting] murder.”⁸⁸ The court stated that even if a movie glamorizes murder, the fact it was a Hollywood blockbuster film shows it was intended to entertain and thus earn the studio a big profit.⁸⁹ For example, a movie such as *Kill Bill: Vol. 1* shows that the movie studio, Miramax Films, had not intended it to make it easier for someone to kill another person. Miramax is clearly not intending to enable murderers. The purpose

83. *Id.*

84. *Id.* at 267.

85. *Id.* at 265.

86. *Id.*

87. *Id.*

88. *Id.* at 266.

89. *Id.* at 265.

of the film has never been touted as anything other than entertainment, as distinguished from *Rice* where the publisher admitted its book was designed to help make the kill.

Moreover, in a news report, the journalist's purpose is to educate the community, not to make it easier for someone to repeat the crime, as the book *Hit Man* did.⁹⁰ Paladin ended up settling out of court, and in addition to paying the family money, the publisher agreed to destroy remaining copies of the book.⁹¹ While the idea of banning books seems to be reminiscent of Ray Bradbury's book *Fahrenheit 451*, a manual created to help someone complete a murder and cover their tracks seems pretty clearly against the public interest.

Rice's ruling certainly applies to injurious speech on the Internet. In the age of global terrorism, if someone distributes a manual on evading airport security and causing massive death through a terrorist attack, and the publisher of such an online manual were to admit that was his purpose, he should have to pay for any damage they cause if someone follows the instructions and is successful. One of the more dangerous aspects of Internet writings is the publisher's ability to spread such information for a very small transaction cost, and a general inability to stop the spread of such harmful information. The only way to hold these publishers accountable would be under *Rice*, requiring a plaintiff to prove, via stipulation or otherwise, that the publisher's intent was to create a terrorist attack and that the work was marketed for that purpose. Admittedly, in the *Hit Man* book there were warnings that said "for academic study only!"⁹² But given the context of the publisher's statements that the book was intended to help others kill, the court argues that the warnings were used to make it seem even more realistic that if the person followed the instructions, they would be able to commit a dangerous act. Otherwise, why would they need to warn the reader not to do it? This point relates well to the Internet because it is easy for a website operator to require the writer of online manuals to write "do not attempt" on the website of the previous terrorism example, but any such requirement is likely negated by the extreme specificity with which the procedures are described. Certainly a few words in a disclaimer will not cancel out the many words that follow that appear to advocate otherwise. Were *Hit Man* published online merely to

90. *Id.* at 266.

91. David G. Savage, *Publisher of 'Hit Man' Manual Agrees to Settle Suit Over Triple Slaying*, L.A. TIMES, May 22, 1999, at A10.

92. *Rice*, 128 F.3d at 254.

glorify the killing of another human being, suppressing it would be a violation of freedom of speech. But the fact that it was a step-by-step instruction manual and the publisher's intent was to help others kill, its suppression likely saved lives.

The issue of injurious speech does not only arise in a publication's articles, but also in its advertisements. In *Braun*,⁹³ a magazine was found liable for an advertisement in its classified section. The "Gun for Hire" ad was for a contract killer, Michael Savage, who was seeking employment:

GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered. . .⁹⁴

Someone took Savage's offer seriously. In 1985, Bruce Gastwirth enlisted Savage's services to kill Gastwirth's business partner, Richard Braun.⁹⁵ Braun's son filed a civil suit against the gun magazine that published the ad, *Soldier of Fortune*, and its publishing company for his injuries and the wrongful death of his father.⁹⁶ Braun's son suffered emotional injury from witnessing Savage's associate kill his father, as well as physical harm from the attack.⁹⁷ Given that the court was considering holding a publisher liable, the court wanted to guard against a potential chilling effect that could occur: a publisher may engage in self-censorship if the law imposed too much of a burden on publishers about ads they feature in their magazine. To ensure that the ruling would compensate the victim and at the same time not chill speech, the Eleventh Circuit Court of Appeals used a balancing test to see whether the likelihood the harm would occur multiplied by the harm's severity would outweigh the defendant's burden in taking safety precautions.⁹⁸ Moreover the court affirmed the district court's test that the First Amendment allows "a state to impose liability on a publisher for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial

93. *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110, 1122 (11th Cir. 1992).

94. *Id.* at 1112.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1115.

danger of harm to the public.”⁹⁹ For example, the court notes that the ad used language such as “gun for hire” and not only left open what the gun would be hired for, but also intentionally used broad language on two occasions, such as “other special skills” and “all jobs considered,” which the court interpreted as including jobs that are unlawful.¹⁰⁰ While the ad does not say, “I can be hired to kill people,” or “I have the skills and equipment necessary to kill someone, so please hire me to do so,” the court stated that it was easy enough to interpret that Savage could be hired to kill people, because that’s certainly how Gastwirth read it.¹⁰¹

While the First Amendment protects commercial speech, which facilitates informed decision-making about financial matters, the First Amendment does not protect commercial speech that involves breaking the law, such as a wanted ad for the purchase of drugs.¹⁰² Just like in *Winter*, the court *Braun* found that the publisher had no duty to investigate. Although *Braun* held the publisher and magazine liable, the result is entirely consistent with *Winter* because the magazine in *Braun* still had no duty to investigate the ads. In fact, *Braun*’s point is that the publisher does not need to investigate because they will only be liable for an injury-causing ad when the danger is apparent.¹⁰³ Thus, the reason that it comports with the First Amendment is twofold: The fact that a publisher has no duty to investigate and the requirement that the information in the ad must clearly cause “substantial” public danger.

This fits nicely within the digital landscape because injurious speech may arise in an online advertisement. The *Braun* ruling is especially relevant because virtually all magazines and newspapers are publishing online. For example, a magazine that also publishes online could have an ad that comes up in a pop-up or side-bar. In fact, such advertising is the main way that magazines and newspapers stay profitable online if they are not charging readers for subscriptions. The dissent in *Braun*, however, raised a counterargument relating to the Internet: Not all ad spaces are alike—there are billboard type advertisement spaces or the classified section where the publisher may have less of a role.

99. *Id.* at 1119.

100. *Id.* at 1121.

101. *Id.* at 1112.

102. *Id.* at 1117.

103. *Id.* at 1118–19.

Despite the publisher's low burden and lack of duty to investigate, it is still possible a publisher may be liable for what it prints. Moreover, the focus here is on websites for more traditional publications, such as *Time Magazine*, which on their web site's homepage has a section that says "sponsored links."¹⁰⁴ The *Braun* ruling should certainly not create too tough a burden for a publication on a website. If the publisher does not have enough sensibility to know when an ad makes an offer to commit a "serious violent crime,"¹⁰⁵ then they probably should not be in the information gathering business. We want to "chill" murder, so that both the gun for hire and the client will have a harder time achieving their goals. That is certainly applicable online, where a user can use a cloak of anonymity with less fear they will get caught.

This case exemplifies how, when it comes to private victims, courts may theoretically be able to draw a clear "content" line between bullying speech that is offensive but protected and bullying speech that is actionable despite the First Amendment. Practically, however, the courts have a very difficult time making the distinctions in a way that would not chill free speech. Even in *Rice*, while the court held the publisher liable for a book's injurious speech, the court noted such a case was very rare because the publisher admitted it sold the book to help others commit murder.¹⁰⁶ Moreover, the court stated the entire book was injurious speech. While it is true that defamation cases involving private figures seem to allow legal actions against a relatively wide range of speech, this paper does not address the tort of defamation, which is not protected by the First Amendment. The interesting challenge that injurious speech poses, and the reason it is the exclusive focus of this paper, is that it addresses the tensions involved between holding a party responsible for causing injury and affirming First Amendment protections. Importantly, while cyberbullying may include "hate speech," this paper does not focus on injurious speech targeted at a protected group or at an individual because they are a member of a protected group. Rather, this paper focuses on injurious speech that can cause injury regardless of one's gender, race or religion.

104. TIME, <http://www.time.com/time/> (last visited Oct. 18, 2011).

105. *Braun*, 968 F.2d at 1119.

106. *Rice v. Paladin Enter., Inc.*, 128 F.3d 233, 266 (4th Cir. 1997).

V. Proposal: Applying Statutory “Safe Harbors” to Injurious Speech

In 1995, an unaired episode of *The Jenny Jones Show* garnered national media attention. In front of a studio audience, a homosexual man, Scott Amedure, confessed his secret affection for his heterosexual friend, Jonathan Schmitz.¹⁰⁷ Three days after the show’s taping, Schmitz killed Amedure and was subsequently convicted of second-degree murder. Amedure’s family sued *The Jenny Jones Show* producers,¹⁰⁸ claiming that they should have known about Schmitz’s mental illness. Surely being confronted with such a surprise could be traumatic for a person, especially when the announcement is televised. Schmitz’s mental illness may have only exacerbated the situation. It was precisely the effect of Amedure’s statements that prompted Schmitz to act, leading to Amedure’s injury and death. The show maintained that producers are not responsible for guests’ safety after they have left the studio. The issue of vicarious or contributory liability for a TV station, book publisher, or Internet site is thus very relevant.

Efforts to create statutory “safe harbors” from secondary liability, as in vicarious or contributory liability similarly could be applied to digital injurious speech. An example of this in the area of copyright infringement is the Digital Millennium Copyright Act of 1998 (“DMCA”). The DMCA’s Title II establishes a “safe harbor” for Internet service providers (“ISPs”), basically shielding them from liability for copyright violations, if they adhere to certain requirements. Namely, if a copyright holder notifies the ISP, they must quickly prevent others from accessing the allegedly infringing material.¹⁰⁹

DMCA “safe harbor” provisions could extend protection to certain entities facing vicarious or contributory liability for injurious speech torts if they satisfied similar requirements. Under such a legal regime, an ISP would not be held liable for hosting a website that features actionable injurious speech. For example, in a situation where a group of teenagers sling insults at each other on Facebook, the “notice and take down” rule for ISPs would only take effect if the speech truly amounted injurious speech, which as we have seen in the case law, is a very high threshold. The take down orders would likely

107. Michelle Green, *TV’s Fatal Attraction*, PEOPLE (Mar. 27, 1995), available at <http://www.people.com/people/archive/article/0,,20105369,00.html>.

108. *Graves v. Warner Bros.*, 656 N.W.2d 195 (Mich. Ct. App. 2002).

109. 17 U.S.C. § 512 (2000).

not become weapons against expression because, as we have seen in *Weirum*, speech becomes injurious only when it is the “foreseeable result” of a situation that creates an “undue risk of harm.”¹¹⁰ In his book, *The Future of the Internet and How to Stop It*, Jonathan Zittrain argues that the “notice and take down approach” effectively balances competing concerns of removing content while not impinging on freedom of speech.¹¹¹ Zittrain provides the example of the Internet hosting site, Geocities, which should be able to host a home page without fear of liability for the content on the page, as long as it blocked and removed the content once it was notified of a violation.¹¹²

This framework allowed free expression on the Internet to continue, and Zittrain argues that these personal home pages were precursors to what we know as “blogs” today.¹¹³ “Had these intermediaries stopped offering these services for fear of crushing liability under a different legal configuration, people would have had far fewer options to broadcast online: they could have either hosted content through their own personal PCs, with several incumbent shortcomings, or forgone broadcasting altogether.”¹¹⁴ On the other hand, one could argue that the ISP are in a great position to prevent the injurious speech. After all, they could take acts that could reduce the likelihood and severity of bad outcomes. Certainly they could do some of their own policing to avoid injurious speech, and it is especially bad press to have someone injured as a result of an online radio broadcast. If indeed a party is harmed by injurious speech online, who should bear the costs? Should it be the injured party, or the party in the chain of benefit, such as the ISP? The directly responsible party, for example the author of the injurious speech, could be penniless, so the injured party might prefer to sue the ISP.

The anonymity of posters on the Internet creates another hurdle to holding culpable parties responsible. Even if an individual had a strong injurious speech case, they might have a great deal of difficulty determining who deserves to be sued. But in the search for the culpable party, we also don’t want to violate someone’s privacy. Just like we might feel uncomfortable if a company always knew where we visited in the physical world, so too would we feel uncomfortable if a company knew where we visited in the virtual world.

110. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 40 (Cal. 1975).

111. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 119 (2008).

112. *Id.*

113. *Id.*

114. *Id.*

Those who argue that the “notice and take down” provisions, like those in the DMCA, do too little too late, run headlong into problems with prior restraint. Prior restraints to speech, “rather than punishing it after the fact if indeed it is unlawful”¹¹⁵ are presumed unconstitutional.¹¹⁶ “Notice and take down” provisions are not prior restraints and avoid this presumption.

Just as the DMCA’s “safe harbor” provisions exonerate an ISP from liability for copyright infringement unless it is notified of the infringement, so too should ISPs not be held responsible for injurious speech that would subject the speaker to liability.

VI. Conclusion

Virtually all newspapers and magazines publish online. It seems that we are more networked than ever, with television news stories and programs streamed online, pervasive email communications, blogs, and social networking sites such as Facebook, LinkedIn, as well as movies and films being distributed via iTunes. This frees speech even more, but it also makes the implications for injurious speech on the Internet have a wider scope. In examining the following cases in print and broadcast, such as *Hustler*,¹¹⁷ *Herceg*,¹¹⁸ *Winter*,¹¹⁹ *Olivia*,¹²⁰ *Weirum*,¹²¹ *Braun*,¹²² and *Rice*,¹²³ we have seen how courts have attempted to strike a balance between freedom of speech and expression and protecting people who suffer emotional or physical harm. Moreover, I have tried to “link” each case to a digital discussion, so that we can fully relate the issues courts have faced in the past in order to understand their implications for the future.

Indeed, with the proliferation of discussion with regards to cyberbullying, we have already seen this new framework in action. One could argue that we have criminal law to punish criminals, and making cyberbullying a crime poses too dangerous a risk to free speech. *Herceg*, in ruling in favor of *Hustler Magazine*, recognized that the power of speech can have disastrous consequences at times,

115. Zittrain, *supra* note 111.

116. *Near v. Minn.*, 283 U.S. 697, 723 (1931).

117. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

118. *Herceg v. Hustler*, 814 F.2d 1017 (5th Cir. 1987).

119. *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991).

120. *Olivia N. v. National Broadcasting Company*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

121. *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975).

122. *Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992).

123. *Rice v. Paladin*, 128 F.3d 233 (4th Cir. 1997).

but it is a right worth protecting even in those cases. Moreover, as the court articulated in *Olivia*, unless the injurious speech incites unlawful activity, a court will not hold the network civilly liable for their broadcast. Even the book publisher in *Winter*, purporting itself to be a reliable source of information, caused two people to develop such serious health conditions as to require liver transplants, and was not held liable.

At the same time, as the court ruled in *Weirum*, a broadcaster can be held liable if it motivates dangerous behavior. Similarly, *Braun* held a publisher accountable for advertising a “hired gun” because the injurious effect of the speech in the ad was so clear, the publisher did not even need to investigate to detect the harm. Sometimes, as in *Rice*, criminal law is not enough, and the publisher quite literally has to pay for its intentional facilitation of injurious speech, when it amounts to aiding and abetting a murder. Judging by the case law, it looks like Sanchez’s “Megan Meier Cyberbullying Prevention Act” will face some obstacles to ensure it does not impermissibly restrict free speech. Certainly it should be restricted to victims who are not public figures, lest it run afoul of the *Hustler* case, which ensured that the injurious speech would have to be interpreted as statement of fact and also be “extreme or outrageous.”

While cyberbullying’s scope is not normally considered to apply to public figures, the proposed statute, if it would pass First Amendment constitutional muster, should nevertheless be narrowly drafted as to reflect the Supreme Court’s jurisprudence involving public figures. Despite the potential for greater “hurt” that injurious speech may inflict via the Internet as opposed to broadcast channels because of its ability to reach more people online, the speaker’s ability to remain anonymous, and the low transaction costs involved in creating injurious speech, the First Amendment protection should not be reduced for this medium. While I may not agree with the Supreme Court’s positing that the Internet may be allowed greater First Amendment protection than for example, broadcast TV, I would not argue that there be any less. The legal zone of immunity should not be less because limiting free speech protections on the Internet would chill writers and speakers in more traditional media, given that much of what is written may be published on both print and online. As much sincere sympathy for Megan Meier’s family as there may be, under current case law and statutes neither Drew nor MySpace could face liability for Meier’s death.

Finally, in considering the “safe harbor” provisions of the DMCA, rather than holding ISPs accountable for content that users post

online, it would likely be more effective to have a graduated response system. For example, it may be worth exploring the same “notice and takedown” provisions that have protected the copyright holder in the intellectual property regime. These provisions could be applied to ISPs, and thus they would not be responsible for removing injurious speech unless they are notified and do not respond. For example, if a person sends a message containing injurious speech and the victim identifies and substantiates that the message caused them severe emotional distress or resulted in physical harm, perhaps the ISPs can be required to send a message to the user who wrote the injurious speech. Of course, the threshold should be a very high one to even consider involving the ISP in such a matter, so as not to jeopardize its free speech protections. “Notice and takedown” certainly may be one way to proceed in certain cases of “cyberbullying,” but is vital to prevent ISPs from acting in an overprotective way to avoid liability and future policy must be in line with First Amendment policy and jurisprudence.