What's the Problem? Defining Cyberbullying

The issue of cyberbullying has become the subject of extensive media coverage in recent years. The problem has caught the attention of pundits, legislatures and prosecutors alike. While existing laws reach some of this behavior, a number of states have passed laws specifically designed to curb cyberbullying. This societal problem cannot be addressed in a meaningful manner without first defining what is meant by the term cyberbullying. It is useful to examine cyberbullying through the lens of traditional bullying when attempting to craft a workable definition.

Traditional bullying has a widely accepted definition.

> Bullying is aggressive behavior that is intentional and that involves an imbalance of power or strength. Sometimes this imbalance involves differences in physical strength between children, but often it is characterized by differences in social power or status. Because of this imbalance of power or strength, a child who is being bullied has a difficult time defending himself or herself. Typically, bullying does not occur just once or twice, but is repeated over time.[1]

In the broadest sense cyberbullying refers to bullying that occurs through electronic communication devices, therefore the definition of cyberbullying must incorporate bullying's essential elements. It follows that in order to be considered cyberbullying, an act must be (1) willful; (2) repeated; (3) such that it causes harm perceived by its target; and (4) perpetrated via computers, cell phones, or other electronic devices.[2]

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[1] KOWALSKI, et al., CYBER BULLYING: BULLYING IN THE DIGITAL AGE, 17 (2008).

[2] SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 5 (2009).

The first three elements of cyberbullying mirror those of traditional bullying; the requirement that cyberbullying be perpetrated via an electronic device is the main distinguishing feature between the two. That such behavior is willful seems an obvious requirement. Likewise, if the harm of a bullying act is not perceived by its target then it fails to cause emotional distress. The repetition requirement is undoubtedly crucial when the behavior takes the form of traditional bullying.

> The repetitive nature of bullying creates a dynamic where the victim continuously worries about what the bully will do next. Indeed, the target often alters daily behavior patterns to avoid personal contact with the bully, because it is assumed that something bad will happen if they interact.[3]

> Cyberbullying, however, creates scenarios where it is difficult to determine repetition.[4]

Robin M. Kowalski explains that a single act of cyberbullying often creates repeated harm:

> A single act (e.g., a nasty e-mail or an inflammatory text message) may be forwarded to hundreds or thousands of children over a period of time. From a victim's perspective, he or she may feel repeatedly bullied, to say nothing of the fact that the victim may reread the e-mail or text message himself or herself multiple times, again leading to the feeling of being bullied repeatedly. Even though there may have been only one initial act, it may have been perpetrated through many people and over time.[5]

This creates questions of whether repetition should be a required element of cyberbullying and if it is included how repetition itself should be defined.

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[3] SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 12 (2009). In large part state statutes addressing cyberbullying do not require repetition.

[4] *See* J.C. ex rel. R.C. v. Beverly Hills Unified School Dist., No. CV 08-03824 SVW, 2010 WL 1914215, at *1 (C.D. Cal. May 6, 2010) (many of the views of a derogatory youtube video were from the victim herself).

[5] KOWALSKI, et al., CYBER BULLYING: BULLYING IN THE DIGITAL AGE, 62 (2008) (citing Tonya R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association With Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001)).

Virtually everyone agrees that bullying takes place between children. When adults engage in these same types of behavior, society classifies it in other ways. While almost all cyberbullying definitions require that an adolescent be involved in an interaction,[6] there are differing views regarding the status of both the victim and perpetrator.

Renee L. Servance states cyberbullying can only be directed at students.[7] The definition provided on the website www.stopcyberbullying.org requires a minor be both the perpetrator and victim.[8] Other definitions encompass situations where children are the perpetrators and school officials are the victims.[9] [10]

Karly Zande argues cyberbullying only includes events with minors as culprit and victim.

> Victims of incidents involving a child and adult, or two adults, have other legal claims available to proceed under . . . . These offenses, often more serious than the acts of a cyberbully, can be more appropriately [handled] in the criminal system

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[6] *But see* NEV. REV. STAT. §§ 388.132; 388.135 (defining cyberbullying in such a way that it must take place in a school environment but can have both an adult perpetrator and victim); *accord* DEL. CODE ANN. tit. 14 § 4112D; UTAH CODE ANN. §53A-11a-201.

[7] Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict between Schools and the First Amendment*, 2003 Wis. L. Rev. 123, 1219.

[8] What is Cyberbullying Exactly, *available at* www.stopcyberbullying.org/what_is_cyberbullying_exactly.html; SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 19 (2009).

[9] Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 Hastings Const. L.Q. 835, 867 (2008); *see also* KOWALSKI, et al., CYBER BULLYING: BULLYING IN THE DIGITAL AGE, 43-44, 146-47 (2008) (citing Tonya R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association With Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001)) (Kowalski actually argues further that cyberbullying can take place between two adults not associated with a school).

[10] Other states have statutes in which its unclear exactly how age plays into the definition. *See, e.g.*, MASS. GEN. LAWS ch. 71 § 37O. Section 37O defines "bullying" as "the repeated use by one or more students" of certain acts directed at a victim. MASS. GEN. LAWS ch. 71 § 37O(a). The plain language here would tend to indicate that adults could be victims of cyberbullying. However, the same statute requires "a strategy for providing counseling . . . for perpetrators and victims and for appropriate family members of said students. MASS. GEN. LAWS ch. 71 § 37O(d)(x). This language would seem to indicate that both perpetrators and victims must be students.

or . . . civil courts. [I]t would be a waste to utilize court resources in a cyberbullying claim when schools are in a better position to educate the cyberbully as to appropriate online and social behavior, as well as to determine and oversee appropriate punishment. Oftentimes, this decorum lesson from the school may be enough to curb the cyberbully's behavior.

Giving a concrete age definition to cyberbullying also allows for the formulation of a better test reflecting the differences in maturity between children and adults. Child victims may fear going to school, experience physical symptoms, have low self-esteem, and exhibit decreased performance in school. Adult victims of cyber-crimes are more likely to brush it off . . . .

This limitation will also allow for the courts to develop a clearer, narrower test for dealing with instances of cyberbullying consistent with other student speech cases. Further, it will give added protection to the free-speech rights of student cyberbullies themselves, taking into consideration the maturity level and ages of their targeted victims. This reflects the different maturity levels of the student and adult involved.[11]

There is also an argument that cyberbullying includes events involving a student perpetrator and a victim associated with that student's school. Bullying is largely about the exploitation of power. Cyberbullying does not require physical strength. Instead power is in one's ability to use technology. Rarely would a traditional bully be able to use physical strength to bully a teacher. If a student did act violently, such a use of force would be a crime. Further, the adult in this situation would have a greater ability to ensure the behavior could not be repeated. However, cyberbullying changes that dynamic. A student may be able to use technology to harm an adult and yet act in a way that is legally actionable.

Traditionally, students have not had the ability to affect adults' social status. A student might mock a teacher or start a rumor in school. However, this behavior would likely reach only other students and the veracity of these attacks would be suspect. In the digital world students have the

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[11] Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 Barry L. Rev. 103, 127-28 (2009) (internal citations omitted).

ability to reach teachers among their peer group. By posting information on the Internet, students can affect the reputation of a school official not just in the classroom, but throughout the community and beyond. Additionally, because the Internet allows information to be posted anonymously or under false pretenses, it may be unclear that the information comes from a source that lacks credibility. These changes in the power dynamic between student and teacher may counsel for creating policies that protect adults and not just children.

To effectively address cyberbullying these are questions that must be answered.