

CONFRONTING BULLIES ON THE DIGITAL SCHOOLYARD

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Policymakers and law enforcement officials at the state and federal levels have taken steps in recent years to address the safety of young people on the Internet. But one area of online safety in which there is a need for greater leadership is cyberbullying. There has been growing public awareness of the dangers of cyberbullying—the use of digital media by young people to harass, bully, or humiliate their peers—but there is no uniformity in how state or federal laws address the problem. Codifying a clear definition of cyberbullying in statute and distinguishing it from other forms of online harassment would go a long way toward helping legislators, law enforcement, schools, parents, and other community members create strategies for responding to such incidents. The response to cyberbullying in Texas illustrates the difficulty of mobilizing state officials to take action. At the federal level, most efforts to promote youth safety online have focused on stopping sexual predators, not bullies.

INTRODUCTION

In 2001, Lauren Newby, a sophomore at Lake Highlands High School in Dallas, Texas, was the victim of malicious taunting by current and former classmates. The students ridiculed the young woman about her weight, her disability, and her boyfriend. The incident began with disparaging remarks on a message board, but soon escalated into physical attacks on her home and vehicle. What distinguishes these attacks from traditional bullying incidents is their origin on the Internet instead of school grounds.[1] Like many other young people across the United States, Ms. Newby was the victim of a pervasive and dangerous Internet practice known as cyberbullying.

This article examines efforts to address cyberbullying both in Texas and at the federal level, where officials are struggling with how to define the problem. Ultimately, cyberbullying merits a collaborative strategy among parents, educators, policy makers, and the private sector. Yet, this article explores some of the structural obstacles that have prevented such a strategy from coming to fruition. The example of Texas illustrates that even in a state where law enforcement officials recognize threats to youth safety posed by the Internet, there is a disproportionate focus on adult sexual predators and too little attention paid to youth-on-youth bullying. At the federal level, efforts to address cyberbullying and other forms of cyberharassment have been hampered by concerns about legislation that would curtail civil liberties.

UNDERSTANDING CYBERBULLYING

Many scholars and child safety advocates have attempted to provide a useful conceptualization of the term cyberbullying; however, no single definition exists to guide parents, educators, and law enforcement officials. For example, John Palfrey and Urs Gasser define cyberbullying as “the intentional use of any digital medium, including text-messaging, pagers, and phone calls, to harm others.”[2] They note that the only difference between bullying on or off the Internet is that cyberbullying is “put on the record in a more permanent way.”[3] In this regard, cyberbullying, like traditional forms of verbal bullying, has the potential to precipitate actual physical violence. What distinguishes cyberbullying from other forms of bullying is the likelihood of emotional damage caused by the public and lasting nature of the communication by a potentially anonymous attacker.[4]

Although there have been some reports of cyberbullying perpetrated by adults, most definitions of cyberbullying frame the problem as one in which both the victims and the perpetrators are young people.[5] The National Crime Prevention Council (NCPC) applies the term cyberbullying to harmful interactions between young people, with an emphasis on teenagers. NCPC includes in its definition: posting abusive text or images, sending threatening messages, or the use of identity fraud to convince an individual to give up personal information.[6]

As one would expect, lack of a standard definition of cyberbullying has contributed to a failure to create a consistent statutory definition, but the lack of consistent definitions and legal practices does not mean cyberbullying is not a serious problem. In 2006, the Crimes Against Children Research Center (CCRC) estimated the risks for children and teens for certain behavior online. Specifically, CCRC found that one out of eleven young people was in danger of “harassment [through] threatening or other offensive behavior.”[7] Between 2001 and 2006, harassment increased from six to nine percent of all “youth Internet users.”[8] Revisiting this study in 2008, the director of the CCRC noted that a significant amount of the harassment studied likely came from other young people, not “hardened Internet predators.”[9]

ACTION IN THE STATE OF TEXAS

Current law and policy priorities in Texas reflect national trends of the response to cyberbullying; as in other states, officials in Texas publicly recognize the problem of cyberbullying, but they have focused law enforcement activities in the digital sphere specifically on the investigation and prosecution of online sexual predators, not on efforts to curb youth-on-youth online bullying.

Under existing law in Texas, a person may be found guilty of harassment (a misdemeanor offense) if he or she uses e-mail, instant messaging, network calls, or other electronic communications to initiate communication with the intent to “harass, annoy, alarm, abuse, torment, or embarrass another” person or household.[10] In this respect, the Texas Penal Code is progressive in its integration of electronic and non-electronic forms of harassment into a single statute with common penalties; there is no discrimination between the physical world and the virtual world. However, the Penal Code statute on harassment is separate from the state’s treatment of bullying, which falls under the state Education Code and deals specifically with victimization on public school property.[11]

During the regular session of the 81st Legislature in Texas, Representative Mark Strama (D-50th District) introduced legislation designed to address the divide between the current reality of online bullying and the legal tools that schools have at their disposal to respond to bullying incidents. As amended and reported out of the Texas House Committee on Public Education, House Bill (H.B.) 1323 would have added “verbal expression through electronic means” to the statutory definition of bullying under the Texas Education Code and would have clarified that bullying may include behavior on or off of school grounds.[12] This legislation would have inextricably linked physical schoolyard behavior with malicious online conduct, and allowed school district boards the authority

to pursue transfers of the bully or the victim, depending on verification of the behavior and the request of the victim’s parent or guardian.[13] However, H.B. 1323 was not considered by the full Texas House of Representatives before the conclusion of the regular legislative session.

Legislative progress has been made in Texas. On June 19, 2009, Governor Rick Perry signed H.B. 2003, which amended the Texas Penal Code to create felony and misdemeanor offenses for certain types of online harassment. Under the revised laws, a person may be found guilty of a third-degree felony for using another person’s name or likeness on a social networking site for the purpose of harassing someone else.[14] Also, a person may be punished with a Class A misdemeanor offense (the most serious class of misdemeanor offenses in Texas) if he or she sends electronic communication, including texts, emails, and instant messages, that make reference to a person’s name, Internet domain, or other identifying contact information, provided that the information was referenced without permission and the communication was made with the intention of harming or defrauding another person.[15]

The new law became effective on September 1, 2009, and its impact on Internet safety will be determined in the months ahead.

According to the Office of the Attorney General in Texas (OAG), cyberbullying prevention is currently most

effectively treated not as a legal matter, but as a matter of community outreach.[16] The OAG deploys personnel to school districts throughout the state on a weekly basis to discuss Internet safety with parents, students, and educators, focusing especially on the vulnerable online population of 12- to 15-year-olds.[17] While Attorney General Greg Abbott has been aggressive in his efforts to protect children online, the majority of his efforts have focused on the protection of children from sexual predators.[18]

FEDERAL LEGISLATION

While some states like Texas now have laws with respect to various forms of cyberharassment, no federal statute or common legal standard has appeared. Federal law does consider threats communicated by the Internet to be criminal actions, punishable by up to five years in prison.[19] However, this law requires the delineation between a threat, meaning “one that a reasonable person would take as a serious expression of an intention to inflict bodily harm and ... communicated to effect some change or achieve some goal through intimidation,”[20] and the sort of harassment or annoyance that might occur through electronic communications. Federal law (under the Federal Telephone Harassment Statute, 47 U.S.C. 223) also permits the prosecution of cyberharassment through telephones, telecommunications devices, and email

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Table 1: Selected State Laws Relevant to the Prevention of Cyberbullying of Minors

State	State Law	Brief Summary
California	CA Penal Code § 422	Establishes that threats made toward an individual or his or her family through the use of an electronic communication are to be considered as legitimate threats, regardless of whether the threat will be carried out. Sets forth misdemeanor penalties for carrying out specific cyberharassment actions.
Florida	FL Stat. § 784.048	Defines cyberstalking to include a pattern of behavior targeting a specific person through electronic mail or communication. Additional penalties exist for cyberstalking of a person under the age of 16.
Illinois	IL Comp. Stat. 720 § 135 1-2	Specifically defines actions constituting harassment through electronic means of communications, including the harassment of victims under the age of 13 by defendants who are at least 16 years of age.
Michigan	MI Comp. Laws § 750.411s	Prohibits the posting of threatening or harassing messages through the Internet and computer systems, programs, and networks or by other electronic means.
Oklahoma	OK Stat. 21 § 1172	Includes conspiracy or concerted action with others among prohibited methods of perpetrating cyberharassment.
Texas	TX Penal Code § 33.07	Creates felony and misdemeanor penalties for certain actions defined as online harassment, including the use of social networking websites on the Internet.

Source: Alison M. Smith, Protection of Children Online: Federal and State Laws Addressing Cyberstalking, Cyberharassment, and Cyberbullying (Washington, D.C.: Congressional Research Service, September 5, 2008): 29-37.

communications, provided that the perpetrator remains anonymous.[21] Federal courts have yet to rule specifically on whether Internet chat rooms or bulletin boards are included under this statute.

Similar to state legislation, federal legislation related to protecting children online has typically focused on the prohibition of “child pornography, child luring, and child sexual exploitation” because of the nature of physical harm associated with these three criminal activities.[22] Congress has attempted to “maintain a balance between enacting statutes broad enough to cover undesirable behavior, while simultaneously narrow enough to prevent infringement upon an individual’s right to express oneself under the First Amendment.”[23]

Over the last twelve years, while three enacted federal laws have attempted to prevent young people from accessing sexual materials on the Internet, none have addressed concerns of cyberbullying. The Children’s Internet Protection Act of 2000 (CIPA), the only one of these three laws affirmed as constitutional by the Supreme Court, requires that “a school or library may not use funds it receives under [federal] statutes to purchase computers used to access the Internet, or to pay the direct costs of accessing the Internet” unless the institutions

use Internet filters to prevent access to child pornography or other materials that are obscene or (in the case of young users) harmful to minors.[24] The Supreme Court held that users may turn off the filters for research or other legal Internet usage and that the ease of using such a switch guarded against constitutional concerns that users might be blocked from accidentally filtered material.[25]

For advocates of cyberbullying protections, the judicial interpretation of CIPA could mean that filtering or blocking software could be implemented to interpret online conversation and block inappropriate contacts. While parents have the right to use filters at home, the CIPA ruling might allow the extension of filtering technology to protect against cyberbullies during the use of school or library computers.

On April 9, 2009, Representative Linda Sanchez (D-CA) introduced H.R. 1966 that would amend federal law to make cyberbullying a crime, punishable by two years of imprisonment and/or a fine.[26] The bill would make criminal anyone who “transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behav-

ior.”[27] H. R. 1966 would include as “electronic means” all email, instant messages, Web sites (including blogs), telephones, and text messages.[28] Similar forms of this legislation were introduced during the 110th Congress; none were passed before the Congress adjourned in December 2008.[29]

COURT ACTION

The American judicial system has established some precedents in the event that parents or students contest disciplinary action on the grounds of cyberbullying or cyberharassment. First, the United States Supreme Court has affirmed that the First Amendment does not provide safe harbor for so-called “offensive speech” that occurs on school campuses.[30] Second, state courts have upheld the right of school districts to punish students for Web-based harassment, particularly in cases in which students create potentially threatening materials, access them at school, and share the content with other students.[31] Courts at the state level have placed the language of cyberbullying outside of First Amendment protections on free speech. Third, however, while the state courts have generally determined that cyberbullying or cyberharassment must constitute legitimate disruption to school operations to justify school disciplinary actions, the courts have not made a clear determination on what materials cross the delicate boundary between harassment and a genuine threat.[32]

RECOMMENDATIONS

Clear evidence exists to demonstrate that cyberbullying exists and is a growing threat to young people. Understandably, both states and the federal government have focused on pursuing legal solutions to the problem of cyberbullying, and many lessons can be learned from the experiences of Texas and the federal government. The solution to this problem requires a multi-faceted collaboration between parents, educators, law enforcement officials, policy makers, and online social networking and communication companies. Recommendations for future action include:

1. **Legislators at the state and federal levels should develop clear-cut definitions of cyberbullying and cyberharassment and determine what rules govern the interaction between minors versus the interactions between minors and adults.** Consistent statutory definitions of cyberbullying are imperative for the measurement of policy outcomes and the development of prevention strategies for law enforcement officials, educators, and parents. Jurisdictions could benefit from distinguishing between cyberbullying—in which both the victims and the perpetrators are typically minors—and cyberharassment, perpetrated by adults against other adults or children. Such a distinction would frame the

response to cyberbullying within the traditional educational understanding of “bullying” as a schoolyard activity, which is a necessary step in developing strategies for combating the phenomenon.

2. **Federal and state laws should address physical and electronic bullying and harassment together, with the understanding that the real campus is now integrated with the online world.**

Crucial to this proposal, cases of cyberbullying should be handled first through the educational system instead of solely through the courts. Certain tragedies may merit criminal investigation and prosecution when serious physical harm occurs with—or is caused by—emotional damage.[33]

Many schools do have safety officers to patrol their campuses for the purpose of observing and preventing criminal behavior; however, a strong law-enforcement-only approach is inappropriate for stopping cyberbullying. While legal measures themselves may be inadequate for protecting children from cyberbullying or inappropriate information online at all times, government entities have an important role to play in producing educational resources on the Internet and working with the private sector to develop protection mechanisms.[34]

3. **The education and policy communities should play active, collaborative roles in teaching students about the dangers of cyberbullying.**

In the digital age, countering bullying must involve understanding and acknowledgement of the fusion of real and online life. Because the anonymity of the Internet presents an extra danger of acting without full appreciation of consequences, educators must be capable of teaching students how to recognize, avoid, and report bullies both at school and on the Internet.[35] As in Texas, it is important for policy makers and law-enforcement officials to be visible classroom participants as young people are educated on the means and consequences of cyberbullying.

4. **Parents should actively discuss Internet safety with their children and, to every extent possible, engage them about their own online habits.** With effective home monitoring of minors’ computer usage, an effective program of school-based education on cyberbullying, and a program of laws that adequately define and punish cyberbullying and cyberharassment, it may be possible to reduce the emotional harm that continues to spread among current and future generations of Internet users.

CONCLUSION AND NEXT STEPS

Before the public sector considers any change in the legal structure regarding online communication, the private sector of online service providers has a crucial opportunity to demonstrate that they have concerns about protecting young subscribers from potentially harmful situations. MySpace, for example, has reached an agreement with 49 state attorneys general to develop a task force to study the online safety of minors who use its site.[36] Notably, the only office to abstain from this agreement is the Texas OAG. Attorney General Abbott has stated that he believes MySpace provides inadequate protections for minors and that signing the joint statement to establish the task force “would be misperceived as an endorsement of the inadequate safety measures contained therein.”[37] Attorney General Abbott also added: “[The

OAG] cannot endorse any initiative that fails to implement a reliable age verification system. Doing so would give Texas parents and their children a false sense of security.”[38]

Mr. Abbott may be commended for standing on principle for age-verification protection, but the sort of public-private partnership created by the MySpace task force remains a potentially valuable tool for understanding and combating cyberbullying through social networking Web sites.

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ENDNOTES

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[2] John Palfrey and Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (New York: Basic Books, 2008): 90.

[3] *Ibid.*, 93.

[4] *Ibid.*, 93-94.

[5] *Ibid.*, 94. NOTE: The authors specifically cite the suicide of Megan Meier in Dardenne Prairie, Missouri. Meier was deceived by the false online persona of a romantically interested boy created by a pair of girls and their parents. Meier discovered the hoax before taking her own life.

[6] National Crime Prevention Council. “*What is Cyberbullying?*” National Crime Prevention Council, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (accessed: July 7, 2009); National Crime Prevention Council. “*Cyberbullying FAQ For Teens.*” National Crime Prevention Council. <http://www.ncpc.org/topics/cyberbullying/cyber>

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[7] Janis Wolak, Kimberly Mitchell, and David Finkelhor, *Online Victimization of Youth: Five Years Later* (Alexandria, Virginia: National Center for Missing & Exploited Children, 2006): vii, 1.

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[10] Texas Penal Code Annotated, Title 9, Chapter 42, Sections 42.07a-42.07c.

[11] Bully Police USA. “*Texas: C.*” Bully Police USA, http://bullypolice.org/tx_law.html (accessed: July 4, 2009).

[12] Texas House of Representatives, House Committee on Public Education, *Committee Report on H. B. 1323* (Substituted), Texas House Bill 1323, 81st Legislature, regular session (2009): 1601.

[13] *Ibid.*

[14] Office of the Attorney General of Texas.

“*Cyber Safety.*” Office of the Attorney General of Texas, <http://www.oag.state.tx.us/criminal/cybersafety.shtml> (accessed: July 6, 2009).

[15] *Ibid.*

[16] David Boatright, Chief of Criminal Investigations Division, Office of the Attorney General of Texas, telephone interview with author, July 7, 2009.

[17] *Ibid.*

[18] Howard Witt. “To Texas AG, Net predators are fine prey.” *Chicago Tribune*, http://www.chicagotribune.com/services/newspaper/printedition/chi-abbott_wittnov05,0,243190.story (accessed: July 6, 2009).

[19] Alison M. Smith, *Protection of Children Online: Federal and State Laws Addressing Cyberstalking, Cyberharassment, and Cyberbullying* (Washington, D.C.: Congressional Research Service, April 15, 2009): 5-6.

[20] *Ibid.*

[21] *Ibid.*, 7.