New Technologies and Criminal Law:

Criminalizing Cyberbullying?

by

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— *Abstract* —

According to many scholars cyberbullying is a psychologically devastating form of harm, which is facilitated by the advancement and proliferation of technology in the classroom and the workplace. The emergence of 'cyberbullying' as a social problem has given rise to the exploration of criminal law as a suitable means for regulation and harm reduction. Themes and questions pursued in this research include firstly the nature and scope of cyberbullying as a novel and technologically created crime. Secondly, the definition of crime and competing views on approaches to and strategies for combating crime. Thirdly, the suitability of criminal law in regulating the complex social problem of cyberbullying, which also includes a discussion of the factors, principles and values influencing conceptions of crime and their influence on crime control strategies. Finally, through the analysis of existing criminal law and other legal remedies, certain *Criminal Code* amendments are suggested along with other intervention strategies that have been proven through empirical research to work effectively in preventing cyberbullying.

*To my Family, including our newest Munchkin Annabella
And the love of my life, my babyTIGER, Valérie*

*For my Nonno, the legacy you have left behind
will not soon be forgotten
— A.D.*

— *Acknowledgements* —

My experience at Carleton University has been invaluable to me – in fact, it was a great example of what Randy Paush termed “a head-fake”. A “head fake” in its most literal sense is nothing more than an athlete using his head as a tool of misdirection. Anyone who loves sports can relate to the scenario where an athlete moves his/her head in the opposite direction of their body so that their opponent thinks they are going in that direction. However, the more important kind of head fake – the one I am talking about in this context – is the one that teaches people to do things they do not consciously know they are learning until they are well into the process. My entire education at Carleton University was one important “head fake”– I thought I was learning how to become a better legal scholar and they gave much more than just academic competences – they gave me the confidence, the ability to react in pressure situations and the tenacity to continue in the pursuit of my childhood dreams. For this, I wish to extend my sincerest gratitude to my all of my undergraduate and graduate professors, and every member of the Carleton department of law administrative staff.

Throughout my journey at Carleton University the three pieces of work of which I am the most proud are the result of independent research guided by my M.A. supervisor, R.P. Saunders. In my six years at Carleton university professor Saunders supervised my undergraduate honours paper on Battered Woman Syndrome (BWS), a one year directed studies on Plea-Bargaining, and my M.A. thesis. I am sincerely indebted to him not only for his academic support and his editorial assistance but also for his sage career advice, and his moral support throughout the many ups and down in my early

academic career. His guidance as my second year criminal law professor, as well as my honours supervisor has not only sparked my interest in criminal law reform but enabled me to grow as a critical legal scholar. His numerous letters of support for my candidacy to law school, and graduate programs are also worthy of my deepest and most sincere gratitude.

Special thanks are also in order for my parents, who have sacrificed many things and worked countless hours so that I may attain my childhood dreams. Without their support none of this would be possible – they are the foundation upon which I build to achieve my academic goals, they are the model I try to mimic in my personal life, and they are the inspiration I use to keep on overcoming obstacles that may impede the attainment of my objectives. Their altruistic approach to parenting has perhaps robbed them of many luxuries but it has blessed them with a grateful son. For every sacrifice they have made and for all that they have done, they share an integral part in this most recent achievement, and in all my eventual successes.

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Introduction

There are an inestimable number of individuals who currently use computers and its related technology to simplify their lives, to stay connected with family and friends, to earn a living, to facilitate learning and education, and for leisure activity.¹ While technology facilitates many facets of our lives, there is a growing sentiment that technology can be used for antisocial purposes, to cyber stalk, to cyberbully, to engage in cyber harassment or even to prey upon and victimize other users. Cybermisconduct and cyberbullying is becoming a global phenomenon “and, disturbingly, it is on the rise, lending prima facie credence to the dystopian view that computer-mediated communication exacerbates bad behavior”.² The importance of the issue is heightened by the fact that “the tide of online violence is rising at a time when the Internet has moved from being a luxury to a necessity of daily life”.³ As such, in 2008 the Canadian Teachers Federation (CTF), a national voice representing over two hundred twenty thousand teachers in schools across Canada submitted a brief to the Department of Justice, relating to the growing trend of misuse and abuse of technology in Canadian classrooms. The CTF’s brief examined the existing *Criminal Code* provisions that can be applied to cyberbullying and proposed amendments that would make cyberbullying an explicit criminal offence in Canada.

The CTF’s brief has called national attention to the debate regarding the effective regulation of cybermisconduct. It has highlighted the difficult reality that effective

¹ Susan C. Herring, “Cyber Violence: Recognizing and Resisting Abuse in Online Environments” (2002) 14 *Asian Women* at 187.

² *Ibid.*

³ *Ibid.*

regulation of cybermisconduct is extremely complex. This complexity stems on the one hand from the anonymity that new technology gives its users. However, it is equally complex by virtue of the fact that “in society, there are numerous ways in which “good” or desired behavior is encouraged and, at the same time, unwanted behavior discouraged”.⁴ In our everyday lives we are made aware that certain behaviors are frowned upon and therefore should be avoided, and yet this in itself does not speak to how to distinguish between various categories of wrongs nor how to regulate or control those wrongs. The question of importance for me is what constitutes a crime and what criteria do I use to distinguish crimes from these other less serious forms of wrongs? In this regard, the definition of a crime can vary significantly depending on a multitude of factors: historical context, the society in which it occurs and even the context in which the crime took place. In Canada, while there is a strong consensus that homicide is a serious act, this tells us very little about how we ought to respond to this conduct. For instance, killing someone for profit does not engender the same consequences as killing someone in self-defence. Consequently, the investigation into what should and should not be considered criminal conduct requires an examination of the value systems in the particular society where the conduct is occurring in order to determine whether such conduct constitutes a significant or fundamental affront to those values. This in my view is an effective backdrop upon which to determine what conduct warrants criminal sanctions, and yet even if criminal sanctions are warranted, this in itself does not constitute a sufficient justification for excluding other intervention strategies that can be

⁴ Law Commission of Canada, *What is a Crime? Challenges and Alternatives* (Ottawa: Government of Canada, 2003) at 7.

equally effective. The difficulty in determining the appropriate level of legal regulation for cyberbullying and other forms of cybermisconduct stems from the multitude of intervention strategies and the apparent incongruence between varying mechanisms of social control. The task becomes one of determining the characteristics of cyberbullying, what makes it different from other forms of bullying, and how to tailor our responses to cyberbullying so that our mechanisms of control are fair, effective and in keeping with our democratic principles and values systems. As such, I examine the possibility of amending our *Criminal Code* to include new forms of cybermisconduct such as cyberbullying. In addition to this, I examine a range of noncriminal sanctions which have been proven effective and examine the possibility of holistic, multidisciplinary reform.

In my first chapter I am concerned with exploring the scope and nature of cyberbullying and cybermisconduct in Canadian society. I do this by examining numerous studies that have been conducted on cyberbullying. In the second chapter I examine what criminal law ought to accomplish in Canadian society. This involves not only determining acceptable criteria upon which to define crimes but also the consideration of values Canadians foster or hold important in determining what constitutes unwanted conduct which would be subject to criminal sanction. The third chapter examines existing criminal law provisions which can be used to prosecute cyberbullying or cybermisconduct, as well as other noncriminal legal remedies that can be used by victims to seek redress. Chapter four discusses whether cyberbullying ought to be a separate criminal offence. This chapter explores the advantages and disadvantages associated with making cyberbullying a separate criminal offence as well as outlining the reasons why the CTF would amend the *Criminal Code* to include cyberbullying as an

explicit offence. The last chapter reviews new legislative developments with reference to cyberbullying and examines certain criminal and noncriminal reforms. Ultimately, it is my contention that cyberbullying ought to constitute a separate criminal offence in the *Criminal Code*. Building on the arguments presented by the CTF, I assert that cyberbullying is not an administrative wrong but rather a serious crime – so serious that it transgresses fundamental Canadian values, values upon which our society is predicated.

Background: The proliferation of technology in schools and the home

While the spread of technology in the classroom has had many benefits for teachers and students alike, there is increasing evidence that such technology can become unacceptably invasive if it is not monitored closely. As technology advances and becomes a more widely accessible tool for our youth, an entire generation of parents and educators not necessarily reared in a technologically savvy era are just beginning to understand the implications of such social occurrences. While the Internet may have once been used uniquely as a source for acquiring knowledge or playing games, it has transformed itself into a “Pandora’s box” of sorts – it is a technology that has grown into an inter-connected community, one that beneficially breaks down traditional boundaries of time and space, and yet one which continually creates unique challenges for the offline world to address. One of the negative repercussions of this rapidly growing technological trend in Canada is the emergence of cyberbullying.

In 1999, “Canada became the first country in the world to connect every school and public library to the Internet”.⁵ Over the past decade, students all around Canada have been given daily access to the internet from their home and their schools. In fact, Canadian students rank among the highest in the world in terms of computer access from home and at school. Statistics Canada reported in 2000 that nearly 8 out of every 10 young Canadians had a computer at home, and 7 out of 10 had access to the

⁵ A. Wayne Mackay & Lyle Sutherland, *Teachers and the Law*, 2nd edition (Toronto: Emond Montgomery Publications, 2006) at 65.

Internet at home.⁶ Research conducted by the Media Awareness Network in 2005 highlighted that 94% of Canadian children in grades 4 to 11 have Internet access from their home, which accentuated a significant increase from the 79% that had been reported in 2001.⁷ What is even more astonishing than this high rate of internet access is that over half of these Canadian children—an overwhelming 61% have high-speed internet access.⁸ What is even more surprising than this is that in 2005 over one third of fourth graders in Canada had internet access through their own personal computer—a percentage which increases to slightly over 50% by the time students reach grade 11.⁹ Moreover, Statistics Canada reports that approximately 60% of Canadian schools allow their students to use the internet outside of the classroom, during lunch and recess when there is little or no supervision offered.¹⁰ In addition to this, the Media Awareness Network confirms that 99% of Canadian youth have used the Internet at least once and 48% say they use the Internet a minimum of an hour each day.¹¹ Accordingly, due to the high accessibility of the internet, it is not surprising that Canadian youth are extremely active internet users. However, the internet represents only one aspect of available technology which is at the finger tips of our Canadian youth. While research suggests that while only 6% of children have their own cell phones in grade four, the frequency of

⁶ Statistics Canada, “Computer Access at school and at home” *The Daily Telegraph* (29 October 2002) online: Statistics Canada < http://www.statcan.gc.ca/edu/feature-caracteristique/edu06e_0013-eng.htm >.

⁷ Media Awareness Network, “Young Canadians in a wired world: Phase One” (1 March 2000) online: *Industry Canada* <<http://www.media-awareness.ca/english/research/YCWW/phaseI/>>.

⁸ Media Awareness Network, “Young Canadians in a wired world: Phase Two” (1 November 2005) online: *Industry Canada* < http://www.media-awareness.ca/english/research/YCWW/phaseII/upload/YCWWII_Student_Survey.pdf > at 4.

⁹ *Ibid* at 4.

¹⁰ Statistics Canada, “Information and Communication Technologies in Schools Survey” *The Daily Telegraph* (10 June 2004) online: Statistics Canada < <http://www.statcan.gc.ca/daily-quotidien/040610/dq040610b-eng.htm> >.

¹¹ Media Awareness Network, *supra* note 7.

cell phone ownership is dramatically higher at 46 % in grade 11.¹² Of the entire percentage of children who reported owning a cell phone, 56% reported having text messaging as a feature, and 44% reported having additional internet access by phone.¹³ Due to the accessibility of technology, such as computers with internet use, cell phones with text messaging capabilities and relatively low levels of parental supervision, it is not surprising that “the Internet has become a common platform for cyberbullying”.¹⁴

What is Cyberbullying?

Before discussing the prevalence of cyberbullying in Canada I feel it is important to define the term and explore some of the ways in which this new social phenomenon is manifested. According to Bill Belsey, an Alberta educator who operates the cyberbullying.ca website, cyberbullying is a process that:

involves the use of information and communication technology such as e-mail, cell phone and pager text messages, instant messaging, defamatory personal web sites, and defamatory personal polling Web Sites, to support deliberate, repeated, and hostile behavior by an individual or a group, that is intended to harm others.¹⁵

A shorter and more compressive definition is presented by Nancy Willard, the Director for Safe and Responsible Internet Use who defines cyberbullying as a form of “speech that is defamatory, constitutes bullying, harassment, or discrimination, discloses personal information or contains offensive, vulgar or derogatory comments”.¹⁶ The biggest challenge facing those who wish to define cyberbullying is that technology changes and

¹² Media Awareness Network, *supra* note 8 at 14.

¹³ *Ibid* at 14.

¹⁴ Krista R. Cochrane, *Exploring Cyberbullying in Saskatchewan* (Masters of Education, University of Saskatchewan Department of Education Psychology and Special Education, 2008) at 25.

¹⁵ *Cited in* A. Wayne Mackay & Lyle Sutherland, *Teachers and the Law*, 2nd edition (Toronto: Emond Montgomery Publications, 2006) at 65.

¹⁶ *Cited in* Shaheen Shariff, *Cyber-Bullying: Issues and solutions for the school, the classroom and the home* (New York, NY: Routledge, 2008) at 29.

evolves extremely fast. Thus, providing an all-inclusive and exhaustive definition of all the various forms of cyberbullying may in fact be an impossible task. As Shaheen Shariff astutely points out, since 2007 a comprehensive and up-to-date definition of cyberbullying would have to “include social communications networks such as Facebook, You Tube, MSN Windows Live Messenger, Orkur, Linkdlin, MySpace and countless others that are surfacing on the internet”.¹⁷

Discussing the prevalence of cyberbullying and cybermisconduct in Canada

A study conducted in 2005 by the Media Awareness Network found that of the 34% of Canadian children, that reported being bullied, 27% of these children had been bullied over the internet.¹⁸ More recently, a study conducted in 2007 by the Kids Help Phone Line reported that of the 2, 474 children that had been surveyed 70% of respondents reported being bullied online and 44% reported having bullied someone online at least once.¹⁹ Of the children that reported being bullied it was found that the three most frequent online bullying experiences were: being called names/made to feel bad (76%), having rumors spread about them (52%), being threatened or scared (38%).²⁰ What is also interesting about this study was that 77% of students being cyberbullied report having been bullied by instant messaging such as MSN. E-mails and social networking sites came a distant second at around 37% and 31% respectively.²¹ However, what is perhaps most alarming from the reported results of this study is that in the three

¹⁷ *Ibid* at 29.

¹⁸ Media Awareness Network, *supra* note 8 at 9.

¹⁹ Elizabeth Lines, “Cyber-bullying: Our Kids’ new reality a kids help phone research study of kids online” (1 April 2007) online: *Kids Help Phone* <http://org.jeunessejeecoute.ca/media/21704/2007_cyber_bullying_report.pdf> at 6

²⁰ *Ibid* at 6.

²¹ *Ibid* at 6.

most popular reactions to online bullying no respondent actually reported the incident to a person of authority—such as a parent, a teacher, a principal, or even a guidance counselor. In fact, the most common response to being cyberbullied is inaction – as 43% decided to do nothing.²²

Similarly, research conducted in 2008 by Shaheen Shariff reports that 34% of students in grades six to nine in Montreal, Quebec admit being called a bad name on the Internet or harassed because of the way they look.²³ Moreover, 13% received threatening messages from someone at school and 11% report having received a threatening message that made them afraid to attend school.²⁴ A study conducted by Krista R. Cochrane of 840 students in grades 7 to 9 in a large public school division in central Saskatchewan found that of the 47.1% that responded to the survey, 62.9% reported being bullied and 49.5% of these reveal being cyberbullied.²⁵ In addition to this, 69.4% of respondents admitted knowing someone that had been a victim of cyberbullying. It is also quite important to note that the 58.7% of the cyberbullied victims reported that they were victimized one to three times, with 30.1% who were victimized four to ten times, and 10.2% who were victimized an excess of ten times. Consequently, by virtue of the frequency of cyberbullying in Canada, and the devastating psychological and emotional impact that it can have on the well-being of victims, teachers, parents, legislators, school board officials, academics, members of the media and even ordinary citizens have begun contemplating whether certain forms of cyberbullying ought to be considered a separate criminal offence.

²² *Ibid* at 6.

²³ Shariff, *supra* note 16 at 78.

²⁴ *Ibid* at 78.

²⁵ Cochrane, *supra* note 14 at 65.

Determining whether something ought to be considered a criminal offence is no light matter. In Canadian society, we reserve the most severe penalties for crimes. Thus, the determination of what ought to fall under the purview of criminal law must be achieved with a certain amount of reserve. Such reserve, is necessary because

Criminal law is a blunt and costly instrument – blunt because it cannot have the human sensitivity of institutions like the family, the school, the church, or the community, and costly since it imposes suffering, loss of liberty and great expense.²⁶

Hence, because of the gravity of wrongdoing associated with criminal law, it should be used as an instrument of last resort. The powerful symbolic message attached to it must not be diluted by too many offences, too many charges, too many trials, and too many prison sentences. Criminal law ought to be an extreme reaction reserved for extreme bad behaviour – society's ultimate weapon that must stay sheathed as long as possible.²⁷ The ultimate question of importance thus becomes one of determining whether certain forms of cyberbullying belong within the ambit of criminal law. However, before addressing this difficult question we must tackle certain fundamental theoretical questions that speak to the origins and historical traditions of our criminal law. Such considerations include a discussion of the public perception of crime in Canada, what constitutes a crime in our Canadian legal tradition, and what criminal law ought to accomplish in a humane, free and just society in order to gain a better understanding of what criminal law means to the majority of Canadians and to determine what it ought to accomplish as our harshest mechanism of social control.

²⁶ Law Reform Commission of Canada, *Our Criminal law* (Ottawa: Government of Canada, 1976) at 27.

²⁷ *Ibid* at 27.

Public Perceptions of Crime in the face of falling Crime Rates

We live in uncertain times—the impending economic recession that awaits all countries contributes to a climate of economic and political instability around the globe. The rising rate of unemployment, poverty, and global warming in Canada trouble the very foundation of our free and democratic society, and yet despite the growing number of serious socioeconomic problems crime still seems to fall in a special category. The Law Reform Commission of Canada (LRCC) suggests that this is so because “crime [unlike any other social problem] threatens us personally and makes us fearful for our own survival”.²⁸ In fact such fear can in some instances lead to “a reflex to criminal law” — the sort of excess reaction or overreaction that tends to use the most intrusive measures to deal with a complex social issue when less intrusive measures can achieve the same or, in some cases, more meaningful results.²⁹ One potential caveat of “a reflex to criminal law” is that criminal law:

Both universalizes the problem and individualizes its causes. It universalizes the problem in the sense that it recognizes the claim of the victim as valid and sufficient enough to demand a guarantee of protection by the state. It individualizes the problem by making individuals (mainly individual offenders) responsible for the problem. For example, while we may recognize that child abuse is the result of complex social and psychological factors, we nonetheless place responsibility for such conduct at the individual level.³⁰

²⁸ *Ibid* at 1.

²⁹ See especially Law Commission of Canada, *supra* note 4 at 5.

³⁰ *Ibid* at 11.

As a result, “the social, political and cultural context in which the problem occurs disappears into the background”.³¹

Our understanding of crime comes from a myriad of experiences and interactions we have with our family members, friends and other individuals we encounter throughout our lives. In addition to this, communications through the media also influence our notions of crime: “from television sets to movies, newspapers and the Internet, are regularly bombarded with a variety of messages about the nature of crime and its control”.³² Certain media outlets, especially television programming and news reports tend to “focus on violent crime, which many scholars say creates an inaccurate perception about the level of violent crime in Canada”.³³ In fact, this phenomenon is not a new one:

In February, 1982, more than 2000 adult Canadians were asked a series of questions about the extent of violent crime, and sentencing and conditional releases practices in Canada. The results indicated that generally, Canadians vastly over-estimate the proportion of crime which involves violence, believe murders have increased since Parliament abolished the death penalty (when in fact they have declined steadily since), and think people released on parole are far more likely than in fact they are to commit violent crimes soon after they are released.³⁴

Generally, “the image Canadians have of crime is a violent one – far more violent than statistics indicate is the case”.³⁵ While only a relatively small portion (six to eight percent)

³¹ *Ibid* at 11.

³² *Ibid* at 12.

³³ *Ibid* at 13.

³⁴ Department of Justice of Canada, *The Criminal Law in Canadian Society (Le droit pénal dans la société canadienne)* (Ottawa: Department of Supply and Services, 1982) at 16.

³⁵ *Ibid* at 16.

of reported crimes is violent, “Canadians believe that the situation is seven times as serious, that more than half of all crime is violent”.³⁶

According to Ulrich Beck, “modernity has moved from a phase where it safely could ignore the ‘side-effects’ of industrialization—the threat of radioactive fallout, cancer-causing toxins and pollutants—to a new phase called the risk society”.³⁷ In the risk society, traditional institutions and structures can no longer control the “hazards and insecurities induced and introduced by modernization itself”.³⁸ As a consequence of the risks produced by the process of industrialization, “society turns ‘reflective:’ we become attuned to the potential ‘unintended consequences’ of the modernization process”.³⁹ In this new era, “professional knowledge elites – the mass media, scientific and legal professionals – emerge as key figures in defining risks”.⁴⁰ According to David Schneiderman the implications relating to Beck’s risk society are threefold: (1) the universalizing tendency of risks (2) the reliance on professional expertise to reduce risks; and (3) coping mechanisms tend to focus particularly on legal institutional responses.⁴¹ Consequently, the key notion of a risk society is that citizens become “so preoccupied by questions of crime and security... [that they become] fixated on how to reduce the ‘imminent’ potential of criminal behavior”.⁴² This in turn translates into political pressure on governments to adopt a “get-tough-on-crime” law and order agenda.

³⁶ *Ibid* at 17.

³⁷ David Schneiderman, “Terrorism and the Risk Society” in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2002) at 64.

Also see Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992).

³⁸ *Ibid* at 64.

³⁹ *Ibid* at 64.

⁴⁰ *Ibid* at 64.

⁴¹ *Ibid* at 64.

⁴² Law Commission of Canada, *supra* note 4 at 13.

Interestingly enough, according to the LCC “an increased reliance on criminal law and punishment has come at a time when the official crime rate has actually decreased”.⁴³ In dire contrast to the “get-tough-on-crime” law and order agenda, which seems to support the notion that crime is expanding out of control – official crime rates have seen a steady drop since the early 1990s.⁴⁴ While crime rates do not in and of themselves constitute a complete picture because they are dependent upon official crime reporting, they do seem to suggest “that claims of rising and ‘out of control’ crime levels and reports that more punishment and control is necessary” may simply be erroneous and misplaced.⁴⁵ Based on the contradictory relationship that exists between public perception of crime and its actual occurrence it is my assertion that democratic societies that aim to achieve “freedom, justice and security for all its citizens face few greater challenges than how to cope with crime”.⁴⁶

What is Crime?

By definition, criminal law involves the “prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole”.⁴⁷ It involves a punitive response to a perceived problem or social ill and “is generally characterized as a necessary evil in a society to stave off the threat of violence, disorder and danger”.⁴⁸ However, this classical conception of criminal law – the one that associates criminal law with violence, murder, robbery and punitive sanctions

⁴³ *Ibid* at 14.

⁴⁴ Josée Savoie, “Crime Statistics in Canada” (2001) 22 No 6 *Juristat* at 3.

⁴⁵ Law Commission of Canada, *supra* note 4 at 14.

⁴⁶ Law Reform Commission of Canada, *supra* note 26 at 1.

⁴⁷ Daphne A. Dukelow, eds., *The Dictionary of Canadian Law*, 3rd ed., (Scarborough, Ontario: Thomson-Carswell, 2004) *s.v.* “Criminal Law”.

⁴⁸ Law Commission of Canada, *supra* note 4 at 11.

represents only one of the many functions of criminal law.⁴⁹ A holistic understanding of what criminal law ought to accomplish in Canadian society cannot divorce itself from the following considerations: How do we determine what constitutes a crime? How do we regulate competing views on approaches to and strategies for combating crime? How do we determine the suitability of criminal law among one of the many alternatives for regulating certain complex social problems, and how do we frame our criminal law to deal with such undesirable behavior?

The Problematic Notion of Harm in Defining Crime

It is often argued that “criminal law ought to be reserved for the most serious harms in society”. According to the Ouimet Report “No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means”.⁵⁰ While it is often said that criminal law ought to be reserved for the most serious harms in society, the notion of harm only tells us that something ought to be taken seriously; it does not on the other hand tell us how we ought to respond to unwanted behavior or which harms.⁵¹ For instance, consider the following example: death is perhaps the most serious form of harm that can be inflicted upon an individual, as murder and manslaughter carry the harshest penalties proscribed in the *Canadian Criminal Code*, and yet each year the number of workplace related deaths far exceeds the number of homicides in Canada. If serious harm is the only necessary condition for when to use criminal law than recourse to criminal law would be used excessively in Canada following work related deaths. However, reality does not reflect

⁴⁹ *Ibid* at 11.

⁵⁰ *Ibid* at 14.

⁵¹ *Ibid* at 15.

this tendency – in fact, “even when it might be possible to show negligence, deaths in the workplace are rarely treated as criminal events”.⁵² Thus, the LRCC specifies in *Our Criminal Law* that the difference between “real crimes” and “regulatory offences” is that such acts are not only punishable acts that result in harm but they also constitute wrongs that contravene fundamental values:

To count as a real crime an act must be morally wrong. But this, as we said earlier, is but a necessary condition and not a sufficient one. Not all wrongful acts should qualify as real crimes. The real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values.⁵³

As such, the LRCC suggests that these fundamental values fall into two categories: (1) the values which are generally essential to the very existence of society, and (2) the values that are pivotal to the existence of our own particular society. Values which are generally essential to the very existence of society “are those without which social life would be impossible”.⁵⁴ Examples of such values are a commitment to the sanctity of life, the inviolability of the person, the virtue of truth and the necessity of order. Consequently, “transgressions of these essential values are crimes of violence, crimes of fraud and crimes against peace, order and good government”.⁵⁵ In addition to generally essential values, most societies hold other values: for instance, in Canada we place high value on individual liberty. Non-democratic countries around the world clearly demonstrate that placing value on individual liberty is not necessary for social life – as an un-free society still remains a society. However, most Canadians would not want to live in a society that

⁵² *Ibid* at 15.

⁵³ Law Reform Commission of Canada, *supra* note 26 at 20.

⁵⁴ *Ibid* at 20.

⁵⁵ *Ibid* at 20.

did not at its very foundation strive for a certain degree of individual freedom, justice, tolerance, human dignity and equality. These transgressions constitute a secondary form of “real crimes” and they comprise crimes like kidnapping, obstruction of justice, hate propaganda etc.⁵⁶

Expectations: What Should Criminal law Accomplish?

According to the Department of Justice, “the purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society”.⁵⁷ While the *Criminal Code* has no preamble that outlines specific guiding principles, criminal law sentencing principles do accentuate certain values that can be used to gain a better understanding of the goals of our criminal justice. These principles and objectives can be found in part under section 718 of the Canadian *Criminal Code* which states the fundamental purpose and principles of sentencing under the *Criminal Code*. These principles state that the purpose of sentencing is to contribute, along with crime prevention initiatives respect for the law and the maintenance of a just, peaceful and safe society by imposing proportional sanctions that seek the following goals: (1) to denounce criminal conduct (2) to deter offenders specifically and others generally from committing such criminal offences (3) to separate offenders from society when is necessary (4) to rehabilitate offenders (5) to provide reparation for criminal wrongdoing and harm done to victims or the community at large (6) and to promote a sense of

⁵⁶ *Ibid* at 21.

⁵⁷ Department of Justice of Canada, *The Criminal Law in Canadian Society (Le droit pénal dans la société canadienne)* (Ottawa: Department of Supply and Services, 1982) at 5.

responsibility in offenders and acknowledgement of the harm done to individual victims or the community at large.⁵⁸ While the second goal of the sentencing principles calls for specific and general deterrence “many critics suggest that criminal law has failed to prevent certain offenders from committing certain crimes”.⁵⁹ Consider as an example the so-called “war on drugs”. Studies conducted on cannabis use in Canada “have demonstrated that 25 years of criminalization have had no significant deterrent effect”.⁶⁰ In fact, “many would concur that the various punitive approaches... have failed and that the war on drugs should be abandoned”.⁶¹ Moreover, some critics have also noted that many of the sentencing goals are contradictory, and that there is very little guidance as to how judges should apply these goals. Although criminal law has a difficult time controlling the future through effective deterrence and rehabilitation, this does not mean that society should ignore the present and the past:

We still need to do something about wrongful acts: to register our social disapproval, to publicly denounce them and to re-affirm the values violated by them. Criminal law is not geared only to the future; it serves to throw light on the present – by underlying crucial social values.⁶²

Thus, beyond deterrence and rehabilitation criminal law carries a powerful symbolic message – one that “signals that society disproves of an act and that a formal response by the state is necessary”.⁶³ It is precisely this struggle to define the symbolic message of our criminal law that has seen certain unwanted forms of behavior reshaped, reformed and

⁵⁸ *Criminal Code*, R.S. C. 1985, c. C-46, s. 718.

⁵⁹ Law Commission of Canada, *supra* note 4 at 11.

⁶⁰ *Ibid* at 11.

⁶¹ Steven Vago and Adie Nelson, *Law and Society*, Canadian Edition (Toronto: Pearson Prentice Hall, 2004) at 178.

⁶² Law Reform Commission of Canada, *Our Criminal law* (Ottawa: Government of Canada, 1976) at 16.

⁶³ Law Commission of Canada, *supra* note 4 at 12.

repackaged as criminal acts. For example, in many jurisdictions around the world marijuana use and prostitution are no longer viewed as criminal acts, while certain countries have already seriously contemplated the criminalization of undesirable conduct resulting from computer use. Given the strong symbolic function of criminal law and its ability to change and grow over time, the question becomes what kind of criminal law should we have and what are the inherent values it should serve to underline?

Criminal Law Aspirations: Humanity, Freedom & Justice

The LRCC has outlined three aspirations that criminal law should fulfill/meet in Canada: humanity, freedom and justice. According to the LRCC each thrust of criminal law operates “in two opposite directions – both for and against the individual citizen”.⁶⁴ In this sense these aspirations are a benchmark, an ideal which Canadian criminal justice officials strive to attain. Take the principle of humanity as a starting point – our criminal law aims to reduce the occurrence of violence, dishonesty and acts which violate our common sense notions of humanity.⁶⁵ Examples of such acts include murder, rape, robbery – they are essentially acts which violate the sanctity of mutual respect and human dignity between human beings. In conjunction with the notion of humanity Justice Iacobucci speaks of the concept of human dignity, which is in large part intertwined with the objective of humanity in criminal law:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to

⁶⁴ Law Reform Commission of Canada, *supra* note 26 at 7.

⁶⁵ *Ibid.*

the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.⁶⁶

Hence the idea rests upon the notion that “if criminal law sets limits to what we can do to one another, it also sets limits to what the authorities can do to suspects and criminals”.⁶⁷ As a result, such principles were entrenched in the *Canadian Charter of Rights and Freedoms*, which among other things protects individuals from discrimination based on religion, sex, gender, nationality, and ethnicity. It strictly prohibits the use of torture, inhumane interrogation tactics and it enshrines our fundamental freedoms including our democratic, mobility, legal and equality rights.. Consider the following passage from Justice Bertha Wilson:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life. Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state.⁶⁸

Thus, our criminal law “leaves it to the individual to keep the law and stay out of trouble or else to break the law and pay the penalty”.⁶⁹ In this sense Canadian criminal law is

⁶⁶ *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 at 530.

⁶⁷ Law Reform Commission of Canada, *supra* note 26 at 8.

⁶⁸ *R v. Morgentaler*, [1988] 1 S.C.R. 30 at 158.

⁶⁹ Law Reform Commission of Canada, *supra* note 26 at 8.

predicated on the notion that individuals have a choice – they can lead their lives within the confines of the law and share in its protections or they can choose to contravene the law and still benefit from its protections, while suffering from the consequences of their actions. In other words, Canadian criminal law treats Canadians “as persons rather than a thing – a human being to be persuaded, not a robot to be programmed...and this [truly] is a dictate of humanity”.⁷⁰

Secondly, our criminal law aims at freedom. A special section of our criminal law, “consists of all the different prohibitions that manifest social disapproval of the acts prohibited and aim to keep society free from them”.⁷¹ This requires freedom to have a reciprocal relationship where individual freedom is limited in some aspects of our lives in order for us to enjoy certain fundamental protections and freedoms in other aspects. This fundamental restriction is thus kept in check by two fundamental common law principles: the presumption of innocence and the principle of noncriminality.⁷² The presumption of innocence is entrenched in section 11(d) of the *Canadian Charter of Rights and Freedoms*. It states that “any person charged with an offence has the right to be to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.⁷³ This means that under our criminal law an individual does not have to prove his innocence, but the prosecution must prove his/her guilt – the idea behind this notion being that until enough evidence is present to charge an individual he will remain free. This is perhaps the most significant demonstration that freedom is an important underlying value in our criminal justice system. On the other

⁷⁰ *Ibid* at 8.

⁷¹ *Ibid* at 8.

⁷² *Ibid* at 8.

⁷³ *Ibid* at 8.

hand, the principle of noncriminality assumes that “there is a general presumption that an act is not a crime”.⁷⁴ This essentially means that no one needs to prove his/her right to do something because unless the law specifically prohibits it he/she is free to do it.

Lastly, our criminal law aspires to achieve justice. Justice is by-and-large a complex term, which can take on many different meanings depending on the context in which it is used. According to the LRCC in criminal law it means three distinct things:

- (1) That guilt, innocence and sentence should be fairly determined according to the available evidence; (2) that punishment should be appropriate to the offence and the offender; and (3) that like cases should be treated alike and different cases differently.⁷⁵

Another extremely important aspect of justice, as an aspiration of criminal law, is the doctrine of criminal equality. This doctrine states that a crime is a crime no matter who is culpable of committing it. If murder is a crime for every citizen in Canada, then the act of murder is prohibited for government officials, police officers unless the law specifically allows such a penalty or action (i.e. in the case of self-defence or in the case of capital punishment). Consequently, “under Canadian law, all of us are equal unless the law specifically says otherwise”.⁷⁶

Criminal Law As Only One Option Amongst A Variety of Interventions Strategies

Despite the fact that criminal law plays an important function in many of our governments response strategies to undesirable conduct, it is vital to remember that many other strategies exist to counteract unwanted social behaviour. In fact, “contemporary governments rarely assume sole responsibility for responding to

⁷⁴ *Ibid* at 8.

⁷⁵ *Ibid* at 9.

⁷⁶ *Ibid* at 9.

unwanted conduct”.⁷⁷ Instead, social control is achieved through a variety of informal and formal mechanisms and in conjunction with a variety institutions and actors. Consider the control of alcohol as one particular example of this point. Agents of the criminal justice system attempt to deter drunk driving by imposing harsher stiffer penalties for driving under the influence. They also passed criminal legislation mandating zero tolerance for drivers with a probationary permit. Professionals in the healthcare system and a variety of non-profit organizations such as Alcohol Anonymous treat alcoholism as an illness. Governments tax the sale of alcohol, and make it illegal to sell to minors, while Mothers Against Drunk driving (MADD) pay for public education campaigns that make people aware of the dangers related to irresponsible alcohol consumption. As D. Garland states contemporary societies have

developed a new mode of governing crime...[one that] involves the central government seeing to act upon crime not only in a direct fashion through state agencies (police courts, prisons, social work etc.) but instead by acting indirectly, seeking to activate action on the part of non-state agencies and organizers... Its primary concern is to devote responsibility from crime prevention on to agencies, organizers and individuals which are quite outside the state and to persuade them to act appropriately.⁷⁸

On the whole, then, social control is produced through an elaborate and interwoven web of relationships, where “families, friends, schools and our places of employment all play a role in teaching us what is considered appropriate conduct when responding to inappropriate behaviour”. The various social institutions each have their own way of rewarding or punishing behaviour, where the severity and the nature of the sanction

⁷⁷ Law Commission of Canada, *supra* note 4 at 23.

⁷⁸ D. Garland, “The limits of state sovereignty: Strategies of crime control in contemporary society” (1996) 36(4) *The British Journal of Criminology* at 452.

usually depend on the social institution meting it out. Some alternative intervention strategies include: regulations, therapeutic approaches, public education programs, community-based support programs, non-criminal legal sanctions.

Regulations encompass a complex array of response mechanisms: “from rules and regulations with attached penalties to licensing, directives and standards, as well as best practices and reward programs”.⁷⁹ Regulations are a system of rules that elicit responsible action, which also can be used by governments and private actors. Such rules or regulations need not be created by governments alone; in fact, professional bodies, industry associations and other independent entities often create regulations. Regulations usually have sanction structured in their bodies of rules “to combine persuasion in the majority of cases with direct enforcement, such as a licence revocation, in a small number of cases”.⁸⁰

Therapeutic approaches on the other hand, are predicated on the notion that some form of medical or psychological treatment is necessary to arrive at a meaningful solution. Similar to criminal law therapeutic approaches individualise the problem – “the individual becomes a ‘sick person’ who needs help or needs to be healed; he or she may be characterised as being unable to assume normal social roles, not responsible for his or her illness”.⁸¹ We can see the use of such approaches in relation to gambling, alcoholism, and drug addiction. In such cases, depending on the nature of the illness, treatment may vary from counselling services, group therapy or even the prescription of certain medications.

⁷⁹ Law Commission of Canada, *supra* note 4 at 24.

⁸⁰ *Ibid* at 24.

⁸¹ *Ibid* at 27.

Public education programs involve changing attitudes and conduct through the “strategic use of communications [which] can play a key role in raising public awareness, changing attitudes and promoting personal and community involvement”.⁸² Public education programs are different in that they “seek voluntary conduct modifications by persuading rather coercing citizens to alter their views and conduct on a particular issue of concern”.⁸³ In spite of this difference, it is important to remember that such public education programs (and this is generally true for all other alternative intervention strategies) tend to be more effective when they are backed by the threat of criminal sanctions. Public education programs can take on many different forms: “billboards, public lectures, television commercials, posters and brochures are some of the better-known forms”.⁸⁴ Public education programs however, are not always effective because they “place the onus on individuals to recognize that their conduct is undesirable.... Consequently, some individuals may respond well but others may need more help before a change in conduct is forthcoming”.⁸⁵ An example of this can be demonstrated by taking a look at public education programs that aim to stop teenage smoking. Such programs can tell teenagers that smoking may cause cancer but it cannot “tackle the reasons why people start and continue smoking”.⁸⁶

Community-based support programs are another way to address unwanted conduct. Such programs are usually defined by what they are an alternative to – a middle

⁸² *Ibid* at 28.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

ground between retribution and rehabilitation.⁸⁷ The appeal of such restorative justice or informal community control support programs “rests on the view that government and communities must accept mutual responsibility for harmful conduct, and that the offender’s community can help to restore pro-social values and attitudes in a holistic, supportive and healing environment”.⁸⁸ The use of community-based support programs includes programs such as Alcoholics Anonymous, “quit” smoking programs, anger management, as well as informal dispute settlement such as sentencing circles in the case of aboriginal justice, victim-offender mediation, and even family conferences.⁸⁹

In the above discussion, I have outlined some of the core tenants of our criminal justice system. In addition to this, I have also introduced alternative response mechanisms for dealing with unwanted conduct in society. Given my earlier discussion on how criminal law’s three aspirations can be use to differentiate between “real crimes” and administrative offences, and given the fact that “alternatives to criminal law do not necessarily equate to better or more effective ways of dealing with harmful behavior” the task becomes one of determining how to choose among a variety of intervention strategies?⁹⁰ Helene Dumont raises and responds to a similar question:

How can our criminal law better reflect the public’s concern for safety, while promoting their desire for a democratic society based on peace, liberty, tolerance, and justice? To accomplish this goal, legislators and the Canadian public as a whole, should try to apply more reason than fear in developing criminal law-infrastructure for safety. They must recognize the symbolic and political power of criminal laws, and determine the effectiveness of each punitive measure in terms of securing personal and

⁸⁷ John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” (1999) 25 *Crime and Justice* at 5.

⁸⁸ Law Commission of Canada, *supra* note 4 at 30.

⁸⁹ *Ibid* at 30.

⁹⁰ *Ibid* at 35.

public safety. Finally legislators must always choose the solutions that will result in a peace, free, tolerant and just society.⁹¹

In a similar vein, the LRCC purports that when determining between which intervention strategies are appropriate in a particular context we must consider a variety of interrelated factors. Such factors include matching the internal logic of a particular intervention strategy with appropriate types of unwanted conduct and determining how such strategies measure up against some of our key democratic tenets.⁹²

Criminal Law & Canadian Values: Principles of Intervention in a Democratic Society: Justice, Equality, Accountability, Efficiency

As alluded to earlier in my discussion of criminal law and its aspirations, the notion of “justice occupies a central feature in our democratic society”.⁹³ If the criminal law aspires to be just and fair in its treatment of suspects, offenders and criminals, then it is subsequently a fundamental value within Canadian society that our intervention strategies are not only egalitarian in theory but also in practice. In other words, this means that the selection of the intervention strategies we choose to suppress certain forms of unwanted behavior must also coincide with what is just in a democratic society. In Canada “justice” has many connotations – it means living in a society that does not unduly restrict freedom of action and strives for equality of opportunity for all its citizens.⁹⁴ Criminal law imposes “limitations on freedom through incarceration, probation, orders that impose curfews and prohibit consumption of alcohol, or

⁹¹ Helene Dumont, “Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay on an Apparent Contradiction” (2001) 39 *Osgood Hall Law Journal* at ¶8.

⁹² Law Reform Commission of Canada, *supra* note 26 at 35.

⁹³ *Ibid* at 35.

⁹⁴ *Ibid* at 36.

conditional sentences that mandate completion of community service work”.⁹⁵ Thus, in order to achieve a balance between individual freedom and “justice”, we should only use the most intrusive intervention strategies when the behavior is grave enough to warrant such measures. However, “justice” is about more than guarding against undue restrictions; it “can become a hollow concept if individuals do not enjoy access to its associated mechanisms”.⁹⁶ Canadian citizens should have equal opportunity; they should be treated fairly and justly by the criminal justice system, yet a common concern related to this notion is that the criminal justice system marginalizes disadvantaged groups. Thus, it is important to remember when choosing intervention strategies that

at a societal level, the value of justice also includes consideration of social justice or the idea of a just social distribution....[caution must be exercised] against intervention strategies that are overly individualistic in nature and scope. Criminal law, for example, has been used often as an overly individualistic response that cannot take into consideration the broader social context within which behavior occurs.⁹⁷

This difficult determination is not made in isolation, but in conjunction with other Canadian values and democratic principles.

Let us take the principle of equality as another example of a core democratic value, which can be used to weigh which intervention strategies we use in Canadian society. In addition to valuing justice, Canadians “recognize the importance of ensuring equal participation of everyone in our system of governance”.⁹⁸ If the law ought to reflect a commitment to equality and addressing inequality, then we ought to limit the

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 38.

overrepresentation of Aboriginal peoples and other minorities in our penitentiaries.⁹⁹ Such occurrences are the direct result of socio-economic factors which make certain social and economic groups in Canada more prone to coming into contact with the criminal justice system. The challenges of addressing inequalities such as this one are complex, however, “unless our intervention strategies consider the wider context within which inequality emerges, our responses risk perpetuating discriminatory practices within society”.¹⁰⁰ We must consequently, “reflect upon ways in which various intervention strategies are used within our society and examine the ways in which they tend to contribute to inequality”.¹⁰¹

On the other hand, accountability in a democratic society requires that people “exercising authority must account for the way in which they use their power within public and private spheres”, while also meaning that individuals should take responsibility for their actions.¹⁰² There are a variety of intervention strategies at the disposal of a society to entice individuals to be accountable for their actions. Criminal law forces offenders to be accountable for their offences, while it also dictates to judges and crown attorneys codes of conduct meaning that no one is above the law. Accountability as a value inherent in our democratic society and the criminal justice system is there to ensure an open and transparent process. Growing reliance on community-based support programs can be beneficial for certain forms of unwanted conduct, however it can also be ill suited for violent crimes. The challenge is to find a balance where suitable offences can be dealt with by the community, allowing offenders

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 39.

¹⁰¹ *Ibid* at 39.

¹⁰² *Ibid* at 40.

and victims to foster positive social relations and empower individuals and communities to restore and transform broken relationships, while valuing fairness, equality and justice.¹⁰³

The last goal which governs the determination of which intervention strategies we ought to choose is efficiency. Canadians deserve “public policy that can achieve results it promises”.¹⁰⁴ This means choosing intervention strategies that best direct public resources through a cost/benefit analysis where possible. For instance, let us assume that it would be difficult and inefficient to prosecute human trafficking by intervening with criminal law because the cost was substantial in relation to the percentage of offenders that were caught. It would never be in the best interest of Canadian society to stop regulating human trafficking through public resources. Such a decision while efficient in a simple cost benefit analysis would contravene the other principles of intervention such as justice, equality, and accountability. Moreover, such a calculation would neglect the non-monetary value that lies at the core of limiting such grave injustices. Consider the LRCC in the following passage:

Certainly efficiency is not the only criterion to measure in designing social policy aimed at deterrence of undesirable conduct. At times, what is at stake is so important that resources must be marshaled to accomplish the goal, no matter what the cost.¹⁰⁵

On the other hand, many regulatory schemes have been labeled “as inefficient in cases where they are perceived to result in ‘excessive regulation’ thereby impeding free flow of

¹⁰³ *Ibid* at 41.

¹⁰⁴ *Ibid* at 42.

¹⁰⁵ *Ibid* at 42.

the economy of the effectiveness of the market”.¹⁰⁶ It is difficult in most cases to predict how intervention will affect future behavior, yet we must strive to ensure that our responses best fit the undesired conduct and matches as much as possible the values and principles of intervention that emerge in a democratic society.

Balancing Values & Aspirations to Achieve Meaningful & Effective Results

It is important to remember however, that the alternatives available when responding to unwanted conduct do not exist in isolation from each other – in fact, in almost every area of social life it is likely that more than one strategy for responding to such conduct is available.¹⁰⁷ The challenge is thus to determine how each response strategy relates to one another, and to determine where cyberbullying fits in the grand scheme of things. Hence, the next section will consider existing criminal law provisions and other legal remedies that can be mobilized to address this new form of undesirable conduct.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

Chapter III: Exploring Existing Criminal Provisions Law & Other Legal Remedies

The Internet has created a “real locale” without clearly established policies on cyber-civility or conduct. While there has been much discussion between academics, and even politicians “no one has yet found an acceptable and workable way to create and enforce the modicum of culture that allows people to get along with each other” on the internet.¹⁰⁸ If maintaining civil behaviour is challenging in a well-organized society one can only imagine what happens in a “dystopian fiction – where the rules and authority are removed or are perceived by young people as inapplicable in cyberspace”¹⁰⁹ This predicament is an unfortunate reality which educators, parents, and students face every day, “as they attempt to navigate the legal and moral challenges around responding to cyberbullying and, ultimately as they attempt to develop in students [an] appropriate moral compass for an electronic age”.¹¹⁰

Section 264 of the Canadian Criminal Code: Criminal Harassment

To a limited extent, existing criminal law can be mobilized to address certain forms of cybermisconduct. In Canada, certain *Criminal Code* provisions such as criminal harassment, hate propaganda, obscenity, defamatory libel, and communicating threats can all to a certain extent extend to online harassment, cyberbullying, and cybermisconduct. While criminal harassment is not a new offence, “recognition of it as a distinct criminal behaviour is recent”.¹¹¹ Prior to 1993, an individual who engaged in

¹⁰⁸ Shariff, *supra* note 16 at 191.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Department of Justice Canada, *Criminal Harassment: A Handbook for Police and Crown prosecutors* (Ottawa: Government of Canada, 2004) online: <http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/ch_e-hc_a.pdf> at 1.

stalking conduct “might have been charged with one or more of the following offences: intimidation (section 423 of the *Criminal Code*); uttering threats (section 264.1); mischief (section 430); indecent or harassing phone calls (section 372); trespassing at night (section 177); and breach of recognizance (section 811)”.¹¹² In August of 1993, the *Canadian Criminal Code* was amended to create a new offence of criminal harassment. Section 264 of the *Canadian Criminal Code*, which deals with criminal harassment and s. 264.1 that deals with uttering threats stipulate the following:

264.(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

- (2) The conduct mentioned in subsection (1) consists of
- a. Repeatedly following from place to place the other person or anyone known to them;
 - b. Repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
 - c. Besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries business or happens to be; or
 - d. Engaging in threatening conduct directed at the other person or any member of their family.¹¹³

- 264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
- a. To cause death or bodily harm to any person
 - b. To burn, destroy or damage real or personal property; or
 - c. To kill, poison or injure an animal or bird that is the property of any person.

¹¹² *Ibid* at 1.

¹¹³ *Criminal Code*, R.S. C. 1985, (1st Supp.), c. 27, s. 264.

However, “one of the challenges currently faced by legal authorities is the difficulty of applying existing legislation to criminal activities involving new technologies”.¹¹⁴ According to the Canadian Teacher’s Federation (CTF), section 264 and 264.1 of the *Criminal Code* are rarely used to address cases of online harassment directed at students and teachers. This in their opinion raises significant questions regarding how effective these provisions may be in effectively controlling these new technologically created forms of unwanted conduct.¹¹⁵

Despite the fact that cases of criminal harassment in cyber-space have largely not been successful, a lower court ruling from British Columbia, “may have opened the door to future claims, including those involving cyberbullying, where perceived intent of harm is very real”.¹¹⁶ In the case of *R v D.H.*, Judge C.G. Maltby had to determine whether D.H. was guilty of uttering a threat to Dawn Marie Wesley, contrary to s.264.1 (1)(a) of the *Criminal Code*.¹¹⁷ According to Judge Maltby the entire incident surrounding the suicide of Dawn Marie Wesley “arose from rumours and innuendos that were rampant within the walls of their high school”.¹¹⁸ Evidence was presented to the court which indicated that Dawn Marie was under the impression that S.W. was spreading rumours and lies about her. Dawn Marie eventually confronted S.W. and told her to stop

¹¹⁴ See Especially, Melanie Kowalski, *Cyber-crime: Issues, Data Sources, and Feasibility of Collecting Police-Reported Statistics*. (Ottawa: Statistics Canada, 2002), online: <<http://www.statcan.ca/english/freepub/85-558-XIE/free.htm>> at 7.

¹¹⁵ Canadian Teachers’ Federation, *Addressing Cyberconduct: A Brief to the Department of Justice Canada* (Ottawa: CTF, 2008) online: <<http://www.ctf-fce.ca/e/publications/brief/Canadian%20Teachers%20Brief%20to%20Justice%20eng%20w%20cover.pdf>> at 2.

¹¹⁶ Shaheen Shariff, “Cyber-Dilemmas in the New Millennium: School Obligations to Provide Student Safety in a Virtual School Environment” (2005) 40 *McGill Journal of Education* at 482.

¹¹⁷ *R v D.H.* (2002) BCPC 0386 online: <http://www.provincialcourt.bc.ca/judgments/pc/2002/03/p02_0386.htm>.

¹¹⁸ *Ibid* at ¶ 5.

spreading the rumours. D.H., a friend of S.W., heard about the confrontation between Dawn Marie and S.W. and on November 9th, 2002 she

approached Dawn Marie using both aggressive words and body language. She was obviously angry. She was swearing and waving her hands around the direction of Dawn Marie. D.H. said to Dawn Marie that Dawn Marie had better leave S.W. alone or she would kick her ass and beat her up, along with other comments in the same vein.¹¹⁹

A few days later D.H. found out by way of telephone that Dawn Marie had committed suicide and left a suicide note with names mentioned on it. According to Judge Maltby, *R v D.W. and K.P.D.*¹²⁰, the case of the two other co-accused clearly sets out the case law regarding the meaning of bodily harm in s. 264.1 (1). In *R. V. D.W. and K.P.D.* Judge J. Rounthwaite states that by virtue of *R v McCraw*¹²¹ “bodily harm includes psychological hurt or injury, as well as physical”.¹²² Moreover, Judge J. Rounthwaite also suggests that *R v. Remy*¹²³ and *R v Deneault*¹²⁴ clearly indicate that threats do not have to be directed at a particular person, but simply an ascertainable or identifiable group.¹²⁵ Moreover, conditional and future threats count as threats to bodily harm, and the offence does not require that the threatener have any intention to carry out or act on the threat.¹²⁶ In addition to this, Judge J. Rounthwaite states that:

Parliament, in creating this offence recognized that the act of threatening permits a person uttering the threat to use intimidation in order to achieve his or her objects. The threat need not be carried out; the offence is completed when the threat is made. It is designed to facilitate the

¹¹⁹ *Ibid* at ¶ 6.

¹²⁰ *R v D.W. and K.P.D.* (2002) BCPC 0386 File No. 7221-1.Abbotsford.

¹²¹ *R v McCraw* (1991) 66 C.C.C.(3d) 517 (S.C.C.).

¹²² *Cited in R v. D.H.* (2002) BCPC 0386 at ¶ 10.

¹²³ *R v Remy* (1993) 82 C.C.C. (3d) 176 (Que. C.A.).

¹²⁴ *R v Deneault* (2002) B.C.J. No. 517 (B.C.C.A.).

¹²⁵ *Cited in R v. D.H.* (2002) BCPC 0386 at ¶ 10.

¹²⁶ *Ibid* at ¶ 10.

achievement of the goal sought by the issuer of the threat. A threat is a tool of intimidation which is designed to instil a sense of fear in its recipient. The aim and purpose of the offence is to protect against fear and intimidation... For the purposes of this case, the test is, has Crown proven beyond a reasonable doubt that (1) the accused spoke words to Dawn Marie Wesley containing a threat of death or bodily harm; and (2) the accused intended the words to intimidate or be taken seriously.¹²⁷

By virtue of Judge Maltby's agreement with the abovementioned reasoning and the evidence that suggests both tests as outlined by Judge J. Rounthwaite were satisfied beyond a reasonable doubt, D.H. was found guilty. In conjunction with this, Judge Maltby further elaborated on his judgement by stating "If I ignore the law by excusing the conduct of D.H. I would be sending a message to other youths, that it is permissible to intimidate and threaten other youths, and it is certainly not the message the courts or society want to convey". According to Shaheen Shariff "the decision signals that schools ought to take reports of bullying in any form (whether physical, verbal or virtual) very seriously".¹²⁸ However, despite the growing acknowledgement that law clearly has a role to play in establishing policies principles and guidelines that aid schools in becoming an inclusive environment, some authors are sceptical about the ability of zero tolerance policies, suspensions and criminal harassment charges in dealing with such complex social problems.¹²⁹

¹²⁷ *Ibid* at ¶ 12.

¹²⁸ Shariff, *supra* note 116 at 482.

¹²⁹ *Ibid* at 483.

Section 298 of the Canadian Criminal Code: Defamatory Libel

In addition to criminal harassment and uttering threats provisions in the *Criminal Code*, provisions relating to defamatory libel could also be extended to deal with certain forms of inappropriate online messages and/or postings. In the view of the CTF, while section 298 of the *Criminal Code* could be employed to deal with certain forms of cyberbullying or cybermisconduct, the actual reality is that it is rarely used in the Canadian Criminal Justice System: “while it could be possible to consider more widespread use of defamatory libel provisions of the *Code*, balanced against this is the practical reality that these provisions are in disuse and it is perceived that their use is a heavy handed response”.¹³⁰ According to section 298(1):

A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.¹³¹

In spite of the relatively rare use of defamatory libel in the criminal context, it is also worth mentioning that students or teachers who are victims of online bullying may also initiate a civil action for defamation. Pragmatically speaking, the CTF suggests that rather than fine-tuning provisions or criminal law which are seen in parts as outmoded, perhaps a more sensible solution would be to model *Criminal Code* provisions that criminalize the transmission of false messages, and indecent harassing phone calls.¹³²

¹³⁰ Canadian Teachers' Federation, *supra* note 115 at 3.

¹³¹ *Criminal Code*, R.S. C. 1985, c. C-46, s. 298.

¹³² Canadian Teachers' Federation, *supra* note 115 at 3.

Section 372 of the Canadian Criminal Code: False Messages

In Canada, the *Criminal Code* also makes it a criminal offence to transmit false messages with the intent to injure or alarm any person. By virtue of section 372(1):

Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.¹³³

In addition to this, Section 372(2) states that “Every one who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction”¹³⁴ and section 372(3) states “Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable by summary conviction”.¹³⁵ Given that the current sections do not necessarily or directly address the new types of unwanted criminal activity created by cyberspace, the CTF suggest “it would seem appropriate to introduce a new Section dealing with cyberspace, rather than to attempt to bend the existing language to a new use”.¹³⁶

Section 320.1 & 164.1 of the Canadian Criminal Code: Hate Propaganda

Aside from the above mentioned provisions, “the *Criminal Code*’s provisions regarding hate propaganda would, in extraordinary circumstances, be directly engaged by conduct arising in schools”.¹³⁷ A key feature of hate propaganda legislation is a “recently introduced provision [sections 320.1 and 164.1] expressly aimed at securing information

¹³³ Cited In *Ibid* at 3.

¹³⁴ Cited In *Ibid* at 3.

¹³⁵ Cited In *Ibid* at 3.

¹³⁶ *Ibid* at 3.

¹³⁷ *Ibid* at 4.

concerning the identity of persons posting materials that may constitute hate propaganda or child pornography”.¹³⁸ Section 320.1(1) entrenches the following guidelines for judges:

If a judge is satisfied by information on oath that there are reasonable grounds for believing that there is material that is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to:

- a. give an electronic copy of the material to the court;
- b. ensure that the material is no longer stored on and made available through the computer system; and
- c. provide the information necessary to identify and locate the person who posted the material.¹³⁹

Thus section 320.1 of the Criminal Code not only empowers a court to order an Internet Service Provider (ISP) to present information necessary to identify the person who posted the online material but also “sets out a procedure under which an opportunity is given to the person who posted the material to appear to oppose an order to delete the material”.¹⁴⁰ Such sections are extremely helpful to students and educators in the context of the most severe and abusive types of cyberbullying as many of the defamatory messages tend to be posted anonymously and are difficult to trace without the collaborative efforts of the ISP provider. The CTF delineates two reasons why effective blocking provisions are of primary importance: firstly, because much of the information that constitutes online harassment is posted anonymously and secondly, the removal of defamatory materials from distribution on internet requires action by internet intermediaries such as: “the website on which the materials are posted; the internet

¹³⁸ *Ibid* at 4.

¹³⁹ **Cited In** *Ibid* at 4.

¹⁴⁰ *Ibid* at 4.

service providers that host the website, and; the search engines that host copies of external websites on their own servers”.¹⁴¹ This complex process results in an unfortunate reality – one where banned materials continue in public circulation long past the point in which they were ordered to be removed from the original website.

The law of duty relationships & its affiliation to Cyberbullying

Apart from criminal sanctions, redress for victims of cybermisconduct can also be obtained through a variety of noncriminal legal frameworks. In Canada, the law of torts represents a legal framework in which the central idea is that in a civil society there is an “overarching obligation we owe to each other to refrain from acting in such a way that injury is caused to someone’s person or property”.¹⁴² Despite the rather expansive legal taxonomy of duty relationships, Shariff suggests that “there are two areas of tort law relevant to cyberbullying of peers and authority figures: (1) libel and (2) negligence”.¹⁴³ According to Logan Atkinson, duty relationships can be broken down into two categories of legal wrongs: intentional breaches and unintentional breaches.¹⁴⁴ Under the category of intentional breaches two categories of torts exist: injuries property interests and personal interests. For the purposes of cyberbullying, what is most relevant is the latter. Beneath the category of intentional breaches, cyber-libel is a special subcategory of wrongs that belongs under the group of injuries to personal interests and more specifically under the classification of injuries to an individual’s reputation.

¹⁴¹ *Ibid* at 5.

¹⁴² Logan Atkinson and Neil Sargent, *Private Law and Social Life: An Introduction*, 2d ed. (Markham, Ontario: LexisNexis Canada, 2007) at 75.

¹⁴³ Shariff, *supra* note 16 at 195.

¹⁴⁴ Atkinson and Sargent, *supra* note 142 at 79.

Figure 1: Taxonomy of Tort Law and Duty Relationships

Source: Logan Atkinson and Neil Sargent, *Private Law and Social Life: An Introduction*, 2d ed. (Markham, Ontario: LexisNexis Canada, 2007)

Tort law: (1) Libel

In *Botiuk vs. Toronto Free Press Publications Ltd.* the Supreme Court of Canada defined defamation as the publication of a statement “which tends to lower a person in the estimation of right thinking members of society, or to expose a person to hatred, contempt or ridicule”.¹⁴⁵ Libel as opposed to slander is a subcategory of defamation that involves defamatory words which are given permanence through a published book, a newspaper article, a movie, a television broadcast, or even a posting on a website.¹⁴⁶ In fact, according to Bernstein and Hanna, “most defamation on the Internet is properly characterized as libel, whereas verbal comments, insults and threats made over cell phones might be considered to be slander, because they are made over electronic

¹⁴⁵ Cited in Atkinson and Sargent, *supra* note 142 at 83. See especially *Botiuk vs. Toronto Free Press Publications Ltd.*, [1995] S.C.J. No. 69 126 D.L.R. (4th) at 622-23(S.C.C.).

¹⁴⁶ *Ibid* at 83.

airwaves”.¹⁴⁷ The question thus becomes what distinguishes ordinary libel from cyber-libel? Consider the following passage by Lyrrisa Barnett Lidsky:

Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and “venting” is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that “anything goes,” and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world... Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie.” The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse.¹⁴⁸

Cyber-libel has certain discernable qualities – for instance, the anonymity which is afforded through the medium of a computer not only allows the perpetrator to assume alternative identities, it also reduces inhibitions and makes it difficult if not impossible to identify the origin of the libellous messages. In addition to this, libellous messages in cyberspace can be sent instantaneously and to a significantly large audience in an indeterminate fashion. In conjunction with this, Shariff suggests four possible

¹⁴⁷ *Cited in* Shaheen Shariff, *supra* note 16 at 196.

¹⁴⁸ Lyrrisa Barnett Lidsky, “Silencing John Doe: Defamation and discourse in cyberspace” (2000) 49 *Duke Law Journal* at 862-5.

contrasting implications. Firstly, defamatory comments which are made on the Internet can be read across the world in a relatively short time span. Secondly, “defamed material on the Internet can be republished quickly and easily and reproduced indefinitely”.¹⁴⁹ Thirdly, the internet provides a veil of anonymity – a sort of shield where cyberbullies and perpetrators of cybermisconduct can hide behind pseudo names, which makes it virtually impossible for victims, or even for prosecutors to identify them. Lastly, and this is perhaps the most troublesome issue with regard to cyber-libel, “information on the internet travels through several computer systems between the author and recipients (a variety of intermediaries such as bulletin board messages, social networking sites, blogs web pages, e-mails), all of which can be stored on various servers”.¹⁵⁰ Consequently, cyber-libel can not only be repeated quite easily, it can be altered, modified and easily recalled.

According to Bernstein and Hanna, “Canadian courts, unlike those in the United States, have been more willing to aggressively vindicate the reputation attacks committed over the internet, with substantial damage awards”.¹⁵¹ Elizabeth F. Judge suggests that cyber-libel and defamation cases have exacerbated a competing-interests-conflict – in which reputation and speech are both valued, yet it is difficult to impose a universal standard by which to reconcile these interests.¹⁵² While the United States “strongly values free expression...other jurisdictions [such as Canada] value reputation more highly”.¹⁵³ In

¹⁴⁹ *Ibid* at 196.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

¹⁵² Elizabeth F. Judge, “Trends and Themes in Cyber-libel and Other Online Torts” in The Honourable Mr. Justice Todd Archibald and Mr. Michael G. Cochrane eds., *Annual Review of Civil Litigation* (Toronto: Carswell, 2005) at 47.

¹⁵³ *Ibid* at 47.

Colour Your World Corp vs. Canadian Broadcasting Corp. the Ontario Court of Appeal clearly articulated the test for determining whether a statement is defamatory:

The statement is judged by the standard of an ordinary, right thinking member of society. Hence the test is an objective one...The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast, or written statement, should be assessed from the perspective of... a person who is reasonably thoughtful and informed, rather than someone who has an overly fragile sensibility.¹⁵⁴

As Elizabeth Judge points out, when the internet was in its early beginnings there was no doubt a tendency for Canadian courts to treat it as such. However with the proliferation of technology in schools and in the workplace and growing mainstream access to the internet the perception of Canadian judges is changing. There is now "greater potential for internet messages posted to a website to be taken at face value than was true when fewer people accessed the internet".¹⁵⁵ Consider the following:

Since statements are judged under defamation law based on injury to a person's reputation in the minds of "right thinking members of society generally," that standard will be easier to meet to the extent that there is a perception that "ordinary" people now read internet content and do so frequently. It will also follow that harm to someone's *online* reputation can be considered in the remedies. As described below, courts increasingly are finding not only that statements communicated online can have defamatory effects, but that those effects can be even more severe online than in traditional media.

In the case of *Barrick Gold Corp vs. Lopehandia*¹⁵⁶ a business person posted online messages to a website which was predominantly dedicated to "providing information to those interested in the mining industry, including investors, which were critical of the plaintiff

¹⁵⁴ *Colour Your World Corp vs. Canadian Broadcasting Corp.* (1998) 38 O.R. (3d) 97 at 36.

¹⁵⁵ Elizabeth F. Judge, *supra* note 152 at 8-9.

¹⁵⁶ *Barrick Gold Corp vs. Lopehandia* [2004] 71 O.R. (3d) 416, (2004) 239 D.L.R. (4th) 577, [2004] O.J. No. 2329 (Ont C.A.)

Barrick Gold, an Ontario mining company”.¹⁵⁷ Some of the defamatory accusations posted to the website included accusatory and fraudulent statements regarding tax evasion, fraud, money laundering, crimes against humanity, manipulation of gold prices and obstruction of justice. While the court originally granted Barrick Gold the sum of 15,000\$ “the Ontario Court of Appeal reversed the trial court judge on damages, substituting a damages award which increased compensatory damages from \$15,000 to \$75,000, added an award of \$50,000 punitive damages, and issued a permanent injunction”.¹⁵⁸ While the trial judge was of the opinion that the defendants’ online rants would not have been taken seriously by investors and potential customers visiting the website, the Ontario Court of Appeal questioned this reasoning stating that the internet is:

Instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed.¹⁵⁹

Rather than assume that the defamatory comments would not be taken seriously due to the unfounded nature of the allegations, the Ontario Court of Appeal chose to emphasize that “libel published on the internet exacerbates the reputational injury because of its features: it is available worldwide, accessible instantly and interactive”.¹⁶⁰ Thus, in the view of the majority of the Court of Appeal there are certain features relating to cyber-libel which engender graver consequences for the victims than traditional forms of libel. Such features include most notably the constant reality that the very nature of the internet elevates the probability that online messages will be accepted

¹⁵⁷ Elizabeth F. Judge, *supra* note 152 at 9.

¹⁵⁸ *Ibid* at 9.

¹⁵⁹ **Cited In** *Ibid* at 10.

¹⁶⁰ *Ibid*.

at face value, than if those identical messages were printed in traditional print mediums.¹⁶¹ The court in *Barrick Gold* observed:

While it is always important to balance freedom of expression and the interests of individuals and corporations in preserving their reputations, and while it is important not to inhibit the free exchange of information and ideas on the Internet by damages awards that are overly stifling, defendants such as Mr. Lopehandia must know that courts will not countenance the use of the Internet (or any other medium) for the purposes of a defamatory campaign of the type engaged here.¹⁶²

Thus there is a sense, at least that Canadian courts acknowledge a special trait of cyber-libel in that it is able to cause immediate and irreparable harm to the reputation of a victim. In conjunction with this acknowledgement on the part of Canadian courts, the Supreme Court of Canada in *Hill vs. Church of Scientology of Toronto* signals to all that:

A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation. Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.¹⁶³

In Canada, freedom of expression is guaranteed to all citizens by virtue of section 2 of the *Canadian Charter of Rights and Freedoms*, which stipulates “everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including

¹⁶¹ *Ibid.*

¹⁶² Cited In Shariff, *supra* note 16 at 199-200.

¹⁶³ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 56 ¶ 107.

freedom of the press and other media of communication”.¹⁶⁴ While these entrenched freedoms are highly valued in Canadian society, section 1 of the *Charter* does prescribe ground where such rights can be limited: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.¹⁶⁵ Thus, in order to justify an intrusion on free speech the courts must demonstrate that such a limit is reasonable and demonstrably justified in a free and democratic society. This process usually involves the satisfying two central criteria:

First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom [and]... the standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified.¹⁶⁶

The second stage of the test involves a proportionality test. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.¹⁶⁷ There are three important components of a proportionality test. Firstly, the measures implemented must be carefully tailored to achieve the objective in question.¹⁶⁸ The

¹⁶⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, Section 2(b)

¹⁶⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, Section 1

¹⁶⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 42-43 ¶¶ 69-70.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

measures must not be arbitrary, unfair or based on irrational concerns. In other words each measure must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective must always meet the standards of minimal impairment – meaning the measures should impair as least as possible the freedom in question or just as much as is needed to satisfy the objective.¹⁶⁹ Thirdly, a proportionality test must be satisfied whereby there is balance between the objective sought and the measures responsible for limiting the *Charter* right or freedom. As a consequence of the *Oakes* test, “any school policy that infringes individual rights must therefore be justified by the policy maker [and] ... the onus also rests with the policy-makers to establish that the rights in question will be infringed as minimally as possible”.¹⁷⁰

In Canada, a precedent set out in *Irwin Toy Ltd. V. Quebec* stipulates that expressions are protected by our Constitution as long as they convey a nonviolent message: “Indeed, freedom of expression ensures that we can convey our thoughts and feelings in nonviolent ways without fear of censure”.¹⁷¹ Shaheen and Hoff succinctly describe the legal implications of such judicial trends by contemplating whether online harassment should be considered as a form of violent expression: “Even though physical force cannot take place online, victims can (and do), perceive online threats as very real”.¹⁷² In fact, Susan Herring states that a principal distinction between traditional form of violence and cyber violence:

is that in the former case, some significant portion of the behaviour takes place online...Cyber violence thus may, but need not, have a physical

¹⁶⁹ *Ibid.*

¹⁷⁰ Shaheen Shariff and Dianna L. Hoff, “Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace” (2007) 1 *International Journal of Cyber Criminology* at 14.

¹⁷¹ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 47.

¹⁷² Shariff and Hoff, *supra* note 170 at 14.

component, and much of the harm caused by cyber violence – as indeed by offline violence – is physiological and/or emotional (which is not to say less real or destructive).¹⁷³

However, despite growing academic research that suggests online harassment constitutes a form of actual violence – as justified by the equally, if not greater negative impacts it has on the victim/s – United States judges have traditionally refused to acknowledge that online harassment necessarily equates to that of a violent message.¹⁷⁴ As Shariff points out, the “reluctance by the [American] courts to avoid involvement in the quagmire of cyberspace is not surprising... [as] the courts have typically adopted a hands-off approach in matters of educational policy”.¹⁷⁵ While U.S. courts lean towards the protection of free speech, they stress those expressions which disrupt the school’s learning environment, interfere with the educational institutions learning objective/mission, mobilise school resources to harass and/or threaten students cannot seek refuge by First Amendment protections.¹⁷⁶

Similarly to the American context, in Canada it seems that the origin of online bullying, harassment and cybermisconduct (whether it is from home, a school computer, or even a remote location away from the particular boundaries of a school) is not as important as the effect that such actions have on the learning environment. In *Ross v. New Brunswick School District No. 15* the Supreme Court of Canada stated:

¹⁷³ Susan C. Herring, “Cyber Violence: Recognizing and Resisting Abuse in Online Environments” (2002) 14 *Asian Women* at 187.

¹⁷⁴ **See especially** *United States of America, Plaintiff v. Jake Baker*, Baker posted a graphic story about how he raped and tortured a university classmate and communicated his plans to engage in this conduct to friends via e-mail. Baker was charged with criminal harassment. The court threw out the claim, rationalising that rape could not actually/physically occur over the internet. The court was also hesitant to infringe on Baker’s rights to free speech.

¹⁷⁵ Shariff and Hoff, *supra* note 170 at 15.

¹⁷⁶ *Ibid* at 20.

The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.¹⁷⁷

In this particular case the Court found that the distribution of anti-Semitic publications outside the nexus of the school amounted to a disruption of a positive school environment. The Court argued that teachers are inextricably linked to the integrity of our school systems – so much so that:

...teachers as “medium” must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to “choose which hat they will wear on what occasion”.¹⁷⁸

Consequently, because the integrity of the education system cannot be divorced from the perceived integrity of educators, the mere fact that unacceptable expressions occur outside the nexus of the classroom is irrelevant or moot because while such actions may not seem to have a direct impact on students they may conflict with underlying values and principles that the education system perpetuates.¹⁷⁹ Subsequently, the re-occurring argument by school officials that cyberbullying falls outside of their jurisdiction because it occurs outside the purview of educators or outside the walls of the educational institution are flawed if we draw upon the rationale of our highest court.

Despite this, the Supreme Court of Canada has however stated that a certain degree of flexibility or discretion must be awarded to school educators or authorities

¹⁷⁷ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 38 ¶ 42.

¹⁷⁸ *Ibid* at 38 ¶ 44.

¹⁷⁹ *Ibid* at 39 ¶ 44.

when they are performing their duties. In fact, the Supreme Court of Canada maintained in *R. v. M. (M.R.)* that “School authorities must be accorded a reasonable degree of discretion and flexibility to enable them to ensure the safety of their students and to enforce school regulations”.¹⁸⁰ The standard of action imposed on Canadian educators and school officials in trumping *Charter* rights, such as those relating to privacy is thus articulated as follows: (1) the absence of a warrant *in-and-of-itself* does not automatically constitute an unreasonable search and seizure; (2) The school authority must have reasonable grounds to believe that school regulations and/or discipline have been breached and that a search will demonstrate evidence of such a breach; (3) the judiciary should defer to school authorities when determining if reasonable ground existed for a search by virtue of the fact that school authorities are in the best position to access and process information within their educational environments; (4) examples of reasonable search and seizures include information received from a student and or students considered to be credible, observations by school educators or administrators, or any combination of these pieces of information which the relevant authority considers to be credible in the context of the circumstances existing at the particular school.¹⁸¹ Thus, as Shariff and Hoff astutely point out, “the key for schools is to determine a clear nexus between the cyber bullying act and the school”.¹⁸² The key elements in reaching such a decision can rest upon whether the cyber-bullying act was made available/displayed at school or more importantly if such hostile behaviour causes interference with a positive/comfortable/inclusive learning environment, even if the act created a seemingly

¹⁸⁰ *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 at 33 ¶ 49.

¹⁸¹ *Ibid* at 34-45 ¶ 50.

¹⁸² *Ibid* at 34 ¶ 50.

poisonous or hostile environment for as little as one student.¹⁸³ Once such a nexus is established, there appears to be an obligation for school officials to address it if they do not want to give rise to a cause of action under the law of negligence.

Tort law: (2) Negligence

The second area of tort law that relates to the cyberbullying of peers and authority figures is the law of negligence. The law of negligence is a body of law which can be classified under the heading of unintentional torts and it “imposes on each of us the obligation to refrain from acting in ways that cause reasonably foreseeable injury to another’s personal or property interests”.¹⁸⁴ Hence, under the tort of negligence “each of us is responsible to act in accordance with a reasonable standard of care so as to avoid such injuries”.¹⁸⁵ The test of reasonableness is an “objective test” – in other words, the courts will “impose on us a set of assumptions about right conduct based on the way in which we expect reasonable persons to behave in like situations”.¹⁸⁶ Contextualizing this in terms of legal claims that might arise after peer-to-peer cyberbullying and anti-authority cyber-insubordination means that “when a claim in negligence is brought against a school, the plaintiff must establish that there was a duty of care and tangible harm, that the tangible harm was foreseeable, and that the school official’s actions or omissions either proximately or remotely caused injury”.¹⁸⁷

¹⁸³ Shariff and Hoff, *supra* note 170 at 19.

¹⁸⁴ Logan Atkinson and Neil Sargent, *Private Law and Social Life: An Introduction*, 2d ed. (Markham, Ontario: LexisNexis Canada, 2007) at 91.

¹⁸⁵ *Ibid* at 91.

¹⁸⁶ *Ibid*.

¹⁸⁷ Shariff, *supra* note 116 at 480.

Figure 2: Should the School take precautions against a risk of harm?

Source: David Ford and Emil Ford, *Cyber Bullying*, online: <<http://www.emilford.com.au/web/documents/Cyber-Bullying.pdf>>.

However, as Shariff points out “the tort law criteria for third party liability requires strong evidence of proximate cause (namely, that injuries sustained by the victim must be caused directly by the actions or omissions of a school official or teacher)”.¹⁸⁸

However, in *Gould vs. Regina (East) School Division No 77* Judge Matheson “left the door slightly ajar to the possibility that teachers might be held liable in cases of egregious (but unspecified) psychological harm to students”.¹⁸⁹ In this particular case, a student and her parents brought an action against the board of education and a teacher claiming negligence, professional malpractice and a breach of the *Education Act*. It was alleged by the plaintiffs that Jacklynne, the student in question, “was subjected to ‘unsatisfactory, inappropriate and objectionable behaviour’ by Ms Zarowny; that she failed to perform the duties of a teacher in accordance with the Education Act and that she bullied the

¹⁸⁸ *Ibid* at 480.

¹⁸⁹ Shariff, *supra* note 16 at 208.

infant plaintiff”.¹⁹⁰ In supporting these claims the plaintiffs alleged that Ms Zarowny spoke excessively loud in class, ridiculed, bullied and intimidated her students, failed to address the learning needs of the plaintiff, and displayed intolerance towards her pupils.¹⁹¹ Judge Matheson stated the following: “given the right circumstances, conduct that was ‘sufficiently egregious and offensive to community standards of acceptable fair play’ might support a cause of action for educational malpractice”.¹⁹² In determining the standard that courts should utilize when trying to determine if conduct was sufficiently egregious and offensive Judge Matheson stated:

When does speaking in a sufficiently loud enough manner to be heard by all the students become unacceptably loud? What one person may perceive as inappropriately loud and intimidating voice, another person may envision as necessary as an attention getter. And while one student may consider the curriculum as inadequate for his or her needs, the majority of students may reach the opposite conclusion. It is surely not the function of the courts to establish standards of conduct for teachers in their classrooms, and to supervise the maintenance of such standards. Only if the conduct is *sufficiently egregious and offensive to community standards of acceptable fair play* should the courts even consider entertaining any type of claim in educational malpractice.¹⁹³

Ultimately, the court found that the parents did not have a cause of action against the school board or their employee but the judge’s rationale in this case raises the question whether a teacher or a school board can be found to have breached the standard of appropriate conduct outlined by the court if they are aware of peer-to-peer cyber-bullying and they do not act in a timely or appropriate fashion. Given the severe psychological and emotional stigma associated with prolonged online attacks, it is not unreasonable to assume that the courts might plausibly consider such behaviour as

¹⁹⁰ *Ibid* at 208.

¹⁹¹ *Ibid*.

¹⁹² **Cited In** *Ibid* at 208.

¹⁹³ **Cited In** *Ibid* at 208-09.

“sufficiently egregious” psychological harm. While cyber violence might lack the physical component of violence, it nonetheless constitutes a real form of violence as it can have a devastating impact on the morale or psychological well being of a victim.¹⁹⁴ According to Herring one of the greatest obstacles in generating an effective action plan against cyberbullying and online violence “is that it tends to be viewed as less serious, less ‘real’ than violence in the off-line world”.¹⁹⁵ Although the prototypical mental representation of a violent offender tend to be “socially marginal types – possibly with a history of violent criminal behaviour” there is an incongruent reality between our notion of which types of individuals are capable of carrying out physical violence and which type of individuals are capable of carry out acts of cyber violence. In fact, there are certain distinguishable differences about cyber violence (anonymity, impersonality or remoteness of communication and likelihood of being caught) which increase the likelihood that average or more or less well adjusted individuals will engage in such forms of violence.¹⁹⁶

As Herring states:

cyber violence is less prototypical than physical violence in where and how it takes place, in allowing perpetrators to deny their intent to harm or easily, and in enabling ‘normal’ people to perpetrate widely-targeted harm, without requiring that the perpetrator be in an extreme emotional state (or risk his or her life) to carry it out.¹⁹⁷

The unfortunate result of such realities is that cyber violence may be more difficult to recognise, harder to resist and even more difficult to punish. Consequently, the question of interest to me in the next section is as follows: given the variety of criminal and non-criminal mechanisms that currently exist to address cybermisconduct (in its various

¹⁹⁴ Herring, *supra* note 1 at 188.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

forms), is it necessary to further criminalize such behaviour by initiating amendments to the *Criminal Code* or even going as far as creating new criminal offences that specifically address cyberbullying and make it explicit that the use of technology to convey messages that threaten, or perpetuate fear and intimidation amount to a punishable offence under the *Canadian Criminal Code*?¹⁹⁸

¹⁹⁸ Canadian Teachers' Federation, *supra* note 115 at 6.

Chapter IV: Contemplating Whether Cyberbullying ought to be a Separate Criminal Offence: Is this Just another Reflex to Criminal Law?

Jeremy Bentham vs. Friedrich Karl von Savigny

There exists a classical question in law – “the question of whether law can and should lead, or whether it should never do more than cautiously follow changes in society”.¹⁹⁹ These contradictory approaches are mirrored in the divergent views of British social reformer Jeremy Bentham and German legal scholar Friedrich Karl von Savigny.²⁰⁰ Towards the commencement of industrialization in Europe, “Bentham expected legal reforms to respond quickly to new social needs and to restructure society”.²⁰¹ By contrast, Karl von Savigny “believed that only fully developed popular customs could form the basis of legal change”.²⁰² He believed this particularly because “customs grow out of the habits and beliefs of specific people, rather than expressing those of an abstract humanity, legal changes are codifications of customs, and they can only be national, never universal”.²⁰³ According to Steven Vago and Addie Nelson we are now six generations after Bentham and Karl von Savigny expressed their divergent views, and the relationship between law and social change still remains a very contentious issue among academic scholars:

Still, “there exist two contrasting views on the relationship between legal precepts and public attitudes and behaviour. According to one, law is determined by the sense of justice and the moral sentiments of the population, and legislation can only achieve results by staying relatively close to prevailing social norms [or]... [a]ccording to the other view, law,

¹⁹⁹ Steven Vago & Adie Nelson, *Law and Society*, 2d Canadian ed. (Toronto: Pearson Prentice Hall, 2008) at 247.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

and especially legislation, is a vehicle through which a programmed social evolution can be brought about”.²⁰⁴

Both positions present extremes in a dyadic debate – “at one extreme, then, is the view that law is a dependent variable, determined and shaped by current mores and opinions of society... [where] legal changes would be impossible unless preceded by social change”.²⁰⁵ At the opposite extreme, the law can be viewed as an instrument of social engineering – where law not only stimulates social change but is at the forefront in shaping the attitudes and behaviours of its citizens.

Fine-tuning/Reformulating this Classical Question

In my opinion, this dyadic debate shifts the focus away from a more important question – the question ought not to be: “does law effect social change?” or “does social change alter law?” because both questions are likely to be correct in diverging contexts. As Vago and Nelson astutely point out, a more interesting and appropriate question is one that contemplates “under what specific circumstances can law bring about [effective] social change, at what level, and to what extent”.²⁰⁶ As Vago and Nelson asserts, “Law is often an effective mechanism in the promotion or reinforcement of social change. However, the extent to which law can provide an effective impetus for social change varies according to the conditions present in a particular situation”.²⁰⁷ According to William M. Evan, law is likely to provide an effective impetus for social change when it meets the following seven conditions:

- (1) the law must emanate from an authoritative and prestigious source;
- (2) the law must introduce its rationale in terms that are understandable

²⁰⁴ *Ibid* at 247-48.

²⁰⁵ *Ibid* at 248.

²⁰⁶ *Ibid* at 249.

²⁰⁷ *Ibid* at 257.

and compatible with existing values; (3) the advocates of the change should make reference to other communities or countries with which the population identifies and where the law is already in effect *[if possible]*; (4) the enforcement of law must be aimed at making the change in relatively short time; (5) those enforcing the law must themselves be very committed to change intended by law; (6) the instrumentation of the law should include positive as well as a negative sanctions; (7) the enforcement of the law should be reasonable, not only in the sanctions used but also in the protection of the rights of those who stand to lose by the violation of the law.²⁰⁸

While the factors presented do not constitute an exhaustive list, they present certain variables that are inextricably linked to the effectiveness of using law to produce social change. My reasons for presenting them are twofold. Firstly, they provide a backdrop against which to assess whether there currently exists the necessary preconditions in Canadian society for the effective regulation of cyberbullying through the codification of criminal sanctions. Secondly, they allow us the opportunity to speculate which mechanisms of social control are most effective in regulating online conduct.

Arguments Against the Criminalization of Cyberbullying

Advocates against the criminalization of cyberbullying generally accentuate the limitations of law in creating/bringing about social change. As the Law Commission of Canada noted, “over the years, both academics and governments have warned against the pitfalls of relying too heavily on the criminal law to deal with complex social issues”.²⁰⁹ In many instances, such advocates claim, “we expect criminal law responses will keep us safe and secure...[and] quite often, however there is a gap between what is expected of criminal law, and what defining and responding to behaviour as crime can achieve”.²¹⁰

²⁰⁸ Cited in *Ibid* at 257. See especially William Evan, “Law as an instrument of Social Change” in Alvin W. Gouldner & S.M. Miller eds., *Applied Sociology: Opportunities and Problems* (New York: Free Press, 1990) at 288.

²⁰⁹ Law Commission of Canada, *supra* note 4 at 2.

²¹⁰ *Ibid*.

Perhaps the most recent example of such a gap came by way of the tragic events of 9/11. According to Kent Roach, while criminal law might be invoked in certain instances to fulfill a symbolic function, there is very little evidence that tougher laws such as the *Anti-terrorism Act* will deter future terrorists.²¹¹ Consider for a moment the ordinary criminal and the evidence surrounding the “get-tough-on-crime approach”. If contemporary empirical evidence is lacking to demonstrate that instituting mandatory minimum sentences will deter the less serious criminals, how can one even begin to believe that a politically or religiously motivated terrorist will be deterred from committing a crime on the grounds of harsher penalties? D.A Andrews and James Bonta, who are well respected in the field of criminal psychology, suggest that they “have been unable to find any studies that reveal systematically positive effects of official punishment on recidivists” – in other words, empirical evidence suggests harsher penalties do not deter crime.²¹² As Roach contends, following the tragic events of 9/11 “Canadians have relied on the criminal law in a desperate and frequently vain quest for an increased sense of security” and unfortunately, this unnecessary reflex to criminal law has left them with a false sense of security.²¹³ At the heart of his argument Roach warns against the dangers of reflexively invoking criminal law to address complex social problems. He contends that quick fix black letter law solutions that do not weigh heavily the potential ramifications of such actions can in certain instances be nothing more than a placebo – one which in this particular context gave Canadians an illusionary sense of security at the expense of other democratic values, which they cherished. If one were to apply the logic of Roach’s

²¹¹ See especially Kent. Roach, *September 11: Consequences for Canada* (Toronto: University of Toronto Press, 2003).

²¹² *Ibid* at 91.

²¹³ *Ibid* at 15.

argument to the context of online cybermisconduct, such as cyberbullying, a number of corollary arguments might emerge against its criminalization.

Advocates might also suggest that there are already certain sections of the *Canadian Criminal Code* that can be used to prosecute cyberbullying and that the lack of criminal prosecutions in this area have little to do with the fact that our laws are ill-suited to deal with these new forms of offences but rather more to do with a general lack of will on the part of Crown prosecutors to prosecute these type of behaviours coupled by the general sentiment that criminal sanctions do little to regulate the growing social problem of cyberbullying. As several authors have suggested, including Henry A. Giroux and Robert DiGuilio “zero-tolerance policies, suspensions and [even] criminal harassment charges against adolescents rarely solve school problems”.²¹⁴ They contend criminal responses are largely ineffective and that schools should take the lead “in acknowledging their important role as educators, to work with parents towards developing positive and educational programs and tools that provide students with beneficial Internet experiences”.²¹⁵ The idea behind this is that criminal law as a mechanism of social control is more concerned with punitive sanctions than proactive prevention. According to DiGuilio, “much research clearly shows that criminal-justice responses and environments that emphasize punitive measures serve to foster aggression, violent behaviour, and vandalism”.²¹⁶ Moreover, DiGuilio supplements his viewpoint by asserting:

²¹⁴ Shariff, *supra* note 116 at 483.

²¹⁵ *Ibid* at 484.

²¹⁶ Robert DiGuilio, *Educate, Medicate, or Litigate? What teachers, parents, and administrations must do about student behaviour* (Thousand Oaks, CA: Corwin Press, 2001) at 11

Even medical researchers have concluded that America's predominant response to violence has been a reactive one – to pour resources into deterring and incapacitating offenders by apprehending, arresting, adjudicating, and incarcerating them through the criminal justice system. This approach, however, has not made an appreciable difference.²¹⁷

Consequently, proponents might be wary about the implications associated with the prosecution of such new criminal offences particularly because the overwhelming majority of wrongdoers in these new categories of offences may be youth offenders. As Henry A. Giroux states, in western society “increasingly, children seem to have no standing in the public sphere as citizens, and thus are denied any entitlement and agency”.²¹⁸ In addition to this, “their voices and needs are almost completely absent from the debates, policies, and legislative practices that are constructed in terms of their needs”. In Canada there has been a growing body of academic work, legislation and judicial opinion that supports the need to treat children differently from adults. In fact, Canadian Law recognizes three distinct phases of criminal accountability: (1) offenders under the age of twelve (2) offenders that are twelve to eighteen years of age (3) and adults.²¹⁹ In the first category no criminal liability can attach and thus, offenders are dealt with in family court proceedings. In the second category of criminal responsibility there is limited accountability or diminished criminal liability under the *Youth Criminal Justice Act (YCJA)*. The rationale behind such categories of criminal responsibility is relatively simple – under criminal law we only punish blameworthy behaviour. The idea behind a diminished sense of criminal liability for youth offenders relates to their lack of maturity

²¹⁷ *Ibid.*

²¹⁸ Henry A. Giroux, *The Abandoned Generation: Democracy Beyond the Culture of Fear* (New York: Palgrave Macmillan, 2003) at xiv.

²¹⁹ See generally Justice Marvin A. Zuker, Randolph C. Hammond & Roderick C. Flynn, *Children's Law Handbook* (Toronto: Thomson Carswell, 2005) at 2-3.

and moral development. Since they do not have the same intellectual capacity as adults they cannot fully appreciate the nature of their actions and fully foresee the consequences of their behaviour in the same way as adults are expected to. Proponents who are against the criminalization of cyberbullying may argue that criminalizing cyberbullying may be a regression back, in spirit, to the *Juvenile Delinquents Act (JDA)*, where too much discretion was given to the courts, police officers, and corrections officials to determine the best interests of our youths. The general argument here is that criminal law as a formal mechanism of social control tends to be reactionary, slow, expensive and ineffective in regulating certain types of social behaviours. Thus, proponents of this view argue that criminal law is not best equipped to deal with this dynamic technologically created social problem particularly because it is reactionary in nature, and perhaps the regulation of cyberbullying and cybermisconduct is best left to the proactive collaborative efforts of school boards, educators, and parents. In fact, Public Safety and Emergency Preparedness Canada (PSEPC) advocates to “... be effective, bullying interventions must focus beyond the aggressive child and the victim to include peers, school staff, parents and the broader community”...comprehensive anti-bullying initiatives can help reduce occurrences of bullying”.²²⁰

Addressing Counterarguments & Conceding Certain Points – The Heart of My Argument: Arguments in Favour of Criminalizing Cyberbullying

While it can be conceded that criminal reform is always best achieved through collaborative efforts, there is much validity to the CTF’s stance that “it is [both] unreasonable and impractical to expect individual teachers or parents of a student who is

²²⁰ Cited in *Ibid* at 279.

the victim of cybermisconduct or cyberbullying to engage in very expensive litigation to protect the individual from persistent cybervictimization”.²²¹ While such advocates as the CTF acknowledge that “that there are elements of existing criminal law, human rights legislation and section of defamatory libel that can be applied to inappropriate use of electronic communications”, the practical reality is that they are very poorly applied.²²² Hence they are adamant about the need for changes to existing legislation in order to address problems with cybermisconduct, cyberbullying, cyber-stalking, online harassment and defamation which new technological advancements have facilitated.²²³ Such advocates demand changes that would: (1) clarify the application of existing law to cybermisconduct; (2) develop new provisions that address elements of our contemporary reality that existing law is ill suited to address and never was designed to contemplate.²²⁴ In supporting their views proponents of this view assert:

Our present *Criminal Code* has its roots in nineteenth-century England. Enacted in 1892, it has undergone a number of ad hoc revisions, with the result that we now have a Criminal Code which does not deal comprehensively with the general principles of criminal law, which suffers from a lack of internal logic and which contains a hodgepodge of anachronistic, redundant, contradictory and obsolete provisions. The end result is that Canadians living in one of the most technologically advanced societies in human history are being governed by a Criminal Code rooted in the horse-and-buggy era of Victorian England.²²⁵

It seems illogical, if not also counterintuitive, to avoid updating our *Criminal Code* on the premise that cyberbullying is not widely prosecuted more because of a general lack of will on the part of Crown prosecutors than because the *Criminal Code* lacks the necessary

²²¹ Canadian Teachers’ Federation, *supra* note 115 at 6.

²²² *Ibid* at 1.

²²³ *Ibid*.

²²⁴ *Ibid*.

²²⁵ Law Reform Commission of Canada, *15th Annual Report* (Ottawa: Government of Canada, 1985-86) at 15.

provisions to prosecute such crimes. In fact, the LRCC explicitly states in *Crimes Against the Environment Working Paper 44*: “restraint in the recourse to criminal law is only one facet of the Commission’s mandate to remove anachronisms and anomalies in the law”.

It was also called upon and mandated to:

Develop new approaches to and concepts of the law in keeping with, and responsive to, the changing needs of Canadian society. It has always been understood by the Commission that the changing needs and perceptions of Canadian society may also urge additions to the Criminal Code of offences not presently prohibited by it, at least not directly and explicitly enough. The same tests which should lead to some *Code* offences being removed from the Code because (for example) they are no longer perceived as serious threats to our fundamental values, also lead us to conclude that some offences not presently found in the Code should be added to it.²²⁶

While the warnings relating to quick-fix black letter law solutions advocated by Kent Roach in the aftermath of the 9/11 terrorist attacks might have some validity, I do not believe that proponents who support the criminalization of cyberbullying are advocating for isolated or one dimensional criminal reform. Actually, formal mechanisms of social control are always more effective when backed by a wide variety of social control mechanisms. In the context of the criminal law reform post 9/11 I agree with Roach’s central point that “what the September 11 terrorists did was a crime [according to the *Canadian Criminal Code*] long before they boarded the doomed aircraft” however, I do not believe in the context of cyberbullying that our current *Criminal Code* has adequate provisions to deal with the various criminal offences that may emanate from the use of

²²⁶ Law Reform Commission of Canada, *Crimes Against the Environment Working Paper 44* (Ottawa: Government of Canada, 1985) at 3.

technology.²²⁷ Those who oppose my viewpoint often invoke the principle of restraint in the use of criminal law – advocating that because criminal law is the ultimate expression of a state’s power, and such power often entails some of the most restrictive sanctions we ought to “be reluctant to invoke the coercive measures of the law unless and until it is apparent that no other response is appropriate or adequate”.²²⁸ While such proponents may believe with reference to cyberbullying that sufficient responses exist outside the ambit of criminal law, it is important to remember that the principle of restraint does not condemn the use of criminal law “when identifiable forms of behaviour cause serious harm to the fabric of society”.²²⁹ It only “implies that the criminal law should not be invoked for comparatively trivial nuisances”.²³⁰ The question thus becomes would criminalizing certain forms of cybermisconduct such as cyberbullying equate with the trivialization of criminal law? As a corollary to this, it is also imperative to stress that new governing principles inherently “require that old laws be reviewed with the intention that any of them that cannot be reconciled with the new constitution of the state should be repealed or reformed so as to ensure consistency with current standards”.²³¹

Differentiating my Position From Those Who Do Not Agree With the Criminalization of Cyberbullying

The fundamental difference between my view and those who do not believe cyberbullying ought to be a criminal offence is their belief that “the *Criminal Code*

²²⁷ Kent Roach, “The New Terrorism Offences and the Criminal Law” in Ronald J. Daniels, Patrick Macklem & Kent Roach eds., *The Security of Freedom: Essays On Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2002) at 151.

²²⁸ Patrick Healy, *Restraint in the Criminal Law* (Ottawa: Department of Justice Canada, 2008) online: <<http://www.justice.gc.ca/eng/pi/icg-gci/cl-dp/cl-dp.pdf>> at 10.

²²⁹ *Ibid* at 11.

²³⁰ *Ibid*.

²³¹ *Ibid*.

contains too many offences of an insufficiently serious nature, and that their inclusion in the Code ties up criminal courts needlessly, unduly stigmatizes individuals who do not deserve it, depreciates the value of the criminal law, and engenders disrespect for the law”.²³² In contrast to this view, I am of the opinion “that criminal law should be used more energetically to reinforce certain [core] values presently seen as threatened” by new forms of unwanted technologically created conduct.²³³ I argue that the “criminal law and justice system must be ‘modernized’ to deal with new or emerging offences” [and I believe] “...there is a place for the criminal law in some instances, because such activities violate emerging social values that acquire more importance as society becomes more complex and interdependent and its citizens thereby become more vulnerable to [new forms of] complex mischief”.²³⁴

The Law Reform Commission’s Test for Determining “real crimes”

The debate regarding the proper ambit of criminal law is by no means a new one. In reality the only thing that ever changes in the context of this debate is the conduct which is being considered for criminal sanctions. Throughout the years “a number of ‘tests’ or ‘criteria’ have been suggested to aid in the process of addressing the key question of whether particular forms of conduct can be dealt with adequately and appropriately through other social institutions, or whether it requires a response by the criminal law”.²³⁵ The LRCC suggested a set of “tests” for determining what constitutes, and does not constitute crimes:

²³² Department of Justice of Canada, *supra* note 34 at 35.

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid* at 43.

- Does the act seriously harm other people?
- Does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- Are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?
- Given that we can answer ‘yes’ to the above three questions are we satisfied that criminal law can make a significant contribution in dealing with the problem?²³⁶

The most basic of themes in such test is the reoccurring theme of “serious harm” but what constitutes serious harm? What types of actions are so seriously harmful that they warrant the most severe categorization in a democratic society? I am in accordance with the Department of Justice Canada in advocating that this serious harm is harm that

may be caused or threatened to the physical safety or integrity of individuals, or through interference with their property. It may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values – those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians.²³⁷

Ultimately, it is my contention that cyberbullying constitutes the type of offence that severely contravenes such values – values not only cherished by Canadians, but also, values inextricably tied to the social fabric of our democratic society and our criminal justice system.

Cyberbullying as a Real Crime and not an Administrative Wrong

Cyberbullying is not merely a regulatory offence – it is a transgression which merits the categorization of “real crimes”. It merits the categorization of a “real crime” because the nature of the act offends and threatens the very values our democratic

²³⁶ Cited In *Ibid* at 44-5.

²³⁷ *Ibid* at 45.

society and our criminal justice system is predicated upon. In defending this proposition let us consider the LRCC's four pronged test for determining what are, and are not, crimes. The first echelon of the test requires us to consider whether cyberbullying seriously harms other people. Having acknowledged in chapter two the shortcomings of uniquely using the notion of harm to determine criminality, I would like to stress here that the criterion of serious harm is only one of the necessary preconditions in this test. Thus, the question of importance here becomes does cyberbullying cause serious harm to other people? Consider the following note written by Hamed Nastoh before he committed suicide:

Dear Mom and Dad:

The first thing is, I love you Mom and Dad, but you didn't understand why I had to commit suicide. There was so much going on, and I tried to cope with it, but I couldn't take it anymore...

It was horrible. Every day, I was teased and teased, everyone calling me gay, fag, queer, and I would always act like it didn't bug me...

But I was crying inside me. It hurt me so bad, because I wasn't gay. And when people said it, my own friends never backed me up. They just laughed. I would pray to God every night for every one to stop saying that.

I know that you are going to miss me and that you will never forgive me, but you will never understand. You weren't living my life. I hate myself for doing this to you. I really, really hate myself, but there was just no way out for me.

Sure I could have taken a gun and shot everyone in the head...but what would the point be?...

I love you Dad and Mom. Please, please go to schools and talk to kids that bullying and teasing has big consequences. And tell them to stop crying. That's just my only wish and I hope people will miss me. Please visit my grave, often so I'm not lonely.²³⁸

In the following note Hamed Nastoh describes a traditional form of bullying – peer-to-peer schoolyard bullying. Cyberbullying can be substantially worse. There are certain factors which not only facilitate the harmful act but that worsen the consequences for

²³⁸ Cited in Shaheen Shariff, *supra* note 16.

the individual victim – such factors include the anonymity of the conduct (which is facilitated by technology), the potential for an infinite audience, the permanence of the expression, and the infinite access technology provides for bullies:²³⁹

Cyberbullying does not end when the child arrives home. Because kids spend so much time on cell phones and the Internet, they are easy targets for cyber-abuse. Bullying can continue even in the privacy of a teen's bedroom with messages suddenly appearing on the computer or cell phone screens. It can happen at any time and can be so intrusive that a child or teen feels trapped and helpless. Cyber bullies are like stalkers they rarely let up until they are caught...The advent of technology has taken bullying to new heights. Cyber bullies are more vicious and hurtful than in-person bullies, saying things online that they would never say in face-to-face interactions. The anonymity of one-line harassment gives bullies the power to attack others with little risk of being caught. Using cyber technology to harass is particularly heinous because it shields bullies from the consequences of their actions. Having no actual physical contact with their victims, the cyber-bully's feelings of empathy and remorse are minimized.²⁴⁰

Cyberbullying causes serious psychological harm to its victims – so serious is that harm that in some instances it leads its victims to commit suicide. Can there potentially be anything more serious, more dangerous to the social fabric of a society based on tolerance, individual liberty, and respect than to allow behaviour that result in the gravest of consequences to go unabated without criminal sanctions associated to it? Additional research by Brown et al. suggests that cyberbullying can also result in a range of negative consequences including but not limited to low self-esteem, anxiety, anger, depression, school absenteeism, poor grades, an increased tendency to violate against others, and youth suicide.²⁴¹ As a result, there is very little doubt in that cyberbullying – an act which

²³⁹ See especially *Ibid* at 31.

²⁴⁰ Robert H. Brent, "Ontario Education Act Amendments Target Cyber-bullies beyond the schoolyard" (2007) 7 *Risk Management in Canadian Education* at 48.

²⁴¹ See especially Karen Brown, Margaret Jackson & Wanda Cassidy, "Cyberbullying: Developing policy to direct response that are equitable and effective in addressing this special form of bullying" (2006) 57 *Canadian*

has been characterized as substantially worse than conventional types of bullying – causes serious harm to others.²⁴²

The next step of the LRCC test requires us to consider whether cyberbullying in some other ways so seriously contravenes our fundamental values as to be harmful to society. Cyberbullying contravenes numerous fundamental values in Canadian society. In chapter two I differentiated between fundamental values that are essential to the very existence of every society and those that are pivotal to our own particular society. I contend that cyberbullying contravenes both types of fundamental values. For the purpose of developing my argument I shall focus on the “critical interplay between democracy and education”.²⁴³ Writing at the turn of the 20th century John Dewey writes “public schools were designed to reflect the ‘needs’ of existing community life...improving the life we have in common so that the future shall be better than the past”.²⁴⁴ As Cassidy and Jackson astutely acknowledge, schools in a democratic society are designed to be “more than a place for transmitting knowledge; it was to offer hope for creating a better, more just and equitable world... [in fact,] education of children in Canada today is considered one of the most important functions of government”.²⁴⁵ Let us consider the preamble of the *School Act* of British Columbia which states:

Whereas it is the goal of a democratic society to ensure that all its members receive an education that enables them to become personally fulfilled and publically useful, thereby increasing the strength and contributions to health and stability of society; and Whereas the purpose

Journal of Educational Administration and Policy online: <http://www.umanitoba.ca/publications/cjeap/pdf_files/brown.jackson.cassidy.pdf> at 4.

²⁴² *Ibid* at 2.

²⁴³ Wanda Cassidy & Margaret Jackson, “The Need For Equality in Education: An Intersectionality Examination of Labelling and Zero Tolerance Practices” (2005) 40 *McGill Journal of Education* at 435.

²⁴⁴ **Cited In** *Ibid* at 435.

²⁴⁵ *Ibid* at 435-36

of the school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy.²⁴⁶

In considering the objectives sought by our educational system, we must ask ourselves whether cyberbullying cheats certain children in Canada out of the opportunity to achieve the sort of self-actualization that our democratic society requires of our educational system. We must examine whether the prevalence of cyberbullying impedes the ability of certain students to benefit from a safe, ordered and inclusive learning environment. There is no question in my mind that cyberbullying threatens the value systems upon which our society is built. Numerous studies demonstrate that cyberbullying marginalizes a whole range of students. In a study conducted by Shariff in 2007 20% of 770 young people were cyberbullied.²⁴⁷ This number amounted to 154 students in this particular Ontario high school that have been exposed to the negative impacts cyberbullying has on the human psyche and their educational experiences. Cyberbullying prevents students from enjoying their educational experience – it contributes to the ostracization of victims (especially those who are different and who don't fit in), a wide range of negative and emotional personal behaviours, a decrease in school performance and an even an increasing rate of drop-outs.²⁴⁸ Consider the following passage:

The impact of bullying on children in the normal course of school life is not as well recognized but can be devastating. Mental anguish from the societal exclusion caused by physical and psychological bullying is sufficient to destroy the confidence of any adult, let alone a child, on

²⁴⁶ Cited In *Ibid* at 436.

²⁴⁷ Shariff, *supra* note 16 at 45.

²⁴⁸ See especially, *Ibid* at 25.

whom it can have lifelong effects. As the evidence illustrates, the impact of bullying (on victims and perpetrators) should not be taken lightly. Researchers find that victims and bullies experience greater psychosomatic problems, including depression, anxiety, low self-esteem and poorer overall mental and physical health than those not involved in bullying... [All these problems seem to lead] to a growing body of research that shows that teasing and exclusion in particular can have devastating consequences, including school avoidance and poor school functioning.²⁴⁹

While these findings have been verified and duplicated by many researchers, “these findings are corroborated by victims’ own descriptions in their legal claims against schools and by parents of students who committed suicide”.²⁵⁰ In *R v. M.R.M.* the Supreme Court of Canada captures the importance of education as a fundamental value in our society by expanding on the onerous and burdensome task that school educators and administrators have in educating our youth.

Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. When children attend school or school functions, it is they who must care for the children's safety and well-being. It is they who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfil their potential. In order to teach, school officials must provide an atmosphere that encourages learning. During the school day they must protect and teach our children. In no small way, teachers and principals are responsible for the future of the country. It is essential that our children be taught and that they learn.²⁵¹

In this passage the Supreme Court of Canada is highlighting the pivotal importance that education plays within our society. In fact, Cory J. goes so far as to state explicitly that “it is difficult to imagine a more important trust or duty in our society”.²⁵² By virtue of these statements I have no hesitation in stating that cyberbullying so seriously contravenes or

²⁴⁹ *Ibid* at 26.

²⁵⁰ *Ibid* at 25. See *Dufour vs Howe Sound Board of Education* (2000) (Case abandoned); *Jurban vs North Vancouver School Distr. No 44* [2002] B.C.H.R.T.D. No 10 (Q.L.) 221).

²⁵¹ *R v. M.R.M.* [1998] 3 S.C.R. 393 [1998] S.C.J. No. 83 at ¶ 35.

²⁵² *Ibid.*

threatens many of our fundamental values in Canadian society (including and not restricted to our commitment to education, respect for diversity and multiculturalism, and the promotion of democratic values within our system of education) that I have no doubts that the second test can be answered in the affirmative.

The next step in this four-pronged test is the determination of whether we are confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values. Even if it is acknowledged that there is a certain degree of validity to the premise that Crown prosecutors are generally reluctant to prosecute cyberbullying because they believe it is best left outside the criminal justice system, it is difficult to see how updating the *Criminal Code* to incorporate new forms of online criminality would be an impediment to Canadians, the values they cherish or the fundamental values our criminal justice system is predicated upon. The LRCC strongly urges “that criminal sanctions should be applied only to those who are culpable – that is, those who contravene the law intentionally, recklessly, or at least negligently”²⁵³ as opposed to those who contravene the law through “carelessness or failure to attain requisite standards of diligence”.²⁵⁴ Cyberbullying is a deliberate act – one that intentionally causes serious harm to its victims, and one that often requires a certain degree of premeditation. Even if the perpetrator contends that he/she did not know the criminal ramifications of their acts, criminal culpability can extend to those who are recklessly negligent. I would argue that the act of logging onto a computer, connecting to the internet, and repeatedly posting declamatory and/or

²⁵³ Department of Justice of Canada, *supra* note 34 at 46.

²⁵⁴ *Ibid.*

harassing material which cause another individual serious psychological, emotional, and maybe even physical harm as a direct consequence of online harassment does not equate with what the LRCC categorises as carelessness or failure to meet standards of due diligence. Such an action is deliberate, premeditated, or at least sufficiently reckless to be labelled criminal. If criminal law aspires to fulfill the objective of humanity, freedom, and justice then I cannot see how the remedy, in this case the criminalization of cyberbullying, would be an affront to our fundamental values. The principle of humanity at its roots strives to reduce acts which violate the sanctity of mutual respect and human dignity between individuals. In this context I re-iterate the words of Justice Iacobucci:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.²⁵⁵

Cyberbullying is an affront to the principle of human dignity. Studies have demonstrated that cyberbullies like to target those individuals who are different or who do not fit in. According to Shariff “homophobic harassment is emerging as a prevalent aspect of cyber-bullying”.²⁵⁶ If human dignity is harmed when unfair treatment is premised upon personal traits or circumstances then cyberbullying is a direct affront to human dignity if it has a tendency to target victims based on their sexual preference, religion and so forth. If the principle of justice requires that guilt and innocence be decided fairly according to evidence, that punishment be appropriate to the offence, and that like cases be treated equal then legislators must ensure that amendments to the *Criminal Code* which make

²⁵⁵ *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 at 530.

²⁵⁶ Shariff, *supra* note 16 at 34.

cyberbullying a criminal offence conform to these standards. Until legislators actually begin the undertaking of making cyberbullying an explicit criminal offence it is difficult to determine whether hypothetical provisos would be an affront to the principle of justice. However, I can say that I strongly believe that sound criminal reform can be achieved in this context, if it is holistic in spirit, meaning it draws on multidisciplinary research, and is not exclusively reflexive in nature. In terms of the criminal law aspiration to achieve freedom, it can be stressed here that freedom requires a reciprocal relationship – where individual freedom must be limited in certain contexts in order for citizens to enjoy certain fundamental freedoms in other areas of their lives. Given my discussion on the detrimental effect that cyberbullying has on democratic values and their promotion in educational contexts, I have no problems with limiting free speech in certain contexts – namely those which can be demonstrably justified in a free and democratic society.²⁵⁷ Hence, it is my contention that updating the *Criminal Code* to include cyberbullying is not only in keeping with the underlying values that our criminal justice system is predicated upon but it is equally the duty of our government to ensure that nothing jeopardizes the furthering of democratic values and the education of our Canadian youth.

The last echelon of the test, given an affirmative answer to the above three questions, requires us to consider whether we are satisfied that criminal law can make a significant contribution to dealing with the problem. This is a more difficult question

²⁵⁷ Section 1 of the *Canadian Charter of Rights and Freedoms* affords all Canadians the rights aforementioned in the *Charter* while prescribing limits on those rights in contexts that are seen as demonstrably justified in a democratic society. Section 1 analysis involves two stages: (1) A definitional stage and (2) an ad-hoc balancing stage. In the definitional stage the court determine whether there actually is an affront to free speech and in the ad-hoc balancing stage they determine whether such encroachments can be reasonably justified. In terms of Constitutional issues the most prominent Canadian scholar is Peter Hogg. **See especially** Peter W Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997) and *R. v. Oakes*, [1986] 1 S.C.R. 103.

than the previous three because it requires the evaluator to speculate on the future. Advocates who disagree with the criminalization of cyberbullying would most probably invoke many studies that demonstrate harsh penalties do not equate with deterrence. They would note on how criminal law has been largely ineffective in terms of regulating certain behaviours such as alcohol consumption during prohibition, and drugs related offences in more recent times. However, criminal law is not only about reducing the occurrence of crime. While there has been a shift in more recent times toward advocating that criminal law ought to be more proactive, “we still need to do something about wrongful acts: to register our social disapproval, to publically denounce them and to re-affirm the values violated by them”.²⁵⁸ As such, “criminal law is not geared only to the future; it serves to throw light on the present – by underlying crucial social values”.²⁵⁹ As such I believe criminal law can make a difference with reference to cyberbullying – it can make a difference in the reaffirmation of those values necessary, or else important, to the reaffirmation of integral societal values. Cyberbullying creates serious harm to its victims; and it threatens those values which are integral to our democratic society. Left unaddressed, cyberbullying can breed disrespect for the law. While the current regulatory scheme puts the prime duty for teaching values on families, schools, churches, educators, and other socializing agencies, the criminal law can be used in the most serious cases of cyberbullying as an instrument for reaffirming fundamental values in society and as a mechanism for protecting its citizens from serious harm. Although the criminal law is at its base a moral system (and such a system may have certain faults), criminal law serves

²⁵⁸ Law Reform Commission of Canada, *supra* note 26 at 16.

²⁵⁹ *Ibid* at 16.

the function of a necessary evil – one where restraint must be applied while also denouncing acts that seriously transgress essential values. This in my opinion is the true function of criminal law. Articulated in this fashion, I believe the criminalization of cyberbullying can make a significant difference, as long as criminal law reform is done in conjunction with a wide range of other less formal sanctions and as long as we do not “fruitlessly pin all our hopes on criminal law”.²⁶⁰

While advocates who disagree with the criminalization of cyberbullying believe that criminal law is ill suited to deal with this new social reality, I assert let us update our criminal law so that it may contain a specific provisions that deal with cyberbullying and let us reserve those measures for the most severe cases. In Canada, the *Criminal Code* reserves it harshest sanctions for offenders who commit violent offences, however violence can manifest itself in more than one way. When a cyberbully threatens the life or the causes a victim to fear for his/her security through the use of technology such as a computer, a cell phone, repeated text messages and so on, the nature of the crime is fundamentally different from any crime that the current *Criminal Code* envisages for that offence. If criminal law is reserved for the most heinous and serious crimes, then I assert any new *Criminal Code* provisions which explicitly address cyberbullying and cybermisconduct should only be used as a last recourse – when the gravity of the crime cannot be counteracted with any other suitable remedy. I think it is of paramount importance here to highlight that creating a specific criminal offence for cyberbullying and other forms of cybermisconduct does not negate the reality that crime prevention is

²⁶⁰ *Ibid* at 17.

a holistic process. As such, it is my belief that it is not only the role of the federal Department of Justice to create new separate criminal offences for these types of intrusive online behaviours but also to supplement these *Criminal Code* amendments by supporting public awareness campaigns that target the prevention of cyberbullying and appropriate cyberconduct, and by developing a federal action plan to aid provincial school boards in dealing with these new impediments to our education system. The final chapter is reserved not only for proposing selective amendments to the *Criminal Code* but also for highlighting certain intervention strategies that should be coupled with criminal reforms to achieve maximum efficiency in preventing these new forms of online criminality.

There is too often, the perception that responding to unwanted conduct with criminal law negates all other possibilities or mechanisms of social control. While this perception may have been founded in the early beginnings of our criminal justice system, it seems untrue in the context of contemporary societies. In fact, the LCC states that “social control in a contemporary society is produced through a complex web of relations... and response mechanisms are rarely used in isolation” from one another.²⁶¹

According to P.J. May

Compliance with rules and standards is rarely automatic and, as such, needs to be induced. The traditional approach is to coerce compliance by means of threats of penalties... An alternative is to reward regulated entities for complying and to make it easier for regulated entities to comply. In practice, new social regulations contain a mix of coercive, facilitative, and incentive features... The traditional enforcement approach assumed that compliance would not be readily achieved in the absence of coercion. The new approach assumes that compliance is more readily achievable. The key implication of the distinction is that compliance can be enhanced through other means than enforcement alone.²⁶²

History has shown that effective social control is almost always best achieved when a wide array of informal sanctions are coupled with diverse forms of complimentary formal sanctions. For instance, consider the inability of criminal law to regulate alcohol consumption during prohibition or the western world’s apparent failure to effectively control drugs through the establishment of new criminal laws.²⁶³ Legal regulation,

²⁶¹ Law Commission of Canada, *supra* note 4 at 23.

²⁶² Cited In *Ibid* at 24. See especially P.J. May, “Social Regulation” in L.M. Salamon, ed., *The Tools of Government — A guide to the New Governance* (New York: Oxford University Press, 2002).

²⁶³ See especially Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979). Gross argues that the war on drugs in relying too heavily on criminal law has served to intensify other social

particularly through criminal law, should only be one facet in an elaborate and interwoven web of multidisciplinary response mechanisms. While criminal law can achieve meaningful results in the right contexts, it cannot be used to the exclusion of all other intervention strategies. There is no question that cyberbullying has become a serious social problem — one which contravenes some of the most fundamental Canadian values. As such, criminal law reform with reference to new technologically created crimes is necessary because it seems impractical to expect that a victim of cybermisconduct, or educators, or even parents, should bear the sole responsibility in protecting certain fundamental Canadian rights. While it is certainly justified to invoke criminal law when conduct contravenes fundamental values, it is irresponsible and even maybe foolish to rely too heavily on criminal law at the exclusion of other intervention strategies which have been proven to work.

The CTF's Proposed Recommendations

In recognizing the potential pitfalls associated with relying uniquely on criminal law to address complex social issues, the CTF has developed a holistic and multidisciplinary policy for addressing cyberconduct and cyberbullying. I characterize such reforms as holistic and multidisciplinary because they draw on scholarship from a variety of academic fields and because the policy for addressing cyberconduct and cyberbullying is not only reactive in nature but proactive in spirit. Their policy recommendations do not seek to overly burden the criminal justice system by relying too heavily on the criminal law, but the CTF “policy speaks strongly to the need for

problems such as overcrowded penitentiaries, the diversion of police from other crimes, the spread of AIDS, systemic racism and unemployment.

education as a key element in addressing, preventing and protecting students and teachers from cyber-related harm”.²⁶⁴ In fact, the CTF’s policy “speaks to the roles and responsibilities of parents and guardians, schools, school boards and school districts, teachers, students, teacher organizations, ministries of education and governments”.²⁶⁵ As such the CTF’s recommendations to the federal Department of Justice involve asking for support in recognizing the extreme impact that the misuse of technology can have when it manifests itself in the form of cybermisconduct and cyberbullying. Consequently, the CTF recommends that the government responds by:

- Supporting public awareness campaigns that focus on appropriate cyberconduct and the prevention of cyberbullying;
- Supporting amendments to the regulatory framework for the rating of films and video games to reduce the possibility of excessively violent products being sold to children and youth;
- Supporting amendments to the *Criminal Code of Canada* that make it clear that the use of information and communication technology to convey a message that threatens death or bodily harm, or perpetuates fear and intimidation in another, constitutes a punishable offence under the *Criminal Code*;
- Helping to enact new information and communication technology/cybermisconduct and cyberbullying legislation that protects teachers, students and others from harm.
- With respect to the last two points above, this brief makes specific suggestions on the following sections of the Criminal Code:
 - Section 264; Harassment
 - Section 298; Defamatory Libel
 - Section 372 (1),(2),(3); False Messages
 - Section 320.1 & 164.1; Hate Propaganda²⁶⁶

In regards to the latter recommendations the CTF suggests that while criminal harassment charges under section 264 of the *Criminal Code* are rarely used in responding to online harassment, legislative amendments which explicitly define cyberbullying as a

²⁶⁴ Canadian Teachers’ Federation, *supra* note 115 at 5.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid* at 6.

form of criminal harassment might make the application of section 264 more explicit. Moreover, while section 298 of the *Criminal Code* which relates to defamatory libel is rarely used and in disuse, another approach advocated by the CTF is to develop less serious offences targeting online harassment and/or cyber defamation. As the CTF points out the false messages section of the *Criminal Code* (section 372) already makes it an indictable offence to convey messages with the intent to injure or alarm individuals by way of letter, telegram, phone, cable, or radio. Such an offence is punishable by imprisonment for a term not exceeding two years. On the other hand, section 372(2) makes it a criminal offence punishable by summary conviction to intend to alarm or annoy a person through the use of indecent telephone calls, and section 372(3) further criminalizes harassing phone calls. According to the CTF it would make perfect sense to create an entirely new section — one that is in keeping with the new technological reality of the twenty- first century. Here the CTF suggests the creation of a hybrid criminal offence — where posting false information, and/or threats with the intent to harm and/or intimidate another person could be punishable by way of a summary or indictable offence depending on the seriousness of the posting, and the impact that it had on the victim.

Criminalization does not exclude other mechanisms of social control:

In November of 2005 the Ontario Safe Schools Action Team conducted an in-depth investigation of bullying in which they examined a wide range of prevention programs and action plans for effectively addressing bullying in its many forms. Their overarching recommendation at that time was that “bullying prevention should be

identified as a priority for every school board and every school”.²⁶⁷ As such, the Ontario Safe Schools Action Team urges that “each school board in the province should adopt a bullying prevention policy and, flowing from that policy, each school in the province should, as a priority, implement an effective bullying prevention program”.²⁶⁸ Additional recommendations directed towards the Ministry of Education recommend:

- Immediate and mandatory training on bullying prevention for current school administrators, with training for new administrators to be provided by school boards;
- School board funding for bullying prevention training for teachers and other school staff;
- A bilingual, toll free, 24 hours province-wide Anti-Bullying Hotline to offer support, advice, and referrals to parents, teachers, and students;
- Consider additional professional development days to facilitate training for schools;
- Provide school boards with a bullying prevention policy framework;
- Provide funding to support the purchase or development of evidence-based bullying prevention programs for each schools;
- Require each school board to designate a Safe Schools resource person/coordinator to provide ongoing support, resources, and expertise on bullying prevention and intervention strategies;
- Appoint a Safe Schools Implementation Coordinator for a specified term;
- Provide schools with centralized data analysis;
- Encourage community partners to support bullying prevention initiatives.²⁶⁹

The overarching idea behind these recommendations was to “increase awareness of bullying as an issue with roots and solutions that are much broader than the education system and work to change attitudes related to bullying”.²⁷⁰

²⁶⁷ Liz Sandals et al., “Shaping safer schools: A bullying prevention action plan” *Safe Schools Action Team* (November 2005), online: <<http://www.edu.gov.on.ca/eng/healthsafeschools/actionTeam/shaping.pdf>> at 6.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid* at 6-7.

²⁷⁰ *Ibid* at 7.

In developing these recommendations the Ontario Safe Schools Action Team “reviewed evidence about what has, and has not, worked in various jurisdictions” and this research was also subsequently reinforced through multidisciplinary consultations with stakeholders.²⁷¹ Their conclusions support prevention programs that have at their heart the collaboration of all members affected by cyberbullying – meaning the members of the school community including at not restricted to students, teachers, administrators, support staff, parents and others.²⁷² They support prevention/intervention plans that address:

- **Education** to develop a deeper awareness and understanding of bullying that helps foster prevention.
- **Assessment** to determine the extent and nature of bullying, perceptions around the issue, and the effectiveness of prevention efforts.
- **Action** to provide identification and prevention strategies for the whole school community and targeted interventions for students that address:
 - School-wide education, embedded in the curriculum, for the entire school population;
 - Routine interventions strategies for those involved in the early stages of bullying; intensive intervention strategies for those involved in repeated bullying and victimization, with possible referral to community/social service resources.
- **Policy** to establish the framework within which bullying prevention in the school is defined, prioritized, implemented, and evaluated.²⁷³

These recommendations are made based on recent research on cyberbullying that suggests effective bullying prevention programs seek to “define bullying and support students who are bullied, as well as those who bully”.²⁷⁴ Moreover, the most effective programs also concentrate on strong leadership modeled by principals and teachers and take a comprehensive approach where all school community members are involved. This

²⁷¹ *Ibid* at 12.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

requires that the level of discourse surrounding bullying prevention is adapted to students at the various stages of educational development (elementary, juniors, senior high school and so on).²⁷⁵ Additionally, there is growing research that suggests attention to gender differences in bullying prevention has a positive impact on the effectiveness of the program, as well as educational practices which are embedded in the student's academic curriculum.²⁷⁶ In conjunction with this, effective bullying prevention programs also share an important focus on developing practices that fostering healthy relationships as bullying is a relationship problem that requires relationship based solutions which promote respect, tolerance and empathy towards victims and even perpetrators.²⁷⁷

The Rapidly Changing/Dynamic Quality of Cyberbullying

Aside from the thorough research that the above recommendations are grounded upon, what I find particularly interesting about the above report is that throughout the entire report the word cyberbullying does not come up even once. This in my view is perhaps one of the strongest examples of the rapidity in which technology can be mobilized towards the creation, expansion, facilitation and proliferation of new and unwanted forms of undesirable conduct. To all those who are skeptical about the relevance of updating our *Criminal Code* to include cyberbullying because they believe existing provisions in the *Code* can be adapted to new forms of online cyberconduct, I pose the following question: how can the *Criminal Code* which has its roots in nineteenth century England, which does not deal comprehensively with the general principles of criminal law, and which contains a series of obsolete provisions adequately address new

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid* at 13.

forms of online criminal conduct, when research conducted in 2005 would be considered out-of-date in 2009? While this question raises difficulties for those who do not share my view that the Criminal Code ought to be updated to include new forms of online criminality including but not limited to cyberbullying, my next example presents even more difficulties for those who disagree with me. Consider the following: I began writing my M.A. thesis in September of 2009, and had finished the first draft of my final chapter on March 31st 2009, however on April 1st 2009 not even 24 hours later my final chapter was outdated because a Private Members Bill was introduced in the House of Commons proposing an act to amend the *Criminal Code* with reference to Cyberbullying.

On April 1st 2009 the Hon. Hedy Fry, (seconded by MP Brian Murphy) introduced a Private Members Bill C-355 “which would amend the *Criminal Code* in order to clarify that cyberbullying is an offence”.²⁷⁸ According to the Dr. Fry

in the digital age, bullying has spread from Canada’s schoolyards to the Internet, so that criminal harassment, defamatory libel, and false messages are now carried out electronically in order to injure reputations, insult, and expose to hate and ridicule others...My bill updates the Criminal Code to clarify that cyberbullying is indeed an offence that will lead to criminal prosecution.²⁷⁹

Bill C-355 is not only supported by a wide array of MPs in the House of Commons, it is “supported by the Canadian Teachers’ Federation, which represents close to 200,000 teachers across the country, and the anti-bullying website, BullyingCanada.ca”.²⁸⁰ In supporting the Private Members Bill Emily Nobel, President of the CTF states

this bill has the potential of being the first concrete step in making the *Criminal Code of Canada* more effective in addressing the issue of

²⁷⁸ Daniel Rubinstein, “Fry Introduces Cyberbullying Bill” Hedy Fry Vancouver Center Website (2 April 2009) online: <<http://www.hedyfry.com/vancentre/node/230>>.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

cyberbullying...These proposed changes to the Criminal Code, along with protective measures already adopted by provincial/territorial governments, would complement the ongoing educational efforts that are currently being undertaken to address cyberbullying.²⁸¹

In supporting these propositions, Katie Neu, co-founder of BullyingCanada.ca stated “times are changing and cyber bullying is becoming more and more of an issue and people don’t really know how to handle the situation...If the *Criminal Code* includes cyberbullying then maybe it can be stopped before it gets any worse”.

Bill C-355 amends section 264 of the *Criminal Code* by adding after subsection 2 harassment which stems directly from communication by means of a computer.²⁸² Section 2.1 states “for greater certainty, paragraphs (2) (b) and (d) apply in respect of conduct that is communicated by means of a computer or a group of interconnected or related computers, including the internet, or any similar means of communication”.²⁸³ Moreover, the Bill also proposes an amendment to 298 by once again adding after subsection 2 an clarifying subsection that notes defamatory libel can be committed by means of a computer and/or related commuturs, or any other similar methods of communicating.²⁸⁴ With respect to False Messages (section 372 of the *Criminal Code*) Bill C-355 would replace it with the following:

372. (1) Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio, computer or a group of interconnected or related computers, including on the Internet, or otherwise, information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

²⁸¹ *Ibid.*

²⁸² Bill C-355, *An Act to amend the Criminal Code (cyberbullying)* 2nd Sess., 40th Parl., 2009, (1st reading).

²⁸³ *Ibid*

²⁸⁴ *Ibid*

(2) Every one who, with intent to alarm or annoy any person, makes any indecent telephone call or sends any indecent electronic message to that person is guilty of an offence punishable on summary conviction.

(3) Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls or sends repeated electronic messages to that person is guilty of an offence punishable on summary conviction.²⁸⁵

The changes to Section 372 of the Criminal Code are perfectly logical given that the computer has become a much more prevalent form of communication, than radio, telegrams, letters, cable and arguably maybe even the telephone. Given the recentness of this Private Members Bill it is difficult to predict how much support it has/or will gain in the federal government. However, one thing is certain, cyberbullying is rapidly becoming a topic of concern for legislators and criminal justice officials, as well as for educators, parents, and school administrators. No matter what happens at this point, even if Bill C-355 is not enacted, educators and school officials can use the Bill C-355 to denounce cyberbullying by raising the argument that it constitutes a serious threat to Canadian values – one which is being dealt with seriously by our elected officials. This progress can serve to motivate victims of cyberbullying, to help shift power imbalances by making them more aware of their rights as Canadian citizens but also by giving them hope by ridding them of the sense of helplessness that often come with online victimization.

²⁸⁵ *Ibid*

Conclusion

In Canadian society there exist many intervention strategies for responding to unwanted behavior. What is required in order to achieve meaningful results in the prevention of unwanted behaviors is intervention strategies that “complement rather than detract from each other and informed intervention approaches guided by various democratic principles”.²⁸⁶ As Canadians we “strive for our society to be governed in a way that promotes and enhances the capacity of all members to participate in their system of governance”.²⁸⁷ Since meaningful participation is a fundamental value in our democratic society, “our governance relationships must be shaped by a concern that people must not be prevented from contributing to our system of governance”.²⁸⁸ The question becomes what does meaningful participation in a democratic society entail?

I assert in this thesis that meaningful participation in a democratic society is more than exercising one’s right to vote for elected officials. It means much more than this because children do not have a right to vote in democratic societies and yet our highest court and our various provincial and federal governments has repeatedly articulated the invested interests all democratic societies have in their youth. Meaningful participation in a democracy can also amount to the right and perhaps even the responsibility to develop certain skills whether it is through access to higher education or through gaining a specialization in a trade. All democracies have a vested interest in promoting well ordered, balanced, and productive citizens – citizens that can hold rewarding jobs, pay

²⁸⁶ Law Commission of Canada, *supra* note 4 at 43.

²⁸⁷ *Ibid* at 46.

²⁸⁸ *Ibid*.

taxes that go towards our social programs, and contribute to the overall health of our system of governance by actively engaging in the politics that govern their lives. The basic point, the centrality of my argument, is that cyberbullying is a cancer that undermines this most fundamental idea. For this reason, I would not categorize it as an administrative wrong but rather as a “real crime” – a conduct so detrimental to the values that Canadians hold dear, that governments and citizens are obligated to respond in kind.

Responding in kind, however, does not mean a one dimensional, reflexive, ill conceived campaign of criminal prosecutions for every case of cyberbullying which occurs. Responding in kind means advocating holistic criminal reform – reform that is based on sound scientific research, research that has been tested empirically and proven effective, and not panicked criminal law reform, reform which is unprincipled, based on fear and that goes against values of transparency, participation, and trust. As such, any criminal law reform must be guided carefully with a response strategy that is rooted in the limitations of a uniquely criminal law approach and one that recognizes the benefits in cooperative response techniques.²⁸⁹ As R.A. Macdonald states, there are numerous tools that government can deploy to achieve a regulatory agenda; the most basic ones are a system of sanctions and rewards but beyond this approach there is a third alternative “...where the idea is to create a climate of compliance rather than a simple fear of sanction or pursuit of an inducement as the motive of action”.²⁹⁰ As such, I advocate criminal law reform that recognizes the roles, limitations and advantages of various intervention strategies. Moreover, such reform should be one that reflects on the

²⁸⁹ *Ibid* at 47.

²⁹⁰ **Cited in** *Ibid* at 47. **See also** R.A. Macdonald, “the governance of Human Agency” (2002) Background Document submitted to the Special Committee of the Senate on Illegal Drugs at ¶ 62.

necessity of developing a criminal law policy on cyberbullying that is clearer and more understandable to the general public in order to enhance the ability of teachers, students, victims, parents, citizens and even bullies to participate meaningfully in the reduction of cyberbullying and cybermisconduct through a combination of criminal law responses and alternative strategies.²⁹¹

²⁹¹ *Ibid* at 48.

LEGISLATION

Statutes

Bill C-355, *An Act to amend the Criminal Code (cyberbullying)* 2nd Sess., 40th Parl., 2009, (1st reading).

Criminal Code, R.S. C. 1985, (1st Supp.), c. 27, s. 264.

Criminal Code, R.S. C. 1985, c. C-46, s. 298.

Criminal Code, R.S. C. 1985, c. C-46, s. 718.

Constitutional Statutes

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being

Schedule B to the *Canada Act 1982* (U.K.), 1982, Section 1.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being

Schedule B to the *Canada Act 1982* (U.K.), 1982, Section 2(b).

CASES

Barrick Gold Corp vs. Lopehandia [2004] 71 O.R. (3d) 416, (2004) 239 D.L.R. (4th) 577,
[2004] O.J. No. 2329 (Ont C.A.).

Colour Your World Corp vs. Canadian Broadcasting Corp. (1998) 38 O.R. (3d) 97.

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 56 ¶ 107.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.

Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497.

R v Deneault (2002) B.C.J. No. 517 (B.C.C.A.).

R v. D.H. (2002) BCPC 0386.

R v D.W. and K.P.D (2002) BCPC 0386 File No. 7221-1.Abbotsford

R v McCraw (1991) 66 C.C.C.(3d) 517 (S.C.C.).

R. v. M. (M.R.), [1998] 3 S.C.R. 393.

R v. Morgentaler, [1988] 1 S.C.R. 30.

R. v. Oakes, [1986] 1 S.C.R. 103.

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825.

SECONDARY MATERIALS AND OTHER SOURCES

Atkinson, Logan and Neil Sargent. *Private Law and Social Life: An Introduction*, 2d ed.

(Markham, Ontario: LexisNexis Canada, 2007).

Beck, Ulrich. *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992)

Braithwaite, John. "Restorative Justice: Assessing Optimistic and Pessimistic

Accounts" (1999) 25 *Crime and Justice* 1.

Brent, Robert H. "Ontario Education Act Amendments Target Cyber-bullies beyond

the schoolyard" (2007) 7 *Risk Management in Canadian Education* 45.

Brown, Karen, Margaret Jackson & Wanda Cassidy, "Cyberbullying: Developing

policy to direct response that are equitable and effective in addressing this special

form of bullying" (2006) 57 *Canadian Journal of Educational Administration and Policy*

1.

Canadian Teachers' Federation, *Addressing Cyberconduct: A Brief to the Department of Justice*

Canada (Ottawa: CTF, 2008) online:<[http://www.ctffce.ca/e/publications/brief/Canadian %20Teachers %20Brief%20to%20Justice%20eng% 20w% 20cover.pdf](http://www.ctffce.ca/e/publications/brief/Canadian%20Teachers%20Brief%20to%20Justice%20eng%20w%20cover.pdf)>.

Cassidy, Wanda & Margaret Jackson, “The Need For Equality in Education: An Intersectionality Examination of Labelling and Zero Tolerance Practices” (2005) 40 *McGill Journal of Education* 435.

Cochrane, Krista R. *Exploring Cyberbullying in Saskatchewan* (Masters of Education, University of Saskatchewan Department of Education Psychology and Special Education, 2008).

DiGuilio, Robert. *Educate, Medicate, or Litigate? What teachers, parents, and administrations must do about student behaviour* (Thousand Oaks, CA: Corwin Press, 2001).

Dukelow, Daphne A. eds., *The Dictionary of Canadian Law*, 3rd ed., (Scarborough, Ontario: Thomson-Carswell, 2004) *s.v.* “Criminal Law”.

Dumont, Helene. “Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay on an Apparent Contradiction” (2001) 39 *Osgood Hall Law Journal* 306.

Evan, William. “Law as an instrument of Social Change” in Alvin W. Gouldner & S.M. Miller eds., *Applied Sociology: Opportunities and Problems* (New York: Free Press, 1990).

Garland, D. “The limits of state sovereignty: Strategies of crime control in contemporary society” (1996) 36(4) *The British Journal of Criminology* 452.

Giroux, Henry A. *The Abandoned Generation: Democracy Beyond the Culture of Fear* (New York: Palgrave Macmillan, 2003).

- Gross, Hyman. *A Theory of Criminal Justice* (New York: Oxford University Press, 1979).
- Herring, Susan C. "Cyber Violence: Recognizing and Resisting Abuse in Online Environments" (2002) 14 *Asian Women* 187.
- Hogg, Peter W. *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997).
- Judge, Elizabeth F. "Trends and Themes in Cyber-libel and Other Online Torts" in The Honourable Mr. Justice Todd Archibald and Mr. Michael G. Cochrane eds., *Annual Review of Civil Litigation* (Toronto: Carswell, 2005).
- Lines, Elizabeth. "Cyber-bullying: Our Kids' new reality a kids help phone research study of kids online" (1 April 2007) online: *Kids Help Phone* <http://org.jeunesse.jecoute.ca/media/21704/2007_cyber_bullying_report.pdf>.
- Lidsky, Lyrrisa Barnett. "Silencing John Doe: Defamation and discourse in cyberspace" (2000) 49 *Duke Law Journal* 855.
- Mackay, A. Wayne & Lyle Sutherland. *Teachers and the Law*, 2nd edition (Toronto: Emond Montgomery Publications, 2006).
- May, P.J. "Social Regulation" in L.M. Salamon, ed., *The Tools of Government — A guide to the New Governance* (New York: Oxford University Press, 2002).
- Roach, Kent. *September 11: Consequences for Canada* (Toronto: University of Toronto Press, 2003).
- . "The New Terrorism Offences and the Criminal Law" in Ronald J. Daniels, Patrick Macklem & Kent Roach eds., *The Security of Freedom: Essays On Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2002).
- Rubinstein, Daniel. "Fry Introduces Cyberbullying Bill" Hedy Fry Vancouver Center

Website (2 April 2009) online: <<http://www.hedyfry.com/vancentre/node/230>>.

Sandals, Liz et al., "Shaping safer schools: A bullying prevention action plan" *Safe Schools Action Team* (November 2005), online: <<http://www.edu.gov.on.ca/eng/healthsafeschools/actionTeam/shaping.pdf>>.

Savoie, Josée. "Crime Statistics in Canada" (2001) 22 No 6 *Juristat* at 3

Schneiderman, David. "Terrorism and the Risk Society" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2002).

Shariff, Shaheen. *Cyber-Bullying: Issues and solutions for the school, the classroom and the home* (New York, NY: Routledge, 2008).

———. "Cyber-Dilemmas in the New Millennium: School Obligations to Provide Student Safety in a Virtual School Environment" (2005) 40 *McGill Journal of Education* 467.

——— & Dianna L. Hoff. "Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace" (2007) 1 *International Journal of Cyber Criminology* 1.

Steven Vago and Adie Nelson, *Law and Society*, Canadian Edition (Toronto: Pearson Prentice Hall, 2004).

Zuker, Justice Marvin A., Randolph C. Hammond & Roderick C. Flynn. *Children's Law Handbook* (Toronto: Thomson Carswell, 2005).

GOVERNMENT DOCUMENTS

Department of Justice of Canada. *The Criminal Law in Canadian Society (Le droit pénal dans la société canadienne)* (Ottawa: Department of Supply and Services, 1982).

———. *Criminal Harassment: A Handbook for Police and Crown prosecutors* (Ottawa: Government of Canada, 2004) online: <http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/ch_e-hc_a.pdf> at 1.

Healy, Patrick. *Restraint in the Criminal Law* (Ottawa: Department of Justice Canada, 2008).

Kowalski, Melanie. *Cyber-crime: Issues, Data Sources, and Feasibility of Collecting Police-Reported Statistics*. (Ottawa: Statistics Canada, 2002), online: <<http://www.statcan.ca/english/freepub/85-558-XIE/free.htm>>.

Law Commission of Canada. *What is a Crime? Challenges and Alternatives* (Ottawa: Government of Canada, 2003).

Law Reform Commission of Canada. *Our Criminal law* (Ottawa: Government of Canada, 1976).

———. *15th Annual Report* (Ottawa: Government of Canada, 1985-86).

———. *Crimes Against the Environment Working Paper 44* (Ottawa: Government of Canada, 1985).

Media Awareness Network. “Young Canadians in a wired world: Phase One” (1 March 2000) online: *Industry Canada* <<http://www.mediaawareness.ca/english/research/YCWW/phaseI/>>.

———. “Young Canadians in a wired world: Phase Two” (1 November 2005)

online: *Industry Canada* < http://www.media-awareness.ca/english/research/YCWW/phaseII/upload/YCWWII_Student_Survey.pdf >.

Statistics Canada, "Computer Access at school and at home" *The Daily Telegraph* (29 October 2002) online: Statistics Canada <http://www.statcan.gc.ca/edu/feature-caracteristique/edu06e_0013-eng.htm>.

———. "Information and Communication Technologies in Schools Survey" *The Daily Telegraph* (10 June 2004) online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/040610/dq040610b-eng.htm>>.