

**THE CLASH OF TITANIC PARADIGMS—THE  
AMERICAN CRIMINAL JUSTICE SYSTEM  
VERSUS MODERN COMPUTER  
TECHNOLOGY: THE GREATEST  
UNRESOLVEABLE CONFLICT BETWEEN A  
SQUARE PEG AND ROUND HOLE?**

*Stephen Treglia*

Normally I would start out by saying what an honor it is to be here and how glad I am to be here. And actually I wrote that to Stephanie when I sent my e-mail. But I wrote that e-mail to her I think either Monday or Tuesday. And to say that right at this moment I think is a little less than honest because there's been a major event in the last 36 hours that changed that. If I had not previously committed a couple of months ago to do this, I'd be at the Canyon of Heroes right now cheering the New York Yankees. So when that fortuitous event happened to be timed the way it is, I said, "Couldn't they have had the parade on Monday?" I would have been down there in a heartbeat. So in any event, I am very glad to be here and as much as I would much rather be on Broadway right now watching the Yankees, it still is a great thrill to have listened to these different viewpoints of technology. I wish there was an earlier train up here from New York because I would have liked to have heard the first session.

I'm really going to build very much on what Brian Kane was talking about. It is as frustrating as it can be for us as prosecutors in this new area of law enforcement to try to work and try to get legislators to give us the tools and weapons we need. And that's really going to be kind of the theme of my presentation here this afternoon.

I was a one-person office when I first started doing this in 1997 under Dennis Dillon. I now have two Assistant D.A.'s working with me. We just christened a new undercover room where we have not just one undercover investigator going online as a teenager in chat rooms, but we now have three. So we are

expanding our responsibilities and taking on more cases all the time and very much thanks to our current DA, Kathleen Rice. As I said, we go back to 1997, which makes us one of the very first in the country. We are uniquely a full service technology crime unit. By that I mean we have forensic investigators on staff, which is very unusual for a District Attorney's office. As I said we have undercovers, we have investigators, we have IT staff helping us, accountants, and so forth. And this makes us rare even in the New York City area to this day. Really Westchester County is the only other D.A.'s office that I know of anywhere in the state, outside of the A.G.'s office of course. But for a local prosecutor's office, and we're one of the very few in the country, to have a soup-to-nuts operation.

But now let's get back to what we're here for. I very much agree with Brian that the current structure of the internet makes it very difficult for us to work efficiently in law enforcement. And it may be an unresolvable issue and certainly we don't have the time to have you all chime in today, I certainly would love to hear some of your views on this. And no easy answers currently exist on the horizon.

And I'm just going to bring in a couple of stories to you today to demonstrate to you how scary this stuff is. How many of you know the Megan Meier story? Okay. Actually, now I've lectured routinely to high school students, and when I go to high schools to talk about this I see a much higher percentage of the hands go up. I meant to make this one comment about Professor Hutter, and it slipped my mind, but I want to do it now. How many of you are Albany Law School students? Oh, just about everybody, okay. Just a little while ago when Professor Hutter spoke my accolades or whatever, when I went to school here he was not available to me as a professor my first year, but my second year everybody was talking about this new professor and he'd be really cool to go to and start taking his class. And I actually took him my second year for Conflicts of Law. If you ever graphed me out in law school as to how I did in my courses, if it had to do with criminal law or if it had to do with trial tactics or evidence, my grades would be kind of up here. But everything else—property, contracts, whatever else it was that I took—I'm down there. I don't know how I got through law school quite frankly. But the one non-criminal law course that I loved to go to, I'm not just saying this because he's here, but it really was true, was Conflicts of Law, that and Taxation, because I was a math major

as an undergrad, Taxation and Conflicts of Law were my two favorite non-criminal law classes.

So it was of course intimidating going to his class and he was so brilliant on the subject and now thirty years later to hear him now talking about me as one of the leaders in an area of law in the state is a little shocking. No matter where you guys are in your class, just hang in there, get out there and find a job, and maybe thirty years from now one of your professors will be out singing your accolades at something just as this. But back to the story. I just had to say that about Professor Hutter because I remembered him so fondly when he was one of my professors.

It's a horrible story for those of you who don't know about this story. Megan's next door neighbor, we think it was another thirteen-year-old girl, someone she knew, with the assistance of other students in their class made up a phony MySpace page. They created this fictitious character, a sixteen-year-old male called Josh Evans. The fake pages were originally created to see what the thirteen-year-old Megan Meier was saying about the girl next door, seeing if she was saying anything malicious about her. The real harm allegedly was then done by her mother, Lori Drew, the next door neighbor's mother. And Josh initially expressed a lot of interest in Megan and then he turned on her. He ended up by saying, "The world would be better off without you." Megan already was a severely emotionally depressed child. And on October 17, 2006 she hanged herself.

Now, what happened to the neighbor next door? Laurie Drew was actually prosecuted. And the story of this prosecution and the case as it went on is fascinating. Both of these people they were living in Missouri, I forget the exact city they lived in or town they lived in, but they were neighbors in Missouri. Missouri decided they couldn't prosecute the mother, Lori Drew, they just didn't have a statute capable of doing this. So the Feds got involved and decided to bring her to California, because that's where MySpace was. And they charged her with federal violation of a felony statute in the Computer Fraud and Abuse Act for violating the terms of service for the purpose of causing harm to another individual. She was also charged with three misdemeanor counts for violating the same statute, but a different provision, for violating the terms of service for the purpose of gathering personal information.

Now, the victim and the defendant were both from Missouri, but Missouri refused to prosecute, she was tried in California and

she was only convicted of the misdemeanors. She was found innocent of the felony charges, and you have to be able to piece enough of the story together, but another lead came in, so I've got a pretty fair idea why this was. The damaging statement, "The world would be better off without you," was done by AIM. And for those of you who do work in the technology field you may know AOL saves no instant messages. It just doesn't have the wherewithal. Originally, it had thirty-three million customers, they couldn't have done it. Maybe now that they're down to whatever numbers they are, they probably could have the server farm space out somewhere to save them, but they don't. They don't have it set up. Yes, if we as a law enforcement agency asked them to wiretap or record things they can, but they don't do it prospectively unless we ask them to do it with a court order.

So nobody ever saved that AIM message. So I'm assuming when it came time to try the case they couldn't prove the most damaging statement was done through an interstate connection because nobody ever saved the AIM conversation. What she was convicted of was the MySpace postings, which had been saved, MySpace saves everything. So that was what she was convicted of by the jury. And I didn't put up the jury response articles, if you just Google Megan Meier you'll come up with millions of stories on this.

The jury was devastated. They wanted to convict her of a felony, but the jurors felt they were obligated; they couldn't do it because it didn't match the law. And they probably were right. But now the latest is she gets convicted of the three misdemeanors and then this case hangs on forever until this past summer where the judge tossed the case. And the reason the judge tossed the case, the decision's available out there if you want to take a look at it, is because the judge opined that if we were to hold her guilty for violating the terms of services, for lying in her terms of services, not complying with the terms of services, we would have to convict just about everybody in the world including Megan Meier. Why? Because she should never have been registered in MySpace in the first place. You can't be registered on MySpace if you're under the age of fourteen. And in fact, MySpace tells you that. So even Megan Meier herself would have been guilty of committing the crime.

So the Court ruled that because of it just being applied to everyone, there's just no way that there is a way to resolve that issue, so he tossed the charges. Now, what would you charge in

New York? Promoting a suicide attempt? I don't think you could charge that because would the statement that, "The world would be better off without you," be the intent of you wanting someone to kill themselves? Most likely not. Aggravated harassment in the second? There would be some struggle with that as to whether communications on the internet are literally what are defined in the statute of aggravated harassment. However, there was a recent amendment after this case that expanded the role to all types of communications. There wasn't a specifically defined type of communication prior to the Megan Meier case, but recently it has been expanded to cover all types of communications.

How about falsifying business records in the second? I've actually prosecuted somebody for doing that for calling himself a Marx Brother's movie character. He identified himself to the web registrar as that person to go defame somebody in our office. So he had been previously convicted of stalking his psychiatric nurse and was under a conditional discharge of his sentence for a year on the requirement that he commits no further crimes, and I charged him with falsifying the business records in the second for falsifying his registration name with the website. Now, if that case doesn't begin to show you some of the problems we're facing and where we fit these new areas of technology into criminal statutes, you'd better be ready. I mean, my kids are fortunately eighteen and twenty—somehow I made it this far—and partly because I've been doing this for about thirteen years now and I've hammered them over the head about, "I know more than you think I know about you," including when I first found their MySpace pages when they'd been on for about two months and shocked the hell out of them, especially my older daughter when I told her all the stuff I knew she was putting out there. But if this doesn't scare the hell out of you, it should. This is an epidemic going on in high schools right now. I'm constantly contacted by principals and parents saying, "My kids have their pictures, their nude pictures out there that they're shipping off to their boyfriends and then their boyfriend for whatever reason is posting them all over the place. What can we do about it?" And typically teenagers sending sexually explicit photos of themselves to other teens, it's called sexting over cell phones or computers.

I got my first case a few months ago I thought it'd be pretty easy to figure out. I couldn't believe how difficult it was to figure this out. Who can be charged? What can be charged? And

there's actually a policy decision. Should they be charged? I want to take you through this real case and I'm going to change the facts a little bit so nobody can be identified here. It wasn't in New Jersey, but it was easy because we all joke in New York, we always kid about New Jersey, so I picked New Jersey. New Jersey, thirteen-year-old female the age is right here for this part of the story, meets a twenty year old male on Facebook. She pursues him over various media including cell phone. She sends him, unsolicited, a topless picture of herself. What's the crime? Okay. So is it possession of child porn on the twenty year old? Well, child porn in New York must be a specific sexual act or the lewd exhibition of the genitals. So topless doesn't count ever. Topless is not child pornography in New York. Even the simple nude exhibition doesn't count unless it's a lewd depiction of the genitals. And I've done a lot of research on the case, so there isn't a lot there and it's not very clear exactly what they mean by lewd depiction, but obviously topless it doesn't count and simple nude doesn't count. So the answer was no.

How about disseminated indecent material to minors in the first degree? Now, I'm going to try to do what Brian did and throw it out there for a second. What do you think might the problem be with this charge? Can he be charged with the disseminating? Yes?

[AUDIENCE MEMBER: No, because it was disseminated by the minor to him.]

That's the answer exactly. And now it does include the transmission of nude pictures, who did the disseminating here? She did. So under the current facts she disseminated. Now, there was a way to do this though. If you get the instant messages or e-mail communications or cell phone communications prior to the sending of a photograph and he encouraged her to do that, send me a topless picture of you. Then that would be a valid charge. So that's what we needed to do, we needed to get her computer, we needed to get her e-mail account.

By the way, by the time this case came to us from the other state, the case was a year old. The Hotmail e-mails were all long gone, nobody ever preserved them, so we couldn't charge him with that. True additional fact now, now the twenty-year-old after he gets the topless picture decides, you know, the guy's not a genius here, he sends her a picture of his exposed penis to her. We find that in her computer and he confesses. Can we charge Disseminating Indecent Material to Minors in the second?

If you read the statute you'd actually swear you can. And in fact that's what the police charged him with, the New York State police charged him with. It criminalizes the transmission of adult pornography including simply nude pictures by adults to minors online. Small problem. That statute was ruled unconstitutional in 1997. In fact, it was so ruled unconstitutional, this Court now, there's some question as to whether the Southern District of Federal Court can send out an injunction prohibiting all D.A.'s offices and the New York Attorney General's Office in New York from prosecuting a crime, but they actually issued injunctive relief prohibiting us from charging that statute. So in the real world distribution is still a crime, but via a computer it's not that crime.

Any other possibly charges besides disseminating in the second? How about endangering the welfare of a child? And that was the charge that he eventually pled guilty to as a misdemeanor. The problem is it's only a misdemeanor and it's not a sex offender registry act registerable offense. Now, in the circumstances of this case him being twenty years old and he was the one who was pursued. It's probably the best thing that could have turned out here. Even if he had been charged with the felony of disseminating second, I would hope that we would have thought that the endangering here in this situation is the fairest plea result. Of course we don't know that answer because we didn't have that opportunity, it was the only charge we could file.

Now, we're going to start changing the facts a little bit. Because I started thinking about this, how difficult it was just to figure this one out, I started thinking of permutations of this. Make her a sixteen-year-old female who sends out the picture just of her vaginal area, all right? Unsolicited by male who we'll make a seventeen-year-old. Male deletes it immediately, but doesn't realize it's still stored there. Is he chargeable as to the possession of child pornography?

Now, I don't know how many of you know that, and you may even start to get worried about this when you hear this, every time you visit a website, whatever is on that website gets stored on your computer for a period of time in cache section of your computer. Temporary internet file folder is where we find them. Is that considered possession? This is a very hot debate right now in law enforcement circles and you're going to start seeing some case law coming down on this in the very near future.

There are Federal cases that kind of go both ways. We're

making a test case of it in a New York case where the facts are considerably in our favor. He admitted knowing that it was stored on his computer and that he liked to revisit it every so often on websites because he liked seeing young boys in sex acts on the internet. So our case will be fairly easy to prove, but I would hope that we get a court decision talking a little bit more about this subject. But in this fact pattern is there anyone else besides the boy who can be charged? Think about that just for a second, who else can be charged?

[AUDIENCE MEMBER: The girl.]

The girl. And there are jurisdictions who are charging the girl. There are three that I know of: New Jersey, Virginia, and the third state, Pennsylvania. Each has a prosecutor in each of those states has taken on a charge against the girl, each time under tremendous criticism. The only case I know that's been resolved was either New Jersey or Pennsylvania; when she went through counseling they dismissed the charges. Fortunately, I have not been faced with that decision to make yet and I have no idea what we'll do when it happens. Obviously it will depend on the particular facts of the case.

Now, here's another issue. Based on New York law can the sixteen-year-old female in this hypo or the seventeen-year-old male be charged with possession? Why can the female be charged with promoting if not chargeable with possession? Well, there's a real oddity here in the law. Now first of all, the male can be charged if he requested her to send it. Because under the definition of promoting, merely to procure something is promoting. And we're going to test this statute out. This case was about someone ordering pornographic magazines from an undercover officer, and said because he procured it from the undercover officer he in effect was promoting. And if you think of this expansive definition of the term promoting, you're creating a marketplace by seeking it out and asking it to be delivered to you. So in effect you are promoting the child pornography industry. So it makes some sense and we're going to test it out in a case right now that we've just indicted. Where we are also going to say if someone goes out looking on the internet for this sort of stuff, they are promoting.

Now, the oddity about that is when you are seventeen, how can a seventeen-year-old boy not be charged? The possession charge is anybody under sixteen. For some reason, our State Legislature when they came up with this, and the possession

charge has been around for a long time, the promoting only started in '96, when they went with the promoting statute they made that seventeen. So anybody sixteen or under is a child in the picture can be charged with the promoting—it has to be fifteen or under for possession. So we've always got to be careful of those ages when we're looking at how to charge these laws.

We've already touched on this, this is really the major theme of my point here and I've been part of the D.A.'s Association Subcommittee of Computers and Technology since its inception in 1999. And I was the chair for five years. So for five years I would come up here and try to beg the Legislature, to beg the Governor to start forward-thinking laws to help us in this. And it was very frustrating. I finally quit from the Chair because it was just a waste of my time, quite frankly. I'm still part of the committee, but I don't want to come up here and waste my days in Albany, although I love Albany. But wasting my time up here, coming here to talk to Legislators who don't want to listen to us.

As you know, the law moves very slowly. Technology moves blindingly fast. Plus much of the methodology that we are now looking at what to do with simply haven't been around that long. MySpace has been around about seven years, Facebook even less. Sexting has really only been a problem for the last eighteen months.

Let me give you one quick example. Of all of the statutes that we have recommended with our subcommittee, one finally got passed recently: the business records. When you go the grand jury, you're allowed to introduce several types of things through an affidavit of the person who created the record. For example, autopsy reports, ballistic reports, medical records, all of those go in by affidavit. So when you have an internet case you would think, "Well, do I have to call as a live witness in New York the person from AOL to say who the subscriber is when we're talking about an AOL case? Do I have to call the person from Verizon down in Virginia because they're the providers to say who the account was? The internet provider, the internet service provider, who was that account assigned to?" Under New York law, until about a year and a half ago, the answer was yes, even in the grand jury. And we actually had a homicide case in which the issue of AOL was significant. Who had the AOL account? And AOL called us up and said we're not sending, that we're disobeying your subpoena. Why? Because if we start complying with grand jury requests for everybody in the country, we'll never

get any work done. We don't have enough people. It's tough enough sending people for trial. We are simply not going to comply with your grand jury subpoena, go get your Legislature to change the statute. Which is this statute in about thirteen states, and, of course, the Feds you can basically put on the arresting officer and have that person tell the whole story by hearsay.

In New York, you could not produce that evidence through hearsay testimony. You had to produce it through non-hearsay. So we finally got the statutes fixed about a year and a half ago. We thought. When I finally saw the final version of the statute, which nobody really consulted us before they actually enacted it, if you read the statute it clearly says only internet service providers. And why they put it that limited and we certainly did not recommend that type of statute.

What does that exclude? It excludes Google, it excludes Yahoo!, it excludes Hotmail. None of those are internet service providers. And you were hoping to say, well, maybe there's some wiggle room, they're still internet services. If you read the statute it's in the 190 Article, but I can't remember which one off the top of my head.

If I gave you the history, and this is actually the 40th anniversary of the internet, the beginnings of the internet. If I took you through the history, and I do that to some of my lecturers of how the internet developed, you would realize this was never intended to be like today's purpose. It was never what was really intended for the internet to be. And it's virtually impossible to un-ring the bell now. To retrofit provisions and security and whatever in the internet as it presently exists.

Obviously, the multi-jurisdictional nature of the online world some of the things that are crimes here are not crimes in other countries. Child pornography is quite legal in many countries. So those are some of the issues that present themselves that I don't know if they are really resolvable.

Some good news, I do have some good news for you. The Federal Government has, and I think it's called the anti-Megan Meier, the Megan Meier Cyber Bullying Prevention Act, is up before Congress right now and, who knows when it will get passed, that's there. Missouri actually enacted a version of the statutes to try to combat this problem. This is the first arrest from August of this year, so just a couple of months ago. And of course the first thing defense counsel says is, "I'm going to test

the Constitutionality of it.”

So as we all know, it's not enough just to get the statute enacted. Then we've got to fight the battles that we have to fight under many grounds or many bases to keep that statute alive. Most of this stuff though is reactionary versus proactive. It's almost impossible to get anything passed ahead of time.

None of these issues, of course, deal with the multinational issues of the internet, and there are much darker issues too. There's a whole lot on the internet that nobody really knows much about that's the real dark side of the internet. For those who know internet relay chats. That is a real problem and I don't think anybody has a solution for that. And that's it. Certain portions of the internet are extremely hidden. The most serious criminal offenders traffic there and the most serious security dangers to our form of government safety lurks there.

I think that's the end of what I have here. But I want to bring up one more point, I've got five minutes left before my thirty minutes is up and I wanted to bring this up, because I didn't want to put this in slides for it to be floating around here. How many of you use things like, you know, file sharing, computer file sharing programs like LimeWire—you won't get in trouble, I promise, you can raise your hand. Go ahead, how many? No, it can't be this few. There's got to be more of you than that.

All right. So many of you don't want to admit to it. What do you use it for? I'm going to give you immunity from prosecution. What do you typically use it for?

[AUDIENCE MEMBER: Music.]

Thank you. Obviously. It's obviously used for getting music. And the reason I'm saying you're going to be immune from prosecution at least from me, first of all, you're not in my county, but most people do it in violation of the copyrights. They do it without getting the permission of the music holder or and then they do it without paying for it. But what else can LimeWire be used for do you think? You can swap anything, can't you? You can swap absolutely any file. And a very common crime that we prosecute is the swapping of child pornography depictions. This is an epidemic right now on the internet. One of the good things about it though is it's very easy to prosecute. I can't tell you exactly how we go about doing it, but there is a system out there that we can identify who's swapping known depictions of child pornography.

Anybody know what a hash value is? Besides up here.

Anybody know? Hash values were invented and much of computer forensics that we do in law enforcement is just stolen from some other realm of computer technology. Hash value was created so that when people started sending important e-mails out, important documents via e-mail,—particularly in the legal fields—you send out a contract via e-mail. How do you know the contract you send out is the same contract that gets received at the end? That's pretty critical.

So a professor up at MIT, a math professor up at MIT came up with this, Rivest, I think is his name, came up with this clever thing called hash values. It's a mathematical formula. It's an algorithm that it gets applied to the ones and zeroes in a computer file. It can be anything. It can be the entire hard drive, which is why it's important to us in forensics because we never look at the original hard drive, we make a copy of it and make sure the copy is digitally and forensically accurate. You throw that formula against all the ones and zeroes and you get this ridiculously long result. It's like 40 characters, letters and numbers. And the likelihood depending on the formula you use, the most common one right now is called MD5, the Message Digest 5. The reliability of that is in the duodecillions, which is a one followed by thirty-six zeroes, twelve groups of zero, that's where you get the duodecillion from. No, I'm sorry, it's thirty-nine zeroes. That's right, because the first one thousands doesn't go into numbers and you've got millions, billions, trillions, so it's an extra three zeroes there. So one followed by thirty-nine zeroes. Billions and billions of more times more reliable than DNA. The other ones are like the SHA-1 value or the SHA-2 values are even more secure than that.

So the likelihood when we see a known hash value that we already know what the picture is by its hash value, and the law enforcement guys can track those hash values being transmitted over the internet on this file and all of the various forms of file sharing software. And they can also track the IP address. When they get the hash value they also get the IP address of where it's coming from. And since most of you now have high speed internet access as opposed to the days when it was all dial-up, it's a much more reliable form of saying where are you located at the time you're transmitting this or making this depiction of child pornography available.

And this is the hottest investigative area right now for law enforcement. And there are classes being taught, we can't get

**2010] THE CLASH OF TITANIC PARADIGMS 419**

into the classes they're so, everybody's trying to get into them because they want to learn how to do this technology and this technique. So it's a very popular way of doing things right now. We're making a lot of arrests in this area. So the flip side of this is as much as frustrating sometimes the law is in this area, the technology itself gives us also tremendous opportunities to do good things in this area of law enforcement.

So as frightening and as difficult it is to deal with this stuff sometimes, on the flip side is sometimes we get tremendous opportunities.

That ends my time. Thank you very much.