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### When the Story is Too Good to be True: A Lawyer's Role in Resisting the Lure of Narrative

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## WHEN THE STORY IS TOO GOOD TO BE TRUE: A LAWYER'S ROLE IN RESISTING THE LURE OF NARRATIVE

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SCOTT BROWN\*

### INTRODUCTION: PRELUDE TO A TALE

Lawyers love to use stories to their own advantage. Many lawyers know of at least one case where a sympathetic plaintiff in possession of a sad story and little evidence of causation has nevertheless carried the day. The power of a good story is why an attorney so often strives to mold the facts of their cases into a tale with clear heroes and villains.<sup>1</sup> The importance of storytelling in legal persuasion is the subject of numerous academic articles<sup>2</sup> and encouraged in legal writing textbooks and trial practice guides used all over the country.<sup>3</sup> In short, lawyers acknowledge that stories have enormous persuasive power and are an important piece of the lawyer's toolbox.<sup>4</sup>

But what happens when the shoe is on the other foot? Lawyers are in no way immune to a compelling story. Legal actors—in the role of both advocate and legislator—can be so moved by stories that they act in ways they might not if they took a more dispassionate view of the facts.

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1. See Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 768-69 (2006).

2. See, e.g., Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127 (2008); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53 (2008).

3. See, e.g., Brian J. Foley, *Applied Legal Storytelling. Politics, and Factual Realism*, 14 J. LEGAL WRITING INST. 17 (2008); Stephanie Kane, *Narrative, the Essential Trial Strategy*, 34 LITIG. 52, 52 (2008).

4. "Storytelling starts long before the opening statement. The trial lawyer enters this story world when she conducts her first interview, and she remains in that world throughout the trial. Narrative technique is thus the essential trial strategy." Kane, *supra* note 3, at 53.

The recent spate of high profile bullying stories over the past few years and the reaction to those stories by prosecutors, legislators, and the legal academy provide examples of lawyers' susceptibility to the power of an emotional narrative.

Consider the story of Phoebe Prince, a fifteen-year-old freshman at a South Hadley, Massachusetts high school who committed suicide in January 2010,<sup>5</sup> and the reaction of legal actors in the aftermath. Media reports of this incident presented a clear and tragic narrative. The story quickly spread that Ms. Prince, whose family had recently moved to South Hadley from Ireland, had been relentlessly bullied by a group of popular teenagers at the high school.<sup>6</sup> Media outlets reported that Ms. Prince had been called an "Irish slut" and a "whore" by girls in her class.<sup>7</sup> According to those reports, on the day she died, one of her tormentors drove past her in a car, screamed an insult, and threw an energy drink at her.<sup>8</sup> Ms. Prince went home and hung herself in her closet.<sup>9</sup>

Those reporting the story in both the print media and on television immediately drew a direct causal connection between the actions of the teen bullies and Ms. Prince's suicide. Headlines included *Phoebe Prince, South Hadley High School's "new girl" driven to suicide by teenage cyber bullies*;<sup>10</sup> *Bullied to Death? New Insight on Teen's Final Hours*;<sup>11</sup> and *Young, targeted, and alone*.<sup>12</sup> Ms. Prince was the subject

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5. Susan Donaldson James, *Immigrant Teen Taunted by Cyberbullies Hangs Herself*, ABC NEWS, Jan. 26, 2010, <http://abcnews.go.com/Health/cyber-bullying-factor-suicide-massachusetts-teen-irish-immigrant/story?id=9660938>; Kevin Cullen, *The Untouchable Mean Girls*, BOS. GLOBE, Jan. 24, 2010, [http://www.boston.com/community/moms/articles/2010/01/24/the\\_untouchable\\_mean\\_girls/](http://www.boston.com/community/moms/articles/2010/01/24/the_untouchable_mean_girls/); Yunji De Nies, *Mean Girls: Cyberbullying Blamed for Teen Suicides*, ABC NEWS, Jan. 28, 2010, <http://abcnews.go.com/GMA/Parenting/girls-teen-suicide-calls-attention-cyberbullying/story?id=9685026>; *Mass. High School Girl Takes Life After Allegedly Taunted by Cyber Bullies*, FOXNEWS.COM, Jan. 26, 2010, <http://www.foxnews.com/story/2010/01/26/mass-high-school-girl-takes-life-after-allegedly-taunted-by-cyber-bullies/>.

6. Cullen, *supra* note 5.

7. *Id.*; Alyssa Giacobbe, *Who Failed Phoebe Prince?*, BOSTON MAGAZINE, June 2010, available at <http://www.bostonmagazine.com/2010/05/phoebe-prince/>.

8. Alyssa Giacobbe, *Who Failed Phoebe Prince?*, BOSTON MAGAZINE, June 2010, available at <http://www.bostonmagazine.com/2010/05/phoebe-prince/>.

9. *Id.*

10. Helen Kennedy, *Phoebe Prince, South Hadley High School's "New Girl" Driven to Suicide by Teenage Cyber Bullies*, N.Y. DAILY NEWS, Mar. 29, 2010, <http://www.nydailynews.com/news/national/phoebe-prince-south-hadley-high-school-new-girl-drive-suicide-teenage-cyber-bullies-articles-1.165911>.

11. *AC360°: Bullied to Death? New Insight on Teen's Final Hours* (CNN television broadcast, Apr. 9, 2010) *See generally* *Bullied to Death? New Insight on Teen's Final Hours: Join the Live Chat*, CNN (Apr. 9, 2010, 9:45 PM), <http://ac360.blogs.cnn.com/2010/04/09/>

of a cover story in People Magazine, again with the caption “*Bullied to Death?*”<sup>13</sup> The suicide generated hundreds of media commentaries from experts and parents about teens, bullying (both cyber and traditional) and high school. Internet comments on those stories are innumerable; a single story on the New York Times web site two months after the story first broke generated 533 comments.<sup>14</sup>

The legal community of Massachusetts reacted to the story of Ms. Prince’s suicide in two ways. First, the local District Attorney’s office charged six classmates of Ms. Prince with felonies in both juvenile and criminal courts.<sup>15</sup> In announcing the charges, District Attorney Elizabeth Scheibel asserted that the “South Hadley Six,” as the teens came to be known, had engaged in a “three month campaign of verbally abusive, assaultive behavior and threats of physical harm . . . [that] far exceeded the limits of normal teenage relationship-related quarrels.”<sup>16</sup> The two male members of the “South Hadley Six,” aged seventeen and eighteen at the time of their alleged actions, were charged with statutory rape.<sup>17</sup> Five of the six teens were charged with other crimes, including stalking, criminal harassment, and most seriously, violation of civil rights with bodily injury.<sup>18</sup> These crimes carried sentences of up to ten years in prison.<sup>19</sup>

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bullied-to-death-new-insight-on-teens-final-hours-join-the-live-chat/.

12. Susan Adelson, Op-Ed, *Young, targeted and alone*, DAILY HAMPSHIRE GAZETTE, Mar. 3, 2010.

13. Liz McNeil, *Suicide in South Hadley Bullied to Death?*, PEOPLE, Feb. 22, 2010, at 63, available at <http://www.people.com/people/archive/article/0,,20350702,00.html>.

14. Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate’s Suicide*, N.Y. TIMES, Mar. 29, 2010, at A14, available at [http://www.nytimes.com/2010/03/30/us/30bully.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/03/30/us/30bully.html?pagewanted=all&_r=0).

15. *Id.*

16. *Prosecutor: 9 Teens Charged in Bullying that Led to Girl’s Suicide*, CNN (Mar. 30, 2010), <http://www.cnn.com/2010/CRIME/03/29/massachusetts.bullying.suicide/index.html>.

17. Alysha Palumbo, *Six Teenagers, Three Juveniles Charged in ‘Unrelenting’ Bullying of Phoebe Prince*, NEW ENG. CABLE NEWS (Mar. 29, 2010), [http://www.necn.com/news/new-england/\\_NECN\\_Six\\_Teenagers\\_Three\\_Juveniles\\_Charged\\_in\\_unrelenting\\_Bullying\\_of\\_Phoebe\\_Prince\\_NECN-252149401.html](http://www.necn.com/news/new-england/_NECN_Six_Teenagers_Three_Juveniles_Charged_in_unrelenting_Bullying_of_Phoebe_Prince_NECN-252149401.html).

18. *Id.*

19.

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States. Any person convicted of violating this provision shall be fined not more than one thousand dollars or imprisoned not more than one year or both; and if bodily injury results, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than ten years, or both.

The second way in which the legal community reacted to the Prince story was through legislative action. Within two days of the Prince suicide, legislators were openly energized to complete work on anti-bullying legislation already under consideration after previous high profile suicides.<sup>20</sup> The Joint Committee on Education's co-chairwoman, State Representative Martha M. Walz, urged the committee to finish quickly, stating "[w]hat happened in South Hadley underscores the importance of stopping bullying as rapidly as possible . . . ."<sup>21</sup> On May 3, 2010, less than five months later, the Massachusetts State legislature enacted a comprehensive anti-bullying statute, imposing new requirements on schools to engage in bullying prevention and intervention.<sup>22</sup> A number of lawmakers candidly admitted they were motivated by the Prince story and similar instances. While speaking on the floor of the House in March, Representative Walz stated that accounts of bullying-related suicide "haunted her" and that she believed the new legislation "sends a message that things must change," and opposed an amendment that would have narrowed the definition of bullying because bullies must not be let "off the hook."<sup>23</sup> A week earlier Senator James Eldridge asserted that the new legislation "point[s] the finger and say[s] [bullying is] unacceptable."<sup>24</sup> Senator Gale Candaras inveighed that the new statute "sends a clear message that [bullies] are going to be held accountable."<sup>25</sup> One commentator went as far to say that the legislators seemed to view the new anti-bullying law as providing a form of closure for themselves, the victims and the public at

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MASS. GEN. LAWS ch. 265, § 37 (2012).

20. James Vaznis, *Bullying legislation gains new urgency*, BOS. GLOBE (Jan. 26, 2010), [http://www.boston.com/news/local/massachusetts/articles/2010/01/26/beacon\\_hill\\_lawmakers\\_see\\_urgent\\_need\\_for\\_antibullying\\_bill/](http://www.boston.com/news/local/massachusetts/articles/2010/01/26/beacon_hill_lawmakers_see_urgent_need_for_antibullying_bill/); Ann-Marie Dorning, *Anti-Bullying Efforts Gain in Mass.*, ABC NEWS (Nov. 17, 2009), <http://abcnews.go.com/WN/anti-bullying-efforts-gain-mass/story?id=9103058>.

21. Vaznis, *supra* note 20.

22. An Act Relative to Bullying in Schools, St. 2010, ch. 92 (codified as amended at MASS. GEN. LAWS ch. 69, § 1D; ch. 71, §§ 37H, 37O, 93; ch. 71B, § 3; ch. 265, §§ 43, 43A; ch. 268, § 13B(3); and ch. 269, § 14A (2012)).

23. *Massachusetts House Session: S 2323 Relative to Bullying in Schools*, The Bills in Third Reading Committee (Mar. 18, 2010) (statement of Rep. Martha Walz) (The amendment failed, 8-142). *S 2323 Relative to Bullying in Schools Before the Bills in Third Reading Committee*, Mass. House Session (Mar. 18, 2010) (statement of Rep. Martha Walz). The amendment failed 8-142. *Id.*

24. *Massachusetts Senate Session, School Bullying: Question Came on Engrossing S 2313 Relative to Bullying in Schools* (Mar. 11, 2010) (statement of Sen. James B. Eldridge). *Question Came on Engrossing S 2313 Relative to Bullying in Schools*, Mass. Senate Session, (Mar. 11, 2010) (statement of Sen. James B. Eldridge).

25. *Id.* (statement of Sen. Gale Candaras).

large.<sup>26</sup>

The reaction in Massachusetts is far from unique. Other high profile bullying stories have led to the twin response of criminal charges against the bullies and new anti-bullying legislation. When a thirteen-year-old from Missouri named Megan Meier killed herself after being rejected on MySpace by a person she believed to be a local boy, it was a deeply personal and painful time for the family.<sup>27</sup> But when the truth behind the suicide came to light a full year later revealing that she had been the victim of a cruel hoax fabricated by a former friend, the mother of that friend, and the mother's teenage employee, the story exploded.<sup>28</sup> The nationwide outrage convinced a United States Attorney in Los Angeles to charge the mother, Lori Drew, with federal conspiracy and computer fraud crimes that had been enacted for purposes far afield from prosecuting a bully.<sup>29</sup> He convened a grand jury only after the local District Attorney declined to bring charges, stating that however reprehensible Drew's actions, they did not violate Missouri law.<sup>30</sup> Within a year of the story breaking, Missouri modified its existing criminal harassment statute, broadening the definition to include internet communication and changing the crime from a misdemeanor to a felony

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26. See Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 436 (2012).

27. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, <http://www.nytimes.com/2007/11/28/us/28hoax.html>.

28. *Id.* The Meier case involved inexplicable and cruel behavior by an adult. Lori Drew, her daughter, who had formerly been a friend of Meier, and the nineteen-year-old employee of her advertising business created a fake MySpace profile purporting to be "Josh Evans" a sixteen-year-old boy who had recently moved to the area. "Josh" and Meier began chatting via messages sent over MySpace. Several weeks later "Josh" told Meier that he had heard rumors about her and that he did not want to be friends anymore. The final message from "Josh" stated that the world would be better off without her. Shortly after receiving this message, Meier hung herself. *Key Events in the Megan Meier Case*, USA TODAY (May 15, 2008), [http://usatoday30.usatoday.com/tech/products/2008-05-15-1838288037\\_x.htm](http://usatoday30.usatoday.com/tech/products/2008-05-15-1838288037_x.htm); Lauren Collins, *Friend Game*, NEW YORKER (Jan. 21, 2008), <http://www.newyorker.com/magazine/2008/01/21/friend-game>; Steve Pokin, *No Charges to be Filed Over Meier Suicide*, SUBURBAN J. (Dec. 4, 2007), [http://www.stltoday.com/suburban-journals/no-charges-to-be-filed-over-meier-suicide/article\\_fd48db3e-b0ad-5332-b5a5-4ac231bc378c.html](http://www.stltoday.com/suburban-journals/no-charges-to-be-filed-over-meier-suicide/article_fd48db3e-b0ad-5332-b5a5-4ac231bc378c.html).

29. Scott Glover & P.J. Huffstutter, *'Cyber Bully' Fraud Charges Filed in L.A.*, L.A. TIMES, May 16, 2008, <http://articles.latimes.com/2008/may/16/local/me-myspace16>. Drew was indicted on charges to violate 18 U.S.C. § 371 by agreeing with her daughter and her employee to break MySpace's term of service agreement by creating a false account. The false account allegedly violated 18 U.S.C. § 1030(a)(2)(C) because Drew used a computer to gain access to information from another protected computer. Professor Rebecca Lonergan of the University of Southern California noted at the time that "[t]his is an extremely aggressive prosecution . . . I'm not sure the courts are going to let this stand." *Id.*

30. Jennifer Steinhauer, *Woman Indicted in MySpace Suicide Case*, N.Y. TIMES, May 16, 2008, <http://www.nytimes.com/2008/05/16/us/16myspace.html>.

punishable by four years in prison for repeat offenders and adults who target minors.<sup>31</sup> Once again lawmakers behind the legislation spoke of being directly influenced by the tragedy, with Governor Matt Blunt stating that “[s]ocial networking sites and technology have opened a new door for criminals and bullies to prey on their victims, especially children.”<sup>32</sup> Nationally, Congresswoman Linda Sanchez of California and Congressman Kenny Hulshof of Missouri introduced the Megan Meier Cyberbullying Prevention Act, which would have made cyberbullying a federal crime.<sup>33</sup>

Yet another high profile example of this phenomenon is the story of New Jersey college freshman Tyler Clementi, who committed suicide by jumping off the George Washington Bridge. The media wasted little time in seizing upon the narrative that Tyler had killed himself after learning that his roommate, Dharun Ravi, had watched and publicized Clementi’s tryst with another man.<sup>34</sup> When prosecutors chose to bring invasion of privacy charges against Ravi strident voices in the media demanded stronger charges be brought, after which felony bias crime charges were added to the indictment.<sup>35</sup> At the same time, the legislature enacted stringent and sweeping new anti-bullying legislation.<sup>36</sup>

So lawyers are human after all, and respond to powerful emotional narratives like everyone else. But should they? Using the recent rash of

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31. MO. ANN. STAT. § 565.090 (1999).

32. Jim Salter, *Mo. Internet Harassment Bill Passed After MySpace Suicide*, USA TODAY (July 1, 2008), [http://www.usatoday.com/news/nation/2008-06-30-internet\\_N.htm](http://www.usatoday.com/news/nation/2008-06-30-internet_N.htm).

33. Megan Meier Cyberbullying Prevention Act, H.R.1966, 111th Cong. (2009).

34. *Tyler Clementi Suicide Result of Hate Crime?*, CBS NEWS (Sept. 30, 2010), <http://www.cbsnews.com/stories/2010/09/30/earlyshow/main6914403.shtml>; Carlin DeGuerin Miller, *Tyler Clementi Suicide: Lawyer Confirms Student’s Suicide, Molly Wei and Dharun Ravi Face Charges for Sex Tape*, CBS NEWS (Sept. 29, 2010), [http://www.cbsnews.com/8301-504083\\_162-20018088-504083.html](http://www.cbsnews.com/8301-504083_162-20018088-504083.html); Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, at A1. The Clementi suicide, and the spate of high profile gay youth suicides surrounding it, lead directly to a nationwide outreach project led by gay columnist and activist Dan Savage titled “It Gets Better,” which is strongly supported by high profile gay celebrities such as Ellen DeGeneres and mainstream groups like the San Francisco Giants. IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/> (last visited May 22, 2015).

35. See Winnie Hu, *Legal Debate Swirls Over Charges in a Student’s Suicide*, N.Y. TIMES, Oct. 1, 2010, at A15; Lisa Foderaro, *Roommate Faces Hate-Crime Charges in Rutgers Case*, N.Y. TIMES, Apr. 20, 2011, at A19.

36. Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1 (documenting the initial charges in the immediate aftermath of the suicide); Lisa Foderaro, *Roommate Faces Hate-Crime Charges in Rutgers Case*, N.Y. TIMES, Apr. 20, 2011, at A19 (detailing the national attention surrounding the case); *id.* (asserting that the national furor lead to both the “nation’s toughest law against bullying” and the seeking of bias crime charges against Mr. Ravi from a grand jury).

bullying stories, and the response of lawyers and legislators to those stories as examples, this article will explore the question of whether lawyers should be more aware of their own vulnerability, and temper their response to an emotionally gripping story when making legal decisions. It will examine the prevalence of bullying as it exists, as opposed to mere prevalence of coverage. It will look at whether criminal charges brought against bullies serve as appropriate punishment for those bullies and an effective deterrent against future bullying. It will further examine whether the legislation enacted in the wake of a tragic suicide related to bullying is truly an effective response to the age-old problem of bullying. Or, to put it in storytelling terms, are lawyers and legislators incorrectly looking at bullying as a simple morality tale when what they really are dealing with more closely resembles a Russian novel, with a complex plot and multifaceted characters.

#### I. THE DANGERS OF BECOMING SWEEPED UP BY, WITH, AND IN, THE STORY

Whenever attorneys react to a compelling story, especially one that has gained prominence in the media, they need to be wary of a common phenomenon. The accumulation of high profile news coverage is apt to lead to unreliable understanding of the problem that lawyers seek to address. Put another way, the popular press can create a “media construction of reality”<sup>37</sup> that differs significantly from actual reality. This faulty construction results from several typical in media presentation.

##### A. *Problem One: The Plural of Anecdote is Not Data*

There is a tendency in the media to link several isolated stories together to create the impression of a greater trend. When this happens, people can become convinced that certain serious social problems plague us significantly out of proportion to their actual existence.<sup>38</sup> Similarly, high levels of media coverage can serve to raise awareness of a long troublesome issue while falsely giving the impression of a new crisis.<sup>39</sup>

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37. Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 760 (2011).

38. *Id.*

39. See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) (examining the increase of crime coverage in the American news media at the same time as drastic decreases in crime rates during the 1990s and early twenty-first century); *id.* (noting that a plurality of poll respondents believed every year but one that crime rates had actually increased).



There is evidence that this is exactly what has happened with the current perception that there is an epidemic of bullying among the nation's young people.<sup>40</sup> This perception may be fueled not just by individual stories but also by reports detailing the new form that some bullying takes. Young people can now be subjected to taunts and abuse via social media and texts. This form of bullying is more insidious, the media's theory goes, because the victim does not have a safe haven to which they can retreat after the school day ends. Moreover, abuse inflicted on social media might be more public than abuse doled out in person and thus more harmful.<sup>41</sup> Even so, this only means that there is a new way to bully, not that there is an epidemic of bullying.

Furthermore, the term bullying has become fashionable and is often used to encompass behavior that previously would have been described with different terms. For instance, the Tyler Clementi incident has been widely described as a bullying case, but the term appears inapt due to the lack of direct aggression and indirect nature of his roommate's actions. Moreover, as his roommate's behavior was not repetitive, it would not meet most legal definitions of bullying.<sup>42</sup>

Likewise, in the past the term "bullying" was more often used to describe conflicts between minors rather than those between adults,<sup>43</sup> whereas now the term has been widely applied to minors who behave abusively towards adults.<sup>44</sup> The more expansive use of the term bullying

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40. Compare studies such as Finklehor and Smith below on the actual level of bullying amongst American youth to the roughly fifteen-fold increase in the term "Bullying" in literature since 1994, using the term "Bullying" in Google ngram as provided by Jean-Baptiste Michel *et al.*, *Quantitative Analysis of Culture Using Millions of Digitized Books*, 331 *Science* 176 (2011), ngram at [http://books.google.com/ngrams/graph?content=Bullying&year\\_start=1950&year\\_end=2008&corpus=5&smoothing=3](http://books.google.com/ngrams/graph?content=Bullying&year_start=1950&year_end=2008&corpus=5&smoothing=3).

41. Jan Hoffman, *As Bullies Go Digital, Parents Play Catch-up*, N.Y. TIMES, Dec. 4, 2010, at A1 ("[O]nline bullying can be more psychologically savage than schoolyard bullying. The Internet erases inhibitions, with adolescents often going further with slights online than in person.").

42. See, e.g., MASS. GEN. LAWS ch. 71, § 370 (2012); VT. STAT. ANN. tit. 16, § 11 (2004). But see N.J. STAT. ANN. § 18A:37-14 (passed after the Clementi suicide).

43. For example, there are roughly three times as many Google hits for "schoolyard bully" as for "workplace bully," two commonly used phrases.

44. See, e.g., Greg Botelho, *Emotional, Widespread Reaction to Harassment of 68-Year-Old Bus Monitor*, CNN (June 23, 2012), <http://www.cnn.com/2012/06/22/us/new-york-bus-monitor-reaction/index.html>; Eyder Peralta, *Students Seen Bullying Bus Monitor Suspended For A Year*, NPR (June 29, 2012), <http://www.npr.org/blogs/thetwo-way/2012/06/29/156011740/students-seen-bullying-bus-monitor-suspended-for-a-year>; John Schriffen, *Students Apologize to Bullied Bus Monitor*, ABC NEWS (June 22, 2012), <http://abcnews.go.com/blogs/headlines/2012/06/students-apologize-to-bullied-bus-monitor/>. These are three amongst hundreds of media accounts applying the term "bullied" to an adult bus monitor who received vicious verbal abuse from students.

could both add to a perception that bullying is on the rise and signal awareness of the purported epidemic.<sup>45</sup> In light of this, it is incumbent upon lawmakers to take a measured approach to determining the degree and frequency of the problem before rushing to solve the “new” bullying problem.<sup>46</sup>

B. *Problem Two: The Real World is Complicated*

Some media stories are simply false and these falsehoods can create significant social unease. Among such false stories are the “death panels” supposedly created by the Affordable Care Act, the family farms lost to “the death tax,” and the existence of “pharm parties” where teens put their parents’ prescription drugs in a bowl and then consume a random handful of pills.<sup>47</sup> Despite the lack of any factual basis to these stories, their pervasive presence in the media has an enormous power to shape popular belief. This power is particularly strong with people who are not very well informed on the issues at the outset.<sup>48</sup> Even more problematic is that once a story has been widely reported in the media, people continue to believe in its veracity even when they receive convincing evidence to the contrary.<sup>49</sup>

Individuals are especially susceptible to continued belief when the original, false story reinforces their ideological view of the world.<sup>50</sup>

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45. See Michel *et al.*, *supra* note 40; Beale, *supra* note 40, on the increased use of the term and the effect of increased media attention on public attitudes, respectively.

46. David Finkelhor *et al.*, *Trends in Childhood Violence and Abuse Exposure: Evidence From 2 National Surveys*, 164 ARCHIVES PEDIATRIC & ADOLESCENT MED. 238, 240 (2010) (showing statistically significant decreases in both physical and emotional bullying across two surveys in 2003 and 2008); *see id.* (reporting a thirty-two percent decline in reports of physical bullying from the first study to the second); *see also id.* (noting a smaller, but still statistically significant, decrease in emotional bullying at the P>.05-level).

47. Levit, *supra* note 37, at 760-61. Levit cites an Iowa economist who has provided tax advice to numerous farmers in the Mid-West and never seen an instance of a family farm lost to estate taxes. *Id.* at n.65. Similarly, there has been no documentation that pharm parties actually have occurred. *Id.* at 67 (citing Jack Schafer, *Back to School Pharm Party*, SLATE (Sept. 8, 2010), <http://www.slate.com/id/2266574/> (considering that the notion of such parties is absurd because a drug user has “no . . . incentive to randomly share his parents’ Oxycontin if there is a chance that all he’ll get in return is his pal’s over-the-counter allergy meds and Advil.”)).

48. Levit, *supra* note 37, at 760.

49. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 323 (2010); *see also* Dave Cullen, Op-Ed, *Don’t Jump to Conclusions About the Killer*, N.Y. TIMES, July 22, 2012, at SR5.

50. Nyhan & Reifler, *supra* note 49, at 323. For instance, Americans who supported President Bush were far more likely to believe Iraq possessed weapons of mass destruction prior to the beginning of the Iraq war than those who did not. *Id.* at 304. The tendency of people to shape their perceptions of even complicated news stories according to their ideological disposition is quite striking. In one study, subjects who described themselves as

Once an individual reaches an opinion, it is difficult to correct and may even be strengthened after the truth is made clear.<sup>51</sup> Add both the speed of transmission and the lack of fact checking associated with social media like Facebook and Twitter, and the potential exists for media stories to create a tidal wave of misinformation.

This type of factual inaccuracy has dogged the bullying stories that have become media sensations. For instance, in the Prince case, it was widely believed that one of the alleged bullies posted “mission accomplished” to a memorial page that had been created for Prince on Facebook, which if true, would indicate true heartlessness and intent to goad Prince to suicide on the part of the writer.<sup>52</sup> However, that the anonymous comments purportedly made by the bullies have never been definitively linked to them, resulting in a widely held belief with sparse factual backing.<sup>53</sup> At worst the story is pure fiction: no evidence ever turned up that the Facebook posts ever existed or if they existed were made by any of the six students.<sup>54</sup>

The public’s perception of what happened to Tyler Clementi was similarly inaccurate. Although “it became widely understood that a closeted student at Rutgers had committed suicide after video of him having sex with a man was secretly shot and posted online,” none of this was accurate: Clementi was openly gay, no one observed him having sex, and no video was ever posted.<sup>55</sup> Mr. Clementi committed suicide three days after an incident in which his roommate, Mr. Ravi, and others watched Mr. Clementi and another man kiss on the bed in the shared

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either liberal or conservative were presented with differing stories about welfare proposals. Self-identified liberals tended endorsed welfare proposals with very harsh terms when they were told that the plan was supported by the Democratic party. Self-identified conservative were likely to endorse welfare plans with more generous benefits than have ever been offered in the United States when they were told that it was the preferred plan of the Republican party. Ezra Klein, *Unpopular Mandate, Why Do Politicians Reverse Their Positions?*, NEW YORKER, June 25, 2012, at 31.

51. Nyhan & Reifler, *supra* note 50, at 323.

52. Alyssa Giacobbe, *Who Failed Phoebe Prince?*, BOS. MAG., (June 2010), <http://www.bostonmagazine.com/articles/2010/05/phoebe-prince/>.

53. *See id.* (making the inference that the bullies and the Facebook posts were linked without evidence, as well as misidentifies the Facebook page as Phoebe’s personal page rather than a memorial set up after her suicide.)

54. *Id.* Interestingly, the actual existence of the quotes is still at question; while Facebook users are many things, the one thing they most certainly are not is anonymous, and the service cracks down thoroughly on any pseudonymous or anonymous accounts; *see also*, Emily Bazelon, *What Really Happened to Phoebe Prince?* SLATE, July 20, 2010, at 1, available at [http://img.slate.com/media/31/100721\\_Bull-E\\_final\\_3.pdf](http://img.slate.com/media/31/100721_Bull-E_final_3.pdf).

55. Ian Parker, *The Story of a Suicide: Two College Roommates, a Webcam, and a Tragedy*, NEW YORKER, (Feb. 6, 2012).

dorm room via a webcam feed.<sup>56</sup> While Mr. Ravi's private communications about Clementi showed he had complicated and ambivalent feelings about having a gay roommate, none of the evidence in the case showed him using any type of homophobic slur.<sup>57</sup> This resulted in the prosecution of multiple charges of bias crimes where the defendant was not obviously homophobic, but also where the suicide, without which criminal charges would never have been filed, could not even be mentioned during the trial due to a lack of connection to the case.<sup>58</sup>

These factual inaccuracies are important because they help fuel public outrage.<sup>59</sup> Moreover, given the propensity of people to believe even incorrect reports that strengthen their ideological viewpoint, the inaccuracies can confirm existing beliefs.<sup>60</sup> Thus, the notion may be reinforced that members of the younger generation are especially brutal and cruel and that the Internet is a novel pathway for this evil, which must be controlled.<sup>61</sup> Such public reaction can bring pressure to bear on legal institutions and in fact seems to have had influenced some prosecutors. In the Prince case, there was a firestorm of media coverage and commentary—some of it quite inaccurate—before the District Attorney's office brought charges and the Massachusetts legislature took action. The impact of public indignation was an even greater factor in the Meier case, with a United States Attorney halfway across the continent filing federal charges after the local prosecutor declined to bring a criminal case.<sup>62</sup> Likewise, the prosecutors increased the severity

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56. *Id.*

57. *Id.*

58. See Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES, (Mar. 17 2012); see also Megan DeMarco, *Live coverage: Dharun Ravi Found Guilty on Most Counts in Webcam Spying Trial Verdict*, NJ.COM, (Mar. 16, 2012), [http://www.nj.com/news/index.ssf/2012/03/ravi\\_webcam\\_trial\\_verdict.html](http://www.nj.com/news/index.ssf/2012/03/ravi_webcam_trial_verdict.html).

59. See, e.g., *Irish Teenager Phoebe Prince's Suicide Outrage Sparks Mass US Backlash*, BELFAST TELEGRAPH, (Apr. 19, 2010), <http://www.belfasttelegraph.co.uk/news/local-national/irish-teenager-phoebe-princes-suicide-outrage-sparks-mass-us-backlash-14772114.html>; Kim Zetter, *Cyberbullying Suicide Stokes the Internet Fury Machine*, WIRED.COM, (Nov. 21, 2007), [http://www.wired.com/politics/onlinerights/news/2007/11/vigilante\\_justice](http://www.wired.com/politics/onlinerights/news/2007/11/vigilante_justice); *Tyler Clementi Suicide Sparks Outrage, Remorse*, CBS NEWS, (Oct. 29, 2010) [http://www.cbsnews.com/2100-201\\_162-6914293.html](http://www.cbsnews.com/2100-201_162-6914293.html).

60. Nyhan & Reifler, *supra* note 49, at 315.

61. An area that this article does not cover, but remains vital is the intersection of student's First Amendment free speech rights and attempts to reduce the incidence of severity. While the Supreme Court has ruled that students have free speech rights, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), it has also ruled that those rights are not coterminous with the rights of adults and that the school administration may make efforts to safeguard students in their care. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

62. See Collins, *supra* note 28; Linda Deutsch, *Woman Indicted in Missouri Suicide*

of the charges brought against Tyler Clementi's roommate Dharun Ravi in the wake of a public outcry.<sup>63</sup> In light of this, it is important for legal actors to maintain a dispassionate view and not become swept up in a story that has inflamed public passion.

C. *Problem Three: The Stories are Black and White; Reality is Grey*

Reality is rarely as simple as portrayed in a *People* magazine story or three minute clip on CNN. Yet nuance is difficult to portray and consequently misperceptions springing from complexity may be even harder to correct than simple inaccuracy. The Prince case provides a good example of that phenomenon. The narrative portrayed in the media provided a simple, compelling, and tragic arc, with a sympathetic victim and clear villains. Moreover, the story was of a piece with a popular media trope,<sup>64</sup> that American high schools are awash with "mean girls" who emotionally torture their less popular classmates on a daily basis.<sup>65</sup> However, as facts emerged, it became less clear that the "South Hadley Six" had engaged in the concerted and predatory behavior that both the media and the District Attorney's office had initially described.

It does not appear, as one legislator professed believing, that a group of teens got together and agreed to induce Ms. Prince to commit suicide.<sup>66</sup> Instead, more in depth reporting established that Prince had been engaged in separate conflicts with two distinct groups of teens at the high school and that these disputes stemmed from Prince's involvement with the boyfriends of two different girls.<sup>67</sup> In both cases,

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*Case*, AP WIRE, (May 16 2008). In the Meier case, the local district attorney declined to file charges against Drew, saying he had reviewed the law related to stalking, harassment and child endangerment and could not find statutes allowing him to file charges. The Meiers and the public decried the lack of prosecution, with Megan's mother stating that she believed the outrage resulted in the prosecution.

63. Foderaro, *supra* note 34.

64. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1341 (11th ed. 2003). Merriam-Webster's Collegiate Dictionary defines trope as "a common or overused theme or device: CLICHÉ."

65. This trope has existed in media portrayals of high school since at least the late 1980s, when the movie *Heathers* depicted the eponymous clique of popular girls as bullies, and has continued through the present day with other films such as *Mean Girls* detailing how the villains treat others rottenly. *HEATHERS* (Cinemark Entertainment 1989); *MEAN GIRLS* (Paramount Pictures 2004).

66. Statement of Senator Gale Canderas, *supra* note 25.

67. Bazelon, *supra* note 54. (This piece was a finalist for the 2011 Michael Kelly Award for "the Fearless Pursuit and Expression of Truth" and the 2011 Gannett Foundation Award for Innovative Investigative Journalism.) See Michael Kelly Award, 2011 Nominee Page, ATL. MEDIA, (Sept. 10, 2012), [http://kellyaward.com/mk\\_award\\_popup/emily\\_b.html](http://kellyaward.com/mk_award_popup/emily_b.html); 2011 Awards, ONLINE NEWS ASS'N, (Sept. 10, 2012), <http://journalists.org/awards/2011-awards/>. It also resulted in a great deal of vitriol towards the journalist many of the over two

the girls reacted angrily to Prince's involvement with their boyfriends, and each had a friend who tried to vindicate their friend's perceived injury by making cruel remarks to Prince.<sup>68</sup> While all of the teens were demonized by the media and charged with multiple felonies by the prosecutors, two of them were at best bit players in any abuse Prince suffered.<sup>69</sup> One of the teens, eighteen-year-old senior Austin Renaud, was charged with statutory rape of fifteen-year-old Ms. Prince.<sup>70</sup> Other than the alleged sexual relationship—which Renaud denied—there was no evidence put forth by the District Attorney that he engaged in any untoward behavior towards Ms. Prince.<sup>71</sup> To the contrary, the evidence reported suggested he had been civil, and even kind, to her.<sup>72</sup> Nonetheless Renaud was routinely touted as a full member of the “South Hadley Six” and included in the metaphorical tarring and feathering meted out by both the media and the DA's office.<sup>73</sup>

The alleged actions of another member of the “South Hadley Six,” sixteen-year-old Flannery Mullins, also failed to merit the evisceration she was receiving at the hands of both the media and the prosecutors. Ms. Mullins found out that Ms. Prince was romantically involved with her boyfriend, Mr. Renaud.<sup>74</sup> After that discovery, Ms. Mullins made a nasty comment about “slutty poser” Irish girls on her Facebook account, but did not directly reference Ms. Prince.<sup>75</sup> There appears to be no evidence that Prince, who did not have a Facebook account, ever read this comment.<sup>76</sup> Ms. Mullins also insisted on going into a school bathroom while Prince was there, when one of Prince's friends, fearing

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thousand comments on the original Slate articles were venomous towards Ms. Bazelon. An example of the reaction can be seen at a website named People You'll See in Hell. *See generally* UPDATE: *What is Emily Bazelon's Problem*, PEOPLE YOU SEE IN HELL, <https://web.archive.org/web/20120320035116/http://pysih.com/2011/04/13/update-what-is-emily-bazelons-problem/> (last visited May 22, 2015) Ms. Bazelon was attacked for allegedly distorting the details around the Prince suicide in response to the nomination of her piece for the Michael Kelly Award, and she was repeatedly attacked in language far worse than was used against Prince for “blaming the victim” by members of the public who had no personal knowledge that would refute her reporting but a conviction that something horrible was done to Prince notwithstanding the true facts surrounding the incident. *Id.*

68. Bazelon, *supra* note 54.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

trouble, asked her not to.<sup>77</sup> By all reports, Mullins and Prince did not even make eye contact in the bathroom.<sup>78</sup> Ms. Mullins announced in gym class, outside of Prince's presence that "someone should kick her ass."<sup>79</sup> In sum, Mullins made comments on a social network Prince did not use; she walked into a bathroom when it was inadvisable for her to do so; and she made a vague threat outside of Prince's presence.<sup>80</sup> This behavior is most correctly labeled as immature and undesirable, not predatory or felonious.<sup>81</sup>

Even accepting that the truth may fall somewhere between, when the details of the Prince case are examined with any rigor, the story reveals itself to not be as open and shut as first reported. The story was not one that could be digested in a single sound bite. Instead, it needed at least as much development as a *New Yorker* story to communicate what actually happened. Despite this, the District Attorney's office opted to pursue criminal charges based upon the more satisfying plot of a morality play. In doing so the prosecutors not only reinforced the media narrative, but also sprung into the center ring of the media circus. By seeking convictions for crimes with long prison terms, they not only fanned the flames of the fire but also brought law to bear that had never been intended for this purpose. The attempt to criminalize bullying may have in the short term assuaged an outraged public. But the long-term consequences of using the criminal law to punish classic high school behavior needs significantly further examination.

## II. BULLYING: A NEW CRISIS, OR AN OLD PROBLEM?

In order to determine the best way to address the impact of bullying behavior, we must first understand the problem. And make no mistake, bullying is a problem. A great number of studies have tied both bullying and being bullied to negative outcomes in children, including increased risk of suicide.<sup>82</sup> Moreover, studies have shown that GLBTQ<sup>83</sup> and

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. "Predatory" behavior in Massachusetts is defined as "an act directed at a stranger or person with whom a relationship has been established, promoted or utilized for the primary purpose of victimization." MASS. GEN. LAWS ch. 6, § 178C (2012), in referring to repeat sexual offenders, and is of a vastly different form from the bullying Prince suffered. Instead, Mullin's behavior seems of a type for an immature teenager who believes that a classmate is trying to steal her boyfriend.

82. *See generally*, Sameer Hindjua & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCHIVES OF SUICIDE RES. 206 (2010) (featuring a detailed examination of previous literature as well as data, which finds in a study of American middle school students

questioning youth are at higher risk for negative outcomes from homophobic bullying as opposed to more traditional bullying.<sup>84</sup> Research has also examined the impact of cyberbullying upon teenagers, finding increased risk of negative outcomes.<sup>85</sup> Given the evidence, it is clear that the media narrative is at least in some sense correct. Being bullied is not good for children.

These same studies, however, show a more complex problem than the media presents for our outrage. For one, those same studies examining the risks associated with being bullied find that many bullied students are bullies themselves, and vice versa.<sup>86</sup> These studies also show that not only do bullied students face negative outcomes from bullying, but so do their bullies.<sup>87</sup> In one of those studies, those who bullied were at roughly as increased a risk of committing suicide as those who were bullied.<sup>88</sup> In another study, those victims of bullying who were themselves also bullies were revealed to be at increased risk of

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that both those who are bullied are at higher risk than peers who are not bullied or bullies for suicidal ideation and more likely to attempt suicide); Gianluca Gini & Tiziana Pozzoli, *Association Between Bullying and Psychosomatic Problems: A Meta-analysis*, 123 PEDIATRICS 1059 (2009), which examines and meta-analyzes eleven previous studies on bullying outcomes.

83. GLBTQ refers to Gay, Lesbian, Bisexual, Transgender, Queer.

84. See Dorothy Espelage, Steven Aragon & Michelle Birkett, *Homophobic Teasing, Psychological Outcomes, and Sexual Orientation Among High School Students: What Influence Do Parents and Schools Have?* 37 SCHOOL PSYCHOLOGY REVIEW 202 (2008), where boys from a high school in a large Midwestern American city “who are bullied by being called gay experience greater verbal and physical bullying than boys who are bullied for other reasons.” *Id.* (finding in a survey of students from eighteen Midwestern American high schools that that non-straight students were more likely to report high levels of depression suicidal feelings).

85. Andre Sourander *et al.*, *Psychosocial Risk Factors Associated With Cyberbullying Among Adolescents*, 67 ARCH. GEN. PSYCHIATRY 720 (2010).

86. See, e.g., Hindjua & Patchin, *supra* note 82, at 209; SUSAN SWEARER ET AL., BULLYING PREVENTION AND INTERVENTION: REALISTIC STRATEGIES FOR SCHOOLS 160 (2009); Sourander *et al.*, *supra* note 85, at 722.

87. Hindjua & Patchin, *supra* note 82, at 214; Sourander *et al.*, *supra* note 85, at 724, see also Young Shin Kim *et al.*, *School Bullying and Youth Violence: Causes or Consequences of Psychopathologic Behavior?* 63 ARCH GEN PSYCHIATRY 1035 (2006) (finding in a study of South Korean middle school students that “psychopathologic behavior, including social problems, aggression, and externalizing behavioral problems, is a consequence rather than a cause of bullying experiences”).

88. Hindjua & Patchin, *supra* note 82, at 216, where “traditional” bullies were 2.1 times more likely than those who were not bullies or bullied to attempt suicide, while “traditional” bullying victims were 1.7 times more likely to commit suicide. Both results were significant at the  $p < .001$  level when compared to uninvolved peers; see also, “bullies were found at significantly higher risk for psychosomatic problems than uninvolved peers.” Gini & Pozzoli, *supra* note 82, at 1063.



psychosomatic problems.<sup>89</sup> Even the ostensibly simple question of whether GLBTQ youth are more at risk for negative outcomes from homophobic bullying is not as simple as at first glance, with self-described gay youth suffering less negative impact from homophobic bullying than their peers who describe themselves as questioning their sexual orientation.<sup>90</sup>

Moreover, there is the question as to whether bullying is a problem that has grown recently into an epidemic, or whether we are merely paying more attention to it. English language written mentions of bullying spiked roughly 1500 percent from 1990 through 2008.<sup>91</sup> At the same time, however, one comparative study of identical surveys given to American students in 2003 and 2008 has shown a major decline in bullying prevalence.<sup>92</sup> That study showed reductions in youth on youth violence and physical bullying, along with a smaller decline in emotional bullying across the same surveys.<sup>93</sup> These results are supported by evidence from other nations, where studies have found declines in bullying dating from the late 1990s on across most countries.<sup>94</sup>

Finally, the data on youth suicide rates does not back up the horror story of our children being at ever increasing risk of bullying that drives them to suicide. Nationally, youth suicide rates are now lower than they have been in over thirty years, after peaking in the late 1980s.<sup>95</sup> The rate in 2007 was just sixty percent of the rate in 1988.<sup>96</sup> At the same time, it must be remembered that bullying is by no means the sole cause of youth suicides. In Massachusetts from 2004 to 2008, for example, only ten percent of all suicides aged ten to nineteen involved “school issues”

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89. Sourander *et al.*, *supra* note 85, at 727.

90. Espelage, Aragon & Birkett, *supra* note 84.

91. See Michel *et al.*, *supra* note 40.

92. Finkelhor *et al.*, *supra* note 46, at 238.

93. *Id.* at 240. The number of survey participants reporting bullying dropped from 21.7% to 14.8%, a drop of nearly 33%. Meanwhile, reports of emotional bullying dropped from 24.9% of participants to 22%, a smaller but still statistically significant drop at the  $p < .05$  level.

94. Ken Rigby & Peter K. Smith, *Is School Bullying Really on the Rise?* 14 SOC. PSYCHOL. OF EDUC. 441 (2011). Of the nine countries looked at in this survey of the literature, only Norway had seen increases in bullying, while an examination of an international data with information from twenty-seven countries showed only one increase in chronic bullying and three more of occasional bullying. *Id.* at 452.

95. Centers for Disease Control and Prevention, National Centers for Injury Prevention and Control, *Suicide Rate for Ages 10-19, 1981-2009*, Web-based Injury Statistics Query and Reporting System (WISQARS) (2005) [www.cdc.gov/ncipc/wisqars](http://www.cdc.gov/ncipc/wisqars) (last visited May 22, 2015).

96. *Id.* It should be noted that the suicide rate has increased somewhat since 2007 through the last available year of 2009, but it remains over 30% lower than the peak in 1988.

as a stressor, of which bullying comprised only one part of the category.<sup>97</sup> Much more common stressors reported around youth suicides were family and relationship crises.<sup>98</sup>

Therefore, it appears that while bullying is a real threat to children it is also a far more complex problem than the media has portrayed, and needs a correspondingly nuanced response in order to be effectively dealt with. Thus far two methods have been proposed as potential solutions, criminalization and legislation. This Article will first look at the effects treating bullies as criminals would have, and then examining the potential of legislation.

### III. PLEASING THE CROWD: PROSECUTING THE BULLY

Bullying has been an issue going back decades; most people can remember their own schoolyard encounters with it, but prosecution of the bully as a response is new.<sup>99</sup> Yet, if the criminal justice system is designed to deter future crimes, rehabilitate current offenders, and provide retribution to the society at large, then criminal charges should be brought against teen bullies only when those purposes are served.<sup>100</sup> Thus, when a prosecutor's office considers criminal charges against an alleged bully, it must ascertain whether the threat of a criminal record and jail time will deter future offenders; whether the bully, still a minor themselves, would best be rehabilitated via the criminal justice system and all its attendant implications; and whether the punishment sought both fits the degree of culpability and redresses the injury to society. Criminalization of bullying seems a poor option on all three counts.

With regard to deterrence, it is too early to tell whether the criminal prosecutions in high profile cases will serve to prevent future bullying. Certainly school officials have used disciplinary measures such as

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97. Massachusetts Violent Death Reporting System, *A Closer Look: Youth Suicides, 2004-2008*, Mass. Dept. of Public Health, <http://www.mass.gov/eohhs/docs/dph/injury-surveillance/suicide/suicide-youth-incidents-bulletin.doc> (last visited May 22, 2015).

98. *Id.*

99. Prior to the passage of state laws criminalizing some types of bullying, such as North Carolina's 2009 law making cyberbullying a misdemeanor, N.C. GEN. STAT. § 14-458.1 (2012), there appear to have been few prosecutions for bullying-related behavior. Some states, such as New Jersey, have enacted new anti-bullying laws and have specifically chosen not to make bullying a crime. The Anti-Bullying Bill of Rights Act, N.J. STAT. ANN. § 18A:13.1-2, 16-30 Jan. 5, 2011. Others, such as Massachusetts, have chosen to expand the definitions of crimes such as stalking and harassment in order to make them more applicable in severe instances of bullying. An Act Relative to Bullying in Schools, 2010 Mass. Acts c. 92 (codified as amended in scattered sections of MASS. GEN. LAWS ch. 69, ch. 71, ch. 71B, ch. 265, ch. 268, and ch. 269).

100. See Waldman, *supra* note 26, at 435.

detention and suspension to prevent bullying with mixed results.<sup>101</sup> For example, although school officials in South Hadley were widely criticized for under-reacting to the bullying of Phoebe Prince, several members of the “South Hadley Six” had been disciplined for their actions prior to Prince’s suicide.<sup>102</sup> Whether the threat of criminal prosecution will be a greater deterrent is unknown, but we will likely find out. Many of the newly enacted bullying statutes contemplate criminal charges against high school bullies.<sup>103</sup> Certainly, if criminal charges prove to have a significant deterrent effect, it would be point in favor of their use. Whatever the deterrent effect, however, it is foolish to believe that the modern criminal justice system will effect rehabilitation.<sup>104</sup>

But the ultimate error in criminalizing bullying comes from imposing criminal punishment in order to provide retribution not just for the victim but also from an angered society. If history is any guide, criminal charges based on most quotidian school bullying will be disproportionate to the crime, for they result from the victim’s reaction to the bullying, as opposed to the severity of the bully’s actions. Thus, if convictions on the charges are secured, the punishment will be exceedingly harsh compared to the accused’s actual crime, with a huge percentage of students potentially being saddled with criminal records that may follow them for the rest of their life.<sup>105</sup> At the same time, because of this lack of proportionality and because charges stemming from common schoolyard misbehavior will be difficult to prove, retribution may not occur. Again, here the Prince story is instructive.

With regard to proportionality, two things about the Prince case are certain. First, her classmates were morally reprehensible when they

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101. According to Waldman, “school principals have been ‘incapacitating’ bullies for decades” with school related punishments and “[n]othing has worked.” Waldman, *supra* note 26, at 434. However, this runs in direct contradiction to the numerous studies above showing declines in bullying, which may result from increased efforts and programs to prevent bullying at schools. Rigby & Smith, *supra* note 94, at 453.

102. Bazelon, *supra* note 54.

103. See, e.g., MASS. GEN. LAWS ch. 69, ch. 71, ch. 71B, ch. 265, ch. 268, and ch. 269; N.C. GEN. STAT. § 14-458.1 (2012).

104. Waldman, *supra* note 26, at 434. “Prison terms for bullies cannot conceivably reform the bully into a good student.” *Id.*

105. U.S. Dep’t Just., Off. Juv. Just. and Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting* (Sept. 2011) (detailing the number of ways juveniles may end up facing adult criminal charges). With criminalization of bullying, it is likely that many of these cases would find themselves before a trial judge rather than in juvenile court. Given that over a third of respondents reported that they committed bullying behavior more than once, the mind-boggling number of potential criminal charges becomes clear. Hindjua & Patchin, *supra* note 82, at 212-13.

taunted her, called her an Irish slut, publicly laughed at her and threatened her, and threw an energy drink at her while she walked home from school. Second, the type of abuse the “South Hadley Six” meted out to Prince in winter 2010, was not all that different than the abuse dispensed by other teens in other schools all over Massachusetts and the country, that year and every year.<sup>106</sup> What differentiates the Prince case from the other incidents is that Prince committed suicide whereas the overwhelming majority of bullying victims do not.<sup>107</sup>

Therein lies a serious flaw in using the criminal law to punish bullying associated with a suicide or other serious consequence. As we have seen in the Prince, Clementi, and Meier examples, the decision to prosecute was not based on the egregiousness of the behavior but rather the result. At first impression, this may seem fair. Bullying is certainly a risk factor in teen suicide.<sup>108</sup> Upon closer examination however, the link does not hold up. For one, the form bullying takes is not necessarily correlated with suicide.<sup>109</sup> Instead, the victims of bullying respond to the abuse they endure in myriad ways. Doubtless, there are numerous factors that allow one victim to cope with the effects of bullying while another victim is driven to the despair that leads to suicide. Prince’s case is again a good example. The bullying she suffered around that time may have been a factor in pushing her into her successful suicide attempt, but Prince also had a number of other factors that increased her suicide risk, such as repeated self mutilation.<sup>110</sup> Most important among these was another, unrelated and near lethal, suicide attempt just a few months before her death.<sup>111</sup>

Yet another problem is that of dealing with the “bully-victim,” victims of bullies who themselves bully others.<sup>112</sup> Several studies have

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106. *See id.* (reporting the prevalence of bullying behavior).

107. *Compare* Finkelhor, *supra* note 46, at 240 (showing that over 50% of surveyed children suffer some form of peer or sibling victimization), *with* Ctr. Disease Control, *supra* note 95 (showing youth suicide rates of 4.64 per 100,000 for the population aged 10-19, or less than .005%). Additionally, “[R]esults suggest that experience with bullying explains only a small amount of the variation in suicidal ideation (only about 6% [for victims of bullying] and 3% [for bullies]).” Hindjua & Patchin, *supra* note 82, at 214.

108. Hindjua & Patchin, *supra* note 82, at 214.

109. *See* Waldman, *supra* note 26, at 419 (comparing the bullying behavior in four different cases and noting that the bullying in one of the non-lethal cases was “exponentially worse” than the one-time breach of privacy endured by Tyler Clementi”).

110. Bazelon, *infra* note 169.

111. *Id.* Prince took a near fatal overdose of drugs in November 2009 after she broke up with Sean Mulveyhill, who was a member of the “South Hadley Six.” At this point, however, none of the other members of the group had any involvement with Prince.

112. Gini & Pozzoli, *supra* note 82, at 1060.

shown that this group is at highest risk for negative pathologies.<sup>113</sup> But this group, comprising a sizable minority of those involved in bullying, is the most difficult of any for the criminal justice system to deal with.<sup>114</sup> If new criminal laws against bullying are applied in situations where there have not been severe negative outcomes, not only will many victims intended to be protected by the laws also be tried for violating them against others, they will in all likelihood be used to protect some of the same types of bullies whose immature behavior drew the public venom that caused the criminalization of bullying. Conversely, should the laws be applied only when tragedy strikes bully-victims might be brought up on charges where their actions were clearly less offensive than what they themselves suffered. Either situation would be a perversion of the justice that was intended to be done via the criminalization of bullying.

Finally, there are also serious problems of intent and causation associated with the criminalization of a person's behavior related to another's suicide. Bullies act "to seem more powerful, to be funny, to 'get back' at others, to show off for . . . friends or to hide his own insecurities"<sup>115</sup> among other reasons, not to goad the victim into suicide. The bully's behavior cannot even be viewed as recklessly disregarding a substantial risk of suicide because suicide is not the most frequent result of bullying or even a frequent result of the depression that often results from bullying.<sup>116</sup> Consequently, using the criminal law to punish bullying associated with suicide will regularly be wildly disproportionate to the behavior involved. It can both punish bullying that is relatively frequent in the wider scheme of teen behavior when the victim commits suicide, and leave truly cruel behavior untouched when the victim does not. But in either case, it seeks to hold teenagers responsible for deadly consequences they neither intended nor could reasonably anticipate.

Indeed these factors were a substantial problem for the prosecutors in the Prince case.<sup>117</sup> In order to seek a sentence commensurate with the perceived wrongdoing, the prosecution employed a novel legal theory involving the Massachusetts civil rights statute. The civil rights charges

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113. Sourander *et. al.*, *supra* note 85, at 727.

114. *Id.* at 722.

115. Waldman, *supra* note 26, at 422.

116. *Id.* at 425.

117. These factors remain a problem even granted criminal penalties for bullying behavior. *See generally* MASS. GEN. LAWS ch. 265, § 43(a) (2012). For example, Massachusetts' expansion of harassment and stalking laws so that they would apply to some bullying behavior have maximum sentences of only two and a half years, far less than the constructive murder of Phoebe Prince would seem to warrant.

required the prosecution to prove that the teens had deprived Prince of her constitutional right to an education and that their actions resulted in bodily injury.<sup>118</sup> Because the only bodily injury in the case was Prince's suicide, the criminal charges essentially responded to People Magazine's query "Bullied to Death?"<sup>119</sup> with "Yes, and we'll prove it beyond a reasonable doubt."

This choice was an audacious one. Although the narrative logic connecting the "South Hadley Six's" actions to Prince's suicide has currency, the legal logic is much shakier. Cases in which an individual has been held criminally, or even civilly, liable for another's suicide are exceedingly rare. Moreover, cases that impose liability have involved actions by a defendant that were both particularly egregious and strongly causally linked to the victim's suicide. For instance, the Model Penal Code suggests that criminal liability for suicide be limited to cases in which the defendant engages in "force, duress, or deception."<sup>120</sup> To illustrate when liability is justified, the comments of the MPC offer a case in which the defendant kidnapped and raped a woman who then took a poison in his presence, after which he did not bring her to medical attention for several days until she eventually died. Under those circumstances, the defendant was found criminally liable for causing the victim's suicide.<sup>121</sup>

In another, very recent, case a Minnesota appellate court upheld the conviction of a defendant found criminally responsible for the suicide of individuals from Canada and the United Kingdom.<sup>122</sup> In that case, the defendant trolled Internet sites frequented by people grappling with suicidal thoughts. The defendant actively encouraged site members to kill themselves and even entered into several suicide pacts. He was convicted on charges related to the suicide of several individuals he

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118. The sentence enhancement provision of the M.C.R.A. can be read to impose strict liability for any violation of civil rights "if bodily injury results." Under the plain language, there is no requirement that the bodily injury be intended or even be the proximate cause of the violation. This portion of the statute has not been addressed at any length by the Massachusetts courts. In the only appellate cases involving the question, the bodily injury of the victim was unambiguously linked to the defendant's violation of civil rights. *See* *Com. v. Zawatsky*, 670 N.E.2d 1969 (1996). Nonetheless, it is very difficult to imagine an appellate court upholding a sentence enhancement of up to ten years imprisonment without a showing that the victim's injury was causally related to the defendant's actions, if for no other reason than the rule of lenity. *Com. v. Carrion*, 725 N.E.2d 196, 197-98 (2000).

119. *McNeil*, *supra* note 13.

120. MODEL PENAL CODE § 210.5.

121. *See Stephenson v. State*, 205 Ind. 141, 142 (1932).

122. *See State v. Melchert-Dinkel*, 816 N.W.2d 703, 704 (Minn. Ct. App. 2012).

communicated with on the site.<sup>123</sup>

No matter what one thinks of the behavior of Ms. Prince's classmates, it is not comparable to the inhuman behavior of the defendants outlined above. The students never explicitly or implicitly encouraged Ms. Prince to commit suicide: even accepting the original media narrative their behavior was limited to insults and threats.<sup>124</sup> In addition there was no evidence that they knew that Ms. Prince was especially emotionally vulnerable or more likely to respond to bullying by committing suicide.<sup>125</sup> Given this and given that the law is loath to hold individuals criminally liable for the suicide of another, the District Attorney's attempt to hold teen bullies responsible for the suicide of a classmate seems either courageous or foolhardy depending on point of view.

The problem of finding a crime to fit a bully's behavior is not unique to the Prince case. In the Meier case the U.S. Attorney hijacked Federal computer fraud statutes meant to fight phishing and identity theft into service to prosecute Lori Drew with violating the of terms of service for private corporation's product. The prosecutors in the Clementi case similarly struggled with the bias crime charges given the paucity of evidence showing that Ravi was motivated primarily by anti-gay animus rather than being a particularly boorish and juvenile college freshman.<sup>126</sup>

In essence, prosecutors who want to prosecute bullies find themselves needing to shoehorn particular behavior into the elements of a crime. In view of this, one is left to wonder why the public would demand, or a prosecutor would seek, criminal punishment for a bully. The unfortunate conclusion one might draw is that both the public and the prosecutor seek the emotionally satisfying ending of the story. Criminalizing bullying may seem to "fulfill an emotional need and address tragedies that . . . pull on the heartstrings of every parent with a child in school."<sup>127</sup> It is deeply questionable whether the criminal law should be used to provide an emotional bloodletting to a narrative that has disturbed the public. The facile catharsis should be left to (not very good) novelists and short story writers.

But even if there were value in using the criminal law to send a message and provide "closure," there would still be a fatal flaw. It does not work. Experience shows that the story does not end with the victim

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123. *Id.* at 705.

124. Jacobbe, *supra* note 52.

125. Eckholm & Zezima, *supra* note 14.

126. Miller, *supra* note 34.

127. Waldman, *supra* note 26, at 434.

avenged and everyone else sadder but wiser. Instead, it is more like a Shakespeare tragedy with bodies strewn across the floor.

#### IV. THE FANTASY OF PUNISHMENT AND THE RESULTS OF PROSECUTION

The prosecution of the “South Hadley Six,” which started with so much fanfare, ended with a whimper. None of the members of the group ended up with a criminal record. Instead, the most serious charges, involving statutory rape and civil rights violations, were dropped against all six defendants.<sup>128</sup> Four defendants pled to “facts sufficient,” a Massachusetts procedural device that allows a criminal record to be expunged after a year’s time.<sup>129</sup> A fifth, Sean Mulveyhill, pled guilty to misdemeanor harassment and received the most serious punishment, a year on probation and community service.<sup>130</sup> One defendant had all charges dropped.<sup>131</sup> The public’s hunger to see the “South Hadley Six” punished with serious jail time remained unsated.

This result was not far different than the Clementi or Meier case. Ravi received only thirty days of jail time for his web cam spying.<sup>132</sup> Although the lightness of this punishment may have startled the general public, it is not surprising when one realizes that he was not charged with having any connection to Clementi’s death; in fact, discussion of the suicide was highly curtailed due to worries about its prejudicial impact upon the case.<sup>133</sup> Lori Drew, despite the horrendous nature of the accusation, was acquitted of the charges against her. Her acquittal was unsurprising given that not only did the crime she was charged with have only a glancing relationship with her actual behavior, but also the prosecutor relied upon wholly novel interpretations of the law to even find charges to bring.<sup>134</sup> However, it left the public desire to inflict criminal punishment upon her unslaked.

This is not to say, however, that the bullies in these cases went

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128. Erik Eckholm, *3 Ex-Students Get Probation in Bullying Linked to a Suicide*, N.Y. TIMES, May 5, 2011, at A19.

129. *Id.*

130. *Id.*

131. *Id.*

132. DeMarco, *supra* note 58.

133. Chris Cuomo & Ian Shearn, *Burden of Proof: The Elephant in the Clementi Trial*, ABC 20/20 (Mar. 5, 2012), <http://abcnews.go.com/US/clementi-trial-daily-analysis-judge-testimony-tyler-clementi/story?id=15854510#.UE50wo1lSyY>.

134. Kim Zetter, *Judge Acquits Lori Drew in Cyberbullying Case, Overrules Jury*, WIRED THREAT LEVEL (July 2, 2009), [http://www.wired.com/threatlevel/2009/07/drew\\_court/](http://www.wired.com/threatlevel/2009/07/drew_court/).



unpunished. None of the “South Hadley Six” returned to South Hadley High School, instead they were all either suspended or withdrew in the aftermath of the suicide.<sup>135</sup> At the time that the charges were resolved all had been out of school for over a year, but only one had earned their high school degree.<sup>136</sup> Sean Mulveyhill lost a college scholarship.<sup>137</sup>

Significantly worse, however, is the abuse and threats from members of the public against each of them regardless of their involvement in the case. One of the students, Sharon Chanon Velazquez, reported in interviews that since Prince’s suicide her family’s home had been vandalized, her personal information posted online, and she had received unrelenting abuse, abuse that included death threats.<sup>138</sup> Velazquez reported that she could not finish school, and that she felt too afraid to leave the house.<sup>139</sup> Indeed, a Facebook group entitled “The South Hadley Six - Bullies or Killers” provides a distilled example of the public rage against the students.<sup>140</sup> On the page’s public wall vituperative comments are still being made over two years after the outrage began. Various commenters call for the teens to be exterminated,<sup>141</sup> state that they would personally physically assault the students,<sup>142</sup> and use sexist<sup>143</sup> language in referring to the students. Examining the commentary and actions made by the community against the students showed that they in no way escaped without punishment no

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135. Fred Contrada, Op-Ed, *Taking a Step Back From the Controversial South Hadley High School Trip to Phoebe Prince’s Home Country of Ireland*, THE REPUBLICAN (Mar. 30, 2011), [http://www.masslive.com/opinion/index.ssf/2011/03/contrada\\_taking\\_a\\_step\\_back\\_fr.html](http://www.masslive.com/opinion/index.ssf/2011/03/contrada_taking_a_step_back_fr.html).

136. Jessica Bennett, *Have Phoebe Prince’s Bullies Suffered Enough?*, THE DAILY BEAST (May 6, 2011), <http://www.thedailybeast.com/articles/2011/05/06/phoebe-prince-have-her-bullies-suffered-enough.html>.

137. *Id.*

138. Jessica Bennett, *From Lockers to Lockstep*, NEWSWEEK, Oct. 4, 2010; *Today Show: Teen Charged in Prince Bullying: ‘I’m Not a Mean Person’*, (NBC television broadcast, July 8, 2011).

139. Bennett, *supra* note 138.

140. *The South Hadley Six - Bullies or Killers* at <http://www.facebook.com/pages/The-South-Hadley-Six-Bullies-Or-Killers/127543120613625> (last visited Sept. 14, 2012).

141. Wally McDonald, Dec. 12, 2011, <https://www.facebook.com/groups/109947665696669/permalink/362842760407157/>. (“The Scum that did this to Phoebe should hang by the neck from a rope like the poor girl did herself to get away from the torment.”).

142. Tanz Ali, Sept. 30, 2013 at 9:55 AM, [https://www.facebook.com/permalink.php?story\\_fbid=273950796019854&id=147141155301469&comment\\_id=3334327&offset=0&total\\_comments=16](https://www.facebook.com/permalink.php?story_fbid=273950796019854&id=147141155301469&comment_id=3334327&offset=0&total_comments=16). (“fuking hate [] [Kayla Narey] smiling i wish i can choke her ritnw”).

143. Bradley Hall, June 7, 2012 at 8:34 AM, [https://www.facebook.com/groups/109947665696669/permalink/362841913740575/?comment\\_id=442537865770979&offset=0&total\\_comments=4](https://www.facebook.com/groups/109947665696669/permalink/362841913740575/?comment_id=442537865770979&offset=0&total_comments=4). (“WTF...didn’t know dairy cows like Sharon were in such high demand by modeling agencies. Maybe she can replace Borden’s girl when the cow retires.”).

matter how tangential their actions were to Prince's suicide.<sup>144</sup> District Attorney David Sullivan alluded to as much after the entering of the pleas, "[t]hey have paid the price in the media and public arena, they will have this on their backs for their rest of their lives."<sup>145</sup>

The memory of Phoebe Prince was also affected. Because of the publicity associated with the prosecution of her bullies her earlier problems with depression and cutting were revealed in the media.<sup>146</sup> The defense lawyers for the "South Hadley Six," made it clear that they intended to fully explore her preexisting mental health problems in their defense of their clients. This tactic may seem unappetizing to the general public, but is not at all surprising given that they were being charged with causing the death of someone whose serious depression predated her acquaintance with them. Perhaps worst of all for her family, Prince's own unsavory and immature behavior was brought to the spotlight. In a sad echo of the name-calling she later faced in South Hadley, Prince apparently once isolated a previous friend in Ireland because she believed that the girl was involved with a boy Prince liked, participating on a page on the social networking site Bebo that contained multiple ethnic and sexual attacks on the girl, including a conversation where Prince referred to the victim as a "Paki whore," a near replica of what Prince herself would be called in South Hadley.<sup>147</sup>

For Lori Drew, avoiding a criminal conviction and jail time did not change that she had become a pariah amongst her community in Dardenne Prairie. It did not change that people boycotted her small business. It did not change that her property was vandalized or that her personal information was spread far and wide. And it did not mean that the world would forget that she was involved in a cruel prank that resulted in the suicide of a thirteen-year-old girl, or that many people would believe that she was primarily responsible for Megan Meier's death.

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144. It is notable that not only are most of these attacks worse than what was alleged to have been said to Prince, but that the behavior is exactly what District Attorney Schiebel claimed would be prevented by charging and convicting the "South Hadley Six." The authors doubt that those heaping abuse upon the alleged bullies would consider it just if they were brought up on charges had one of the six students committed suicide.

145. Peter Schworm, *'Blind eye to bullying' over, DA says*, BOSTON GLOBE, May 6, 2011, available at [http://www.boston.com/news/local/massachusetts/articles/2011/05/06/da\\_defends\\_modest\\_sentences\\_in\\_phoebe\\_prince\\_bullying\\_case/](http://www.boston.com/news/local/massachusetts/articles/2011/05/06/da_defends_modest_sentences_in_phoebe_prince_bullying_case/).

146. Bazelon *supra* note 54.

147. *Id.* The victim was aware of this page, with her mother bringing it to the attention of school administrators. In another incident, according to the victim, "in English class . . . we had to write an essay. Phoebe wrote about a girl and called her a slut who stole her boyfriend. She said in front of the whole class that it was me. I hadn't even kissed a boy yet." *Id.*

Dharun Ravi also did not escape a form of punishment for his behavior. Beyond a jail sentence, criminal fines, and the risk that he would be deported or denied a visa renewal due to his criminal record, he too was the subject of vitriol from the Internet commentariat. Moreover, a very thorough and detailed article about the events surrounding the Clementi incident published his extremely juvenile instant messages with a friend in excruciating and mortifying detail.<sup>148</sup> And again, the victim's life was examined at length and in detail. The same article revealed many private matters about Tyler Clementi that he likely would not have wanted to see in the press, while another specifically examined his mother's guilt over her reaction when he came out of the closet to her, something that occurred just short weeks before his suicide.<sup>149</sup> To some, this ordeal by public humiliation and fear of imprisonment might seem apt punishment for people like the "South Hadley Six," Dharun Ravi, and Lori Drew. Indeed, at the close of the Prince case, Elizabeth Schiebel, the District Attorney who brought the charges, asserted that "[w]ithout the initiation of these criminal charges, there would have been no accountability or responsibility for the perpetrators' wrongdoing."<sup>150</sup> But this statement ignores that criminal charges should not be used as a means of discipline or providing closure. They are intended for when a crime has been committed.<sup>151</sup> Further, as has been seen in just the limited examples above, society is more than capable of showing brutal opprobrium to behavior it deems beyond the pale without involving the criminal justice system. By bringing criminal charges upon these transgressors the legal system acts not to deter future crime or even punish in proportion to the crime but instead to secure society's vengeance. Thus it is driven by, and in turn drives, the court of public opinion.

#### V. CHANGING THE PLOT: LEGISLATURES AND BULLYING

Bullying stories cry out for a response, and lawyers have used criminal charges which ill fit the behavior of the alleged bullies in

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148. Parker, *supra* note 55.

149. *Id.*; Kate Zernike, *After Gay Son's Suicide, Mother Finds Blame in Herself and in Her Church*, N.Y. TIMES, Aug. 24, 2012, at A14.

150. Scheibel retired during the Prince case. Fred Contrada, *Phoebe Prince Bullying Cases Over; In Court, Tears and a Portrait of a Mother's Loss*, MASSLIVE (May 5, 2011, 11:56 PM), [http://www.masslive.com/news/index.ssf/2011/05/phoebe\\_prince\\_bullying\\_cases\\_o.html](http://www.masslive.com/news/index.ssf/2011/05/phoebe_prince_bullying_cases_o.html).

151. In this regard, the District Attorney who replaced Scheibel was more accurate when he said that the resolution of the charges was the "greatest measure of justice in a case where justice can never be served."

attempting to provide a satisfying, if not happy, ending. But, as seen in the cases above, criminal charges for alleged bullies can subvert the goals of the criminal justice system while failing to provide a denouement acceptable to a public intoxicated with the schoolyard horror stories, and a media which has spent months serving them up. So what can the legal system do but change?

In 1999, Georgia became the first state in the nation to pass an anti-bullying law in response to the tragedy at Columbine High School.<sup>152</sup> Today only Montana lacks an anti-bullying law.<sup>153</sup> These laws take numerous approaches to bullying, and states which have passed laws have gone back repeatedly to amend and enhance them.<sup>154</sup> Some states have changed the law to make types of bullying a crime.<sup>155</sup> Others have expanded existing criminal statutes so that they apply to some forms of bullying.<sup>156</sup> Still others rely upon new mandates to schools to create and implement anti-bullying programs.<sup>157</sup> Many utilize several approaches and implement multiple new programs at the same time.<sup>158</sup> What they all share is that they were created during the ever growing panic about the epidemic of bullying. The connection is more explicit in some cases than others, for example those laws that bear the name of bullied students who committed suicide.<sup>159</sup> But while the power of a compelling narrative can be seen in all forty-nine state laws, it is important to examine how each state has dealt with the public pressure brought about by multiple isolated but high profile events.

Once again, what occurred in the wake of the Phoebe Prince and Tyler Clementi suicides is useful in examining legal reaction to the established narrative. Both Massachusetts and New Jersey passed major

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152. Greg Toppo, *Should Bullies Be Treated as Criminals*, USA TODAY (June 13, 2012), <http://www.usatoday.com/news/nation/story/2012-06-12/bullying-crime-schools-suicide/55554112/1>.

153. *Id.*

154. Georgia, for instance, significantly modified its anti-bullying law in 2010 to expand the state's response to bullying in schools. S.B. 250, 471 GA. LAWS ACT (Ga. 2010).

155. See N.C. GEN. STAT. § 14-458.1 (2009).

156. See MASS. GEN. LAWS ch. 69, § 1D; ch. 71, §§ 37H, 37O, 93; ch. 71B, § 3; ch. 265, §§ 43, 43A; ch. 268, § 13B(3); and ch. 269, § 14A (2012).

157. See N.J. STAT. ANN. § 18A:13.1-2, 16-30 (2011).

158. See, e.g., See MASS. GEN. LAWS ch. 69, § 1D; ch. 71, §§ 37H, 37O, 93; ch. 71B, § 3; ch. 265, §§ 43, 43A; ch. 268, § 13B(3); and ch. 269, § 14A (2012).

159. See, e.g., Michigan's "Matt's Safe Schools Act," 2011 MICH. LEGIS. SERV. P.A. 241 (H.B. 4163) (WEST), named for Matt Epling, California's "Seth's Law," 2011 CAL. LEGIS. SERV. Ch. 723 (A.B. 9) (WEST), named for Seth Walsh, Idaho's "Jared's Law," 2006 IDAHO LAWS Ch. 313 (H.B. 750), named for Jared High, and Florida's "Jeffrey Johnston Stand Up for All Students Act," 2008 FLA. SESS. LAW SERV. Ch. 2008-123 (H.B. 669) (WEST).

anti-bullying legislation within two years of their militating events.<sup>160</sup> Both laws have been lauded in media coverage as exemplars of anti-bullying legislation.<sup>161</sup> But while these laws may provide a comforting conclusion to tragic tales, the question persists on whether they can effectively reduce bullying.

In this regard, it is important to keep in mind that legislation is never likely to be a panacea for persistent social problems. To the contrary, the effects of legislation are likely to be uncertain, uneven, and difficult to assess. Moreover, change is unlikely to be instantaneous. Instead, legislation designed to ameliorate bullying will likely resemble legislation to end social problems like sexual harassment, job discrimination and domestic violence: an important tool, that can reduce the problem over time, but unlikely to eradicate it altogether.

Consequently, it is probably too early to assess the effects of anti-bullying legislation. Some of the early data is not terribly encouraging. Indeed, at least one study found the most comprehensive and detailed anti-bullying policies were associated with an increased prevalence of some types of bullying and victimization behaviors in primary-school children, certainly not the hoped-for result.<sup>162</sup> Other commentators have expressed concern about the administrative costs of the reporting aspects of some bullying statutes.<sup>163</sup> One author pointed out that cumbersome administrative requirements can backfire because “[w]hen faced with overly burdensome reporting requirements, the typical teacher or administrator cannot escape the temptation to look the other way rather

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160. See MASS. GEN. LAWS ch. 69, § 1D, ch. 71 §§ 37H, 37O, 93, ch. 71B § 3, ch. 265 §§ 43, 43A, ch. 268 § 13B(3), and ch. 269 § 14A, (2012); N.J. STAT. ANN. § 18A:13.1-2, 16-30 (2011).

161. See, e.g., Emily Bazelon, *Bullies Beware*, SLATE (Apr. 30, 2010), at [http://www.slate.com/articles/life/bulle/2010/04/bullies\\_beware.html](http://www.slate.com/articles/life/bulle/2010/04/bullies_beware.html) (“In response to the suicides of two of its own kids—Phoebe Prince, fifteen, from South Hadley and Carl Joseph Walker-Hoover, eleven, from Springfield—lawmakers unanimously passed a bullying prevention law on Thursday that is probably the most comprehensive one in the country.”); Adam Cohen, *Why New Jersey’s Antibullying Law Should Be a Model for Other States*, TIME (Sept. 6, 2011), at <http://ideas.time.com/2011/09/06/why-new-jerseys-antibullying-law-should-be-a-model-for-other-states>. “On Sept. 1, New Jersey’s new antibullying law—billed as the nation’s toughest—took effect. The law, which co-sponsor Barbara Buono, the state’s senate majority leader, called ‘a powerful message to every child in New Jersey,’ is an important step forward in combating the bullying of young people . . . . But here’s why New Jersey should ignore its critics and press ahead—and why other states should follow its lead.” *Id.*

162. Sarah Woods & Dieter Wolke, *Does the Content of Anti-Bullying Policies Inform Us About the Prevalence of Direct and Relational Bullying Behavior in Primary Schools?*, 23 EDUC. PSYCHOL. 381 (2003).

163. See Ross Brenneman, *Paperwork: Another Reason to Stop Bullying*, EDUC. WK., Oct. 31, 2012, at 14.

than trigger those requirements.”<sup>164</sup>

The most comprehensive study of the impact of anti-bullying legislation was conducted in 2012. This study measured outcomes in the twenty-one states that had collected data on bullying both before and after the passage of anti-bullying legislation.<sup>165</sup> The ultimate conclusion of the study was that the severity or presence of a state anti-bullying statute was unrelated to the incidence of bullying in the schools.<sup>166</sup> It did conclude, however, that some programs were related to a decrease in specific bullying behaviors.<sup>167</sup> It further concluded that its results were far from conclusive or comprehensive.<sup>168</sup>

In short, the bullying story does not end with the passage of legislation. In this regard, it is worthwhile noting that the modern school-based anti-bullying programs were triggered by tragic stories a generation ago and a continent away. Anti-bullying programs were first enacted in Norway, where the catalyst was the suicide of three school age boys, in separate incidents, who had suffered the effects of bullying.<sup>169</sup> Dan Olewus, who was already studying the phenomenon of bullying, started an anti-bullying campaign in Norway’s schools.<sup>170</sup> He began a program operating on three levels: school-wide, the classroom, and individually.<sup>171</sup> Initial results from the program were very encouraging—eight months after instituting the program, schools reported a fifty percent decrease in bullying incidents.<sup>172</sup>

The Olewus program has been adopted by over eight thousand schools in more than forty states in the United States.<sup>173</sup> The results are still uncertain. Pennsylvania has adopted the program for all of its schools and begun a long-term study of its impact. The first two years of results have been promising.<sup>174</sup> Likewise, a meta-analysis of a large

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164. Daniel B. Weddle, *Still Disconnected: Current Failures of Statutory Approaches to Bullying Prevention in Schools*, 77 MO. L. REV. 761, 770 (2012).

165. Samantha Neiman, Brandon Robers & Simone Robers, *Bullying: A State of Affairs*, 41 J. L. & EDUC. 603, 647 (2012).

166. *Id.* at 648.

167. *Id.*

168. *Id.*

169. Emily Bazelon, *Sticks and Stones: Defeating The Culture of Bullying and Rediscovering The Power of Character and Empathy* 177-264 (2013); Susan P. Limber, *Development, Evaluation, and Future Directions of the Olweus Bullying Prevention Program*, 10 JOURNAL OF SCHOOL VIOLENCE 71, 71 (2011).

170. *Id.* at 178.

171. *Id.*

172. *Id.*

173. *Id.* at 185.

174. *Id.*

number of studies of anti-bullying programs in many countries concluded that results are “often effective” and associated with a decrease in incidents of bullying and victimization.<sup>175</sup> Nonetheless, other schools complain that the Olewus program is expensive and difficult to implement.<sup>176</sup>

In the wake of covering the Phoebe Prince story, Emily Bazelon traveled the United States observing anti-bullying programs and found that quality of the programs ranged depending on teacher skill and student interest. At times, she found the programs “boring and rote[,]” but at other times “genuinely helpful.”<sup>177</sup> Her strongest recommendation is that schools pick one approach and stick to it, rather than moving from program to the next according to the latest academic fashion.<sup>178</sup>

Other approaches not covered by anti-bullying laws may be effective as well. Bazelon notes that the entire responsibility for detecting and preventing bullying should not be placed on schools and suggests a greater role for parents.<sup>179</sup> Similarly, the overall public can get involved. Reacting to the suicide of a teenager who was the victim of anti-gay slurs and bullying, columnist Dan Savage started a project called “It Gets Better.” The project started on YouTube with Savage and his male partner talking candidly about the abuse they had suffered at the hands of classmates while growing up, but explaining how as adults they lived happy and successful lives.<sup>180</sup> The project became a cultural phenomenon and contributors included numerous everyday people and celebrities who told stories of childhood and teenage pain giving way to adult success and acceptance. President Obama even contributed a video.<sup>181</sup> Thus, the power of narrative was once again employed to combat bullying. Again, it is difficult to know how helpful these videos are in preventing bullying or in helping bullying victims cope with the abuse they suffer. Nonetheless, they serve as a reminder that in addition to working to prevent bullying, it is worthwhile to help bullied children cope with the effects as well. In short, bullying raises complicated problems, and calls for complicated solutions.

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175. David P. Farrington & Maria M. Ttofi, *School Based Programs to Reduce Bullying and Victimization*, 1, 80 (2009).

176. *Id.*

177. Bazelon, *supra* note 54, at 186.

178. *Id.*

179. *Id.* at 264.

180. Tara Parker Pope, *Showing Gay Teens a Happy Future*, N.Y. TIMES, Sept. 22, 2010.

181. It Gets Better Project, *It Gets Better: Dan and Terry*, YOUTUBE (Sept. 21, 2010), [https://www.youtube.com/results?search\\_query=it+gets+better+project](https://www.youtube.com/results?search_query=it+gets+better+project).

#### CONCLUSION: THE IMPORTANCE OF CAREFUL READING

This article began by noting that lawyers appreciate the power of a story, and the tales of Phoebe Prince, Tyler Clementi, and Meagan Meiers bear out the great power of a story to impact society at large. There is no surprise in this: any social problem is likely to seem more real and more pressing when presented in human terms as opposed to its abstract consequences. And there is no doubt that the stories of these young people have triggered a new and more comprehensive examination of an important social phenomenon.

But for those who must write the sequels to these stories—the teachers, administrators, parents, and students themselves who will control whether bullying as a social phenomenon becomes less damaging as a result of the individual stories that flashed across the media—it is important to do a close reading. Contrary to media reports, there is no rash of predatory students stalking the halls of schools, seeking victims to drive to suicide. If that were true, it would be easier to create a tidy ending by simply removing those students from the school.

But instead, the schools contain a number of confused, searching and sometimes truly cruel children and young people, navigating their way into adulthood. Sometimes they victimize their peers along the way and sometimes they are victimized. Because of the great deal of pointless distress bullying can cause, it is important to address it in a systematic way and the legislation recently enacted may well be one way to do so. But the persons responsible for school children—parents, teachers, and administrators—are well advised to remember that the story is complicated, there are few heroes and villains, and every ending is fraught with ambiguity.