Three Deft Kicks to the Problem of Cyberbullying

Author : Anita Bernstein

Date : February 15, 2021

Ronen Perry, Civil Liability for Cyberbullying, 10 **U.C. Irvine L. Rev.** 1219 (2020).

Torts-minded readers with an under-18 person or two they care about in their lives will appreciate *Civil Liability for Cyberbullying* ("*Cyberbullying*"), published in June by the Israeli private law scholar Ronen Perry. They will find ample theory, doctrine, erudition, and intellectual loft too, but this paper is *peopled*. In both his article and a blog post he wrote about it Perry leads by remembering a person: Megan Meier, who at age 13 heeded a suggestion posted on MySpace in 2006 that she kill herself.

From this opening Perry moves to spend most of his time on three groups whom the law could hold responsible for the harms of cyberbullying. First are young peer offenders. (P. 1226.) Next come what Perry calls "real-life supervisors" (P. 1235): parents, teachers, school administrators. Last are "virtual supervisors, namely platforms that enable juvenile cyber-activity and cyber-wrongdoing," for example Facebook, Instagram, and YouTube. (P. 1245.) Perry has tort liability plans for all these groups. His exposition contains many virtues, of which I will mention three.

Kick #1: Attention to Abettors

Encounters with bullies in my own youth were mercifully scant, but I experienced and witnessed enough to know that the heavy shelf of authority over children's lives—the force wielded by teachers, school administrators, peers' parents, after-school activity managers, summer camp bosses—offered little shelter from this danger. I observed adults in charge, not all of them but too many, appearing to favor aggressors over victims.

That problem remains but ensuing decades brought a little progress. I appreciate the addition of "bullying" to the discourse, mindful that in my adolescence this term was never used to reference a broad-scale problem. Like "stalking," "othering," "mansplaining," "slut-/fat-shaming," and other newcomer-gerunds that speakers apply to conduct they don't like, this word is hard to define with precision and maybe gets thrown around too easily. But it does tell hurt persons that they could be right to consider themselves mistreated, a belief that my generation was brought up to question and resist. Once "bullying" fell in place, a posture of disapproval could enter statutory law. "All state legislatures in the United States require school districts to prescribe and enforce anti-bullying policies," Perry notes (P. 1223), dropping a footnote with citations that run from Ala. Code to Wyo. Stat. Ann.

Good. But not good enough as a response to preventable, deterrable, remedy-able wrongdoing that causes people to suffer. Perry wants behavior to change. He has tortfeasors in mind, choices to influence.

Because they have more money than a young perp who torments a peer, abettors are central to the *Cyberbullying* cast. Perry gives them what they deserve. In my first reading of the article I objected a bit to his use of "supervisors" to describe adults on the scene of children's lives, and more so to his characterization of online platforms as "virtual supervisors." People and entities can undertake the activity of supervision, I thought, but supervisor is not their identity. It seemed to me that Perry had gotten ahead of his evidence. I went on to drop my objection. *Oh hell yes you are*. If nobody forced you to interact with perpetrators, then you can be their supervisor when the law has drawn that conclusion. There is no bullying without bullies, and people who enable the actions of primary wrongdoers have earned the tort liability Perry has in store for them.

Kick #2: Tort Well Deployed

In his blog version of *Cyberbullying* posted in June 2019, Perry contrasted tort liability to an alternative that the United Kingdom had recently announced: New codes of conduct could be promulgated to hold internet businesses responsible for harms that their platforms or services fostered. A white paper published in April of that year had proposed taxes on these businesses to pay for an independent regulator tasked with enforcing compliance.

Perry contended that a "blind spot" marred that conclusion: The British government omitted tort liability from its fix of the problem. To be fair to the white paper, it had a wider range of online harms than cyberbullying in mind. Terrorists' access to communication channels, for example, is not among the ills that tort can readily address.

But Perry is right to deploy tort against cyberbullying. The prospect of being ordered to pay cash damages can steer an individual toward safety and away from endangerment. Perry's tripartite lineup of tortfeasors—(1) those who cyberbully, (2) those with power over cyberbullies in the geographic environments of schools and homes, and (3) those who provide cyberbullying an online location to reap its mischief—is in reach of a deterrence strategy: while admitting that almost all young cyberbullies are judgment proof (Pp. 1262-63), Perry concludes plausibly that "relying on victims' common sense" (P. 1263) in the selection of defendants will conserve judicial time well enough and so tort liability ought to reach children too.

Young miscreants' choices are peripheral here, however, because children lack the power to inflict harm that the law considers significant. Regulators necessarily focus on people who can alter their behavior in response to incentives. So seen, adults nearby and businesses at a distance that should have used ordinary care to prevent or mitigate the harms of cyberbullying are at least as central to a law-based response as the text of a government-authored prohibition.

Tort liability pressed on these defendants offers strengths that criminalization and anti-bullying rulebooks lack. Because injured persons initiate claims without having to pay fees up front, law-based sanctions can land on a responsible party even when enforcers have shrugged off this wrongdoing, when bullies are richer or more prominent than their victims, and when mens rea is either absent or found only in the roily minds of inarticulate children. Tort is also better than codified crimes and regulation at recognizing the danger of inaction and inattention.

Characteristics of origin affect the conditions that legal instruments are suited to address. A crime or codified regulation starts its life as a published official incursion on individual liberty by the government; a tort starts out as a perception that one has been wrongfully injured. Perry's emphasis follows tort priorities. *Cyberbullying* tellingly includes a long paragraph that gathers harmful impacts on young human beings (Pp. 1222-23) while relegating its definition of cyberbullying to a footnote that string-cites others' definitions. (P. 1221 n.9.)

That's tort. Jurors know breach of duty when they feel it and condemn it when they find it: they don't share the public-law inclination to pause over the possibility that government overreaches when it tries to stop something bad. Like the law of negligence that he enlists, Perry cares more about harm to individuals than about claims of right (to free speech, for example) against the state.

In his last sentence, Perry acknowledges that repair of the cyberbullying problem probably calls for additional tools, not just his: he says he is not "contesting the possible need for a more comprehensive framework" than civil actions for damages. (P. 1272.) *Cyberbullying*, in helpful contrast to the UK white paper, chooses pluralism. It frames its solution as part of a larger response.

Kick #3: Law and Economics Usefully Applied

Taking a leaf from Perry, who called *Cyberbullying* "[a] recent study" without naming its author, I mention a law review article, at age 15 no longer recent, that asked what remains of law and economics after one subtracts out its "tautology, circularity, vagueness, and evasion of pertinent political questions." This article did find three things still present in law and economics as a school of thought: a focus on "the policymaker" (in contrast to an external perspective like that of the skeptic or critical theorist), a goal of improved social welfare, and an ex ante rather than ex

post approach to problems that the law can reach.

Cyberbullying embraces the label. Perry announces "a law and economics analysis" (P. 1220) and "an efficient technologically-assisted model." (P. 1225.) He says that "[o]nly if expected liability is equivalent to the expected externalized cost will the potential injurer internalize that cost and take cost-effective precautions" (P. 1249), a remark that one needs to be an economic analyst of law to make. With respect to the heart of what *Cyberbullying* wants to deliver—liability for supervisors—Perry adverts to "[t]he classical economic justification" (P. 1255) for this liability. *Cyberbullying* also shares the above-mentioned signature traits of law and economics in that it addresses policymakers and social welfare and works with an ex ante perspective.

Keeping in mind his two categories of supervisors, Perry identifies precautions they could take against cyberbullying that they now omit because the law does not steer them toward investments in safety. Parents and school authorities could educate children to know that cyberbullying is wrong, impose surveillance technology on children's machines (Perry seems to like this precaution best), and dish out punishments and rewards aimed at improving behavior (P. 1255). Members of the "virtual supervisors" category, i.e. online platforms, have different measures at hand. Perry says they could limit or prohibit posts by users who do not identify themselves (the MySpace peer who in 2006 told Megan Meier that the world would be better without her wrote this message anonymously), collect and store data about users, and turn over this record at the behest of tort claimants who do not know who injured them. (P. 1259.)

In Perry's economics-flavored fix of cyberbullying, the law would force each of the two supervisors to correct or complement a safety-related shortfall of the other. Parents and schools have a lot of power over potential cyberbullies but cannot easily gain information about a child's online conduct needed to inform their task of supervision. (Pp. 1255-56.) Social media and other electronic platforms are too far from children to exercise direct supervision (P. 1262), but they've got the information goods, most pertinently the identity of a particular cyberbully. Safety gaps can be expressed as costs. Perry spots their cheapest avoider.

While very much a work of law and economics, *Cyberbullying* transcends the limitations of the genre. Visit the Law and Economics Commons, a site that provides links to oft-downloaded contemporary law review articles, if you need a reminder of how seldom an economic analyst will make an extended case for more tort liability as a source of welfare. Deterrence, incentives, cost internalization, and problems of missing information are familiar concepts, but few law and economics scholars join Ronen Perry in applying this terminology to enhancing the dignity, comfort, safety, and peace of vulnerable individuals.

Cite as: Anita Bernstein, *Three Deft Kicks to the Problem of Cyberbullying*, JOTWELL (February 15, 2021) (reviewing Ronen Perry, *Civil Liability for Cyberbullying*, 10 **U.C. Irvine L. Rev.** 1219 (2020)), https://torts.jotwell.com/three-deft-kicks-to-the-problem-of-cyberbullying/.