FORWARD

CYBERBULLYING FROM CLASSROOM TO COURTROOM: APPROACHES TO PROTECTING CHILDREN IN A DIGITAL AGE*

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"What did you bully Clewer for?" The question was repeated with maddening iteration by each in turn.

"Because we jolly well chose!" was the answer at last.[1]

Bullying is not a new phenomenon.[2] Yet there seems to be a resurgence of interest in and activity related to bullying, as well as an ever growing parade of poignant endings in the era of modern bullying. Names such as Megan Meier, bullied by the

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[1] Rudyard Kipling, *Stalky and Company: IV. The Moral Reformers*, 12 MCCLURE'S MAGAZINE 427, 434 (1899).
[2] *See, e.g.,* Fredric H. Burk, *Teasing and Bullying*, *in* 3 THE PEDAGOGICAL SEMINARY 336 (G. Stanley Hall ed. 1894) (describing a study of bullying among school children).

mother of one of her classmates,[3] and Ryan Halligan,[4] both of whom took their own lives by hanging after being subjected to real life and online bullying campaigns, are but two of the examples that are all too easy to find with a simple Google search. It appears to many that bullying has been revived from the slap-dash rite of passage often reflected in the movies[5] to a sinister, always on, devastating attack on childhood and children.

Has bullying changed significantly? Has it either increased in quantity or changed in quality? If so, why and how? These are questions perhaps best answered by empirical studies, and some such studies have been completed, suggesting that both the quantity and the quality of bullying have changed in recent years, though not always in the direction some may presume.[6] Some of those changes may be attributable to the life that the always on, constantly connected generation lives, and the role that electronic communication plays in those lives. Other changes may instead reflect broader changes in culture and in society. But even for those changes taking place in societal norms, there can be little question that some changes are facilitated, perhaps even called for, by the Internet and the culture of those who inhabit it. Anonymity, constant access to the victim, a wider audience for the act of bullying, greater planning possible on the part of the bully, all of these are aided by computers, social networks, and mobile phones, making these aspects of bullying more relevant to our political and legal analysis.

Even accepting this, when we look at specific bullying

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[3] *See* U.S. v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009).

[4] *See* Ashley Surdin, *In Several States, A Push to Stem Cyber-Bullying*, WASH. POST, Jan. 1, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/31/AR2008123103067.html (last visited, May 23, 2012).

[5] *See, e.g.*, A CHRISTMAS STORY, (Metro-Goldwyn-Mayer 1983) (Ralphie, the story's main character, is repeated bullied by Farkus, but eventually beats up the bully).

[6] *See, e.g.,* Ken Rigby & Peter Smith, *Is School Bullying on the Rise?* 14 SOC. PSYCHOL. EDUC. 441 (2011) (reporting the worldwide trend toward less bullying overall, and noting as well as shifts from physical bullying to more emotionally based attacks, including cyberbullying in this latter trend). *See also*, Aviva Glasner, *On the Front Lines: Educating Teachers about Bullying and Prevention Methods*, 6 J. SOC. SCI. 537 (2010) ("Today's bully is not the stereotypical big kid, wearing a striped shirt with his belly hanging out pounding other kids on the playground . . ."); David Finkelhor et al., *Trends in Childhood Violence and Abuse Exposure*, 164 ARCHIVES OF PEDIATRIC AND ADOLESCENT MED. 138 (2010) (reporting a large drop in physical bullying from 2003 to 2008).

scenarios, we would do well to consider the extent to which the Internet plays a real, as opposed to a perceived, role. As with any other area on which cyberspace touches, its mere presence does not alone make it important. It is novel, but that does not automatically make it determinative. How can we tell when cyberspace has made a difference? Professor Jack Balkin provides the following useful framework:

> Instead of focusing on novelty, we should focus on salience. What elements of the social world does a new technology make particularly salient that went relatively unnoticed before? What features of human activity or of the human condition does a technological change foreground, emphasize, or problematize? And what are the consequences . . . of making this aspect more important, more pervasive, or more central than it was before?[7]

If we consider salience, and not simply whether cyberspace is "new," we will be on firmer ground if and when we decide that cyberspace somehow makes things different from the situation as it existed before cyberspace itself existed. Where, then, do we find the differences that are brought to the foreground when bullying includes cyberspace in its occurrence?

Consider the following set of distinctions offered up by one district court judge when considering how cyberbullying changes the game from how bullying occurred prior to the Internet age:

> Cyberbullying differs from traditional bullying in several ways. First, a cyberbully can attack anonymously. Second, the bullying can go viral, with many people harassing the same target at once. Third, the bully does not see the emotional toll his bullying creates, allowing the culprit to push further than he or she might in a face-to-face relationship where the adverse effects are clearly perceived. Fourth, many parents and teachers do not have the technological know-how to monitor these actions.[8]

If we consider each of these in turn, we will see that while each has strong corollaries in the world of "traditional" bullying—that is, they are not so different from bullying that has taken place across the ages[9]—taken together and considered along with

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[7] Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 2 (2004).

[8] T.K. v. New York City Dept. of Educ., 779 F. Supp. 2d 289, 300 (E.D.N.Y. 2011), citing Sameer Hinduja & Justin W. Patchin, *Overview of Cyberbullying*, *in* WHITE HOUSE CONFERENCE ON BULLYING PREVENTION 21 (2011).

[9] Hinjuja and Patchin explicitly recognize that "cyberbullying" and "bullying" are not separate at all, but are inherently intertwined: "Despite these

additional facets of interaction enabled by the Internet, they begin to show the elements of bullying that are brought into relief by the use of modern forms of telecommunications, and thus where we should focus our attention.

For example, the Internet changes anonymity, though perhaps not as much as many people think.[10] The truth of anonymity, however, is likely to be overshadowed by the perception of anonymity that the Internet provides to its users.[11] That feeling of anonymity may ratchet up individual willingness to engage in acts they would otherwise reject.[12] But this latter effect is tied more to the third element of the list: the willingness of participants to engage in activities that they otherwise wouldn't because they do not need to face their victims. This seems to be an integral part of "distance" cyberbullying, that is, bullying that takes place between people who do not know each other simply because one person can bully another without seeing any of the final outcomes of the bullying. It seems to play a lesser role, however, in how people who know each other integrate cyber-tools into their cyberbullying tool-kit. In the latter case, the bully wants to see the result; that is a large part of the point. The result gives the bully cachet in his or her community and grows the legend and importance of that person in the eyes of her or his peers.

The differences are thus not inherently so. As another example, "anonymous" bullying can take and has taken place in real space: think of insults painted onto a hallway locker or unsigned notes stuck into a student's bag. In addition, parents

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differences [between bulling and cyberbullying], a significant body of research notes the close connection between experiences with online and offline bullying."

[10] *See, e.g.,* Doe I v. Individuals, whose true names are unknown, 561 F. Supp. 2d 249 (D. Conn. 2008) (rejecting anonymous online speakers' objections to subpoenas seeking to identify them).

[11] *See*, *e.g.,* Deborah M. Moscardelli & Catherine Liston-Heyes, *Teens Surfing The Net: How Do They Learn To Protect Their Privacy?*, 2 J. BUS. AND ECON. RES. 43 (2011) ("The perception of anonymity and safety however may be a false one and is dependent on the consumer's knowledge of online data collection and privacy issues").

[12] *See*, John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY AND BEHAVIOR 321 (2004) (distinguishing between "benign disinhibition"—relating to a willingness to share personal feelings and facts – and "toxic disinhibition"— relating to hatred and harsh criticisms that people would not engage in without the feeling of anonymity provided by the Internet).

and educators have never been particularly good at monitoring and stopping bullying. Whether this was a choice—norms such as "don't be a tattletale" conflicting with the need for reporting as an important element of an anti-bullying strategy—or the result of an inability to find and counter bullying is uncertain. The point here is that the Internet may compound these difficulties, but its involvement does not necessarily make cyberbullying "different" from bullying in historical context.

One scenario that is "different" from the past is the distance bullying referenced above. Distance bullying involves situations in which the bullies do not personally know their victim or victims. Instead, the cyberbullies organize themselves through posts on social media platforms, discussion boards, and other interactive Internet sites. They are mean because they can be, and can be so in relative anonymity.

While "Anonymous" has gained fame recently as often taking stands on political and social issues,[13] many flying under the "Anonymous" moniker have no particular social ambitions. In fact, one meme associated with Anonymous reads: "Anonymous: Because none of us are as cruel as all of us." It would be difficult for this phenomenon to exist without the Internet. It is difficult in the real world for people willing to be cruel to find each other, organize, choose a target, and execute the attack. The timing, identification of compatriots, and organizational effort often is too risky and labor intensive in the real world.[14] The Internet removes many of the impediments to this kind of organization and coordination; as such, it brings new and different elements of bullying—of the cruelty associated with it – to the foreground.

Aside from these kinds of specific Internet exceptions, though, we would do well to remember that the Internet is not distinct from other space.[15] It is not a separate place, but is instead part

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[13] Nicole Perlroth, *Hackers Step Up Attacks After Megaupload Shutdown*, N.Y. TIMES Jan. 24, 2012, *available at* http://bits.blogs.nytimes.com/2012/01/24/hackers-step-up-attacks-after-megaupload-shutdown/ (last visited, May 24, 2012).

[14] It is important to note, however, that we do have corollaries to the effects of anonymity in the real world in the forms of the sheets and hoods of the Ku Klux Klan. *See, e.g.,* Minjeong Kim, *The Right to Anonymous Association in Cyberspace: US Legal Protection for Anonymity in Name, in Face, and in Action*, 7 SCRIPT-ED 51 (2010) (noting that the KKK's attempts at anonymity were not always successful).

[15] *See*, JULIE COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE

of our lived experience, and as such we must consider the bullying as much as if not more than the medium through which the bullying takes place.[16]

The contributors to this symposium edition are aware of and reflect this understanding. Lawrence Paska[17] explains that there are state designed structures in place to push, cajole, and support those in positions near to the cyberbullied to respond to bullying and reject the role of passive onlooker or vicarious enjoyer. This issue is important to those immersed in the field of education, he tells us. Of the many things that Karen Siris teaches us,[18] one thing that stands out that must not be forgotten is that the answers to cyberbullying are personal, not technological. That is, we must act on the whole person, all of the persons, involved in bullying to rationally respond to this problem. Scott Camasser reminds us that states are reacting, setting out the movement and direction of state policy and judicial decisions on this issue, and we must remain aware of how states are responding.[19] Finally, Nancy Willard takes us on a tour de force of the wider constitutional and societal implications of attempting to regulate cyberbullying, bringing us one step closer to understanding how law interacts on a larger scale with the ultimately personal concerns raised here.[20]

Overall, this symposium helps us move us ahead in our attempts to deal with a problem that can and does have devastating real-world effects. Children are dying, adults are isolated and alone. Both bullying and cyberbullying—that malevolent offspring of human nature and technological progress—need our attention. How we react as a society will be

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PLAY OF EVERYDAY PRACTICE (2012) ("The information society is not simply an abstract collection of categories and privileges; its inhabitants exist within real spaces and experience artifacts and architectures as having material properties.").

[16] For an example of the holistic approach to bullying, *see, e.g.,* Jing Wang, Ronald Iannotti, & Tonja Nansel, *School Bullying Among US Adolescents: Physical, Verbal, Relational and Cyber*, 45 J. ADOLESCENT HEALTH 368 (2009).

[17] Lawrence Paska, *Internet Safety and School Culture: State Education Support for Schools*, 22 ALB. L.J. SCI. & TECH. 583 (2012).

[18] Karen Siris, *Out of School Behaviors: A Principal's Responsibility?*, 22 ALB. L.J. SCI. & TECH. 603 (2012).

[19] Scott D. Camassar, *Cyberbullying and The Law: An Overview of Civil Remedies*, 22 ALB. L.J. SCI. & TECH. 567 (2012).

[20] Nancy Willard, *Student Online Off-Campus Speech: Assessing "Substantial Disruption"*, 22 ALB. L.J. SCI. & TECH. 609 (2012).

our legacy to the future generations.