CYBERBULLIES BEWARE: RECONSIDERING *VOSBURG V. PUTNEY* IN THE INTERNET AGE

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I. INTRODUCTION

The suicide of Tyler Clementi, a student at Rutgers University who jumped off the George Washington Bridge in September of 2010 after two fellow students used a hidden camera to live stream his sexual encounter over the Internet, reiterates the need for states to rethink cyberbullying liability.[1] While the world has changed and truly entered the Internet era, the reason for holding bullies liable for their actions remains the same: "If the intended act is unlawful, the intention to commit it must necessarily be unlawful."[2] In the vast and ever-changing world of cyberspace, "[b]ullying is no longer about the strong picking on the weak in the schoolyard. The physical assault has

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1. Michael Daly, *Bullying Has No Bounds on the Internet, as Suicide of Rutgers Student Tyler Clementi Shows*, N.Y. DAILY NEWS (Sept. 30, 2010), http://articles.nydailynews.com/2010-09-30/local/27076722_1_facebook-page-rutgers-student-young-man.

2. Vosburg v. Putney, 50 N.W. 403, 403 (Wis. 1891).

been replaced by a [twenty-four] hour[s] per day, seven days a week online bashing. Savvy students are using instant messaging, e-mails, chat rooms and websites they create to humiliate a peer."[3]

As bullying becomes a nationwide epidemic, the White House estimates that as many as "one-third of the nation's students, or 13 million children, have been bullied. The issue is gaining attention in part because new technologies such as Facebook and Twitter are used for bullying and because of high-profile coverage of teens who have committed suicide to escape the taunting."[4] With this looming threat imposed by continuous cyber-clobbering, the time has come to reconsider liability and culpability for cyberbullying. In light of the vast use of cyberspace as a now-prevalent vehicle for bullying, there is a greater necessity to reconsider liability on the part of bullies for their actions in cyberspace. It is well settled in tort law that one takes the victim as one finds him,[5] and criminal liability for improper acts has long been society's form of punishment for bad acts.[6] The time has come for that liability to extend to the cyberbully.

A. Cyberbullying Defined

Cyberbullying is defined as the "willful and repeated harm inflicted through the use of computers, cell phones, and other

3. *Cyber Bullying: Statistics and Tips*, I-SAFE INC., http://www.isafe.org/channels/sub.php?ch=op&sub_id=media_cyber_bullying (last visited Mar. 10, 2011).

4. Darlene Superville, *Obama Says He Was Bullied, Knows What Kids Endure*, THE WASH. TIMES (Mar. 10, 2011), http://www.washingtontimes.com/news/2011/mar/10/obama-says-he-was-bullied-knows-what-kids-endure/?page=1. In his opening speech for the Conference of Bullying Prevention, President Obama stated that the main goal of the conference is "to dispel the myth that bullying is just a harmless rite of passage. With big ears and the name that I have, I wasn't immune. I didn't emerge unscathed." *Id.*

5. *See Vosburg*, 50 N.W. at 404 ("[T]he wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.").

6. 4 WILLIAM BLACKSTONE, COMMENTARIES 21 ("[T]o constitute a crime against human laws, there must be, first, a vi[c]ious will; and, secondly, an unlawful act consequent upon such vicious will.").

electronic devices."[7] The cyberbully will utilize technology to "send or post text or images intended to hurt or embarrass another person."[8] The various ways a cyberbully will intentionally harm another person in cyberspace "include[] . . . sending malicious e-mails, spreading rumors or threats, and posting embarrassing or intimate photos of a person . . . without [his or her] permission."[9] Moreover, the audience for cyberbullying is without bounds, and an act of cyberbullying can never truly be erased.[10] As such, acts of cyberbullying must carry liability just as other improper acts do, whether criminal or civil. Yet, cyberbullying in the traditional sense applies to youth—specifically children, preteens, or teens—being tormented or harassed by another child, preteen, or teen using the Internet or other digital technology.[11] In today's Internet age, that definition now must extend to anyone tormenting another with the assistance of the Internet regardless of the age or true identity of the bully.[12] And perhaps extending liability to the cyberbully, whether criminal, civil, or even both, will begin to curb the ever-

7. Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CTR., 1 (July 2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.

8. *21st Century Bullying, Crueler Than Ever*, NAT'L CRIME PREVENTION COUNCIL, http://www.ncpc.org/resources/files/pdf/bullying/21st%20Century%20Bullying%20-%20Crueler%20Than%20Ever.pdf (last visited Mar. 5, 2011).

9. *Id.*

10. *Id.*

11. Colleen Barnett, *Cyberbullying: A New Frontier and a New Standard, A Survey of and Proposed Changes to State Cyberbullying Statutes*, 27 QUINNIPIAC L. REV. 579, 580 (2009); *see also Cyber Bullying: Statistics and Tips*, *supra* note 3 (reporting in a 2004 survey that 42% of the 1,500 students in grades fourth to eighth stated that they had been the victim of a cyberbully). Additionally, 157 of the students surveyed indicated that they had been a victim of cyberbullying on numerous occasions. *Id.*

12. *See, e.g.*, United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009). Under the guise of a fictitious social networking website account, Defendant Drew, the forty-seven year old mother of a seventh grader, contacted Megan Meier, a thirteen year old classmate of her daughter, pretending to be a sixteen year old male interested in Meier. *Id.* at 452. After several days of Internet flirting, Defendant Drew, acting as the virtual and fictitious sixteen year old male, used the social networking website to inform Meier that she was no longer liked and that "the world would be a better place without her in it." *Id.* Shortly after receiving the Internet message, Meier took her own life. *Id.*

prevalent epidemic becoming known as cyberbullicide.[13]

> There have been several high-profile cases involving teenagers taking their own lives in part because of being harassed and mistreated over the Internet, a phenomenon we have termed *cyberbullicide*—suicide indirectly or directly influenced by experiences with online aggression. While these incidents are isolated and do not represent the norm, their gravity demands deeper inquiry and understanding.[14]

How many more situations like Tyler Clementi's must occur before society takes notice that criminal and civil liability should be extended to the internet bully? It is time for our society to place responsibility—in the form of tort liability—on the bully for the intentional acts of bullying.

B. Tyler Clementi's Tragic Circumstances

Tyler Clementi was an eighteen-year-old gay student at Rutgers University who committed suicide after his roommate, Dharun Ravi, and his classmate, Molly Wei, secretly videotaped sexual encounters between Clementi and another gay man and then streamed[15] the video over the Internet.[16] Ravi made a Twitter post on September 19, 2010 that read: "Roommate asked for the room till midnight. I went into [M]olly's room and turned on my webcam. I saw him making out with a dude. Yay." Then

13. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CTR., 1 (last visited March 28, 2011), http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf.

14. *Id.* (citations omitted).

15. While the outcome of Tyler Clementi's cyberbullying story is itself a tragedy, an even more troubling aspect and area for concern with regards to future victims of cyberbullies who utilize a Web-camera, is the ease with which Clementi's cyberbullies, Ravi and Wei, were able to setup a live Internet stream of Clementi's sexual encounter. *See, e.g.,* YuTubeMedia, *Make Your Own Live Video Show—How to Use Ustream*, YOUTUBE (Apr. 4, 2009), http://www.youtube.com/ watch?v=EPZXkvl8cT0 (providing a free instructional video demonstrating click by click directions for setting up a live video stream).

16. William D. Kickham, *Tyler Clementi Suicide: Will the Law Hold Cyber-Bullies Civilly Liable?* BOS. ACCIDENT LAW. BLOG (Oct. 16, 2010), http://www.bostonaccidentlawyerblog.com/2010/10/tyler_clementi_suicide_will_th.html.

Ravi streamed Clementi's encounter on the Internet.[17] Three days later, Clementi committed suicide by jumping off the George Washington Bridge into the Hudson River.[18]

Certainly, Clementi's suicide is tragic and troublesome. Clementi was a talented violinist who, after being subjected to cyberbullying and worldwide embarrassment, saw no other option but to end his life.[19] The cyberbullies, Ravi and Wei, were both charged by the New Jersey District Attorney's Office with invasion of privacy; however, under New Jersey law, "the most serious charges carry [only] a maximum sentence of five years."[20] Moreover, a lawyer representing Molly Wei claims she is innocent of any criminal liability, arguing Wei's only involvement was that Ravi was in Wei's dorm room when Ravi activated his computer and streamed the images online.[21]

To date, no civil suits have been filed by Clementi's family, but they have reserved the right to sue.[22] Clementi's family has filed various legal notices, including notices of a tort claim against Rutgers University, but not one against Wei or Ravi.[23] In naming Rutgers University as a defendant, the family alleges the university "failed to put in place and/or implement, and enforce, policies and practices that would have prevented or deterred" the cyberbullying actions of Ravi and Wei.[24] An additional tort notice alleges that Rutgers failed to comply with their agreement to protect Clementi.[25] The university denies any liability for Clementi's death, and in a statement by the school's spokesman,

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*; *see* N.J. STAT. ANN. § 2C:14-9 (West, Westlaw through L.2011, c.25 and J.R. No.2) (defining fourth and third degree crimes).

21. Kickham, *supra* note 16.

22. Ken Serrano, *Tyler Clementi's Parents File Notice of Intent to Sue Rutgers*, MYCENTRALJERSEY (Dec. 21, 2010, 5:34 PM), http://www.mycentraljersey.com/article/20101221/NEWS/101221074/Tyler-Clementi-s-parents-file-notice-of-intent-to-sue-Rutgers.

23. Nate Schweber, *Parents of Student Who Committed Suicide Tell Rutgers University They May Sue*, N.Y. TIMES (Dec. 22, 2010) http://ww.nytimes.com/2010/12/23/nyregion/23rutgers.html.

24. *Id.*

25. *Id.*

E.J. Miranda, Rutgers asserts that it "understands the [family's] reaction [but maintains] the university is not responsible for Tyler Clementi's suicide."[26] If the school is not responsible and the state's district attorney's office is not equipped with the statutory tools to prosecute Clementi's cyberbullies, it appears cyberbullies—at least in New Jersey—have carte blanche to commit cyberbullicide.

Similar cases of bullying have led to lawsuits for injuries or wrongful death, including a recent Tennessee case where the parents of a seventeen-year-old student with Asperger's Syndrome sued their son's school for failing to take "reasonable care to prevent the bullying that they claim led to his suicide."[27] According to the complaint filed by the student's parents, "countless efforts" were made by the parents to meet with school administrators to address the constant bullying of their son, but the administrators allegedly showed "deliberate indifference."[28] Recognizing that anti-gay bullying led to at least four teenagers' suicides in September 2010, activists are beginning to facilitate awareness by launching a YouTube channel profiling happy, well-adjusted gay adults who were bullied in their childhood.[29] Personal injury attorneys, seeking an avenue for liability, advertise: "Call an Illinois injury attorney if you or a family member has suffered injuries as a result of bullying."[30]

Liability in Tyler Clementi's case presents an interesting combination of criminal and tort liability. While Wei and Ravi have been charged with criminal invasion of privacy, the possibility of tort liability remains; however, it is unclear on what grounds.[31] Bullying cases commonly are evaluated under tort privacy actions, including intentional infliction of emotional distress, public disclosure of private facts, and intrusion upon

26. *Id.*

27. Steven Tanner, *Tyler Clementi's Suicide Revives Discussion of Bullying*, THE CHI. PERS. INJ. L. BLOG (Oct. 4, 2010, 8:57 PM), http://chicagopersonalinjurylegalblog.com/2010/10/tyler-clementis-suicide-revives-discussion-of-bullying.html.

28. *Id.*

29. *Id.*

30. *Id.*

31. Kickham, *supra* note 16.

seclusion.[32] There is no doubt that suicide is a tragic response to bullying, and whether the bully is liable criminally or civilly is something legislatures must now address. Ignoring the problem will not make it go away. Absent appropriate cyberbullying legislative reform, the unfortunate story of Tyler Clementi and other cyberbullicide victims will likely become the norm.[33]

As individuals continue to broaden their horizons into the vast global arena with the assistance of the World Wide Web, bullies now have the unique ability to attack anywhere. They can be at school, on the playground, and even on the Internet. While the world has changed, the reason to hold the bully accountable is still the same. As First Lady Michelle Obama noted at the recent White House conference on bullying, "[i]t's tough enough being a kid today, and our children deserve the chance to learn and grow without constantly being picked on, made fun of—or worse."[34] Although the main focus of the White House conference was bullying in general, the conference also highlighted cyberbullying and used one of the weapons in the bully's arsenal—Facebook—to help raise awareness for this growing issue and "dispel a commonly held belief that bullying is a normal rite of passage for kids."[35] However, cyberbullying is not currently recognized as a cause of action in and of itself.[36]

32. Jonathan Turley, *Rutgers Student Commits Suicide After Two Other Students Secretly Film Sexual Encounter* (Sept. 30, 2010), http://jonathanturley.org/2010/09/30/rutgers-student-commits-suicide-after-two-other-students-secretly-film-sexual-encounter/.

33. *See* Hinduja & Patchin, *supra* note 13, at 1.

34. Mimi Hall, *White House Conference Tackles Bullying*, USA TODAY (Mar. 9, 2011), http://www.usatoday.com/news/washington/2011-03-10-bullying10_ST_N.htm (statement by First Lady Michelle Obama at White House Conference on Preventing Bullying).

35. *Id.*

36. *See* Finkel v. Dauber, 906 N.Y.S.2d 697, 702–03 (N.Y. Sup. Ct. 2010) (Internet user filed defamation suit against officers of secret group on social networking website and the Supreme Court of New York, Nassau County, dismissing plaintiff's complaint noted "[i]nsofar as the Plaintiff's counsel suggestion that the posts constitute cyberbullying, the Courts of New York do not recognize cyberbullying or Internet bullying as a cognizable tort action. A review of the case law in this jurisdiction has disclosed no case precedent which recognized cyberbullying as a cognizable tort action."); *see also* United States v. Drew, 259 F.R.D. 449, 467, 451 n.2 (C.D. Cal. 2009) (holding the defendant's conviction based on intentional violation of an internet website's terms of

How then, does one hold the cyberbully liable? States have attempted to begin to address this issue through anti-bullying statutes.

II. STATUTES ADDRESSING CYBERBULLYING

After the tragic Columbine High School shooting in 1999, state legislatures adopted statutes designed to address bullying behavior at school.[37] Many states, including "Arkansas, California, Delaware, Florida, Iowa, Maryland, Minnesota, Missouri, Nebraska, New Jersey, Oregon, Rhode Island, South Carolina, and Washington" have adopted cyberbullying statutes.[38] Yet these statutes apply to the school-age population—not Tyler Clementi, who was already eighteen and in college. Moreover, the statutes have been criticized on the grounds that defining "cyberbullying using restrictive language . . . [attempts] to strike a balance between addressing cyberbullying and conserving school resources. . . . [However, it] fall[s] short of providing a real solution because . . . school discipline cannot reach most cyberbullying behavior."[39] Furthermore, there is no liability created by the statutes—only a prohibition on the act of bullying.

In Arkansas, "antibullying policies" begin with the recognition that every public school student in Arkansas has a right to receive an education "free from substantial intimidation, harassment, [and] harm or threat of harm by another student."[40] The Arkansas statute further requires the school board in every

service was void for vagueness and "[w]hile this case has been characterized as a prosecution based upon purported 'cyberbullying,' there is nothing in the legislative history of the CFAA [Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006)] which suggests that Congress ever envisioned such an application of the statute.").

37. Barnett, *supra* note 11, at 590.

38. *Id.* at 589–90; *see also* Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CTR., http://www.cyberbullying.us/Bullying_and_Cyberbulling_Laws.pdf (last updated Mar. 2011).

39. Barnett, *supra* note 11, at 591.

40. ARK. CODE ANN. § 6-18-514(a)(1) (2010) (LEXIS through 2010).

public school district to adopt policies to prevent bullying,[41] and defines "bullying" as the "intentional harassment, intimidation, humiliation, ridicule, defamation, or threat or incitement of violence by a student against another student or public school employee by a written, verbal, electronic, or physical act that causes or creates a clear and present danger."[42] While specifically prohibiting bullying and recognizing that an electronic act[43] is covered by the statute whether or not the act originated on school property or with school equipment,[44] the statute requires the school board of directors to specify the consequences for engaging in the prohibited conduct.[45]

In California, the education code permits the suspension of a student in fourth grade to twelfth grade, where the superintendent or principal:

> determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.[46]

Yet, the code section applies only to students in fourth to twelfth grades and provides for only suspension or expulsion as a remedy for any student who is found to be in violation.[47]

In Iowa, the anti-bullying statute actually contains specific language recognizing that "[t]his section shall not be construed to preclude a victim from seeking administrative or legal remedies."[48] In Maryland, the anti-bullying statute, like that in

41. *Id.* § 514(a)(2).

42. *Id.* § 514(a)(3)(A).

43. *Id.* § 514(a)(3)(B) ("'Electronic act' means without limitation a communication or image transmitted by means of an electronic device, including without limitation a telephone, wireless phone or other wireless communications device, computer, or pager.").

44. *Id.* § 514(b)(2)(A)–(B)(ii).

45. *Id.* § 514(b)(3).

46. CAL. EDUC. CODE § 48900.4 (West, Westlaw through 2010).

47. *Id.*

48. IOWA CODE § 280.28(8) (2009).

Iowa, specifically provides that "[t]he provisions of this section may not be construed to limit the legal rights of a victim of bullying, harassment, or intimidation."[49] The Rhode Island statute demonstrates the legislatures' consideration of some liability and even goes so far as to reference tort liability.[50] In Rhode Island, the statute specifically states: "This section does not prevent a victim from seeking redress under any other available law, either civil or criminal. This section does not create or alter any tort liability."[51] While the foregoing statutes do not limit a victim's right to "legal remedies," neither the civil nor criminal codes of the states provide specific cyberbullying liability. As such, the need to revisit and extend both civil and criminal liability to cyberbullies is of the utmost necessity.

In New Jersey, where Tyler Clementi attended Rutgers, the anti-bullying statute includes electronic communications and specifically defines bullying to include "any gesture, any written, verbal or physical act, or any electronic communication . . . that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion . . . gender, sexual orientation, [or] gender identity and expression . . . that takes place on school property."[52] While the New Jersey statute would clearly prohibit the conduct of the bullying students in Tyler Clementi's case, because of his age, the statute is not applicable.[53] As such, liability for the conduct must come from somewhere else.

III. EXPANDING THE TRADITIONAL UNDERSTANDING OF INTENTIONAL TORTS IN CYBERSPACE

In October of 2010, Dharun Ravi, Tyler Clementi's roommate, and Molly Wei were criminally charged with two counts each of invasion of privacy for their involvement in the Tyler Clementi case.[54] Although authorities were looking into the possibility of

49. MD. CODE ANN., EDUC. § 7-424.1(h)(2) (West 2010).
50. R.I. GEN. LAWS § 16-21-26(l) (2011).
51. *Id.*
52. N.J. STAT. ANN. § 18A:37-14 (West, Westlaw through L.2011, c.25).
53. *Id.*
54. Naimah Jabali-Nash, *Tyler Clementi Suicide: Additional Charges*

additional criminal charges,[55] New Jersey Attorney General Paula Dow suggested that New Jersey law may not sufficiently address the cyberspace circumstances that led to Tyler Clementi's death.[56] The local prosecutor, Bruce Kaplan, said, "I'm unaware of any case in New Jersey where the homicide statutes have been used to hold somebody responsible for somebody else who chose to commit suicide."[57] However, if Clementi committed suicide as a result of Ravi's and Wei's intentional, harmful actions, his death was not the result of his individual choice, rather the product of cyberbullicide.[58]

Various state legislatures have successfully adopted legislation to punish bullies and cyberbullies inflicting harm at school.[59] But beyond the limited schoolyard setting, courts, legislatures, and law enforcement struggle to recognize cyberbullying as a new cause of action.[60] Because schools have a pendent duty to control the educational environment and to teach students lessons in decorum and civility, bullying is balanced against a limited right of free speech.[61] Thus, both controlling student behavior and restricting harmful speech are necessary to further legitimate government interests.[62] But as

Possible for Rutgers Students, CBS NEWS (Oct. 6, 2010, 2:25 PM), http://www.cbsnews.com/8301-504083_162-20018774-504083.html; *see also* N.J. STAT. ANN. § 2C:14-9 (West, Westlaw through L.2011, c.25).

55. Jabali-Nash, *supra* note 54.

56. *Id.*

57. *Id.*

58. *See* Hinduja & Patchin, *supra* note 13.

59. *See, e.g.*, ARK. CODE ANN. § 6-18-514 (LEXIS through 2010).

60. *See* D.C. v. R.R., 182 Cal. App. 4th 1190, 1199 (2010) (holding that Internet postings on a website by a student threatening to rip out a classmates hair and stab him in the head with an ice pick were not protected speech, and could be understood as a threat). The local police, however, refused to charge the student who made the threat and other postings under Section 653m of the California Penal Code. *Id.* at 1209. Section 653m (a) makes it a misdemeanor for a person to, "with intent to annoy or harass, make[] repeated telephone calls or make[] repeated contact by means of an electronic communication device, or make[] any combination of calls or contact, to another person, whether or not conversation ensues from making the telephone call or contact by means of an electronic communication device." CAL. PENAL CODE § 653m(a) (West 2010).

61. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

62. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503,

the span of cyberbullying[63] reaches beyond the school setting, First Amendment freedoms no longer permit the same level of control, and civility and decorum yield to the fundamental right of free speech.[64] Even when a statute successfully defines a cognizable action for cyberbullying, courts require the underlying tort action as a condition precedent to the cyberbullying claim.[65] In other words, if the underlying tort claim is insufficient, the cyberbullying claim has no basis on which to stand.[66]

With courts' aversion to creating a new cause of action for cyberbullying, perhaps the recent call to enact an anti-harassment statute[67] to address cyberbullying begs a different question. Instead of passing a new law to address the age-old problem of bullying, why not simply acknowledge tort liability history and view it from a different paradigm? Have we forgotten about the consequences of intentional acts that create unintentional harms? On the other hand, courts are right to be skeptical of a cyberbullying cause of action under the current statutory construction and subsequent judicial application. Cyberbullying does not stand on its own, as evidenced by the need to establish an underlying tort.[68] Cyberbullying is actually

507 (1969).

63. The term "cyberbullying" is sometimes used only to denote actions of minors, but just as minors are engulfed by the allure of cyberspace, adults too are unable to escape the virtual calling and are thus just as susceptible to cyberbullying. *See Cyber Bullying: Statistics and Tips*, *supra* note 3 (bullying "turns out to be a topic all too familiar with students"); Laura Petrecca, *Bullying by the Boss Is Common but Hard to Fix*, USA TODAY (Dec. 27, 2010 11:25 PM), http://www.usatoday.com/money/workplace/2010-12-28-bullyboss28_CV_N.htm?csp=ip ("One in three adults has experienced workplace bullying . . . [and] [n]early three-fourths of bullying is from the top down.").

64. *See Harper*, 445 F.3d at 1176.

65. United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009) (holding that once the jury found the defendant not guilty of the unauthorized computer accessing "in furtherance of the commission of acts of intentional infliction of emotional distress," liability for cyberbullying was no longer applicable, "if, indeed, it was ever properly characterized as such").

66. *See id.*

67. Kristen Hamill, *Legislation Targets Harassment on Campus in Wake of Rutgers Suicide*, CNN (Oct. 6, 2010, 8:43 PM), http://edition.cnn.com /2010/US/10/06/new.jersey.student.suicide.

68. *Drew*, 259 F.R.D. at 451; *see also supra* note 66 and accompanying text.

just a new term that encompasses several very old wrongs: intentional torts.

A. Cyber Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress (IIED) is the result of extreme and outrageous conduct intended to cause severe emotional distress to the person of another or the result of the actor's disregard for the substantial probability that the action would cause severe emotional distress to the person of another, as evidenced by a causal connection between the plaintiff's injury and the defendant's conduct, with the harm amounting to severe emotional distress to the plaintiff.[69] Due to the underlying action of any claim for IIED being the result of an actor's extreme or outrageous conduct causing the person of another severe emotional distress, this intentional tort "does not proscribe specific conduct" as guidance for what is and what is not IIED.[70] Thus, this cause of action in "tort is as limitless as the human capacity for cruelty."[71]

However, there are limits to IIED liability to which even the cruelest of human activity will not attach. A cartoon parody depicting the plaintiff engaging in sexual activity—"drunken incestuous rendezvous with his mother in an outhouse"—does not give rise to a valid IIED claim due to the First Amendment protections extended to the drawing and message depicted in the parody.[72] Additionally, a forty-seven-year-old mother posing as a

69. Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993) (dismissing plaintiff's IIED claim against defendant newspaper company for the publication of a photograph of the plaintiff's dismantled face while she was receiving treatment at a private psychiatric facility without first obtaining plaintiff's consent due to plaintiff's failure to overcome the privileged-conduct exception to a claim of IIED).

70. *Id.*

71. *Id; see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936) (arguing that IIED is an example of courts willingness and "adaptability of technique" to acknowledge serious invasions of the person derived from a violation of individuals feelings and emotions).

72. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 47, 55 (1988) (holding that public figures are unable to recover damages from a publisher's advertisement depicting plaintiff in a sexual parody under IIED claim).

sixteen-year-old male to determine the loyalty of her daughter's thirteen-year-old friend was not extreme or outrageous conduct to which a jury of the mother's peers was willing to attach liability.[73] However, a live video stream of an individual engaging in sexual activity is not a parody; it is reality. Nor is the creation and subsequent distribution of the sexual activity over the Internet with the aid of an instant video stream link and a Twitter message extreme or outrageous conduct; it is intentional conduct intended to harm the person of another. Thus, courts are right to be leery of IIED claims stemming from cyberbullying because, while the actions that constitute cyberbullying may be extreme or outrageous, the actions are nonetheless intentional acts designed to cause harmful or offensive contact to the victim, and the contact is merely delivered by the actors in a new, more convenient method: electronically.

B. The Cyber Slap Battery

"It is a basic principal of law, known to first-year law students, that when an individual commits an intentional tort, such as battery, that person is liable for all harm proximately caused by the individual's intentionally wrongful action."[74] In today's world of instantaneous communications, a slap in the face need not be physical, and a bully need not actually touch his victim to do the same, or more, harm.[75]

> There have always been cruel [people] who like to pick on the vulnerable, but only recently have the tools of cyberspace given them such power.
>
> They can shame and humiliate on a scale as big as the Internet itself. Bullying has no bounds. Viciousness can go viral.

73. *Drew*, 259 F.R.D. at 468.

74. Shaw v. Weiss, No. 2:09-CV-01999-KJD-RJJ, 2010 U.S. Dist. LEXIS 100339, at *14 (D. Nev. Sept. 20, 2010) (citing Vosburg v. Putney, 50 N.W. 403, 403-04 (Wis. 1891)).

75. *See* Hinduja & Patchin, *supra* note 13.

> And this power is made all the more dangerous by the emotional disconnect that accompanies disembodied communication. People say things in email they never would in person or on the telephone. Facebook and Twitter trumpet the trivial and make the momentous just part of the flow. Too often, the result is not so much networking as nutworking. Too often, the virtual and the real become confused. . . .
>
> In cyberspace, you can say anything, be anybody. Anyone with a digital camera can live-stream whatever they want, no matter how hurtful, even if it drives a young man to leap into real space to a horrifyingly real death.[76]

Technology may have changed the method of delivery, but the harm remains the same. In the case of Tyler Clementi, the surreptitious intentional act of broadcasting Clementi's private sexual encounters across the Internet resulted in the ultimate tragic harm, Clementi's death by suicide. Perhaps looking back to the historic foundation for tort liability presents a manner in which to hold the cyberbully liable for the results of harmful activity intentionally engaged in on the Internet.

In 1889, in a schoolroom in Waukesha, Wisconsin, a twelve-year-old child kicked a fourteen-year-old classmate, Andrew Vosburg, in the leg after class had been called to order.[77] Although Vosburg could barely feel the kick, it aggravated a prior injury and caused the leg to become lame.[78] The injured student, Vosburg, brought an action for battery, and the court held the classmate liable for any harm that resulted from the kick.[79] The court reasoned that if the kick was unlawful, the intent was too.[80]

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76. Michael Daly, *Bullying Has No Bounds on the Internet, As Suicide of Rutgers Student Tyler Clementi Show*s, NYDAILYNEWS.COM (Sept. 30, 2010), http://www.nydailynews.com/ny_local/2010/09/30/2010-09-30_web_allows_bullies_to_make_torment_global.html.

77. Vosburg v. Putney, 50 N.W. 403, 403–04 (Wis. 1891).

78. *Id*. at 404.

79. *Id.* at 403.

80. *Id*. The court did not agree with the defendant's assertion that the essence of an assault is the intention to do harm, and because the defendant had no intention to harm, Vosburg had no cause of action. *Id.* Although the court differentiated a criminal prosecution for assault and battery from the present tort action, the *Vosburg* court reasoned that if the act is unlawful, so too

Concluding that "the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him," the *Vosburg* court recognized that although the classmate may not have intended to injure Vosburg, the act itself was unlawful, and therefore the classmate was liable for Vosburg's injuries.[81]

In applying the holding of *Vosburg* to the case of Tyler Clementi, what was Dharun Ravi's intent when he broadcast Tyler's furtive sexual encounter? Did Ravi intend to cause Clementi emotional distress? Did Ravi stream the broadcast because he did not like his roommate or his being gay? Moreover, what if Ravi knew his roommate was emotionally unstable and purposefully acted with criminal intent to cause Clementi to commit suicide? Should the law from *Vosburg* apply?

As the law of torts has evolved to recognize the many harms individuals are now capable of inflicting upon one another,[82] the time has come for the tort of battery to encompass the *Vosburg* principles as applied to the cyberbully committing a cyber-slap. Just as the toe striking the shin resulted in extreme pain from the slightest of unlawful movements in *Vosburg*, the simple act of streaming the private actions of an individual on the World Wide Web resulted in an extreme pain, leading to the death of an individual. While this proposed extension of the oldest legally recognized physical harm may appear unnecessary, there is a need for reforming the understanding of how liability and culpability are created in the ever-changing arena of the World Wide Web, and how they should be applied to the bully who

must be the intent. *Id.* Thus, any unlawful action that results in a harmful or offensive contact to the person of another is the result of the actor's intent to harm the victim. *Id.*

81. *Id.* at 404.

82. *See* RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977). *See*, *e.g.*, Rylands v. Fletcher, (1868) LR 3 H.L. 330. (creation of strict liability in tort under the English common law); *see also* Loe v. Lenhardt, 362 P.2d 312, 318 (Or. 1961) (stating that strict liability in tort is justified in cases involving "an adjustment of conflicting interests," which interests include, without limitation, the interest of the person conducting the activity, the interests of the community in which the activity is conducted in the continuation of that activity, and the interests of the injured claimant in receiving compensation for any injury suffered thereby (internal citations omitted)).

sheds the traditional constraints of the school yard to become the all-powerful cyberbully. Just as the Wisconsin Supreme Court in *Vosburg* extended liability to the slightest unlawful touch that occurred from an individual reaching across the classroom aisle, the principles of battery should extend to an individual reaching across the Internet with harmful intentions, resulting in the modern day battery of a cyber-slap.

It is well settled that battery is the result of an intentional action that results in harmful or offensive contact to the person of another.[83] The contact element is established by "the least touching of another in anger."[84] Moreover, the contact need not be to the body of another, but may result in the harmful or offensive touching on an instrument in the control of another.[85] Thus, battery is any intentional action which is the result of the actor's minimal desire to harm another or the tangible being of another. However, what constitutes the tangible being of another? If control over the object subject to a harmful or offensive contact satisfies the "of another" element for battery, then an object created and controlled by the person of another should be encompassed in the "of another" prong of battery, too.

In *Fisher v. Carrousel Motor Hotel*,[86] the Supreme Court of Texas extended the theory of battery to encompass the dispossession of a dinner plate from the hands of the plaintiff by a forceful slap from the defendant's restaurant manager.[87] In *Fisher*, the plaintiff, a mathematician for an agency of the National Aeronautics and Space Administration, received an invitation to attend a buffet-style luncheon hosted by a dining club owned and operated by the defendant.[88] Even though the

83. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

84. Cole v. Turner, [1704] 90 Eng. Rep. 958 (K.B.).

85. *See* RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (1965) (the person of another includes "anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person"); *see also* Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967) (holding that the slapping of dinner plate from a hotel guest's hands constituted an offensive touching and the actor is liable for the intentional tort of battery).

86. 424 S.W.2d 627 (Tex. 1967).

87. Fisher v. Carrousel Motor Hotel, 424 S.W.2d 627, 629 (Tex. 1967).

88. *Id.* at 628.

defendant's manager never touched the person of the plaintiff, the *Fisher* court held "that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body."[89]

In reversing the trial court and court of civil appeals rulings in favor of the defendant, the court in *Fisher* relied on the Prosser's Law of Torts to conclude that an individual has an integrity interest in all things connected with one's person when it is reasonable for the object to be considered an extension of the individual.[90] Thus, *Fisher* stands for the extension of the ancient tort principle of battery to include the unlawful slapping of a dinner plate from the control of the person of another—the plate-slap battery. However, the underlying facts of *Fisher* provide additional support for the court's ruling: the time period—the 1960s; the place—Houston, Texas; the defendant—a Caucasian; and the plaintiff—an African-American.[91]

Consider again the underlying facts of the Tyler Clementi saga: the time—the 2010s; the place—New Jersey's Rutgers University; the alleged defendants—a heterosexual male and a heterosexual female; and the victim—a homosexual. A comparison of the underlying facts of the plate-slap battery with the cyber-slap battery exhibits striking similarities. Both cases occur in a time that society finds itself at a crossroads. In *Fisher,* the age of Jim Crow was all but over and the efforts of supporters of equality among the citizens of the Union, regardless of the color of one's skin, were beginning to take root. In the case of Tyler Clementi, the medium the cyberbullies, Defendant Ravi and Defendant Wei, chose to deliver the cyber-slap (a live, simultaneous video stream via the World Wide Web) is an ever-changing field, much like the previously segregated restaurant in *Fisher* where the plate-slap battery occurred. Moreover, the location of the two stories further supports their similarities. Just as *Fisher* occurred in a private restaurant, open to the

89. *Id.* at 629.

90. *Id.*

91. While the *Fisher* court's holding is not the focus of this Article, in times of necessity, the legislature and the courts will modify pre-existing legal standards to aid in society's evolving process of controlling and establishing the appropriate regulations of and level of human interactions.

public, the Clementi situation occurred in a private dorm room, open to the public through the harmful use of a webcam.

Ultimately, the inherent differences between the parties in each story support the inference that the time has come for the law of battery to expand once again from the plate-slap battery to encompass the cyber-slap battery due to the harmful and offensive contact occurring between white defendants and a black plaintiff in *Fisher*, and the harmful and offensive contact occurring between heterosexual defendants and a homosexual plaintiff in the Clementi situation. As the *Fisher* court applied ancient wisdom to restructure the understanding of battery to include the plate-slap battery, the Clementi situation indicates that the time has once again come for a restructuring of the understanding of battery to extend liability and culpability to harmful intentions that are now manifested over the Internet, with the offensive touching occurring in the form of the cyber-slap.

Regardless of whether or not battery encompasses the tangible objects created and controlled by the person of another, an individual's manifested consent to any harmful or offensive touching undermines the aggrieved party's ability to claim that a battery has occurred.[92] Consent, negating battery, is presumed when an individual engages in any activity which society acknowledges and deems reasonably necessary for permissible interactions within society.[93] Thus, if Tyler Clementi consented to Ravi sharing his private sexual encounter with another male over the Internet via a webcam and a live video stream link, Ravi's actions would be analogous to those of amateur pornography director or the operator of a website containing amateur pornographic videos. If this were the case, Clementi would be considered an adult film star and any redress would be limited to Clementi's share of the proceeds Ravi collected from Clementi's performance.

Unfortunately for Ravi and Wei, Clementi did not consent to the video stream of his private sexual encounter. In fact,

92. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 42 (5th ed. 1984).

93. *Id.*

Clementi specifically asked his roommate for privacy, and Ravi seemingly consented to his dorm mate's request.[94] Ravi's Twitter post the night the cyber-slap occurred supports Ravi's consent to grant Clementi a period of privacy, even if only for the requested time period, in their shared living quarters of the Rutgers dorm room.[95] If Clementi consented to Ravi streaming his sexual encounter with another male over the Internet, it seems unlikely that Ravi would have felt the need to let his Twitter followers, or any other individual accessing the Internet that night, know that Clementi "asked for the room till midnight."[96] Absent Clementi's consent to the unlawful or offensive touching, Ravi is liable for his actions that resulted in the cyber-slap battery to the person of Tyler Clementi.

But to what extent does the creation of a Facebook account, MySpace page, or any other analogous activity in cyberspace objectively manifest an individual's consent? Does an individual's desire to create a virtual "wall" that family, friends, or mere strangers can "write on" equal the manifested consent necessary to be the recipient of a cyber-slap? While neither Clementi's Facebook account nor his MySpace page were the direct medium of Ravi's cyber-slap battery, the actions set into motion by Ravi's cyber-slap battery indirectly resulted in the unlawful contact of Clementi's virtual person.

The ancient right embodied in the common law action of battery is a right to be free from unwarrantable personal indignity, and liability for battery is not denied even if the plaintiff is not aware of the touching.[97] Indeed, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others."[98]

94. Kickham, *supra* note 16.

95. *Id.* ("Roommate asked for the room till midnight. I went into [M]olly's room and turned on my webcam.").

96. *Id.*

97. RESTATEMENT (SECOND) OF TORTS § 18 cmt. D (1965).

98. Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891).

IV. CONCLUSION

In light of the foregoing arguments, perhaps it is time for the courts to extend civil and criminal liability to the act of cyberbullying. How many more victims like Tyler Clementi will it take before society recognizes the need for consequences that specifically address the cyberbullying epidemic?

The story of thirteen-year-old Megan Meir illustrates that a claim of IIED is insufficient to impose liability on an adult who bullies a child to the point where she feels she has no other option but to end her life in order to escape the cyberbully. As the Internet is changing the ability of societies to communicate with one another, so, too, is the definition of what constitutes an extreme or outrageous action. In today's world of cyberspace, a simple miss click of the keyboard or the mouse could send an individual to a website containing images of conduct that, to the subjective self, appear to be extreme or outrageous. Thus, an individual's consent to be on the Web in the first place may impose barriers to liability. Moreover, the Supreme Court's most recent holding reaffirmed, that under the First Amendment, even direct, hurtful, and downright mean written expressions are forms of constitutionally protected speech.[99]

However, when an individual engages in cyber activity by secretly positioning a computer's camera connected to an instant video stream designed to transmit any activity captured by the video camera, the action can only be interpreted as the result of the desire to intentionally harm the person of another. Therefore, liability should extend to the wrongdoer so as to protect the innocent recipient of a cyber-slap. Just as first-year law students are first exposed to the theories of tort liability under the principle of battery, courts and legislatures must not gloss over this age-old principle for grounds to extend liability to cyberbullies who intentionally cause harmful or offensive contact to the person of another with electronic or digital methods of

99. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (rejecting IIED claim against fundamentalist church members picketing near deceased military service member's funeral because content, form, and context of speech was of public concern and entitled to special protection under the First Amendment).

delivery. *Vosberg* permits tort liability for damages caused by the wrongdoer, even if those damages were not foreseeable. Because a wrongdoer is liable for the injuries that result from his wrongful act, whether or not they were foreseeable, Ravi and Wei should be liable for their wrongful acts that resulted in Clementi's tragic suicide. In the ever-developing cyber world, the time has come to make the cyberbully liable for his or her intentional actions in cyberspace that result in the intentional harmful or offensive touching of another.