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### **Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media**

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**LAW AS AN ALLY OR ENEMY  
IN THE WAR ON CYBERBULLYING:  
EXPLORING THE CONTESTED TERRAIN OF PRIVACY  
AND OTHER LEGAL CONCEPTS IN THE AGE OF  
TECHNOLOGY AND SOCIAL MEDIA \***

**A. Wayne MacKay, C.M., Q.C.\*\***

**1. Introduction: Law and Social Problems**

Laws should provide at least one route to solving social problems. That is not to suggest that laws are the only or even the best, response to many of Canada's complex social problems. Indeed, laws can sometimes impede rather than advance a constructive response to a particular problem. History provides many examples of laws being used to buttress the status quo, rather than promote change. Furthermore, complex social problems usually require a multi-tiered response, including education, prevention strategies and other "softer" responses, as well as the iron fist of the law. Law is often a blunt instrument. These reservations about the role of law as an agent of social change apply to the pervasive and perplexing problem of cyberbullying.

Whether law will be primarily an ally or an enemy in the war on cyberbullying is the central question that permeates this article. Responding to this question is complicated by the novelty and the multi-faceted nature of the cyberbullying problem. There is no doubt that legal responses must be paired with educational initiatives, prevention strategies and attitude changing communications, at all levels. A possible analogy could be the war on drunk driving, where harsher and more effective laws were one part of an orchestrated campaign to change social attitudes about drinking and driving.

Because it is so important to understand the magnitude and dimensions of the problem, the next two Parts will address this task. Any effective response must address the fact that cyberbullying at its core is about unhealthy relationships. The question is how best to improve them. It is beyond the scope of this article to explore non-legal responses such as education, prevention and communication strategies, issues which will be explored by others, including my former student and friend, Hannah Choo,

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\* An earlier version of this article was delivered as the Ivan C. Rand Memorial Lecture (21<sup>st</sup>) on February 20, 2014 at the U.N.B. Law School, Fredericton, New Brunswick.

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who is also contributing to this volume. My focus will be on the role and limits of law as a response to cyberbullying.

The problem of cyberbullying engages many of our most fundamental legal concepts and provides an interesting case study. Even when there is general agreement that the problem merits a legal response, there are significant debates about what that response should be. Which level and what branch of government can and should best respond? What is the most appropriate legal process for pursuing cyberbullies—traditional legal avenues or more creative restorative approaches? How should the rights and responsibilities of perpetrators, victims and even bystanders be balanced?

Among the key legal concepts that will be explored are privacy, free speech, liberty, and equality. These are the cornerstones of Canada's constitutional framework and striking the proper balance between them is a challenging and complex business. Before attempting this task I will turn to the nature of the cyberbullying problem.

## **2. Cyberbullying: The Dark Underbelly of Technology and Social Media**

I have been immersed in the troubling issues of bullying and cyberbullying since I chaired the Nova Scotia Task Force on Bullying and Cyberbullying in 2011 and 2012. Few (if any other) experiences have had such a profound and emotional impact on how I view the relationship between law and society. It has also accentuated my concern about the troubling underbelly of the modern world of technology and social media. While the amazing advances in both technology and social media have changed the world in many positive ways, they have also had some very negative side effects as well. The problems of cyberbullying provide a window into even more far reaching social problems. As I stated at the outset of the Nova Scotia Task Force Report on Bullying and Cyberbullying:

Bullying is a major social issue throughout the world and is one of the symptoms of a deeper problem in our society: the deterioration of respectful and responsible human relations. The magnitude of the problem is daunting and there are no simple solutions on the horizon. There are, however, some effective strategies.

The advance of technology and the prevalence of social media are profoundly changing how we communicate, and in so doing, they are also changing who we are.<sup>1</sup>

I shall return in the next section to a brief exploration of how omni-present technology and pervasive social media have changed the way we live and communicate with one another. In many ways we may be witnessing a modern version

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<sup>1</sup> A Wayne MacKay, *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying*. Submitted to the Nova Scotia Department of Education on February 29<sup>th</sup>, 2012. Available on request from the Department of Education and electronically published at <[anticyberbullying.novascotia.ca](http://anticyberbullying.novascotia.ca)> at 1.

of Marshall McLuhan's famous insight that "the medium is the message."<sup>2</sup> The message being delivered by the ever changing forms of technology and the exploding medium of social media, is at best a mixed one. Cyberbullying is one of the darker messages and one that has deep and disturbing implications for all of us.

The problems of bullying and cyberbullying raise some of the largest and most complex issues in society. At the core of the bullying issue is the need for respectful and responsible relationships among young people and in society generally. While there is lots of blame to go around, bullying is not just about unacceptable individual conduct but rather a complex web of relationships and attitudes that permeate all aspects of modern society. It is about values, community (or the loss of it), a breakdown in respect for other people, and the need for citizens young and old to take responsibility for their actions and inactions.

The lack of respect for other people and their property, a failure to take responsibility for individual and collective actions, the loss of a sense of community and core values were all too evident in these high profile displays of violence and irresponsibility. Problems of bullying and cyberbullying are not confined to youth and in many respects the mandate of this Task Force intersects with some of the largest and most troubling issues of our time.<sup>3</sup>

One of the lessons that I learned from the Cyberbullying Task Force experience is that the problem of cyberbullying is more about relationships between people than about traditional legal issues about rights and responsibilities. It is also about a deterioration in our basic human relationships and loss of caring, empathy and respect.

There are direct and tragic consequences to bullying and cyberbullying and the impact is particularly damaging for young people. At a time when "fitting in" and being accepted by one's peers is vital, the corrosive impact of relentless cyberbullying is acute. The immediate trigger for the May, 2011 appointment of the Nova Scotia Task Force on Bullying and Cyberbullying was a series of tragic teen suicides involving young women in high school. There appeared to be links between the suicides and bullying and cyberbullying.

One of these 2011 victims was Jenna Bowers-Bryanton, the fifteen year old daughter of Pam Murchison, who is now a courageous anti-bullying advocate.<sup>4</sup> While suicides are complex issues and there is rarely a clear cause and effect relationship, there does appear to be a growing body of evidence that there are links between

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<sup>2</sup> Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: McGraw-Hill, 1964) at 7.

<sup>3</sup> *Supra* note 1 at 4.

<sup>4</sup> David Jackson, "Mother urges action on cyberbullying: Murchison says someone bragged about causing her daughter's suicide", *Halifax Chronicle Herald* (4 May 2012). She made this assertion before the Nova Scotia Law Amendments Committee and also does school presentations.

bullying and suicides.<sup>5</sup> Another tragic death of a fifteen year old Nova Scotian woman was clearly linked to sexualized cyberbullying, when a naked picture of her, allegedly being sexually assaulted by four boys, was circulated around her school and beyond. The death of Rehtaeh Parsons by suicide at age 17 not only captured the attention of people throughout the world, but also sparked significant legal change, as will be discussed later. Once again her parents, Glen Canning and Leah Parsons, have become tireless advocates for more effective responses to the related problems of cyberbullying and suicides.<sup>6</sup> The role of Rehtaeh's parents, Pam Murchison and many others like them, should not be underestimated. They played an important role in advancing not only education and prevention programs but also the creation of new laws at both the provincial and federal levels.

There have been many tragic suicides including young men as well as women. The 2012 case of a gay teen in Ottawa is yet another example.<sup>7</sup> One factor in his case was the fact that he was gay. Being a member of the LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) community has been identified by many studies (including the *Nova Scotia Task Force Report*) as increasing the risk for both bullying and cyberbullying. It is also not accidental that so many young women are victims of sexualized cyberbullying. Another tragic case of suicide linked to cyberbullying is the October, 2012 case of the British Columbia teen, Amanda Todd. Her online video in which she made a desperate cry for help with a series of hand-written notes, captured both national and international attention. The very technology that victimized her has now been used to track down and charge a man in the Netherlands for enticing her to flash her breasts online.

Cyberbullying is an alarming world-wide phenomenon and not restricted to any particular province or nation. After completing my work on the Nova Scotia Task Force on Bullying and Cyberbullying I was interviewed by journalists from the United States and the United Kingdom and was included as part of a documentary video for Japan's equivalent of the Canadian Broadcasting Corporation. Nova Scotia through a range of circumstances (some involving high profile suicides) has become the epicenter of responses to cyberbullying. In particular, the unique Nova Scotia *Cyber-safety Act*<sup>8</sup> has attracted both national and international attention.

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<sup>5</sup> Carly Weeks, "Suicide risk greater with cyberbullying", *Toronto Globe and Mail* (12 March 2014).

<sup>6</sup> Canadian Press, "Victim's father speaks on cyberbullying at UN Panel", *Toronto Globe and Mail* (10 March 2015). This is but one example of the parents' advocacy on these issues, which includes conferences, blogs, meetings with premiers and the Prime Minister. For an interesting analysis of the Rehtaeh Parsons case see Anne Kingston, "Rehtaeh Parsons, Dalhousie and the wait for justice in Nova Scotia", *MacLean's Magazine* (10 April 2015), online: <<http://www.macleans.ca/society/rehtaeh-parsons-the-dds-2015-scandal-and-the-wait-for-justice-in-nova-scotia/>>.

<sup>7</sup> "Gay Ottawa teen who killed himself was bullied" *CBC News* (18 October 2011), online: <<http://www.cbc.ca/news/canada/ottawa/gay-ottawa-teen-who-killed-himself-was-bullied-1.1009474>>. The boy was the son of Ottawa Councillor, Allan Hubley. There was also the tragic case of Todd Loik as well. Chris Purdy, "Todd Loik, 15, committed suicide because students hounded him with 'nasty' messages, mother says" *The National Post* (25 September 2013), online: <<http://news.nationalpost.com/news/canada/todd-loik>>.

<sup>8</sup> SNS 2013, c 2.

Unfortunately, the tragic convergence of cyberbullying and suicides also has international dimensions. In 2012 two cases in the United States produced national and international headlines. In Steubenville, Ohio, the rape of a young teenage woman by her classmates and members of the school football team initially produced a reluctance to prosecute but eventually resulted in the conviction of the boys.<sup>9</sup> The young female victim was mercilessly attacked on social media for destroying the lives of the young football players. This is an all too frequent phenomenon of victim blaming in respect to both sexualized cyberbullying and sexual assault. Fortunately, the young victim in this case did not resort to suicide.

In a second 2012 American case there is an eerie similarity to the Nova Scotia Rehtaeh Parsons tragedy. Fifteen year old Audrie Pott was allegedly raped by four of her Santa Clara County, California, school classmates. This was followed by relentless cyberbullying and ultimately her suicide. In this case, four boys have been arrested and charged criminally and the parents have also filed a civil law suit against the attackers for wrongful death.<sup>10</sup>

Most victims (including youth) do not resort to suicide as a response to cyberbullying but there are many other negative consequences as well. The negative results of bullying in all its forms are extensive: loss of self esteem, anxiety, fear, diminished academic success and school dropouts are a few examples. Eating disorders, depression, psychological problems and acts of self harm (short of suicide) are some further ones.<sup>11</sup> As earlier indicated, young people are particularly vulnerable but adults are not immune. Workplace bullying is also growing and produces lost productivity, as well as physical and emotional health problems.

While the young are especially vulnerable to bullying and cyberbullying, there are studies that suggest that many young people are lacking in empathy for their peers, and are more prone to nasty online behaviour. It turns out that the innocent child may not really be so innocent after all. Lisa Gregoire in *The Walrus* makes this point by way of a dramatic analogy.

**Before pretty** middle-class girls like Amanda Todd and Rehtaeh Parsons were apparently shamed to death; before teenagers started trading gang rape photos like baseball cards; before the word “cyberbullying” made its snickering entrance into our lexicon (Canadian Bill Belsey is said to have coined the term at the turn of this century); before media became social and “trend” became a verb, there was a novel by William Golding called *Lord of the Flies*, published in 1954 and set during wartime. All of the stranded boys on the island—hunters and prey—cried when the naval officer rescued

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<sup>9</sup> Richard A. Oppel Jr, “Ohio teenagers guilty in rape that social media brought to light”, *New York Times* (17 March 2013).

<sup>10</sup> Associated Press, “Trial to seek role of online bullying in teen girl’s suicide”, *New York Times* (1 April 2015).

<sup>11</sup> *Supra* note 1 at 4-6.

them in the end, because in the absence of adult guidance they had turned into savages. Perhaps they were just imitating their military fathers.

Most of us living in affluent nations do not share that experience of war, but we have found other ways to inflict pain, and our children are still imitating us, says Wayne MacKay, a law professor at Dalhousie University and chair of the 2011 Nova Scotia Task Force on Bullying and Cyberbullying. Professional athletes, reality TV stars, talk radio hosts, rappers, even politicians have turned verbal cruelty into entertainment. Amid this widening social debasement, we gave our children powerful, relationship-warping technologies and left them stranded on an island. (We thought they were just phones.)<sup>12</sup>

I present a less dramatic version of both the potential lack of empathy in children and the importance of adult role models in the *Nova Scotia Cyberbullying Task Force Report*.

There are many modern studies on adolescent brain development that suggest that children at that stage in their lives do not operate well at an emotional level and have difficulty feeling empathy for others. A possibly related factor is the failure of the adults in children's lives to properly instill core values and empathy for others beyond themselves. This is not to blame the parents and the teachers exclusively, as young people must also take responsibility for their actions. However, adult behaviour and adult role models play a significant role in bullying and cyberbullying among the young.<sup>13</sup>

In its Report on Cyberbullying, *Cyberbullying Hurts: Respect for Rights in the Digital Age*, the Standing Senate Committee on Human Rights emphasizes the serious consequences of cyberbullying.<sup>14</sup> As the title suggests, cyberbullying does hurt. The pain is not just felt by the victims but also by the bystanders and the bullies themselves.

The pain caused by bullying is widespread and the consequences are drastic. In the age of the internet, cyberbullying knows no boundaries and it permeates all aspects of the victims lives. It is also corrosive for the bullies and the bystanders as well, and one role sometimes morphs into another.<sup>15</sup>

The consequences of cyberbullying are not just visited upon the individuals involved in the process but also the larger community and the state of human relations within that community. In fact, the virtual online community has for some become

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<sup>12</sup> Lisa Gregoire, "Cyberbullying" the Walrus (28 September 2013) at 113. Also online: <<http://thewalrus.ca/cyberbullying/>>.

<sup>13</sup> *Supra*, note 1 at 8.

<sup>14</sup> Standing Senate Committee on Human Rights, (Chair Mobina S.B. Jaffer), *Cyberbullying Hurts: Respect for Rights in the Digital Age* (December, 2012, at Ch 3 and throughout the Report).

<sup>15</sup> *Supra*, note 1 at 1. This excerpt and others from the *Task Force Report* were cited with approval by the *Senate Report*, *supra* note 14 at 42; *Nova Scotia (Public Safety) v Lee* 2015, NSSC 71 at para 19 and *R v CL*, 2014 NSPC (Youth Court).

more central to their lives than the traditional community in which real people interact and relate.

It is remarkable to what extent the virtual community has replaced the community of real people in the neighbourhood. This is true for adults as well as young people but it is more pronounced among the young. Many members of the younger generation have more frequent and positive relations with their computers and other electronic devices than they have with either their peers or adults. This is likely to have a negative effect on young people's abilities to engage in human interactions in the real world.<sup>16</sup>

For many young people, being connected to the online world is as important as breathing—or at least a close second. This is a point I made when I appeared as a witness before the Senate Standing Committee on Human Rights and was quoted to this effect in their Cyberbullying Report as follows:

In a Canada-wide study it was found that the number one reason young people did not tell adults, including their parents, about being bullied or cyberbullied was not what you would think—it will get worse—but rather fear of losing access to the internet. “If I tell my parents, they will tell me to disconnect and it will be gone.” Kids would rather put up with bullying than be disconnected from that important reality.<sup>17</sup>

Later in my testimony before the Senate Standing Committee and quoted later in their Report I state as follows:

The other realization, through my exposure and immersion in the last year or so to this issue, is that it [the online world] is in many ways a more important reality for youth than the nice, sunny world outside of us here that is the real world: the virtual, online world is as or more significant for many of them.<sup>18</sup>

Contrary to what some people think, the problems of cyberbullying cannot be overcome by disconnecting from the internet. In his presentation to the U.N. Panel on Cyberbullying Rhetaeh Parsons' father Glen Canning, made the point that victims of sexual abuse should not be kept indoors to protect them from abuse, nor should online victims be required to refrain from using the internet to avoid problems of online abuse.

We would never expect a family to keep their children at home if a predator was lurking in the park, or for bullied teenagers to quit school for their own good, or for women to remain indoors as a means to address sexual violence.

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<sup>16</sup> *Supra*, note 1 at 83.

<sup>17</sup> *Supra*, note 14 at 33 (n 127) Wayne MacKay Evidence 11 June 2012.

<sup>18</sup> *Ibid* at 38 (n 148) Wayne MacKay Evidence 11 June 2012.



Yet this is exactly what is expected of victims when it comes to online abuse.<sup>19</sup>

Re-victimizing the victims is not an acceptable response to cyberbullying even if it were possible.

Technology and social media are here to stay and the challenge facing us is to maximize their many benefits and minimize their burdens. The task of responding effectively is a large one because of the deep rooted nature of the core problems and the brave new world of technology and social media in which we live.

Bullying and cyberbullying are symptoms of larger problems in our schools. At the root of these problems is the deterioration of respectful and responsible relations with other people. These problems may start online but they are also evident in face-to-face contact as well. Many who are online bullies are also bullies in the more traditional off-line ways as well. Counteracting these anti-social and disrespectful attitudes and practices is the number one non-academic problem facing schools and is also a major problem for society at large. To add to the magnitude of the problems themselves, there are also significant problems in how both schools and society responds.<sup>20</sup>

Before turning to the challenges of responding to the cyberbullying problem I will briefly explore the complex terrain of technology and social media in which the problem has arisen. Attempting to understand this context will hopefully set the stage for a more realistic analysis of the role law can play in responding to cyberbullying.

### **3. Brave New World of Technology and Social Media**

We live in a plugged-in world where the majority of people in Canada and other developed countries are linked to the world through internet platforms such as Facebook, Instagram, LinkedIn and many other sites. The internet provides unlimited access to information and the verb “google” has become the norm. Any question, from the important to the mundane, is likely to result in a google search rather than a resort to more traditional research tools. People seem to crave a constant state of connection and to disconnect from smart phones, iPads and other forms of digital access is a difficult thing for many people to do. Unplugging is often accompanied by signs of withdrawal such as anxiety and a sense of loss. There are some who suggest we have reached a state of internet addiction and the term “Crackberry” as a play on “Blackberry” is sometimes used.

Another possible result of our immense amount of screen time is new health problems, such as, eye strain or hand and finger issues from texting and tweeting. There are also many issues with distracted driving and we have all seen people walking

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<sup>19</sup> Canadian Press, “Victim’s father speaks on cyberbullying at UN Panel”, *Toronto Globe & Mail* (10 March 2015).

<sup>20</sup> *Supra*, note 1 at 83-4.

down the street (or even through cross walks) with the eyes glued to their small cell phone screens, ignoring the natural and human world that surrounds them.

This all sounds very negative and might suggest that technology and social media are inherently evil forces that are destroying society as we know it. That is not my view. Technology and social media are in themselves neutral and offer wonderful opportunities to connect and communicate in positive as well as negative ways. The issue is not the forms of technology and social media but rather how people use it. It can be used for good or evil and the choice is a human one.

In the various upheavals in the Middle East such as those in Egypt, Tunisia, Syria and other countries over the last couple of years, the success of the rebels was in part attributable to the use of cell phones and communication by Twitter and texting. The use of camera cell phones to capture abuse, such as that of the South Carolina police officer firing eight shots at an unarmed black man in the United States, is a vivid illustration of the positive use of modern technology.<sup>21</sup> Similarly, it was a cell phone photo that brought to light the “so called” rape chant at St. Mary’s University in Halifax, Nova Scotia in 2013. There are many positive aspects to the modern world of technology and social media.

Author, artist and futurist, Douglas Coupland, writes intriguingly about how the internet has literally changed our brains by effectively rewiring them. Everything is interconnected and instantly accessible and to some extent the manifestation of reality that appears on our screens can become a substitute for real life experiences.

According to psychology experts, we slavishly engage via social media when big events are unfolding because humans are biologically hardwired to try and understand and control our environment. “We continually monitor events and ask, ‘Does it have to do with me, am I in danger?’” says Pamela Rutledge, director of the Media Psychology Research Center in Newport Beach, Calif. The cost of such a binge, though, especially when dealing with emotionally difficult material, can amount to more than just hours lost staring at a screen: When the material being consumed is emotionally charged—when users are constantly ingesting, and possibly absorbing others’ fear, anxieties and stories of violence—a person’s world view can be challenged. This might explain the mental fatigue that Justason describes.

This phenomenon of incurring an unhealthy or unrealistic world view was first observed by U.S. communications professor George Gerbner, who developed the Mean World Syndrome theory in the 1970s. It’s a cognitive bias wherein consumers of mass media can come to believe that the world

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<sup>21</sup> Bruce Smith & Jeffrey Collins (Associated Press), “White cop faces murder rap”, *Halifax Chronicle Herald* (9 April 2015) at A-14.

is more dangerous than it actually is through constant exposure to violent imagery or commentary.<sup>22</sup>

This warning is particularly timely as the threat of terrorism is so much in the news. The home grown tragic manifestations of terror in Ottawa in the fall of 2014 resulting in the death of two innocent Canadians by a man who was himself killed in the halls of the Parliament building in a gun battle with security guards, is a vivid example. This gun battle within the halls of the Parliament Buildings is of course caught on a cell phone video and shown throughout the world.<sup>23</sup> On a regular basis the world is exposed to the gruesome beheading of victims of the terrorist group ISIS (Independent State of Iraq and Syria). These kinds of images certainly feed the sense that we live in a dangerous world and that drastic legal measures, such as the Federal Government's proposed anti-terrorist legislation (Bill C-51), are necessary.

There are other examples, besides the gruesome beheading videos displayed by ISIS, of terrorist acts being facilitated and popularized by the use of social media. In February, 2015 a plot by three young people to explode a bomb and/or randomly shoot people in the Halifax Shopping Center, was foiled. One of the three plotters died by suicide and the other two have been charged.<sup>24</sup> The police were tipped off to the plot by Crime Stoppers. The three young people were connected on an online chat site that focused on the shootings at Columbine (Columbiners) and glorification of the Nazi era. They also used modern technology and social media to organize their plot. The young American woman flew from her home in Geneva, Illinois to join the Halifax young men in executing the plot on Valentine's Day. The foiled plot attracted much attention, which seemed to be part of what the young people were seeking.<sup>25</sup>

This troubling case of averted tragedy reflects the danger of providing an online community and connection for people who want to engage in violent and anti-social activities. One impact of technology and social media is the shrinking of the world to a real "global village." This can be good or bad depending upon the nature of the community created. In this case the community of Columbiners and neo-Nazis was a potentially lethal one. There are also the dangers of mistaking constant connection for community and forging online communities at the expense of real ones – in which human beings interact on a face-to-face basis.

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<sup>22</sup> Peter Nowak, "The rise of Mean World Syndrome in social media", *The Globe & Mail* (6 November 2014), online: <<http://www.theglobeandmail.com/life/relationships/the-rise-of-mean-world-syndrome-in-social-media/article21481089/>>.

<sup>23</sup> "Ottawa Shooting: Parliament Hill Closed, Elgin remains closed", *CBC News* (23 October 2014), online: <[cbc.ca/news/Canada/Ottawa/1.2809929](http://cbc.ca/news/Canada/Ottawa/1.2809929)>.

<sup>24</sup> Jane Taber, "Two accused in foiled Halifax attack appear in court", *Toronto Globe and Mail* (18 February 2015). Mary Ellen MacIntyre, "Volume of evidence slows mall threat case", *Halifax Chronicle Herald* (11 April 2015). It will be months before the case goes to trial but the accused are in custody.

<sup>25</sup> Davene Jeffrey, "Plan for mass killings horrifies researchers: Columbiners usually seek 'political engagement'", *Halifax Chronicle Herald* (20 February 2015) and Adam Keylor, "Counterpoint: No need to press moral panic button", *Halifax Chronicle Herald* (20 February 2015).

Another aspect of the “Mean World Syndrome” is whether we are afraid of the right things. While terrorists and young people plotting mass killings are real, are there greater threats about which we are not aware? One example of a real threat that has not been well publicized is the threat of sexual assault faced by young women on Canadian university campuses. The extent to which sexual assault is a real problem on university campuses in North America has recently been attracting more attention in Canada.<sup>26</sup>

My own immersion in this issue came in the fall of 2013 when I chaired the President’s Council investigating and making recommendations about the “so called” rape chant at St. Mary’s University in Halifax, Nova Scotia. As part of the orientation activities student leaders led new students in a chant that called for non consensual sex with young women. This kind of chant and variations on it, had been happening at St. Mary’s University and other universities across North America for many years. It came to first local and then national attention as the result of a cell phone video—a positive use of social media to reveal a systemic injustice.

Among the twenty recommendations made by the President’s Council at St. Mary’s University was a call for an exploration of sexualized cyberbullying on campus. We also noted the natural progression from sexualized bullying and cyberbullying to full scale sexual assault in at least some cases.

We see parallels between sexualized bullying, cyber-bullying and sexualized violence. They all invoke harm, involve an imbalance of power, and have a disproportionate impact on girls and women. They are all under-reported and challenging for educational institutions to investigate and resolve. Traditional justice systems have also proven to be an inadequate recourse for victims. Current prevention and response strategies share many of the same approaches including: (a) education and awareness; (b) bystander empowerment; (c) peer-to-peer interventions/programs; (d) reporting mechanisms; (e) increased co-ordination and collaboration between service providers and departments; and (f) the need for effective public policy and funding support.

Nova Scotians have witnessed first-hand the connectivity between sexualized violence and sexualized cyberbullying with the tragic circumstances leading up to the suicide death of Rehtaeh Parsons in April of this year. Rehtaeh experienced alleged sexualized violence by four perpetrators while attending a house party. A cellphone photo of the sexual assault was taken and shared repeatedly by students at her school and across social media sites without her consent. For many Nova Scotians, the rape

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<sup>26</sup> “Interactive: CBC campus sexual assault reports”, *CBC News* (9 February, 2015), online: <<http://www.cbc.ca/news/multimedia/interactive-campus-sexual-assault-reports-1.2944538>> and Emily Mathieu & Jayme Poisson, “Canadian post-secondary schools failing sex assault victims”, *The Toronto Star* (20 November, 2014), online: <[http://www.thestar.com/news/canada/2014/11/20/canadian\\_postsecondary\\_schools\\_failing\\_sex\\_assault\\_victims.html](http://www.thestar.com/news/canada/2014/11/20/canadian_postsecondary_schools_failing_sex_assault_victims.html)>.

chant at Saint Mary's was even more troubling in the context of Rehtaeh's case.<sup>27</sup>

As part of our analysis of the cultural context of university campuses we also commented on the hyper-sexualization of society, the sexual hook up culture among some emerging adults and the links between alcohol consumption and sexual assaults.<sup>28</sup> In making these observations we attempted to not be judgmental and recognize different ways of viewing things based on age. In doing this I discovered that "sexting" is an adult term and not one used by young people. It is seen as a legitimate form of expression and sharing among friends.<sup>29</sup> This is a matter to which I will return later.

Another result of the modern world of the internet is easy access to online pornography. For many young boys this is where they learn about both sex and sexual relationships. This is problematic for how they view "normal" sex and "appropriate" sexual relations with others. However, as with sexting, this is a modern reality and the question is how we should respond to it as a society. The prevalence of sexting and accessing pornography has been explored by researchers and the media.

Forty percent of the boys admitted to looking for porn online, and the ones that did typically said they were frequently searching for it, says Matthew Johnson, director of education for MediaSmarts... "They're still developing their sexuality, they're developing their ideas of what is normal in sex, they're developing a sexual identity and they're developing an idea of what is appropriate in relationships. So obviously heavy exposure to pornography can be problematic in all of these areas."<sup>30</sup>

In theory the advance of technology and social media should be a leveling force that promotes greater equality. In some limited ways this is true, such as greater inclusion of people with disabilities through the use of technology. In many other areas the modern world of technology and social media further accentuates the existing inequalities. Professor Jane Bailey of the University of Ottawa Law School is an astute observer of the interaction between technology and vulnerable groups, women in particular.

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<sup>27</sup> A Wayne MacKay (chair), *Promoting a Culture of Safety, Respect, and Consent at Saint Mary's University and Beyond: Report from the President's Council* (2013) at 22, online: <<http://www.smu.ca/webfiles/PresidentsCouncilReport-2013.pdf>>.

<sup>28</sup> *Ibid* at 19-21.

<sup>29</sup> Daniel Shwartz, "How teens view sexting", *CBC News* (24 August 2013) and Daniel Shwartz, "The fine line between sexting and child pornography", *CBC News* (3 August 2013).

<sup>30</sup> Michael Oliveira, "Viewing pornography 'really frequently', sexting are commonplace among teenaged boys in Canada: survey", *National Post* (29 May 2014), online: <<http://news.nationalpost.com/2014/05/29/viewing-pornography-really-frequently-sexting-are-commonplace-among-teenaged-boys-in-canada-survey-finds/>>. Also see "Web Porn called danger for youth: Women's Center: Violent nature of images can rewire the brain", *Halifax Chronicle Herald* (21 November 2014) and Alexandra Molotkow, "Pop culture as sex education", *Toronto Globe and Mail* (28 February 2015).

Professor Bailey in concert with Professor Carissima Mathen make the point of gender inequality clearly.<sup>31</sup> There is substantive inequality along gender lines in the online universe. In order to respond to this, they call for thoughtful engagement with the law to facilitate equal access to the internet for women, and to protect them from its negative consequences. These themes are expanded in Professor Bailey's E-Girls Project, E-Quality Project and Towards Cyberjustice Project, all funded by the SSHRC (Social Science and Humanities Research Council).

In other articles Professor Bailey recognizes the positive potential of the internet for women, as a form of free expression and self actualization. It could allow women to construct their own identifies, rather than have others do it for them. She explores the challenges of this self expression in a number of articles and emphasizes the need to avoid judgment about how young women chose to present themselves online. However, she cannot escape the conclusion that women face the difficult challenge of presenting in an appropriately "sexual" way. They must be feminine without exposing themselves to "slut shaming." There is no escaping the conclusion that women are judged much more harshly for their online presence than are men.<sup>32</sup>

There are also many dangers for women online. While men as well as women are the victims of cyberbullying, the risks for women are particularly high. Indeed, the cyberbullying of women usually has a sexual component to it, as was the case with both Amanda Todd from British Columbia (flashing her breasts) and Rehtaeh Parsons from Nova Scotia (photos of her alleged sexual assault). Author and journalist Paula Todd wrote a recent book about this dark world of cyberbullying.<sup>33</sup>

She investigates both the stories of those who have been cyberbullied, and those who bully. She follows the story of Amanda Todd, and spends a significant amount of time with Rebecca Black, whose anti-hit "Friday" made her the most hated person on the internet, at age thirteen. Paula Todd canvasses academic thinking, questions motivations of tormentors, their own patterns of abuse, and even the role of empathy online. Not surprisingly she concludes that there is remarkable lack of empathy online and both boys and girls can be extremely mean and even cruel.

In a bizarre but all too typical case of cyberbullying, Nova Scotia Provincial Court Judge Anne Derrick made the following observation about her cyberbullying case: "Casual cruelty, shattered trust, attempted suicide and criminal charges are the

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<sup>31</sup> Jane Bailey & Carissima Mathen, "Constitutional Advancement of Women's E-quality: Responding to Challenges and Seizing Opportunities" (2005) 20 Queens LJ 660.

<sup>32</sup> Steeves, Valerie & Jane Bailey, "Living in the Mirror: Understanding Young Women's Experiences with Online Social Networking", *Expanding the Gaze: Gender, Public Space and Surveillance*, Amanda Glasbeek & Emily Van De Muelen, eds [forthcoming 2014], and Jane Bailey, "Life in the Fishbowl: Feminist Interrogations of Webcamming", in *On the Identity Trail: Anonymity, Privacy and Identity in a Networked Society*, Ian Kerr, Carole Lucock & Valerie Steeves, eds (New York, NY: Oxford University Press, 2009) 283.

<sup>33</sup> Paula Todd, *Extreme Mean: Trolls, Bullies and Predators Online* (Toronto: McLelland & Stewart, 2014).

bitter harvest of the shadowy, distorted world these teens inhabited.”<sup>34</sup> The facts of the case involved an elaborate scheme by two young boys to torment a vulnerable young girl, who had already attempted suicide. The scheme involved no fewer than three fake Facebook sites, one representing another young woman who the boys indicated took her own life. This caused great grief to the female victim and a friend of hers. In the course of the lengthy and elaborate deception, they also convinced the victim to flash her breasts and then sent these images to her boyfriend and other friends. The young man was convicted of child pornography and extortion. The lawyer for the Crown in this case emphasized the vital role anonymity plays in these tragic situations. “The evidence in this case demonstrates how the anonymity offered by the internet can be used to exploit and target victims. While clearly the internet can, and is often, used for good, this case illustrates how it can be used for much more sinister purposes.”<sup>35</sup>

This kind of sexualized cyberbullying (conducted under the mask of anonymity) does not end at high school but extends to university campuses and beyond into adult life. Journalist Hilary Beaumont, in the lead article in the Halifax weekly, *The Coast*, tells a chilling story about a young woman and her female friend being stalked online by a former boyfriend of the woman.<sup>36</sup> In addition to the distribution of nude photos of both young women, without their consent, the scheme also included a fake Facebook account for one of the victims, in which she (notionally) requested that a stranger come to her apartment (full address given) and rape her, as part of her fantasy. A stranger did respond but fortunately abandoned his plan before entering the apartment.

As was the case with Rehtaeh Parsons, the justice system failed the young women in *The Coast*'s real life story. Even though the harassing and intimidating conduct was traced to a Florida website where the ex-boyfriend had moved, neither the police nor the CyberSCAN Unit were able to provide much help to the victims. After *The Coast* story ran, the case has been reopened and the police are vowing to do better going forward. If the new criminal provisions on the non-consensual distribution of intimate images were in place at that time, there might have been a better result. This law will be examined shortly.

The existence of revenge porn sites have also wreaked havoc on the lives of many women who were trusting enough to allow a nude digital photo to get into the hands of others, usually former boyfriends. Only recently has the distribution of intimate images without consent been criminalized in respect to adults. There have

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<sup>34</sup> Frances Willick, “Young man convicted of child porn, extortion in case of ‘casual cruelty’”, *Halifax Chronicle Herald* (9 April 2015) at A-1 and A-2.

<sup>35</sup> *Ibid* at A-2. Another case of extortion and child pornography involved the posting of nude photos of a sixteen year old girl when she refused his request for more naked photos. *Teen sent to trial in online extortion case*, *Halifax Chronicle Herald* (13 June 2014).

<sup>36</sup> Hilary Beaumont, “The Always-On Stalker”, *The Coast* 22:18 (2 October 2014), online: <[www.thecoast.ca/halifax/current?oid=4425956](http://www.thecoast.ca/halifax/current?oid=4425956)>.

also been some recent legal consequences for the operators of such revenge porn sites.<sup>37</sup>

Another odd and upsetting 2015 case of misogyny occurred at Dalhousie University in Halifax, Nova Scotia. Thirteen of the fourth year students of the Dalhousie Dental School operated a “private” Facebook group—Class of DDS 2015 Gentlemen—in which some of these males posted derogatory comments about women generally, and some of their female classmates who they would want to “hate fuck.” As one might expect with Facebook, the site did not remain private, when one of the male group of thirteen blew the whistle by giving one of the fourth year women dental students access. The case is now being pursued on many fronts—departmental discipline, restorative approaches and an external investigation by Law Professor Constance Backhouse.<sup>38</sup> There are more such examples but the point of online exploitation is all too clear.<sup>39</sup> It is also important to emphasize that such incidents are continent and institution wide and not concentrated in one particular place or institution. Nor are women the only victims of such online activity. Some of this activity (possibly including the Dalhousie Dental School situation) may not even constitute cyberbullying or any other legal violation.

It would be unfair to conclude these two sections on the scope and nature of cyberbullying with the impression that there is a clear divide between young and old. McGill Education Professor and Cyberbullying expert, Professor Shaheen Shariff used to refer to younger people as cyber “natives” and older people as cyber “immigrants.” However, in her compelling new book on sexting and cyberbullying, she has adopted a more nuanced approach to the generational divide. She states as follows about the generational gap:

Thomas (2011) identifies three major themes that encapsulate existing discourses around the term, which include: 1) young people born after 1980 are homogenous; 2) they learn differently from previous generations; and 3) they require new ways of teaching and learning. My decision to move away from this term stems primarily from the first tenet; that is, the fact that “digital natives” tends to essentialize differences and similarities between generations (Buckingham, 2011). Rather than reinforce the divides between

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<sup>37</sup> Tony Perry, “Revenge porn website operator sentenced to 18 years”, *L.A. Times* (3 April 2015) <<http://www.latimes.com/local/lanow/la-me-in-revenge-porn-sentenced-20150403-story.html>>. ‘Revenge porn’, the term coined for the unauthorised sharing of private sexual photographs or videos, often carried out by spurned lovers over the medium of the Internet, has been criminalised in England and Wales under the *Criminal Justice and Courts Act 2015* (“the Act”) which received Royal Assent on 12 February 2015. (Brett Wilson, “‘Revenge porn’ criminalised in England and Wales” (22 February 2015), Inform’s Blog, online: <<https://inform.wordpress.com/2015/02/22/revenge-porn-criminalised-in-england-and-wales/>>).

<sup>38</sup> Opinion Page, “Dental School Affair – Extracting Misogyny”, *Halifax Chronicle Herald* (17 December 2014); Margaret Went, “Rape Culture: Dalhousie’s dental hysteria”, *Toronto Globe and Mail* (6 January 2015) and Sarah Hampson, “Postsecondary Education: ‘This is not an isolated event’”, *Toronto Globe and Mail* (7 March 2015) are but a few examples of weeks of media attention. Anne Kingston provides an interesting analysis of this scandal for *MacLean’s Magazine*, *supra* note 6.

<sup>39</sup> Frances Willick, “Dal Dealing with Fresh Scandal: It started with a friend’s photo”, *Halifax Chronicle Herald* (28 March 2015).



generations, I move in the direction of Thomas' suggestion; that is, research "should engage with the diversity rather than the conformity suggested by young peoples' use of digital technologies" (p. 9). Moreover, three major themes in the discourse that Thomas (2011) identifies are also reflected in news media reports, parent and teacher advocacy for harsher laws around cyberbullying, and the rhetoric used by politicians that single out these generations as troublesome in the ways that they use digital and social media. Popular narratives around this concept place digital technology as something that can emancipate and empower young people to become anything they want to be. In certain cases this may be so, but these qualities of digital technology are often exaggerated, tending to overlook the aspect of technological continuity between generations (Buckingham, 2011). One need only think about how many people over the age of fifty use and integrate digital technology every day: grandparents sending emails, texting, and Skyping; aging baby boomers buying the latest tablets or smart phones; or long-established small businesses integrating digital systems to shift to online appointment bookings to accommodate their clientele. All of this is to say there are differences and similarities among and between the generations, many of which correspond to socioeconomic status and the question of access.<sup>40</sup>

Whether we like it or not, the brave new world of technology and social media is here to stay. Futurist Douglas Coupland, discussed earlier in this section, advises that nostalgia for the simpler times and the "good old days", will get us nowhere. The challenge is how to embrace the positive aspects of this modern reality and respond effectively to, or at least contain, the darker and nastier side effects of technology and social media. One such negative side effect is cyberbullying and I shall now turn to the legal efforts to contain and control it.<sup>41</sup>

#### 4. The Legal Responses to Cyberbullying: Ally for Victims

One of the limitations of a legal response to a problem is that it is normally a *post facto* response. If it is a criminal response it mandates consequences for the perpetrator of the offense, and if it is a civil response it sets the compensation for the victim of the conduct. In both cases the response is after the fact. Except in an indirect way, laws do not prevent bad conduct.<sup>42</sup> Deterrence does play some preventive role but its impact is hard to define and must be combined with education to have any impact. *The Nova Scotia Cyberbullying Task Force Report* identifies education, prevention and law as the three pillars for constructive change to cyberbullying.<sup>43</sup>

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<sup>40</sup> Shaheen Shariff, *Sexting and Cyberbullying: Defining the Line for Digitally Empowered Kids* (New York, NY: Cambridge University Press, 2015) at 4, referring to Michael Thomas ed, *Deconstructing Digital Natives: Young People, Technology and the New Literacies* (New York, NY: Rutledge, 2011).

<sup>41</sup> *Supra* note 22.

<sup>42</sup> Wendy Craig, D Pepler & J Cummings, *Bullying Prevention: What Parents Need to Know* (Tucson (Arizona): Quickfind Books, 2013) is a pragmatic examination of prevention.

<sup>43</sup> *Supra* note 1.

In the *Nova Scotia Cyberbullying Task Force Report* the role of law and policy was characterized as being both a catalyst for change and an anchor for a multifaceted strategy of response.

One of the important roles of law in society is to change attitudes and values about what is inappropriate and blameworthy conduct. The role of law in changing views about drunk driving, wearing seat belts and smoking, and to a lesser extent domestic violence, is a case in point . . . Laws can be one part of a campaign to expose bullying as a behaviour that, to use common parlance, is definitely not cool.<sup>44</sup>

There are jurisdictional challenges to legally responding to cyberbullying. Because of the global nature of the internet there are international dimensions to dealing with the problem. Even within Canada, where powers are divided between the federal and provincial levels by the *Constitution Act, 1867*,<sup>45</sup> the two levels of government engage different aspects of the cyberbullying issue. When the cyberbullying crosses international boundaries, complex issues of conflict of laws and extra-territorial application can arise. This may be an issue for trying the Netherlands perpetrator in the Amanda Todd case. He appears to have been targeting victims in many different countries from the basement of his Netherlands home.<sup>46</sup>

Some of these challenges were noted in the *Nova Scotia Cyberbullying Task Force Report* and acknowledged in a recent Nova Scotia Supreme Court case.

Cyberbullying poses a particular challenge to the community because it happens in a sort of “no man’s land”. The cyber-world is a public space which challenges our traditional methods of maintaining peace and order in public spaces. It is too vast to use traditional methods of supervision. It easily crosses jurisdictional boundaries. It takes place 24 hours a day, seven days a week, and does not require simultaneous interaction for communication to take place. If we continue to rely on traditional methods of responding to bullying, these challenges will be too daunting.<sup>47</sup>

There are many legal dimensions to issues of cyberbullying as the law struggles to catch up to the rapid advances of technology and the emergence of social media. While bullying has been around for a long time, its newer manifestation in the form of cyberbullying, is a much newer and more complex phenomenon. It also crosses many legal boundaries raising issues of criminal sanctions, civil liability, constitutional law, human rights, fair process, restorative approaches, free speech and privacy to name just a few.

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<sup>44</sup> *Supra* note 1 at 48-9.

<sup>45</sup> *The Constitution Act, 1867* (UK) 30 & 31 Victoria, c 3.

<sup>46</sup> “Todd: Suspect faces nine separate criminal charges in the Netherlands”, *Toronto Globe and Mail* (24 April 2014).

<sup>47</sup> *Supra* note 1 at 84. Cited in *Nova Scotia (Public Safety) v Lee* 2015 NSSC 71 at para 19.

### (A) Federal Criminal Responses

It is tempting to think immediately of the criminal law when thinking of bullying. Is bullying a crime? Should it be? Are there appropriate criminal responses to bullying? The answer is: sometimes bullying is a crime, but not always, depending on the circumstances. Certain activities do cross the threshold into the criminal realm. Some examples of offences under the *Criminal Code* that are relevant to bullying and cyberbullying are: assault, criminal harassment, uttering threats, defamatory libel, incitement of hatred, counselling suicide, robbery, extortion, mischief to property or data, unauthorized use of a computer, and possession/distribution of child pornography. There may be others as well.

In spite of the wide range of provisions in the *Criminal Code of Canada*<sup>48</sup> that might be applied in the cyberbullying context there has been some reluctance to apply these provisions in the cyber context. This was an issue that was highlighted by the Rehtaeh Parsons tragedy where the justice system, as well as the health and education systems, failed her. Since the wide publicity surrounding the Parsons case, the police have been more creative in applying the *Criminal Code* in the cyberbullying context. The section most frequently applied appears to be section 163 on child pornography. Both the person taking the picture and the person in the picture having sex with Rehtaeh were ultimately convicted of child pornography for distributing the images to her friends and classmates.<sup>49</sup> In both cases the result was probation rather than jail time. Many people including Rehtaeh's father, Glen Canning, have persuasively argued that part of the denial of justice in the Rehtaeh Parsons case is that the cyberbullying issues have been used to obscure the underlying problem of sexual assault.<sup>50</sup> This was the critical event which set off the dominoes that led to her tragic death.

In another all too typical case, twin brothers (who were just short of eighteen years) engaged in prolonged sexual exploitation and cyberbullying of a vulnerable fourteen year old girl. By threat and extortion they extracted nude photos in increasing graphic detail and induced her to perform sexual acts upon herself and send the images to them by webcam. Contrary to their promises, they sent these compromising photos to friends of the girl and classmates in the community. The youth were charged with child pornography and sexual exploitation. In spite of the more lenient sentencing under the *Youth Criminal Justice Act*,<sup>51</sup> the Manitoba Provincial Court Judge wanted to recognize the seriousness of the consequences for the victim, by ordering sixteen

<sup>48</sup> RSC 1985 c C-46, ss 265, 264, 298, 319(2), 241, 343, 346,430, 342.1 and 163.1 are some examples.

<sup>49</sup> S. Bruce, "Man, 20, pleads guilty to taking child porn photo", *Halifax Chronicle Herald* (23 September 2014), "No jail in high profile case: Photo sharing led to girl's suicide", *Halifax Chronicle Herald* (14 November 2014), "Rehtaeh Parsons case: Teen in explicit photo gets probation", *CBC News* (15 January 2015), online: <<http://www.cbc.ca/news/canada/nova-scotia/rehtaeh-parsons-case-teen-in-explicit-photo-gets-probation-1.2901502>>. Steve Bruce, "Rehtaeh Parsons: Man gets years probation – Judge Photo a 'gross violation'", *Halifax Chronicle Herald* (16 January 2015).

<sup>50</sup> Anne Kingston, "Rehtaeh Parsons, Dalhousie and the wait for justice in Nova Scotia", *MacLean's Magazine* (10 April 2015), online: <<http://www.macleans.ca/society/rehtaeh-parsons-the-dds-2015-scandal-and-the-wait-for-justice-in-nova-scotia/>>.

<sup>51</sup> SC 2002, c 1.

months of secure custody followed by 8 months probation. The Judge described the impact on the victim as follows:

The intentional and completely foreseeable harm done to the victim by the accused can only be described as devastating and long-lasting. The impact of the accused's conduct towards the victim was immediate: she stopped eating, grooming and sleeping, in her mother's words she went from being happy to being deeply troubled. Those were the short-term impacts. Ten months after being victimized, she is still frightened and demonstrating symptoms of extreme anxiety. The psychological damage to the victim is long-term and profound. Her reputation in the community has been damaged and she has been ridiculed at school. Given the difficulty in controlling the use of images, once they enter cyberspace, the harmful impact on the victim may well be long-term.<sup>52</sup>

In a Kamloops, British Columbia case, the issue was one involving the pervasive phenomenon among youth called "sexting." This less serious case was one where a sentence of probation was sought and not jail time. The Judge opted for a conditional discharge as the best for the offenders and not contrary to the public interest. Among the relevant circumstances was the fact that the perpetrators and victims were close in age and sexting was a common practice.

The circumstances described by the Crown are somewhat similar for all three youths. Phones were seized from all three and inappropriate images, as described below, were observed. The three youths were students attending different schools in the Kamloops district. All of the offenders were aged 14 at the time of the offence and are presently aged 15. Counsel submitted and I accept that all three of these young persons were closer in maturity to children than adults. The ages of the female youths involved were between the ages of 13 and 15.

The school authorities, and/or police, also observed communication or chats between these youths and the teenaged females. At times the males were persistent and persuasive in their attempts to elicit photos from the females. At other times the females appear to provide the images more readily. The "chats" by the males to the females were at times immature and demeaning. It is these "chats" which have resulted in the charges presently before the court.

The youths traded these photos with others; Crown counsel described this practice to be similar to the trading of hockey cards. I also was advised that one of the young offenders took pictures of himself and distributed them to others.<sup>53</sup>

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<sup>52</sup> *R v NG* 2014 MBPC 63 at para 41. Some situations, such as that in the previous case, are also dealt with as matters of criminal extortion under s. 346 of the *Criminal Code*. Associated Press, "Boy charged with sexual extortion", *Halifax Chronicle Herald* (18 November 2013).

<sup>53</sup> *R v SB* 2014 BCPC 279 at paras 4-6.

In one final example, a Yukon Youth Justice recognized that the sharing of intimate images among young people, while problematic, does not fit comfortably with child pornography laws. The issue before the Judge was the preliminary one of bail, which was granted. The situation was described as follows:

Ms. Hawkins has put the present alleged crimes into some context. We are dealing with immature, young people who are more or less addicted to their cell phones and social media, and who do very stupid things when they are under the influence of alcoholic beverages.

C.C, S.J., and countless other young people have tragically learned that to expose their naked or partially naked bodies to electronic transmission, it cannot be undone. What is out there is out there. This is clearly at the opposite spectrum from organized criminals who, for profit, kidnap, confine, and force children to perform sexual acts for the camera, and then feed the lascivious appetites of pedophiles. Such evil men and women would not be released on bail.<sup>54</sup>

In academic and wider community circles there is concern about the use of child pornography laws to deal with sexting and less serious forms of sexualized cyberbullying. These perspectives were examined in a series of articles in the *National Post* newspaper over the last few years.<sup>55</sup> In her important book on this topic, Professor Shaheen Shariff explains why she does not support what she calls “big-stick sanctions” which would clearly include the child pornography provisions contained in section 163 of the *Criminal Code*. She elaborates as follows.

On another note, as per the DTL [Define the Line] Research, children and adolescents often displayed either having no awareness about the laws in place governing cyber- bullying, or having some awareness, but little understanding of their implications. Awareness and understanding are two different things. So, I ask you: what good is a law for deterrence if no one knows about it or its effects? While wrongdoers will be punished for their actions, as we have seen in the cases described earlier, solutions that make a difference may come too late. It is essential to be ahead of the problem. Therefore, along with this proposed bill there should come an increased focus on legal literacy for all stakeholders including teachers and parents, but most importantly, for DE [Digitally Empowered] Kids.

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As I have highlighted, DE [Digitally Empowered] Kids are not child

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<sup>54</sup> *R v JJS* 2014 YKY 2 at paras 3-4.

<sup>55</sup> Brian Hutchinson, “Outdated Criminal Code snaring cyber-bullies and sexting minors in child porn net”, *National Post* (23 September 2013), online: <<http://fullcomment.nationalpost.com/2013/09/23/outdated-criminal-code-snaring>>. Karen Seidman, “Child pornography laws ‘too harsh’ to deal with minors sexting photos without consent, experts say”, *National Post* (16 November 2013), online: <<http://news.nationalpost.com/2013/11/16/child-pornography-laws-too-harsh-to-d>>. Sarah Boesveld, “Rehtaeh Parsons story highlights world where sex talk is more open among teens but no less confusing”, *National Post* (16 January 2015), online: <<http://news.nationalpost.com/2015/01/16/rehtaeh-parsons-story-highlights-world>>.

pornographers. The very laws that are supposed to protect kids are being applied to charge and convict children and adolescents with distributing child pornography. The case of the ten Laval adolescents who were having “flirty fun” with Snapchat is evidence of this. Having demonstrated the nuanced and paradoxical conflicts between children’s vulnerability, immaturity, evolving independence, agency, risk taking, and impulsivity, as it emerged in the DTL [Define the Line] Research and as it is addressed in the legal context (Van Praagh, 2005; 2007), it becomes very clear that criminalizing children is not the answer and that child pornography laws are not only misapplied, but they also breach the protections afforded to children under constitutional and human rights principles.<sup>56</sup>

In a more gender focused critique Professors Jane Bailey and Mouna Hanna argue that sexting between similar aged young peers should normally not be criminalized. They argue that to do so adds to the online burdens that women already face and can lead to further victimization of women.

In their own long-term self-interest, it would probably be prudent for teens to avoid capturing and sharing with their partners widely distributable digital memorializations of their sexualized self-representations and sexual activities. (And the same might be said for adults, many of who have also experienced the fall-out of subsequent unauthorized redistributions.) For some (including mainstream industry players engaged in the daily trade in adolescent and teen sexuality), this lesson might be taught through educational initiatives. For others, this lesson will be learned through unfortunate and sometimes tragic social consequences. We should not compound the lessons that girls learn in the school of hard knocks by criminalizing them for sharing their sexualized self-representations with intimate partners who were naively trusted to keep them confidential, nor should we allow ourselves to be diverted from engaging in much-needed critical discourse, activism, and policy making designed to challenge the commercial agenda that profits from promoting hypersexualized understandings of girlhood.<sup>57</sup>

The above critiques emphasize the challenges in classifying laws as an ally or an enemy for victims fighting against cyberbullying. This is a recurring theme, as I explore the scope of legal responses to the problem. The Bailey and Hanna quote above, also suggests the legal focus should be upon sanctioning the distribution of those intimate images to which I will now turn.

In the wake of the Rehtaeh Parsons tragedy and the failure of the justice system and others to respond to her situation, new laws were developed at both the federal and provincial levels to combat cyberbullying. These laws and many

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<sup>56</sup> Shafeen Shariff, *supra* note 40 at 92 and 148-49, respectively.

<sup>57</sup> J Bailey and M Hanna, “The Gendered Dimensions of Sexting: Assessing the Applicability of Canada’s Child Pornography Provision” (2011) 23 CJW L 406 at 441. This same view is supported by Dr. Andrea Slane in her presentation “Immature but not Criminal? Arguments For and Against Criminalizing Cyberbullying” at *Clicks and Stones: Cyberbullying, Digital Citizenship and the Challenges of Legal Responses*, University of Toronto Conference, May 3, 2013.

other systemic changes are the legacy of Rehtaeh Parsons. These changes came about in large measure because of her parents' advocacy, in concert with other parents. One new federal law is the *Protecting Canadians from Online Crime Act* (hereafter referred to as Bill-13).<sup>58</sup>

Even before the aftermath of Rehtaeh Parsons death, there was a federal and provincial committee examining whether the *Criminal Code* was meeting the challenges of cyber crimes. This process was expedited after a number of parents including Glen Canning and Leah Parsons met with Prime Minister Harper in the company of Nova Scotia Premier Darrell Dexter. While this committee concluded that most *Criminal Code* provisions were flexible enough to meet the challenges of the high tech world there was a notable void in respect to the distribution of intimate images without consent. This led to Bill C-13. The critical sections read as follows.

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

- (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) of an offence punishable on summary conviction.

Definition of "intimate image"

(2) In this section, "intimate image" means a visual recording of a person made by any means including a photographic, film or video recording

- (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
- (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
- (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.<sup>59</sup>

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<sup>58</sup> SC 2014, c 31.

<sup>59</sup> *Protecting Canadians from Online Crime Act*, SC 2014, c 31 (in force March 10, 2015).

A violation of this provision can lead to a prison term of up to two years if pursued by indictment, but can also be a summary offence.<sup>60</sup> A violation of this Act can result in a prohibition order under section 162.2(1) and (2).

162.2 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection 162.1(1), the court that sentences or discharges the offender, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

#### Duration of prohibition

(2) The prohibition may be for any period that the court considers appropriate, including any period to which the offender is sentenced to imprisonment.<sup>61</sup>

It is noteworthy that an order prohibiting access to the internet or other digital networks can be included as a condition to any sentence or conditional discharge. This is intended to prevent future offences. In a creative application of existing laws Nova Scotia Provincial Court Judge, Jean Whalen, after making extensive references to the *Nova Scotia Cyberbullying Task Force Report*, ordered a full ban on social media as the best way to achieve “public safety objectives” in this case.

In particular, a full social media ban in accordance with Section 55(h). I agree with the Crown’s analogy that if you commit an offence with a motor vehicle, you lose driving privileges; if you commit an offence with a weapon, you lose the privilege to use, possess or own same. And so it should be with “social media”. Until C.L. understands the need for “respectful and responsible relationships among young people and society in general, he will be prohibited from using any “social media.”

This is not a panacea for all that is wrong with the prevalence of social media among young people. It is, I hope, an effective solution for C.L.<sup>62</sup>

In *R. v. Walker*<sup>63</sup> a Manitoba Provincial Court Judge ordered a young person to delete his Facebook profile and to not access this medium during his probation. Finally, in another Nova Scotia case a young female cyberbully was required to give her password to her probation officer so her social network activities could be monitored.<sup>64</sup>

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<sup>60</sup> *Ibid* at s 162.2(4).

<sup>61</sup> *Ibid* at s 162(1) and (2).

<sup>62</sup> *R v CL* 2014 NSPC 79 at paras 69-70.

<sup>63</sup> (24 March 2013) (MB PC unreported).

<sup>64</sup> *R v ASB* (30 October 2013) 2580026 (NS PC unreported).



Another way in which Bill C-13 potentially limits freedom of speech is by expanding the definition of what constitutes an “identifiable group” for purposes of hate speech in both sections 318 and 319 of the *Criminal Code*. It adds to the existing grounds in section 318(4) of the Code – national [origin], age, sex and mental or physical disability.

12. Subsection 318(4) of the Act is replaced by the following:

(4) In this section, “identifiable group means any section of the public distinguished by colour, race, religion, *national* or ethnic origin, *age, sex, sexual orientation, or mental or physical disability*.”<sup>65</sup> (emphasis added)

This effectively expands the scope of hate speech in section 318 and 319 of the *Criminal Code* limiting freedom of speech. The women dental students in the Dalhousie Facebook scandal, discussed earlier, would not have recourse to hate speech at the relevant time, as it did not include “sex” as the basis for an identifiable target group, until Bill C-13 came into effect on March 10, 2015.<sup>66</sup> The above section expands equality at the expense of free speech. There is also a host of surveillance and enforcement provisions in Bill C-13 that limit privacy and liberty. These kinds of constitutional conflicts will be explored in Part V of this article.

## **(B) Provincial Statutory Responses**

### *i. Nova Scotia Cyber-safety Act*

Nova Scotia’s *Cyber-safety Act*<sup>67</sup>, the first legislation of its kind in Canada, protects victims of cyberbullying and makes those responsible accountable under the law. Instead of relying solely on police pursuing criminal action, victims and their families now have new civil options including seeking protection/prevention orders and suing cyberbullies for damages.

Nova Scotia has also created Canada’s first cyberbullying investigative unit – the CyberSCAN Unit. The team works with victims, families, schools and others to investigate complaints, gather any evidence and help stop cyberbullying. This can be accomplished informally without anyone having to go to court, or if necessary, through formal legal actions such as applying for a prevention order or referring cases to police. There have been hundreds of complaints in the first couple of years of operation and they are split equally between children and adults.

The passing of this legislation and the creation of the six person CyberSCAN Unit was a direct result of the Rehtaeh Parsons tragedy and the heightened awareness

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<sup>65</sup> *Supra* note 59 at s 12.

<sup>66</sup> *Supra* note 50.

<sup>67</sup> *Cyber-safety Act* SNS 2013, c 2.

of the problem of cyberbullying. The purposes of the *Cyber-safety Act* outlined in section 2 are to provide safer communities and to address and prevent cyberbullying.

Cyberbullying is broadly defined in section 3 of the Act as follows.

Section 3(1)(b)

“cyberbullying” means any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites or electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person’s health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way;<sup>68</sup>

This definition is also included in the Regulations to the *Education Act* of Nova Scotia and was adopted on the recommendation of the Nova Scotia Cyberbullying Task Force. It is a deliberately broad definition, designed to keep pace with the fast changing world of technology and social media. It covers a wide range of victims.

It is significant that this definition also applies to bystanders who assist or encourage the cyberbullying in any way. This is a recognition of the important role that participating bystanders often play in adding to the victim’s injury. Something as simple as clicking “like” to an online hurtful comment can have a devastating impact as a form of piling on. The offence need not be intentional, if the perpetrator ought to have reasonably expected harm to flow from the relevant conduct. In this way it is like sexual harassment provisions in human rights codes.

The *Cyber-safety Act* allows for protection orders under section 8 (issued by Justices of the Peace) and prevention orders issued by a court on application from the Director of the CyberScan Unit, under section 26A. Complaints of cyberbullying are filed with the Director, who along with his/her staff have broad powers of investigation. There is a broad range of remedial options from informal resolution, contacting police or other agencies and seeking a prevention order in court.

The Act also creates a tort of cyberbullying and thus allows for a civil action for damages. Parents are jointly and severally liable for the cyberbullying actions of their children unless the parents can demonstrate they were exercising reasonable supervision over their children. This is a potentially broad and ill-defined liability.

Tort of Cyberbullying

Section 21

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<sup>68</sup> *Ibid* at s 3(1)(b).

A person who subjects another person to cyberbullying commits a tort against the person

Section 22 (1)

In an action for cyberbullying, the Court may...award damages; issue an injunction; “make any other order that the Court considers just and reasonable”

Section 22 (3)

Where the defendant is a minor, a parent of the defendant is jointly and severally liable for any damages awarded to the plaintiff unless the parent satisfies the Court that the parent was exercising reasonable supervision over the defendant at the time the defendant engaged in the activity that caused the loss or damage and made reasonable efforts to prevent or discourage the defendant.<sup>69</sup>

The conditions that can be attached to both protection orders and prevention orders are broad and can include confiscation of electronic devices, restricting access to any means of electronic communication and orders ending service with an internet service provider.

Prevention Orders

Section 26B (1) At any time after receiving a complaint, the Director may (a) Investigate the complaint; (b) require the complainant to provide further information; (c) send a warning letter to the person who is identified as engaging in cyberbullying, or a parent of the person; (d) request an Internet service provider to discontinue service to an IP address, website, username or account, identified in the complaint as being used for cyberbullying...

Section 26G (1) A cyberbullying prevention order may include any of the following provisions that the Court considers necessary or advisable for the protection of the subject:

- Provision prohibiting the respondent from engaging in cyberbullying
- Provision restricting or prohibiting the respondent from communicating with the victim
- Provision restricting or prohibiting the respondent from communicating about the victim
- Provision prohibiting or restricting the respondent from using a specified or any means of electronic communication
- An order confiscating, for a specified period or permanently, any electronic device capable of connecting to an IP address associated with the respondent or used by the respondent for cyberbullying
- An order requiring the respondent to discontinue receiving service from an Internet service provider

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<sup>69</sup> *Ibid* at ss 21-22.

- Any other provision the justice considers necessary.<sup>70</sup>

Finally under section 7 of the Act, the Justice of the Peace may require internet service providers and others with relevant information, to disclose information to assist in identifying the respondent perpetrator of cyberbullying or where they are minors to identify their parent. Thus it allows for a piercing of the mask of anonymity so central to much cyberbullying. This and other elements of the Act, limit the free speech and privacy rights of the perpetrators (or alleged perpetrators) and provides a strong ally to the victim in seeking redress. These kinds of provisions are yet to be tested in respect to the *Charter of Rights and Freedoms*.<sup>71</sup> This will be explored in Part Five of this article.

The *Cyber-safety Act* is as much used by adults as young people even though its origins are in the Rehtaeh Parsons situation. While most concede it has done good work some also suggest it may be going too far. It has recently been applied to an employment situation<sup>72</sup> and a family dispute<sup>73</sup> about a will and prior to that an ownership dispute in respect to a nuclear Cold War era fallout shelter in Debert, Nova Scotia.<sup>74</sup> These are unusual cases and most of the cases under the Act have been more in line with what people would expect. It is still early days and people are watching.

## ii. Human Rights Codes and Equality

In many important ways the problem of cyberbullying is a human rights problem. While anyone can be the target of cyberbullying the victims are very often vulnerable individuals and groups such as those identified in the federal and provincial human rights codes. At the heart of the cyberbullying relationship is the same kind of power imbalance as is at play in most cases of discrimination and inequality.

Each province and territory has its own human rights code but for brevity and simplicity I will refer to the *Nova Scotia Human Rights Act* as a typical provincial one. There is also the Canadian Human Rights Act which applies to matters within federal jurisdiction.

The Nova Scotia Human Rights Commission is a body created by the *Nova Scotia Human Rights Act*<sup>75</sup>, an important piece of provincial legislation that protects fundamental rights, promotes the principals of equal opportunity, and protects against discrimination. Each province in Canada has human rights legislation. There is a federal act as well which applies throughout Canada to areas that fall under federal

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<sup>70</sup> *Ibid* at ss 26B(1) and 26G(1).

<sup>71</sup> *Charter of Human Rights and Freedoms* CQLR c C-12. In particular sections 1, 2(b), 7 and 8.

<sup>72</sup> "Cyberbullying notice angers Sydney man", *Halifax Chronicle Herald* (5 March 2015).

<sup>73</sup> *Nova Scotia (Public Safety) v Lee* 2015 NSSC 71.

<sup>74</sup> Sherri Borden Colley, "Cyberbullying hits Diefenbunker", *Halifax Chronicle Herald* (20 January 2015).

<sup>75</sup> *Human Rights Act*, RSNS 1989 c 214 [HRA].

jurisdiction such as federal departments and agencies, and federally regulated industries like banks, airlines, television and radio stations, inter-provincial communications companies and so on.<sup>76</sup>

The role of the Nova Scotia Human Rights Commission is to promote human rights within the province in particular areas which fall under provincial jurisdiction, and to educate the public through research, collaboration, and education. The Commission also enforces the provisions of the Act and deals with complaints of human rights violations. Some complaints are resolved through informal processes, mediation or (as of January 2012) restorative approaches, and some are referred to an adjudicative Tribunal process. Filing a complaint with the Nova Scotia Human Rights Commission is a process that is often more accessible to bullied students and their families than the civil court system. The process is free for the complainant, and can be less adversarial than the court process.

The *Nova Scotia Human Rights Act* prohibits discrimination based on a list of protected grounds in relation to a number of specified areas such as employment or the provision of services to the public. The protected grounds are: age; race; colour; religion; creed; sex; sexual orientation; physical or mental disability; an irrational fear of contracting an illness or disease; ethnic, national or aboriginal origin; family status; marital status; source of income; political belief, affiliation or activity; and association with another individual or class that would fall under these categories.<sup>77</sup>

Significantly, the Act has a free-standing harassment provision in that harassment on any of these grounds is prohibited and does not have to be connected to employment or the provision of a specific service.<sup>78</sup> Harassment is defined in s. 3(ha) of the Act as “a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome”. Many instances of bullying and cyberbullying would fall under this definition, especially those targeted at students for their sexual orientation, race, sex, ethnic origin or disability.

The primary goal of human rights legislation is to eliminate discrimination. Although the Commission does prosecute violations, it has a strong mandate for education and addressing systemic problems. It provides non-adversarial methods for resolving conflicts using mediation, consultation, and restorative approaches, which may be very helpful in preventing and resolving cyberbullying problems. As such, the Human Rights Commission has a pivotal and significant role to play in any bullying

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<sup>76</sup> *Canadian Human Rights Act*, RSC 1985, c H-6. It should be noted that the telecommunications industry is federally regulated and falls under the jurisdiction of the *Canadian Human Rights Act* and the Canadian Human Rights Commission. Section 13 of that Act, which deals with hate speech, makes it an offence to communicate hate messages via the internet on a prohibited ground of discrimination. This section is now repealed. While some cases would fall within the jurisdiction of the Canadian Human Rights Commission (for example, general hate-mongering against an identifiable group), it is likely that most instances of student bullying and cyberbullying would fall within the jurisdiction of the provincial commission.

<sup>77</sup> *Supra* note 75 at s 5(1)(h) to (v).

<sup>78</sup> *Supra* note 75 at s 5(3).

prevention strategy. Recently the human rights commission in Australia has been addressing issues of school bullying as a human rights issue within their jurisdiction.<sup>79</sup>

The Standing Senate Committee on Human Rights also emphasized the importance of taking a human rights based approach to cyberbullying in its Report.<sup>80</sup> It states as follows:

While there are various legal sources of these and other rights held by children (such as Canada's Constitution, federal and provincial human rights legislation, and international treaties), the Standing Senate Committee on Human Rights examined cyberbullying within the context of Canada's obligations under the United Nations *Convention on the Rights of the Child* (the "Convention"). More specifically, we considered Article 19, which affirms that states have an obligation to take all appropriate measures (whether legislative, administrative, social or educational) to protect children from all forms of physical or mental violence. The United Nations Committee on the Rights of the Child has stated that Article 19 applies to: "Psychological bullying and hazing by adults or other children, including via information and communication technologies (ICTs) such as mobile phones and the Internet (known as 'cyberbullying')." <sup>81</sup>

Finally most provincial human rights codes have provisions dealing with discriminatory or hate speech. These sections have been controversial and subject to challenge under section 2(b) of the *Charter of Rights*. This is particularly so in respect to section 13 of the *Canadian Human Rights Act*, which has now been repealed. This is true in spite of support for the equality promoting provision in many quarters.<sup>82</sup>

In Canada, freedom of expression is a *Charter* protected right that can only be restricted in the clearest of circumstances.<sup>83</sup> For example, our courts have determined that is a reasonable limit on freedom of expression to prohibit a person from propagating hate against an identifiable group, or defaming another person. While there is no major case in Canada yet about schools limiting a student's free speech in a bullying context, we have seen from past cases that schools will restrict hate speech on the part of teachers.<sup>84</sup> Hateful or discriminatory speech by students has yet to reach Canada's top court.

<sup>79</sup> *Supra* note 1 at 59. The NS Cyberbullying Task Force also made recommendations about schools liaising with the Human Rights Commission.

<sup>80</sup> *Supra* note 14 at Ch 4.

<sup>81</sup> *Supra* note 14 at 51, citing the Committee on the Rights of the Child, *General comment No.13 (2011), The right of the child to freedom from all forms of violence*, p 10, 18 April 2011.

<sup>82</sup> Jane Bailey, "Twenty Years Later *Taylor* Still Has It Right: Section 13 of the *CHRA*'s Continuing Contribution to Equality" *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, Sheila McIntyre and Sanda Rodgers, eds (Markham, Ontario: Supreme Court Law Review and LexisNexisCanada, 2010).

<sup>83</sup> *Irwin Toy v Quebec* [1989] 1 SCR 927.

<sup>84</sup> *R v Keegstra* [1990] 3 SCR 697 and *Ross v New Brunswick School District No 15* [1996] 1 SCR 825.

Cyberbullying can be viewed as a form of discriminatory or hate speech or lead to other forms of discrimination. Equality is an important touchstone in responding to cyberbullying and human rights codes can be important mechanisms for responding to the real needs of the victims.

### *iii. Education Acts and Discipline*

A significant amount of cyberbullying occurs in schools, thus school officials and school boards have a vital role to play in responding to this problem. That is not to diminish the importance of parents in the home but schools are a major venue for cyberbullying. They also have a student population which is acutely vulnerable to such attacks.

That is why one of the important recommendations of the Nova Scotia Cyberbullying Task Force was to clarify the jurisdiction of schools to deal with bullying and cyberbullying off school sites and after school hours.<sup>85</sup> It was my view and that of others that the jurisdiction to deal with these issues off site and after hours already existed but since schools and school boards were unclear about their authority, it needed to be emphasized.<sup>86</sup>

The Nova Scotia Government through the Department of Education, was not willing to implement this recommendation for fear of antagonizing the school boards and teachers union. This came back to haunt them when the Cole Harbour District High School failed to investigate Rehtaeh Parsons complaint that she had been sexually assaulted by classmates off school premises and after school hours. They argued that they did not have the jurisdiction to do so. This was one more sign that Rehtaeh was not believed and her complaints not taken seriously.

After Rehtaeh's death by suicide and the ensuing *Cyber-safety Act* was created, it included the very recommendations made by the Task Force a year earlier. After this amendment the relevant section of Nova Scotia's *Education Act* reads as follows.

122 Where a student enrolled in a public school engages in

(a) Disruptive behaviour or severely disruptive behaviour on school grounds, on property immediately adjacent to school grounds, at a school-sponsored or school-related activity, function or program whether on or off school grounds, at a school bus stop or on a school bus; or

(b) Severely disruptive behaviour at a location, activity, function or program that is off school grounds and is not school-sponsored or school-related, if the behavior significantly disrupts the learning climate of the school, the principal, or the person in charge of the school, may take appropriate action

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<sup>85</sup> *Supra* note 1 at 65, Recommendation 31.

<sup>86</sup> This view was supported by Eric Roher, "Dealing with off-School Conduct: Cyberbullying, Drug Dealing and Other Activities Outside of School Premises" (2012) 21 *Educ Law J* 91.

as specified in the Provincial school code of conduct policy including suspending the student for a period of not more than five school days.<sup>87</sup>

To be fair, the Department of Education in Nova Scotia did act on a number of the Nova Scotia Cyberbullying Task Force's recommendations and things have improved. There is a safer and more inclusive school climate. However, progress is being made and Nova Scotia like most provinces, now have a better (while not ideal) framework for student discipline, digital education and promoting the health and safety of all students. There still needs to be much more work on educating about digital citizenship and preventing cyberbullying and suicides.

### (C) Common Law Responses

In addition to statutory responses to new problems like cyberbullying, there can also be creative judicial responses to evolve the common law. A good example of this is the decision by Justice Sharpe of the Ontario Court of Appeal in fashioning a tort of invasion of privacy. In concluding that there was a tort against "intrusion on seclusion" he relied upon the *Charter of Rights* values of privacy among other considerations.<sup>88</sup> This could have some application to cyberbullying but it will be explored in Part Five of this article as one aspect of reconceiving the concept of privacy.

There are also other common law torts, such as, appropriation of personality or the intentional infliction of mental suffering which could have some relevance. However, for present purposes I shall restrict myself to two categories of common law responses to cyberbullying. The first is negligence in the school context and the second is defamation.

Occasionally bullied students will seek civil damages from school boards or Departments of Education, as compensation for injuries they have suffered as a result of bullying or cyberbullying. Usually such cases are brought as negligence claims. Negligence, like defamation, is a civil tort, and the person initiating the court action must prove that the school board and/or Department owed them a duty of care, that it breached that duty of care by failing to satisfy the required standard of care, and that the student suffered injury or harm as a result of that breach. If they can prove all these elements, then they are entitled to compensation, usually in the form of money.

In Canada courts have long recognized that schools owe students a duty of care, and have held that the standard of care owed by a school to a student is that of a "reasonably prudent or careful parent."<sup>89</sup> There is little judicial guidance on the standard of care involving harm caused by student cyberbullying, so it could prove challenging to bring an action against a school board or Education Department in such

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<sup>87</sup> SNS 1995-96, c 1 as amended, at s 122.

<sup>88</sup> *Jones v Tsige* 2012 ONCA 108.

<sup>89</sup> *Myers (Next Friend of) v Peel County Board of Education*, [1981] 2 SCR 21. See also: G Dickinson and W MacKay, *Beyond the Careful Parent: Tort Liability in Education* (Toronto: Emond Montgomery Publications Ltd, 1998).



a case. Courts are likely to give school officials a great deal of deference in determining the reasonableness of their actions and decisions in the school context. Schools will not be held liable for unforeseeable events, and they are not required to constantly supervise students. They cannot guarantee safety but must avoid negligence.

There are pros and cons to suing school officials for negligence. From a policy perspective, the publicity surrounding such a case may perform a useful public awareness function and encourage governments and school boards to work towards more effective solutions in preventing and monitoring bullying behavior. In a broader sense, therefore, civil litigation against a school board or Education Department can play an important societal role in emphasizing accountability of schools and school boards, and act as a corrective mechanism and a source of pressure to “fix the system.”<sup>90</sup>

However, from the perspective of the bullied student and his or her family, while it is important that such an option exists, it is not likely to be an appropriate avenue for all but the most serious of cases. It is true that such a lawsuit could result in a financial award or a settlement for the bullied student. However, civil litigation is expensive and slow-moving and can be emotionally devastating for the parties. Further, as with the criminal context, the process is focused on “fixing” (or at least compensating) the problem at the back end, so it does not do much in the way of prevention and deterrence except in the larger, more general sense referred to above.

Legislation which imposes additional statutory duties (that is, beyond those of the “reasonably prudent parent” legal standard) on school boards and their staff to prevent bullying, to initiate anti-bullying programs and to impose certain punishments on bullies, is increasingly being enacted in various jurisdictions. Imposing such statutory duties on school boards will have its costs and benefits. Such an approach is likely to widen the scope of the liability of school boards, since a court would take into account a breach of any such statute when assessing whether a school has been negligent. It might result in increased litigation and therefore in increased public awareness and pressure to improve the system. At the same time, of course, the reality is that increased litigation will result in increased legal costs for school boards. It is only one route to reducing bullying and cyberbullying but civil litigation, or the threat of it, may promote more preventive initiatives to alleviate the bullying problem and to make students safer. There does appear to be a growing trend in both the United States

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<sup>90</sup> John McKinlay, Robert J Konopasky, Abigail Konopasky, A Wayne MacKay & Tessa Barret, “Education’s Perfect Storm: Outmoded or no bullying policies, grievous harm to victims, and justifiable civil litigation” (Paper delivered at the Canadian Association for the Practical Study of Law in Education Conference, St John’s, Newfoundland, May 2, 2011) published as the proceedings of the 2011 Canadian Association of Practical Studies of Law and Education (CAPSLE). “Bullying: Finding Schools Liable Changes Everything” in R Flynn ed, *Rights and Reason: Shifting Tides in Law and Education* (Toronto: Informco Inc, 2012) at 129 (Chp 6).

and Canada to file negligence law suits against school boards as a response to bullying and cyberbullying.<sup>91</sup>

With the creation of the tort of cyberbullying in Nova Scotia's *Cyber-safety Act*<sup>92</sup> and the imposition of a duty on parents to reasonably supervise the online activities of their children, parents too may be the subject of law suits. This may take the form of breach of statute or negligence or some combination of the two. This phenomenon has already emerged in the United States.<sup>93</sup> Once again the cost of pursuing civil litigation may put this option beyond the reach of many victims of cyberbullying.

Defamation is another tort which could be applicable to some cases of cyberbullying, for example, in a case where someone has published or circulated false and harmful information on the internet. When done publicly, cyberbullying of this sort may cross the line into defamation. To succeed in a defamation case, a plaintiff must prove that defamatory words referring to the plaintiff were conveyed to at least one other person.<sup>94</sup>

In a well known defamation case the Supreme Court of Canada confirmed that if one person writes a libel, another repeats it, and a third approves what is written, they are all potentially liable.<sup>95</sup> Since social media sites like Facebook often allow users to publicly share or comment on others' posted content, it appears that someone who "likes" or shares a defamatory post, or who comments approvingly on it, could be at risk of liability for defamation.

Exactly what constitutes publication in an online context has been the subject of recent debate and litigation. In 2011, the Supreme Court of Canada decided that a hyperlink, by itself, should not be seen as "publication" of the content to which it refers.<sup>96</sup> According to this decision, hyperlinks are analogous to footnotes or references; they communicate that something exists, but do not inherently communicate its content. Therefore, publishing a hyperlink to a defamatory website or document, in itself, is not sufficient to ground a defamation action.

In a high profile Nova Scotia defamation case relating to cyberbullying a fifteen year old girl identified only as A.B. alleged she was the victim of bullying through Facebook. An anonymous person had created a false Facebook profile

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<sup>91</sup> Sarah Findlay, "Bullying Victims are Taking Schools to Court", *MacLeans Magazine* (14 September 2011).

<sup>92</sup> SNS 2013, c 2 at ss 21-22.

<sup>93</sup> Jacob Gershman, "Parents may be liable for what their kids post on Facebook, Court rules", *The Wall Street Journal* (15 October 2014).

<sup>94</sup> *Crookes v Newton*, 2011 SCC 47 at para 1, citing *Grant v Torstar Corp*, 2009 SCC 61, 3 SCR 640.

<sup>95</sup> *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130

<sup>96</sup> *Crookes v Newton* 2011 SCC 47.

indicating that it belonged to A.B.<sup>97</sup> The profile included information that identified A.B., and allegedly contained offensive material about her appearance and sexuality. Upon A.B.'s request, Facebook provided the internet address associated with the account, which was traced to Eastlink in Dartmouth, owned by Bragg Communications.

A.B. applied for a court order requiring Bragg Communications to disclose the identity of the person who had been assigned this internet address so that she could sue the person for defamation. A.B. also sought an order allowing her to proceed with the suit using only initials instead of her full name, as well as a partial publication ban preventing the publication of the content of the Facebook profile. These orders were opposed by two media outlets, Halifax Herald Limited and Global Television. Both asserted that the publication ban and anonymous proceeding would infringe the constitutional right to freedom of the press and go against the long established open court principle.

The Nova Scotia Court of Appeal ruled against A.B., holding that defamation is a claim that one's reputation has been lowered in the eyes of the public. To bring an action for defamation, a person must present oneself and the alleged defamatory statements before a jury and in open court, with the diminished expectation of privacy that is part of civil litigation. This case was reversed by a unanimous Supreme Court of Canada which held she could proceed anonymously.

In this landmark case, the first time the Supreme Court of Canada dealt with cyberbullying, the Supreme Court had to balance the privacy and equality interests of the young female victim against the important freedom of the press principle of an open court. This constitutional conflict will be explored in Part V of this article. In order to establish that there was harm from cyberbullying Justice Abella cites with approval significant portions from the *Nova Scotia Cyberbullying Task Force Report*.<sup>98</sup>

I shall now turn to the constitutional conflicts that arise in legal responses to cyberbullying. The law can be an enemy as well as an ally in this war against cyberbullying. Sometimes it is difficult to determine which role the relevant laws are playing.

## **5. CONSTITUTIONAL CONFLICTS – LAW AS ENEMY IN THE WAR ON CYBERBULLYING**

Laws designed to assist victims in their fight against cyberbullying, such as those discussed in Part Four must be conceived and applied within Canada's constitutional structure. They must conform to both the division of powers and respect the *Charter of Rights*. In order to be valid constitutional laws, they must only impose reasonable

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<sup>97</sup> *AB v Bragg Communications Inc*, 2011 NSCA 26 (CanLII). Rev'd 2013 SCC 46, 2 SCR 567.

<sup>98</sup> *Ibid* (SCC) at paras 20-24, citing "MacKay's Report", *supra* note 1 at 4, 42-43, 10, 11-12 and 66 (Appendix E).

limits on freedom of speech within section 2(b); not unduly invade the privacy interests implicit in sections 7 and 8; and respect the process rights of both the alleged perpetrators and victims of cyberbullying. Constitutional restrictions can thus limit laws in ways that produce constitutional conflicts. These conflicts can be seen as the enemy to the victim's pursuit of justice.

Part One briefly explored the freedom of speech challenges that might be made to the hate speech provisions of the *Criminal Code* and the discriminatory speech provisions of human rights codes. In order to be valid, these laws designed to protect the equality interests of victims must only impose reasonable limits on freedom of speech. The same can be said for the common law rules of defamation, which must balance the protection of reputations and freedom of speech. As will be explored shortly, there can also be constitutional conflicts between privacy and freedom of the press.

Even in the pursuit of justice for serious problems like cyberbullying, a fair and appropriate process for all parties must be used. The various legal rights in sections 7 to 14 of the *Charter of Rights* must be respected. There will be challenges to both the federal Bill C-13 and the provincial *Cyber-safety Act* in respect to their process and means of implementation. How far can the privacy of alleged cyberbullies be limited in pursuit of justice for their victims?

What is a fair and appropriate process for victims can also be a perplexing question. The Dalhousie University Facebook Dental School scandal provides a vivid example of that. In order to access the normal university discipline process the female dental students would have to surrender their anonymity. Only by going the restorative justice route could their anonymity be protected. Similarly, the claimant in a defamation action would normally have to give up anonymity to pursue a civil law suit.

In these examples, the same privacy rights that are enemies of victims when focused on the alleged cyberbullies, can be allies of the victims when they want to pursue a remedy anonymously. Even freedom of speech, which is a major defence for alleged cyberbullies (an enemy to the victim's cause), can be an ally to victims when they want to tell their stories. The mandatory publication ban on Rehteah Parsons' name was an impediment to the cyberbullying cause, rather than a protective ally of the victim.

Constitutional conflicts are usually complex and nuanced and while they are usually the enemy of victims pursuing legal remedies, that is not always the case. The value of anonymity to cyberbullies in attacking their victims is obvious. However, that same anonymity can be of great value to victims in allowing them to pursue justice, while avoiding re-victimization. Before exploring the central conflicts between privacy and freedom of speech and their constitutional limits on anti-cyberbullying laws, I shall briefly examine the meaning of privacy in modern world of technology and social media.

### (A) Reconceptualizing Privacy and Reconciling Liberty and Equality

As indicated above, privacy is a double-edged sword in respect to combating cyberbullying. Since a significant amount of cyberbullying is committed anonymously, anonymity is an important ally of the perpetrators and enemy of the victims. This explains why statutory responses such as the federal Bill C-13 and the provincial *Cyber-safety Act*, contain many provisions that limit privacy rights. They do so in the name of protecting the victims of cyberbullying and the crucial legal question is whether these limitations on privacy (conceived largely as a liberty right) are reasonable in the free and democratic society that is Canada.

However, cyberbullying itself can be seen as an invasion of the privacy of the victim. This is particularly so because of the constant barrage of hurtful messages that can arrive at any time or any place. In very real terms cyberbullying can be seen as an “intrusion on seclusion” as articulated in the common law case, *Jones v. Tsige*.<sup>99</sup> In this sense, privacy can be used to shelter the victims, as well as the perpetrators of cyberbullying.

Traditional concepts of privacy have been grounded in liberty and described as the right to be left alone.<sup>100</sup> The extent of privacy protected is variable and changes from one context to another. Even in the more modern emanations of privacy in sections 7 and 8 of the *Charter of Rights* the scope of the right depends upon what can be reasonably expected in a particular context.<sup>101</sup> Statutory privacy protections at both the federal and provincial levels are focused upon the flow and control of “personal information.” There is a wide array of public interest exceptions to privacy in these statutes as well. These statutory regimes are also balancing the liberty and autonomy interests of individuals against other compelling public and private claims. The emphasis is on autonomy and control.

What privacy we can “reasonably expect” is an ever-shrinking commodity in the modern world of technology and social media. There are many commentators who suggest that privacy is dead and we should just get over it. One such group of commentators make the valid point that the internet is watching and it never forgets.<sup>102</sup> At a practical and technological level it is difficult to refute this pessimistic view about the health of privacy in today’s world. Is privacy legally dead as well?

Fortunately, the answer from Canadian courts seems to be – no. It does have to be updated to fit our “information overload” society. In *R. v. Dyment* Justice La Forest (described by some as the patron saint of privacy) rules that there is a privacy right in relation to information and that it also is based upon the dignity and integrity

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<sup>99</sup> *Supra* note 88.

<sup>100</sup> Samuel E Warren & Louis D Brandeis, “The Right to Privacy” (1890) 4 Harvard L Rev 193.

<sup>101</sup> *R v Colaruso* [1994] 1 SCR 20.

<sup>102</sup> Rene Ritchie, Daniel Rubino, Kevin Michaluk and Phil Nickinson, “The death of privacy: The internet is always watching, and it never forgets”, online: <<http://www.androidcentral.com/talk-mobile/the-death-of-privacy-the-internet-is-always-watching-and-it-never-forgets-talk-mobile>>.

of the individual.<sup>103</sup> He also stresses that it is people and not just places that are protected.

As noted previously, territorial claims were originally legally and conceptually tied to property, which meant that legal claims to privacy in this sense were largely confined to the home... *Hunter v Southam Inc.* ruptured the shackles that confined these claims to property... Dickson J... rightly adopted the view... that what is protected is people, not place.<sup>104</sup>

In a more recent case, Justice Binnie explores the concept of privacy in the context of the police using infra-red technology to measure the heat emanating from a house that was suspected of being a marijuana grow-op. He states for the Supreme Court of Canada.

The courts were reluctant to accept the idea that, as technology developed, the sphere of protection for private life must shrink. Instead, it was recognized that the rights of private property were to some extent a proxy for the privacy that ownership of property originally conferred, and therefore, as the state's technical capacity for peeping and snooping increased, the idea of a protected sphere of privacy was refined and developed.<sup>105</sup>

His rejection of the shrinking sphere of privacy and emphasis on the need for the concept of privacy to evolve are extremely important. Justice Binnie also reinforces the point made earlier by Justice La Forest in *R v Dymnt*, that privacy is ultimately about the protection of people.

Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal.<sup>106</sup>

Finally Justice Fish in *R. v. Morelli* highlights the unique nature of computers as a repositories of a vast array of personal information.

... computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interest, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the internet. It is therefore difficult to conceive a s. 8 breach with greater impact on the *Charter*-protected privacy interests of the accused than occurred in this case.<sup>107</sup>

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<sup>103</sup> *R v Dymnt* [1988] 2 SCR 417 at para 22.

<sup>104</sup> *Ibid* at para 20.

<sup>105</sup> *R v Tessling* 2004 SCC 67, 3 SCR 432 at para 16.

<sup>106</sup> *Ibid* at para 21.

<sup>107</sup> *R v Morelli* [2010] 1 SCR 235 at para \_\_.

The need to update and reconceptualize the privacy concept has also been echoed by academics as well as judges. Professor Karen Eltis argues that privacy should be viewed as an extension of personality and classified as a human right grounded in dignity.<sup>108</sup> Professor Eltis also argues that privacy is part of a court's responsibility as a venue for accessing justice. This is relevant to the discussion in the next section as well in terms of access to justice.

There is a deeper underlying change needed—one to our understanding of privacy, and its relationship to access to justice and the exercise of judicial discretion.<sup>109</sup>

Professor Jane Bailey also asserts that by recognizing privacy as a public and collective value it could be better used to combat systemic forms of discrimination. Privacy offers both threats and opportunities for equality seeking groups but Professor Bailey sees privacy as a possible ally to substantive equality.

For equality-seeking communities, privacy understood entirely as a producer of purely individualistic goods such as free expression and liberty is an empty proposition. Privacy understood as a social value and producer of collective goods such as substantive equality seems more like something worth talking about.<sup>110</sup>

Privacy re-conceived as an equality right rather than, or in addition to, one based on autonomy allows for a reconciliation of liberty and equality in a way that would enhance the position of the victims of cyberbullying.

Both Bill C-13 and Nova Scotia's *Cyber-safety Act* have a number of potential violations of the privacy rights of alleged cyberbullies. The protective shield of anonymity has been dented by both the federal and the provincial statutes. There are also significant investigative powers involving search and seizure and broad powers of surveillance, particularly under Bill C-13. Some critics have suggested that the Harper Government is hiding broad powers of surveillance and expanded policing powers under the umbrella of cyberbullying.<sup>111</sup> There was also a cartoon in the *Toronto Globe and Mail* suggesting that Bill C-13 was a Trojan horse (labeled cyberbullying) with a sinister content of excessive police powers.<sup>112</sup> A similar view was expressed in many quarters.<sup>113</sup> There has also been academic criticism, even from

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<sup>108</sup> Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context (2011) 26:2 McGill LJ 289 at 314.

<sup>109</sup> *Ibid* at 309.

<sup>110</sup> Jane Bailey, "Towards an Equality-Enhancing Conception of Privacy" (2008) 31:2 Dal LJ 267 at 309.

<sup>111</sup> "Editorial: Electronic Interception should not be without a warrant", *Toronto Globe and Mail* (21 November 2013).

<sup>112</sup> *Ibid*.

<sup>113</sup> "Editorial: Good cyberbullying bill goes too far", *Halifax Chronicle Herald* (22 November 2013).

those who characterize privacy as an equality, rather than liberty right. Jane Bailey states as follows.

Cyberbullying is not one thing, but has been conflated and packaged to facilitate a tough on crime agenda. Actually what is termed cyberbullying is many different kinds of problems with different sources and solutions. This article focuses on the framing of discussions of cyberbullying in house discussions prior to new laws being formed. The main rhetorical claims are that cyberbullying is worse than other kinds of bullying, that it is ubiquitous and to a large audience, and that inter-generational differences in technological literacy mean parents can't control behaviour online.<sup>114</sup>

The possible privacy invasions under both Bill C-13 and the *Cyber-safety Act* are even more apparent when privacy is viewed in its more traditional way, as a manifestation of liberty and autonomy. However, a proper exploration of the potential privacy challenges to these anti-cyberbullying laws is beyond the scope of this article.

Rights to free speech and privacy interests are often closely intertwined. Much of what happens online takes place anonymously, and indeed, the possibility of anonymity is one of the powerful aspects of cyberbullying that sets it apart from traditional (face-to-face) bullying.

The protection of privacy is a fundamental value in Canada, and is seen as being of growing importance in our society. However, the advances of technology put privacy under increasing threat all over the world. There have been a number of federal and provincial privacy laws enacted in recent decades, as well as the appointment of privacy commissioners. Unlike the right to freedom of expression, there is no free-standing right to privacy in the *Charter*. Certain privacy rights, including the right to informational privacy, do attract constitutional protection, but such rights to privacy in the *Charter* relate to provisions dealing with particular matters of personal autonomy, such as, for example, the "search and seizure" provisions or the "security of the person" provisions in sections 8 and 7 of the *Charter* respectively.<sup>115</sup>

Freedom of expression is one of Canadians' most important and protected freedoms, and courts will not allow it to be limited without good reason. How freedom of expression and privacy interests in the cyberbullying context are interpreted by appellate courts will have a major effect on how anti-bullying legislation and anti-bullying policies are handled in the future. Students presumably have a greater expectation of privacy, like ordinary citizens, when they are not in school emphasizing again the importance of context.<sup>116</sup>

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<sup>114</sup> Jane Bailey, "Time to Unpack the Juggernaut?: Reflections of the Canadian Federal Parliamentary Debates on 'Cyberbullying'", (2015) 37 Dal LJ, Forthcoming.

<sup>115</sup> *Hunter v Southam Inc* [1984] 2 SCR 145; *Cheskes v. Ontario (Attorney General)*, 2007 Ont SC 38387 (CanLII). In the private law context, the Ontario Court of Appeal has recognized the tort of invasion of privacy or "intrusion upon seclusion" in the interesting case of *Jones v. Tsige*, 2012 ONCA 32.

<sup>116</sup> *R v M(MR)*, [1998] 3 SCR 393. See also W MacKay, "Don't Mind Me I'm From the RCMP: Another Brick in the Wall Between Students and Their Rights" (1997) 7 CR (5th) 24.



Online anonymity has been recognized as a legitimate privacy interest, and there have been cases in which the courts have refused to order that the identity of an anonymous online blogger be revealed.<sup>117</sup> The reasonableness of an expectation of anonymity is determined on a case-by-case basis. Courts have generally held that in view of a *prima facie* case of defamation, and the absence of any suggestion of a compelling interest that would favour anonymity (such as fair comment), the expectation of anonymity is not a reasonable one. Courts will also look at the question of whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and the right to privacy of the persons sought to be identified.<sup>118</sup> *A.B. v. Bragg* involving allegations of online bullying and defamation on Facebook illustrates that a court will sometimes order that an internet service provider reveal the identity of an otherwise anonymous poster.<sup>119</sup> I shall now turn to the constitutional conflicts in that important case.

## **(B) Freedom of Expression and the Press**

Freedom of expression and the press under section 2(b) of the *Charter of Rights* is one of Canada's cherished freedoms. That does not mean it is without limits. It is of course subject to section 1 of the *Charter of Rights* and matters which are in the view of the courts, reasonable limits in the Canadian free and democratic society. Hate speech is one such limit, as briefly explored earlier, and others would include sedition, terrorism, obscene speech, child pornography and many more. Free speech provides one of the major challenges for anti-cyberbullying laws.

As with the re-imagining of privacy discussed above, freedom of speech has taken on new forms in the digital age. One of the purposes of the section 2(b) *Charter* guarantee is self-actualization, as well as more traditional purposes like political and commercial speech. We are all engaged in constructing our many identities and masks and increasingly this is done online. Young people are experimenting with “on the edge” self-actualization in forms such as sexting. Sometimes online expression is done under the mask of anonymity and can lead to hurtful and malicious attacks upon other people. Even something as simple as clicking the “like” button in relation to negative comments can have devastating consequences. In the United States the right to “like” comments online has been constitutionally protected as a matter of freedom of speech.<sup>120</sup> The digital world has produced many complex constitutional conflicts.

### *i. A.B. v. Bragg (SCC)*

One such constitutional conflict emerged in *A.B. v. Bragg*—the case involving cyberbullying on Facebook and the victim's request to pursue the identity of her

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<sup>117</sup> See for example, *Morris v Johnson*, 2011 ONSC 3996 (CanLII).

<sup>118</sup> *Warman v Wilkins-Fournier*, [2010] OJ No 1846 (Ont SC)

<sup>119</sup> *AB v Bragg Communications Inc.*, 2013 SCC 46, 2 SCR 567.

<sup>120</sup> *Bland v Roberts*, 857 F Supp (2d) 599 (F D Va, 2012).

cyberbully for a defamation claim anonymously.<sup>121</sup> At its heart the case pits freedom of the press and the open court principle against the privacy interests of a cyberbullying victim seeking to pursue a remedy anonymously. She wants to conceal her identity to avoid further embarrassment and re-victimization. At the trial and appeal court levels in Nova Scotia the freedom of press and speech values prevailed. They concluded that the victim had not established the case for an exception and had not proved harm.<sup>122</sup>

The Supreme Court of Canada disagreed in a unanimous decision written by Justice Abella. The Court sided with the young female victim, granting her request to pursue the identity of her cyberbully anonymously. It rejected her request for a ban on the publication of the details on the fake Facebook site on the basis that her identity would be protected. In the Court's first case on cyberbullying, it struck a clear a decisive blow for the victim by carving out an exception to the open court principle.

If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully.<sup>123</sup>

Justice Abella justified her decision in part on the importance of victims, like A.B., being able to seek help anonymously. It cited the Kids Help Phone (intervenor) factum as support.

As the Kids Help Phone factum constructively notes, protecting children's **anonymity** could help ensure that they will seek therapeutic assistance and other remedies, including legal remedies where appropriate... Child victims need to be able to trust that their privacy will be protected as much as possible by those whom they have turned to for help.<sup>124</sup>

Unless victims of cyberbullying can be assured that their privacy will be protected, they are unlikely to reach out for help. This is an important issue for victims of sexual assaults as well. It was also a factor for some female dental students in the Dalhousie University Dental School Facebook scandal, in opting for the confidential restorative justice process. There is a real conflict between the privacy rights of victims and an open and transparent remedial process in courts or other administrative agencies.

This kind of analysis has led Professor Karen Eltis to conclude that privacy is an "ally" of the accessible court rather than the adversary (or enemy) of an open (accessible to the media) court.

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<sup>121</sup> *Supra* note 119. This case was discussed earlier in relation to defamation in Part IV.

<sup>122</sup> *Supra* note 97.

<sup>123</sup> *Supra* note 119 at para 27.

<sup>124</sup> *Supra* note 119 at para 25.

Courts might construe safeguarding privacy as a means of encouraging participation in the justice system in an age when doing so exposes individuals to countless risks associated with internet access to their personal information. Additionally, it may be seen as a way of enabling courts to maintain essential control over their materials. Consequently, it is not merely that the balance between transparency and privacy has tremendously shifted online – **it may be that safeguarding privacy can become a way towards ensuring access to justice and willingness to participate in light of the challenges of the Internet Age.**<sup>125</sup> (emphasis added)

One of the remaining questions arising from *A.B. v. Bragg* is, how broad is the privacy exception to the open court principle? Does it apply to other forms of bullying or damaging conduct more generally? Is it restricted to the young and perhaps only in respect to sexualized cyberbullying? Justice Abella states as follows.

The girl’s privacy interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying.<sup>126</sup> (emphasis added)

In my view, Justice Abella’s ruling in *A.B. v. Bragg* is grounded in both privacy and equality. These concepts are applied in a way that is compatible, rather than at odds with each other. There may be a question as to whether she goes far enough down the equality road. Though the gender of A.B. is explicit, without further clarification the case becomes about what children are doing on the internet, and not the broader, gendered problems of cyberbullying. Cyberbullying is frequently an issue along the lines of gender, not just for women who are under eighteen. Older female victims of cyberbullying and other forms of sexualized violence online may not be able to use *A.B. v. Bragg* as a precedent, and this can be viewed as a missed opportunity.

Jane Bailey advances this more critical view of Justice Abella’s ruling in *A.B. v. Bragg*.<sup>127</sup>

It seems clear from the reasons for its decision that the Supreme Court was concerned with protecting young victims of sexualized cyberbullying from having their identities disclosed in litigation against their attackers, since disclosure might well discourage victims from seeking legal remedies for this behaviour. And, although Justice Abella referred to a considerable amount of social science evidence concerning the harms of bullying generally and cyberbullying more specifically, nowhere did the Court advert to other findings in those same reports that demonstrate who is

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<sup>125</sup> *Supra* note 108 at 315.

<sup>126</sup> *Supra* note 119 at para. 14.

<sup>127</sup> Jane Bailey, “‘Sexualized Online Bullying’ through an Equality Lens: Missed Opportunity in *AB v Bragg*?” (2014) 59:3 McGill LJ 709.

disparately likely to be victimized by bullying and cyberbullying. Nor did the Court reflect substantively on the foundation of structural inequality that undergirds sexualized attacks and which may partially explain why the targets of these attacks may see privacy as being so important.”<sup>128</sup>

Professor Bailey also suggests that counsel for A.B. might have placed more emphasis on sexual equality in their arguments before the Supreme Court of Canada.

In AB, counsel might have argued that AB’s right to sex equality required enhanced access to pseudonymity in order for her to pursue civil redress against her attacker. At least one of the reports cited in the SCC’s reasons provides support for concluding that females (as well as other vulnerable community members) are disproportionately subject to bullying. The MacKay Report, for example, states: “Bullying often results from, and reinforces, discrimination. Marginalized groups may be targeted for issues of racism, sexism, ableism, xenophobia, and homophobia, among other identities, and are generally considered to be at a higher risk for bullying.”<sup>129</sup>

I am perhaps a bit more optimistic than Professor Bailey that *A.B. v. Bragg* lays the foundation for future expansion of the privacy rights of victims seeking access to legal remedies. The core logic of the case is applicable to other contexts and can embrace other marginalized victims beyond A.B. as well as other young women like her.

## ii. Free Speech Challenges to Cyber-safety Act

Nova Scotia’s *Cyber-safety Act* was conceived and drafted in the aftermath of the death of Rehtaeh Parsons. It was drafted in a very short period of time. Unlike Bill C-13 dealing with the distribution of intimate images without consent, there is no express defence in the *Cyber-safety Act* to the significant limitations placed upon freedom of expression. This does not mean that the Nova Scotia law would not survive a section 2(b) *Charter of Rights* challenge but the burden will be on the government to justify the provisions of the *Cyber-safety Act* as reasonable limits on freedom of speech.

The first court case involving a prevention order under the *Cyber-safety Act* involved a situation of political expression. Andrea Paul, the Chief of the Pictou Landing First Nation was subjected to what Justice Robertson of the Nova Scotia Supreme Court called “very defamatory, abusive and obscene posts related to Chief Paul and her family.”<sup>130</sup> These posts came from one of her Pictou Landing band members and Justice Robertson concluded this was a case of cyberbullying, justifying a prevention order under the *Cyber-safety Act*.

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<sup>128</sup> *Ibid* at 724.

<sup>129</sup> *Ibid* at 727, citing *supra* note 1 at 16.

<sup>130</sup> (NSSC 11 February, 2014) discussed in Ian Fairclough, “N.S court issues first cyberbullying prevention order”, *The Halifax Chronicle Herald* (11 February 2014), online: <<http://thechronicleherald.ca/novascotia/1186305-ns-court-issues-first-cyberbullying-prevention-order>>.

In another political speech context, a young constituent of Nova Scotia Member of the Legislature, Lenore Zann, distributed a naked picture of the former actress. The picture was located from a scene in the television drama—*The L Word*. The picture was sent to the young constituents classmates in school and others and to Ms. Zann herself, with rude comments attached. In spite of requests from Ms. Zann to remove the post, it was only removed after a media storm and intervention from his parents and school officials. Ms. Zann considered making a complaint to the CyberSCAN Unit under the *Cyber-safety Act* but did not ultimately do so.<sup>131</sup>

In another actual case concerning a dispute about a Cold War era fallout shelter (referred to as the Diefenbunker) a protection order was issued under the *Cyber-safety Act*. However, it was later overturned by the Nova Scotia Supreme Court on the basis that it unduly interfered with freedom of speech.<sup>132</sup> There are also at least two other challenges to the *Cyber-safety Act* (especially its broad definition of cyberbullying) in progress. One involves a claim by the owner of Halifax-based *Frank Magazine* that he was cyberbullied by a Cape Breton woman on Twitter. The other involves a challenge to a protection order under the *Cyber-safety Act* in respect to a dispute between former business partners.<sup>133</sup>

Somewhat similar challenges to anti-cyberbullying laws in some American states have been successful under the free speech guarantees in the United States Constitution. One recent case involves a cyberbullying law in Albany County New York. While the state's highest court acknowledged that the purposes of the law were laudable, it concludes that it went too far and created an offence out of constitutionally protected speech.<sup>134</sup>

Similar kinds of criticisms of Nova Scotia's *Cyber-safety Act* have been made in many quarters. Even recognizing the scope of the cyberbullying problem, the critics argue it goes too far in invading freedom of speech.<sup>135</sup> Halifax privacy lawyer, David Fraser, has also been a vocal critic of the *Cyber-safety Act*. He is also acting as counsel in some of the *Charter of Rights* challenges to the Nova Scotia law. Referring to the *Cyber-safety Act* he states:

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<sup>131</sup> Tristan Hopper, "Lenore Zann, actress turned Nova Scotia MLA, launches cyberbullying investigation after teen tweets nude image of her from *The L Word*", *National Post* (13 December 2013).

<sup>132</sup> Francis Campbell, "Cyberbullying order revoked: Judge: Bunker owner's right to free speech trumps harm of remarks to ex-proprietor", *Halifax Chronicle Herald* (1 April 2015).

<sup>133</sup> Paul McLeod, "Cyber-safety Act under Attack", *Halifax Chronicle Herald* (15 January 2015).

<sup>134</sup> Eugene Volokh, "New York's highest court strikes down cyber-bullying law", *The Washington Post* (1 July 2014). Referring to *The People v Marquan* 24 NY (3d) 1. NY Lexis 1527 (CANY – July 1, 2014).

<sup>135</sup> Jesse Brown, *MacLeans Magazine* (8 August 2013), online: <<http://www2.macleans.ca/2013/08/08/nova-scotias-awful-cyber-abuse-law-makes-bullies-of-us-all>> Editorial, "Cyberbullying Nova Scotia: Destructive cruelty, draconian reaction" *Toronto Globe and Mail* (7 May 2012).

... the legislation fails to take into account -- in any way -- that all expression is protected by the *Charter* and can only be regulated or suppressed by reasonable limits, prescribed by law. The legislation is defective and has been enforced by the province in a manner that only makes it worse. In Nova Scotia, any electronic speech that would reasonably be expected to cause someone distress or hurt feelings or harm to self-esteem is deemed to be cyberbullying. There are no defences...Every other Canadian law that tries to limit speech has defences, such as the defence of truth or fair comment under defamation law. Hate speech laws in the Criminal Code have defences. The Supreme Court of Canada, in *Grant v Torstar*, recently recognized that traditional defamation law was not compatible with the *Charter* because a diligent commentator on a matter of public interest would be found liable under existing rules so created a defence of "responsible communication on a matter of public interest." Under defamation law, you can call a convicted thief a thief, but if you dare tweet that in Nova Scotia or put it on a blog, you're a cyberbully.<sup>136</sup>

While it is obvious that Nova Scotia's *Cyber-safety Act* is vulnerable to these free speech challenges, I am not convinced that the essential elements of the Act will be struck down. There is always the defence of reasonable limits under section 1 of the *Charter of Rights*. In *A.B. v. Bragg*<sup>137</sup> the Supreme Court of Canada recognizes the serious nature of the cyberbullying problem. There is a pressing and compelling state objective in responding to cyberbullying. Whether the means adopted are proportional and minimally impairing are the key questions. Freedom of speech is an important ally for perpetrators of cyberbullying and correspondingly a potential enemy to its many victims.

### *iii. The Ambiguous Case of Publication Bans*

There is one more unusual twist to the tangled and tragic story of Rehtaeh Parsons. Because two of the boys involved in her alleged assault were tried on child pornography charges, there was a publication ban issued, preventing the use of Rehtaeh Parsons name. The publication ban was issued pursuant to section 486.4(3) of the *Criminal Code* on April 30, 2014. This publication ban on Rehtaeh Parsons' name, was challenged by various Halifax, Nova Scotia media outlets in May 2014, before Provincial Judge Jamie Campbell (as he then was).<sup>138</sup>

There were strong arguments by counsel representing the various media outlets that a publication ban, while normally an important protection for the victims of child pornography, makes no sense in this high profile and internationally known

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<sup>136</sup> David Fraser, "The disaster of Nova Scotia cyberbullying law; it's time to go back to the drawing board" (26 February 2015), *Canadian Privacy Law Blog*, online: <<http://blog.privacylawyer.ca/2015/02/the-disaster-of-nova-scotia.html>>. An expanded version of his views also appears in David Fraser, "Nova Scotia's Cyberbullying law is a disaster", *Canadian Lawyer Magazine* (2 March 2015), online: <<http://www.canadianlawyermag.com/5493/Nova-Scotias-cyber-bullying-law-is-a-disaster.html>>.

<sup>137</sup> *Supra* note 119.

<sup>138</sup> *R v KB* 2014 NSPC 23.

case involving an alleged sexual assault and cyberbullying with naked photos. Furthermore both of Rehtaeh's parents consented to lifting the publication ban and argued strenuously in the media that not being allowed to use her name would hamper their education and advocacy against sexual violence and cyberbullying. Since Rehtaeh herself was dead there was no child victim to protect.

While Justice Campbell was sympathetic to the view that the publication ban makes little or no sense in the Rehtaeh Parsons case, he ruled that the relevant law can not be reasonably interpreted in any way that did not make the ban mandatory.

The language of section 486.4(3) of the *Criminal Code* is clear. It says that a judge "shall" order a publication ban in every case where child pornography is alleged to be involved. When the word "shall" is used in a statute it means that the judge has no choice in the matter. When child pornography is involved the judge has to make the order. There is no discretion to be exercised. There is no provision that allows the judge to consider whether the imposition of the ban is in the public interest, in anyone's interest, is practically enforceable, has been notoriously flouted or is even contrary to the public interest.<sup>139</sup>

He further explains his reluctant conclusion in the following passage

Judges aren't authorized just to act on their sense or the community's sense of what the right thing to do might be in a particular case. Judges have to apply the law. They can do that with a bit of creativity or imagination to achieve a just result in an individual case. But one thing they can't do is to ignore the law. They can't pick which laws they will or won't apply. They can't just create exceptions and define them on the fly.<sup>140</sup>

The value of protecting the victims in cases of sexual assault by publication bans was articulated by the Supreme Court of Canada in *Canadian Newspaper Co. v. Canada (A.G.)*.<sup>141</sup> The idea is to reduce the possibility of re-victimization from having the victim's name public. The same logic normally applies in respect to victims of child pornography. However, in the sexual assault context a victim can have the ban lifted by applying to do so. One such example involved the daughter of a high profile boxer, who was convicted of assaulting his young daughter. When the daughter grew up and wanted to publish a book about the incident (using her name), the Quebec court allowed her to do so.<sup>142</sup>

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<sup>139</sup> *Ibid* at para 4.

<sup>140</sup> *Ibid* at para 7. Davene Jeffrey, "Judge upholds ban in child pornography case" *Halifax Chronicle Herald* (17 May 2014).

<sup>141</sup> [1988] 2 SCR 222.

<sup>142</sup> *Éditions des Intouchables Inc. c Québec (Procureur général)*, 2004 CanLII 30162, 26 CR (6th) 241 (QC CS).

Justice Campbell in his decision did plant the seeds for a resolution in the Rehtaeh Parsons situation that allowed for an exception in her case. He made the following comments.

The practical merits of this application, in the circumstances of this case, are strikingly apparent. They scream out for a solution. The ban serves no purpose where the deceased young person's name is already well known to be associated with the case. Allowing her parents to waive her privacy rights would be a good thing if it could be done just for this case, just this once.

and

It is not for the court to purport to direct or even to advise or provide recommendations to the Director of Public Prosecutions. I will note however that it would be within the authority of the DPP to issue a direction to prosecutors in a specific case or in certain classes of cases that it would not be in the public interest to prosecute. It would be within the authority of the Attorney General to issue a public direction to the DPP to that same effect.<sup>143</sup>

Nova Scotia Attorney General and Justice Minister, Lena Diab, issued a ministerial directive to the Public Prosecution Service, reducing and clarifying the scope of the publication ban in Rehtaeh's case.<sup>144</sup> The effect was to lift the ban in most contexts but to not allow for negative comments targeting Rehtaeh. It took until December, 2014 for this decision to be made but it was the correct one. It balances the importance of publication bans protecting victims and the practical dictates of the Rehtaeh Parsons case. It is indeed an exceptional case. The directive was well received and liberated her parents and others to use her name to advocate for better measures to prevent future such tragedies for your women.<sup>145</sup>

Prior to the directive easing the publication ban, the *Halifax Chronicle Herald* newspaper took the unusual stance of defying the original publication ban and using her name. This paper and others (including Rehtaeh's parents) who defied the ban, were not prosecuted. The situation is now clear that there will only be prosecutions if her name is used in a negative and hurtful way. The result has been widely applauded and Justice Minister Diab given appropriate kudos.<sup>146</sup>

The saga about the publication ban turns the analysis about privacy and free speech on its head. In this case privacy for the victim was the enemy of advancing the

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<sup>143</sup> *Supra* note 138 at paras 51 and 55 respectively.

<sup>144</sup> Justice/Public Prosecution Service, News Release, "Directive Given About Publishing Rehtaeh Parson's Name (17 December 2014), online: <<http://novascotia.ca/news/release/?id=20141217002>>.

<sup>145</sup> Keith Doucette, "Rehtaeh Parsons father pleased with easing of identity ban", *Toronto Globe and Mail* (18 December 2014) and Michael Gorman, "Rehtaeh gets her name back", *Halifax Chronicle Herald* (18 December 2014).

<sup>146</sup> "Editorial: Rehtaeh Ban Waived: Liberating her story", *Halifax Chronicle Herald* (18 December 2014) and "Editorial: We know her name", *Toronto Globe and Mail* (18 December 2014).



case against cyberbullying by preventing her parents and others from effectively educating and advocating against future such tragedies. Freedom of speech and the press (usually the ally of perpetrators of cyberbullying) are the allies and supports for the victim in the Rehtaeh Parsons publication ban context. Depending upon the context, whether a particular law or legal concept is an ally or enemy in combating cyberbullying may change. What is an enemy in one setting can be an ally in another.

## **6. CONCLUDING THOUGHTS ON THE ROLE AND LIMITS OF LAW AS AN EFFECTIVE RESPONSE TO CYBERBULLYING**

Cyberbullying is a huge problem in Canada, as it is in other parts of the world. It is also a manifestation of more deep rooted problems that have been accentuated by the rapid advances of technology and social media. Not only does the problem of cyberbullying infect the larger community, it is also often paired with other systemic and deep rooted problems in our society, such as, misogyny, racism and homophobia, to name only a few.

Classifying law and legal concepts into allies and enemies in the war on cyberbullying is really too simplistic a framework, as demonstrated by the above analysis. It is really about complex trade-offs of competing values, such as access to justice, privacy, freedom of speech and fair process. However much we want to combat cyberbullying, it must be pursued within the Canadian constitutional framework.

It is clear that there are many legal dimensions to the problem of cyberbullying and there are as many or even more questions than there are answers in this new and evolving area. Modern technology and the explosion of social media, as a major form of communication, challenge the traditional notions of law and its utility in responding to the problem of cyberbullying. Furthermore, these problems and challenges are not unique to Canada: they are gaining more prominence throughout the world.

The role that law can play in responding to this significant social problem is not entirely clear. It can be one important front in a multi-faceted strategy to reduce cyberbullying and mitigate the negative consequences for the victims of this unwanted and undeserved attack upon their dignity as human beings. In a very real sense cyberbullying is a human rights issue. Legal changes can be an important component of a multi-faceted community response to the growing problem of cyberbullying. Such changes can also play a role in changing attitudes and values and emphasize the need to take action.

Laws are only one of many responses that are needed and legal responses need to be supplemented by education, prevention programs, adequate supports for victims and effective interventions for the cyberbullies themselves. It is a community problem and it needs a community response from many different segments of our society.

We live in a world where it is too easy to hide behind anonymity and not take responsibility for our own actions or those of others. We need more upstanders and fewer bystanders. We not only need to be better “digital citizens” we need to be better and more community oriented citizens, in all senses of that term. We must reclaim ownership of the real communities in which we live and take responsibility for the quality of our collective lives.

Not only should the laws themselves be well drafted they also need to be creatively applied. Linking back to the novelty and challenges posed by technology and social media, as discussed in the early parts of this article, it is vital to have better education and training for those who create and apply the relevant laws. This applies to the lawmakers, the bureaucrats who apply them, and the lawyers and judges who interpret them.

We all have a lot to learn if we are to make a real dent in cyberbullying. Like many social problems, it is ultimately a matter of value choices and balancing competing values. Law has an important role to play in articulating the core values of our society and responding to conflicting values. It also has real limits on how effective it can be in promoting real change. There is still a long way to go but the journey has begun and there are some real signs of progress. The potential consequences of not responding to cyberbullying in more effective ways are too large to accept. The many aspects of our system—justice, education and health—that failed Rehtaeh Parsons must be fixed. We all have a role to play in promoting a more accepting and tolerant world where a person’s uniqueness and diversity are celebrated and not subjected to online humiliation and shaming.