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Death by Bullying: A Comparative Culpability Proposal

Audrey Rogers*

On-line connectedness through social media sites on the internet has exacerbated all aspects of adolescent angst, from feelings of isolation, lack of popularity, complicated social hierarchies, exclusion, teasing, and bullying. Proposals to address cyber-bullying typically suggest school-based solutions such as workshops, sensitivity training and codes of conduct.¹ In some instances, cyber-bullying has led to civil actions such as defamation, and infliction of emotional harm, mostly without success.² A less frequent avenue is the criminal law to stop the bullying. When used, the typical charges are for criminal harassment or stalking.³ In one highly-publicized case, federal prosecutors unsuccessfully employed a computer hacking statute to prosecute Lori Drew who created a fictitious on-line persona to bully thirteen-year old, Megan Meier, after the state found no grounds to prosecute her.⁴ Megan hanged herself upon being told by her bully that “the world would be a

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1. See, e.g., Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641 (2011); Lawrence M. Paska, *Cyberbullying from Classroom to Courtroom: Contemporary Approaches to Protecting Children in a Digital Age*, 22 ALB. L.J. SCI. & TECH. 535 (2012).

2. See, e.g., *Finkel v. Dauber*, 906 N.Y.S.2d 697 (Sup. Ct. 2010) (summary judgment granted to defendant).

3. See, e.g., CONN. GEN. STAT. § 53a-183 (2014); WASH. REV. CODE § 9A.46.110 (2014). See generally Shira Auerback, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641 (2009).

4. See *United States v. Drew*, 259 F.R.D. 449, 451 (C.D. Cal. 2009). See generally Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1569 (2010).

better place without you.”⁵ Finding that its harassment statute did not cover the incident, the state found no grounds to prosecute Drew.⁶

The extreme consequence of bullying manifested in the *Drew* case - suicide - is occurring with alarming regularity.⁷ There is a growing popular sense, as exemplified by the coining of the term “bullycide,” that cyber-bullying is a mounting problem that is not responding to other curbing measures, such as school conduct codes, civil actions, or more minor criminal sanctions.⁸ This article explores the possibility and advisability of imposing homicide charges against bullies, a controversial approach because of the serious causation questions it poses. Nonetheless, there is precedent for holding a person criminally culpable for a victim’s suicide. A notorious case involved the head of the Ku Klux Klan who was convicted of murder after the woman he raped killed herself by swallowing poison, “distracted by pain and shame so inflicted upon her.”⁹ Some may see her shame as analogous to gay teens who commit suicide after being bullied about their sexual orientation. But perhaps the law should not demand that free will be completely lacking before a person is charged for another’s suicide. In other instances such as provocation, the criminal law recognizes that the relationship between victim and defendant shapes culpability. This article explores whether it is feasible and desirable to do so with suicides.

Part I provides background on cyber-bullying with a focus on two highly-publicized cases. Causation rules and their application in suicide-by-victim cases are laid out in Part II. Part III assesses whether homicides charges would be possible

5. See *Drew*, 259 F.R.D. at 452.

6. See 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>.

7. David Badash, *Yet ANOTHER Teen Suicide This Week: Anti-Gay Bullying Blamed*, NEW CIVIL RIGHTS MOVEMENT (Jan. 21, 2011), <http://thenewcivilrightsmovement.com/yet-another-teen-suicide-this-week-anti-gay-bullying-blamed/news/2011/01/21/16889>.

8. Apparently coined by journalist Neil Marr and anti-bullying expert Tim Field in their book on bullying in England. See NEIL MARR & TIM FIELD, *BULLYCID: DEATH AT PLAYTIME* (2001).

9. *Stephenson v. State*, 179 N.E. 633, 635 (Ind. 1932).

against a bully. It suggests the all-or-nothing approach to causation, and its exceptions are based on artificial and outmoded reasoning. For example, using the *Stephenson* reasoning, a prosecutor would have to paint a bullying victim as mentally unstable and irresponsible. For victims of bullying who are considering suicide, these prosecutions reinforce their sense of hopelessness and helplessness because they blame the bully for the victims' suicidal acts. The goal, instead, should be to empower bullying victims to seek other avenues to escape their bullies, to feel that they have choices; and that suicide is not an option. The bully should be punished, but the focus should be on his actions, not on the victim's response. Using a comparative causation analysis, as some scholars propose, we look to a person's role in another's death and punish according to the amount he contributed to the death. Factors such as the imbalance of power between the bully and his victim, and the nature and severity of the bullying should be considered in determining whether a person who has a role in another's suicide should be punished.

I. Background

A. *Traditional Bullying*

There is no universally accepted definition of bullying, but a number of states recently have passed school-based anti-bullying legislation, with different definitions of bullying. For example, one jurisdiction states bullying consists of "systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve: (1) Teasing; (2) Social exclusion; (3) Threat; (4) Intimidation; (5) Stalking; (6) Physical violence; (7) Theft; (8) Sexual, religious, or racial harassment; (9) Public humiliation; or (10) Destruction of property."¹⁰ Other states are less detailed, defining bullying as follows: "any intentional written, verbal, electronic, or physical act" that a student has exhibited toward another particular student more than once" that causes mental or physical harm, and "is sufficiently severe, persistent,

10. FLA. STAT. § 1006.147(3) (2010).

or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student.¹¹

The lack of a standard definition of bullying is problematic as it difficult to assess the scope of the problem,¹² but some studies report that as much as 85% of children between the ages of 12 and 15 reported being teased or bullied at school.¹³ This article defines bullying as “physical or verbal abuse repeated over time, and involving a power imbalance.”¹⁴

The victims of bullying can become depressed, anxious, have increased feelings of sadness and loneliness, and loss of enjoyment, health complaints, poor school performance, and are more likely to drop out of school.¹⁵ Workplace bullying is also common with up to 35% of employees reporting that they have been bullied.¹⁶ Similar to school bullying, the victims of workplace bullying can suffer emotionally and physically. In addition, it can harm their careers; victims have high rates of absenteeism and reduced productivity.¹⁷ As described below, in extreme cases, a bully can be charged with causing their victim to commit suicide.

B. *Cyber-Bullying*

Although bullying has been present among teens for centuries, twenty-first century bullying often comes in a form that is termed “cyber-bullying.” According to the National

11. See, e.g., OHIO REV. CODE ANN. § 3313.666 (West 2012).

12. Emily Bazalon, *Defining Bullying Down*, N.Y. TIMES, Mar. 12, 2013, at A23.

13. Deborah Carpenter & Christopher J. Ferguson, *What is Bullying?*, NETPLACES, <http://www.netplaces.com/dealing-with-bullies/what-is-bullying/facts-and-statistics.htm> (last visited Dec. 18, 2014) (discussing the 2001 Kaiser Family Foundation study).

14. See Bazalon, *supra* note 12.

15. *Effects of Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/at-risk/effects/index.html> (last visited Dec. 18, 2014).

16. Gary Namie & Ruth Namie, *Being Bullied? Start Here*, WORKPLACE BULLYING INST., <http://www.workplacebullying.org/individuals/problem/being-bullied/> (last visited Dec. 18, 2014).

17. Jerry Kennard, *Workplace Bullying: The Signs and the Effects on Men*, ABOUT.COM (Feb. 27, 2014), http://menshealth.about.com/cs/workhealth/a/work_bullying.htm.

Crime Prevention Council, cyber-bullying is a problem that affects almost half of American teens.¹⁸ Cyber-bullying is when someone repeatedly harasses, mistreats, or makes fun of another person online or with the use of a cell phone or other electronic device.¹⁹ Cyber-bullying can occur when a person pretends that he or she is someone else in order to trick someone else online, when someone spreads lies and rumors about another online, when someone sends or forwards mean text messages to another, and when someone posts pictures or videos of others online without their consent.²⁰

The Cyberbullying Research Center has done a number of studies to determine the prevalence, nature, and the consequences of cyber-bullying. In the Center's most recent research study, 4,441 youth between the ages of 10 and 18 were surveyed from 37 different schools.²¹ This study revealed that 83% of the youth surveyed used a cell phone at least once a week and that a larger proportion of adolescents are now using Facebook as opposed to MySpace, Twitter, and other social networking sites.²² Out of those surveyed, 20% reported that they experienced cyber-bullying and that they were most frequently the target of mean or hurtful comments and rumors.²³ Moreover, in 17% of the research sample, victims of cyber-bullying were re-victimized two or more times in a thirty-day period.²⁴ Female cyber-bullies were more likely to spread rumors, while male cyber-bullies were more likely to spread hurtful pictures or videos.²⁵

Unlike traditional bullying, cyber-bullying can be especially pervasive. The evolution of technological

18. See *Cyberbullying*, NAT'L CRIME PREVENTION COUNCIL, <http://www.npc.org/topics/cyberbullying> (last visited Dec. 18, 2014).

19. See Sameer Hinduja & Justin W. Patchin, *Teens Use of Technology 2010 February Research*, CYBERBULLYING.US, <http://www.cyberbullying.us/research.php> (last visited Dec. 18, 2014).

20. See *Cyberbullying*, *supra* note 18.

21. See Hinduja & Patchin, *supra* note 19.

22. See *id.*

23. See Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RES. CTR. (July 1, 2010), <http://cyberbullying.us/cyberbullying-research-summary-cyberbullying-and-suicide/>.

24. *Id.*

25. See Hinduja & Patchin, *supra* note 19.

communications allows bullies to embarrass their victims in front of enormous audiences and such communications can never be fully erased.²⁶ Likewise, there is a growing concern for the consequences that both the victims and perpetrators of bullying endure. Research has shown that cyber-bullying is linked to suicidal ideation.²⁷ Both youth who are bullied and those who bully are at a greater risk for experiencing thoughts of suicide, attempting suicides, and successfully completing suicides.²⁸ In fact, research shows that peer harassment contributes to depression and hopelessness, which lay the very foundation for suicide.²⁹ While research shows that all forms of bullying are significantly associated with an increase of suicidal ideation, cyber-bullying victims were nearly twice as likely to have attempted suicide as those who had not experienced cyber-bullying.³⁰

1. Recent Cases

This section focuses on two cases. First, where the cyber-bully risks that his actions may lead to a suicide; and second where the cyber-bully actively encourages the victim to take her own life.

a. *Case One - Tyler Clementi*

On September 29, 2010, the lifeless body of Tyler Clementi was found in the Hudson River.³¹ Just seven days prior, he posted his final words on his Facebook status, “Jumping off the

26. See *21st Century Bullying, Crueler than Ever*, NAT’L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/resources/files/pdf/bullying/21st%20Century%20Bullying%20-%20Crueler%20Than%20Ever.pdf> (last visited Dec. 18, 2014).

27. See Hinduja & Patchin, *supra* note 23.

28. See *id.*

29. See *id.*

30. See *id.*

31. See Kelly Ebbels, *Tragic End for a True Talent*, NORTHJERSEY.COM (Oct. 1, 2010), http://www.northjersey.com/news/104132029_Tragic_end_for_a_true_talent.html.

gw bridge sorry.”³² Tyler committed suicide after being humiliated during the two days prior to his suicide.³³ Tyler’s privacy was invaded when his roommate, Dharun Ravi, and Molly Wei, covertly set up a webcam after Tyler asked Mr. Ravi for some privacy on September 19, 2010.³⁴ Mr. Ravi surreptitiously viewed Tyler engaging in intimate acts with another male, and shortly thereafter, posted on Twitter, “Roommate asked for the room till midnight. I went into Molly’s room and turned on my webcam. I saw him making out with a dude. Yay.”³⁵ Not only did Mr. Ravi watch Tyler’s intimate encounter, but he also streamed the encounter on the Web for all of his friends to view.³⁶ Two days later Mr. Ravi posted on Twitter, “I dare you to video chat me between the hours of 9:30 and 12. Yes it’s happening again.”³⁷ The following day, after Tyler learned what Mr. Ravi had done, Tyler killed himself.³⁸

The Middlesex County Prosecutor’s Office initially charged Mr. Ravi and Ms. Wei with two counts of invasion of privacy for using “the camera to view and transmit a live image” of Tyler.³⁹ A grand jury subsequently handed down a 15-count indictment against Ravi for invasion of privacy, attempted invasion of privacy, bias intimidation, tampering with evidence, witness tampering, and hindering apprehension or prosecution.⁴⁰ He

32. See Alison Gendar, Edgar Sandoval & Larry McShane, *Rutgers Freshman Kills Self After Classmates Use Hidden Camera to Watch His Sexual Activity: Sources*, N.Y. DAILY NEWS (Sept. 30, 2010, 12:06 AM), http://www.nydailynews.com/news/ny_crime/2010/09/29/2010-09-29_rutgers_freshmen_busted_for_spying_on_fellow_students_online_sex_session_official.html.

33. *See id.*

34. *See id.*

35. *Id.*

36. *See id.*

37. Jessica Geen, *US Teenager Kills Himself After Roommate ‘Taped Him Having Sex with a Man’*, PINK NEWS (Sept. 30, 2010, 11:08 AM), <http://www.pinknews.co.uk/2010/09/30/us-teenager-kills-himself-after-roommate-taped-him-having-sex-with-a-man/>.

38. *See id.*

39. See Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1.

40. *See id.* Within a few weeks of Tyler Clementi’s death, three other young people took their own lives. Seth Walsh, a thirteen-year-old, hanged himself after being cyber-bullied because of his sexual orientation. *See John*

was ultimately convicted of all counts, and received a 30-day sentence.⁴¹

b. *Case Two - Megan Meier*

Thirteen-year-old Megan Meier hanged herself in her room after a boy she met online, Josh Evans, told her that “the world would be a better place without her.”⁴² Little did Megan know, Josh Evans never existed.⁴³ Instead, 47 year old, Lori Drew, created a fake MySpace account and communicated with Megan as a cruel joke after Mrs. Drew’s daughter and Megan had a falling out.⁴⁴ Drew, who knew Megan was on medication for depression, had the fictitious boy flirt with Megan and made Megan think he liked her.⁴⁵ “He” then abruptly told her he no longer liked her. That day, Megan killed herself. Finding that its harassment statute did not cover the incident, the state found no grounds to prosecute Drew.⁴⁶ Federal prosecutors sought unsuccessfully to employ a computer hacking statute to punish Drew.⁴⁷ Other than social opprobrium, which was widespread, Drew was not punished.⁴⁸

Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 3, 2010, at WK1. So did Asher Brown, a teen from Texas, who shot himself in the head. See Richard James, *US Gay Community Reeling from ‘Epidemic’ of Suicides Among Teenagers Taunted Over Sexuality*, MAIL ONLINE (Oct. 1, 2010, 11:25 AM), <http://www.dailymail.co.uk/news/article-1316782/US-gay-community-reeling-epidemic-suicides-teenagers.html>. Billy Lucas hanged himself at his grandmother’s house after being bullied because of his sexual orientation, as did fourteen-year-old, Kameron Jacobsen, who took his own life after being taunted on Facebook because of his sexual orientation. *Id.*

41. He was also sentenced to 300 hours of community service, three years’ probation, a \$10,000 fine, and mandatory counseling. Michael Koenigs, Candance Smith & Christina Ng, *Rutgers Trial: Dharan Ravi Sentenced to 30 Days in Jail*, ABC NEWS (May 21, 2012), <http://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014>. The lenient sentence caused a national furor. See Kate Zernike, *Judge Defends Penalty in Rutgers Spying Case, Saying It Fits Crime*, N.Y. TIMES, May 31, 2012, at A22.

42. See Maag, *supra* note 6.

43. See *id.*

44. See *id.*

45. *Id.*

46. *Id.*

47. See *United States v. Drew*, 259 F.R.D. 449, 451 (C.D. Cal. 2009).

48. Debra Cassens Weiss, *Judge Overturns Conviction of Lori Drew in*

Whether homicide charges are appropriate for cyberbullies depends in large part on whether they have caused the victim to commit suicide.⁴⁹ The next sub-section lays on general causation rules.

II. Causation Rules and Cases

The basic homicide doctrine requires that a defendant cause harm as a condition of culpability.⁵⁰ Known as “result-oriented” offenses, homicide statutes do not prohibit any particular conduct *per se*, only the result of the conduct.⁵¹ A person is culpable when he causes an unlawful death by any voluntary act⁵² accompanied by the appropriate mens rea. In contrast, most offenses focus on prohibiting specific acts—robbing, raping, carjacking, drunk driving. One could say that homicide statutes are victim-oriented rather than defendant-oriented in that they look at the result, not the act.

It is with result-oriented crimes, the largest group of which is homicides that causation issues arise.⁵³ Typically, it is when

Cyberbullying Case, ABA J. (Aug. 31, 2009), http://www.abajournal.com/news/article/judge_overturns_conviction_of_lori_drew_in_cyberbullying_case/.

49. Of course, the actor would also have to have the appropriate mens rea for a homicide charge.

50. As I explained in an earlier work, result-oriented crimes are those where there is some conduct, stated either explicitly or implicitly, and a consequence of that conduct. For example, robbery is defined as the forcible taking of the property of another. Here, the defendant’s conduct is the “forcible taking.” There is no result element. The *effect* of a successful robbery is that the victim has less property, but robbery is not a “result-oriented” crime under the above definition. There is no consequence separate and apart from the conduct, and thus, no “result” element to the offense. Compare robbery to murder. A person is guilty of murder when he “intentionally causes the death of another human being.” Here there is no explicitly stated conduct element—any act or omission will suffice. The result element is “causes the death.” The death is a consequence of the actor’s conduct. See generally Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 485 n.26 (2004).

51. *Id.*

52. The voluntary act could be by omission.

53. Some scholars state that the *actus reus* of an offense contains a causation element in that social harm is caused by all crimes. See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 180 (3d ed. 2001).

a victim's death occurs in a manner different than intended or risked by the defendant. For example, if a defendant intends to cause a person's death by shooting her, and instead she dies of fright upon seeing his raised gun, a question arises as to whether he caused her death. Similarly, if two men engage in a drag race and one of them swerves into an oncoming truck, a questions arises as to who caused the truck driver's death.

The fundamental question posed when death occurs in an atypical fashion is stated well in the Model Penal Code, which asks whether the actual result is "not too remote or accidental in its occurrence as to have a just bearing on the actor's liability."⁵⁴ The courts have developed a two-part analysis to answer this question. The defendant's conduct must be both the actual and legal cause of death. To assess the actual cause prong, courts ask whether "but for" the defendant's actions, would the death have occurred when it did.⁵⁵ This step casts a wide net that eliminates only the most peripheral of actions.⁵⁶ One could say, for example, that but for a defendant's mother giving birth to him, he could not have killed the victim, and but for her mother's birth of her, *etc.*

Therefore, most causation analysis focuses on the second prong of legal causation to narrow down all those incidents that may have filled the "but-for" net. One way to measure whether a defendant is the legal cause of death is to see if he is the proximate cause of death. Thus proximity in and of itself is not the requirement, but just the tool. This tool uses foreseeability as the main gauge of legal cause. But even foreseeable results may not suffice as legal cause. In certain instances, the link between the defendant's actions and the harmful result is broken by intervening forces.

The intervening force relevant to this article is the victim's own actions that contribute to her death. Even if foreseeable, such actions may break the causal chain. Why is this the case?

Professor Dressler acknowledges that the vast majority of causation problems occur in homicide offenses.

54. MODEL PENAL CODE § 2.03 (1985).

55. *See* DRESSLER, *supra* note 53, at 184.

56. *Id.* For example, if defendant gives victim poison that would cause death in one hour, but after five minutes, victim is struck by lightning that instantly kills him the defendant is not the but-for cause of death. *Id.* at 186-87.

Two historical explanations exist: First, under English common law, suicide was a crime that resulted in *post-mortem* punishment in the form of forfeiture of land and non-religious burial.⁵⁷ Most likely the latter punishment stemmed from the views of most religions that suicide was a grave sin, as it violated the commandment not to kill.⁵⁸ The exceptions to punishment of the suicide actor were limited to instances where he was insane or compromised by pain or depression, rather than by “anger or ill will.”⁵⁹ Thus, the early common law recognized a distinction between suicides committed with a diminished capacity versus those committed with free will. Even as the prevalence of suicide as a crime diminished, its underlying distinction remained as a basis for determining culpability of third persons to the suicide. As discussed more fully below, the common-law distinction also applies as the basis of the related, but separate crime of assisting a suicide.⁶⁰

A second reason for the rule that a victim’s action breaks the causal chain is grounded in tort rules of contributory negligence. The early common law of torts held that a plaintiff’s contributory negligence barred any tort recovery, mainly because it was thought impossible to properly apportion responsibility. Most jurisdictions have rejected the harsh effects of a contributory negligence rule in favor of apportionment through comparative negligence principles; nevertheless, vestiges of the ban remain by analogy in the criminal law.⁶¹

57. Sue Woolf Brenner, Note, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of “Causing Suicide”*, 47 ALB. L. REV. 62, 64 (1982); Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 349 (1986).

58. See generally G. Steven Neeley, *The Right to Self-Directed Death: Reconsidering an Ancient Proscription*, 36 CATH. LAWYER 111 (1995).

59. See Brenner, *supra* note 57.

60. See *infra* notes and accompanying text.

61. The policy of the law in this respect is founded upon the inability of:

human tribunals to mete out exact justice. A perfect code would render each man responsible for the unmixed consequences of his own default; but the common law, in view of the impossibility of assigning all effects to their respective causes, refuses to interfere in those cases where negligence is the issue, at the instance of one whose hands

The following sub-section describes various scenarios that implicate the ability to freely choose to take one's own life. Generally, when a victim seeks to escape imminent physical or mental injury inflicted by a defendant by committing suicide, the causal chain remains intact between the defendant's act and the victim's death.

A. *Infliction of Physical Injuries That Lead to Suicide*

It is well-settled that when a victim is assaulted by a defendant, the victim's actions to take his or her own life are not a superseding cause that breaks the causal connection between the defendant's actions and the victim's death. Therefore, defendants can and have been charged with

are not free from the stain of contributory fault . . .

CHARLES BEACH FISK, A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE 12 (1885).

It is said again, that the true theory upon which the rule rests is that the defendant is not the cause of the injury if the plaintiff's negligence contributes to it; but this is a very superficial view. If it is meant that the defendant is not the *sole* cause, the argument only goes around in a circle, and if it is meant that the defendant is liable every time he is the sole cause of an injury, it is not true. "The true ground," says Dr. Wharton, "for the doctrine is that, by the interposition of the plaintiff's independent will, the causal connection between the defendant's negligence and the injury is broken." It is also sometimes assumed to rest upon the maxim *volenti non fit injuria*, but the objection to this position, as well as to Dr. Wharton's definition, is that negligence, in its very essence, negatives the idea of an exercise of the will. A person whose negligence causes an injury cannot be spoken of with any accuracy of expression as "willing" it. Negligence can only be conceived upon the hypothesis that the will, as to the particular condition, is inactive. In my judgment no more satisfactory reason for the rule in question has been assigned than that which assumes it to have been founded upon considerations of public policy. We need not seek for any better reason for a rule of law than that, among all the possible rules that might be adopted, it is plainly the best—that indeed it is the only rule upon the subject for an instant practicable.

Id. at 12-13 (footnote omitted) (citations omitted).

homicides, even though the victims cause their own immediate death by committing suicide. The typical rationale is that the defendant's actions rendered the victim irresponsible so that the suicide was not the product of free will. For example, in *People v. Lewis*,⁶² the defendant and the victim were brothers-in-law who engaged in an altercation that resulted in the victim being shot in the abdomen.⁶³ Although medical evidence established that the wound would have caused the victim's death in about an hour, within a few minutes of being wounded, the victim took a knife and cut his own throat causing the victim to die five minutes later. The Court was faced with the dilemma of whether the victim's action of killing himself by slashing his throat, which was indeed the immediate cause of his death, should acquit the defendant of manslaughter.⁶⁴

The Court ruled that it must look to the time of death and determine if the wound inflicted by the defendant contributed to the victim's death.⁶⁵ It held that when the victim slashed his throat, the gunshot wound was contributing to the death, the defendant was properly convicted of manslaughter.⁶⁶

The same principle of culpability applies to cases where the victim refuses medical treatment for her wounds or pulls out intravenous tubes that are the immediate cause of death. The underlying rationale is that the defendant is responsible for destroying the victim's desire to live. For example, in *People v. Macklin*, the defendant shot the victim when the victim showed up at the defendant's house with others to fulfill a debt that the defendant's girlfriend owed the victim.⁶⁷ The victim was shot in the neck and a tracheotomy and breathing tubes were inserted into the victim to enable the victim to

62. 57 P. 470, 473 (Cal. 1899).

63. *See id.* at 471.

64. *See id.* at 471-72.

65. *See id.* at 473.

66. *See id.* This principle is applied regardless of whether the wound inflicted upon the victim before the committed suicide is mortal or non-mortal. *See, e.g.,* United States v. Hamilton, 182 F. Supp. 548, 549 (D.D.C. 1960).

67. *See* *People v. Macklin*, No. 190994, 1999 WL 33435973, at *1 (Mich. Ct. App. Sept. 7, 1999).

breathe.⁶⁸ At some point the tubes were detached from the victim and he died as a result of the absence of the tubes.⁶⁹ The defense argued that the victim's medical condition was stable, that he was recovering from the gunshot wound, and that he committed suicide, which, allegedly, was an intervening cause that broke the causal chain in his homicide charge.⁷⁰ The court disagreed, holding that the victim's suicide was a natural and probable complication of the gunshot wound that caused the need for intubation.⁷¹

What is significant in the refusal of treatment or removal of life-saving devices cases is that the courts do not always rest their rulings on a finding that defendant rendered the victim irresponsible so that the suicide was not an act of free will. To the contrary, some courts rely on a person's right to freely and voluntarily choose to die as the rationale for finding that exercising this right does not relieve the defendant of causal responsibility.⁷² As explained by one court, the basis of defendant's culpability is that he "forged a causative link between the initial injury and death and was a sufficiently direct and contributing event which eventually resulted in death."⁷³ What could break the causal chain is a sufficient length of time and recovery from defendant's act and a suicide.⁷⁴

Why should it be that the choice to commit suicide that is freely and reasonably made does not break the causal chain? One explanation was offered in a leading treatise:

[S]uicide is not abnormal when B acts out of extreme pain of wounds inflicted by A or when the wound has rendered him irresponsible. Although voluntary harm-doing usually suffices

68. *See id.*

69. *See id.*

70. *See id.* at *2. Defendant also argued that the cause of death could have been gross negligence committed by the nurse in removing the tubes. *Id.*

71. *Id.*

72. *See, e.g.,* *People v. Caldwell*, 692 N.E.2d 448 (Ill. App. Ct. 1998); *People v. Velez*, 602 N.Y.S.2d 758 (Sup. Ct. Bronx County 1993).

73. *Velez*, 602 N.Y.S.2d at 762.

74. *Id.*

to break the chain of legal cause, this should not be so when A causes B to commit suicide by creating a situation so cruel and revolting that death is preferred.⁷⁵

The key factors in finding that a suicide does not break the causal chain is the defendant's commission of a violent crime that resulted in the victim's physical pain and trauma, with the suicide occurring shortly thereafter; a finding of lack of free will is not essential.

B. *Infliction of Mental Injuries That Lead to Suicide*

Whether the foregoing rule applied to non-physical injuries was the focus of *State v. Stephenson*, a case famous both for its causation holding and its larger narrative in helping curtail the prominence of the KKK in the United States. Because the infliction of mental anguish is at the heart of current cyber-bullying suicide cases, a detailed discussion of the case follows.

75. WAYNE R. LAFAVE, CRIMINAL LAW § 6.4, at 365-66 (5th ed. 2010); see *People v. Macklin*, No. 190994, 1999 WL 33435973, *1 (Mich. Ct. App. Sept. 7, 1999). This article looks at suicide and whether the defendant has caused it, rather than the specific separate crime of aiding a suicide that is more commonly used when a person helps a terminally ill patient kill him or herself. See generally Shaffer, *supra* note 57, at 348. In the latter case, the person's desire to die pre-dates any action by the defendant, and it is much more likely that courts will find that the victim's actions alone are the cause of his demise. Finding that a person who intentionally aids another to kill himself should be a crime, many jurisdictions enacted assisted suicide statutes that codified the distinction between providing the means to commit suicide and actively participating in the suicide by performing the physical act that causes death. See, e.g., CAL. PEN. CODE § 401 (West 2014); DEL. CODE ANN. tit. 11 § 645 (West 2014); N.Y. PENAL LAW § 120.30 (McKinney 2014). The *Kevorkian* cases highlight this division. See *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1974). Dr. Kevorkian, a prominent and zealous advocate of physician-assisted suicides, developed a "suicide machine" to assist terminally-ill individuals who wished to die. He was indicted on two counts of murder after two women died using his machine with him at their sides, but with the women activating the machine. The Supreme Court of Michigan ultimately ruled that Dr. Kevorkian could not be charged with their deaths because he did not participate in the "final overt act that causes death." *Id.* at 741. It was only after Dr. Kevorkian personally injected lethal drugs into a patient that he was convicted of murder. See Dirk Johnson, *Kevorkian Sentenced to 10 to 25 years in Prison*, N.Y. TIMES, April 14, 1999, at A21.

The case arose in Indiana in 1925. The Ku Klux Klan was at the height of its power in the United States, Indiana was its stronghold with over 250,000 members,⁷⁶ and David Curtiss Stephenson was the Grand Dragon of its Ku Klux Klan.⁷⁷ Stephenson accumulated a great amount of wealth from the position and used his power and wealth to support political candidates. By 1925 over half the members of the Indiana General Assembly, the Governor of Indiana, and many other high-ranking members of the government were all members of the Klan.⁷⁸ As Stephenson bragged to people, "I am the law in Indiana."⁷⁹

In 1924, Madge Oberholzer attended a dinner at the Governor's mansion, where she met Stephenson, and he was instantly attracted to her.⁸⁰ Madge went on two dates with him; on the second date, he revealed that he was the Grand Dragon of the Ku Klux Klan. Incensed, she immediately broke off the relationship. On March 27, 1925, Stephenson called her, and asked her to come to his home about a new, important job.⁸¹ When she arrived at his home, he overpowered her, forcing her to drink several glasses of alcohol until she became sick and nearly passed out. Stephenson then had two of his bodyguards carry her into a car, where she fainted. When she awoke, she was on Stephenson's private train, on its way to Chicago.⁸² There he raped her several times, also mutilating her, until she blacked out.⁸³ Madge thought to kill herself with Stephenson's gun, but wanting to spare her mother disgrace, decided to poison herself, whereby death would occur more

76. *Ku Klux Klan in Indiana*, IN.GOV, <http://www.in.gov/library/2848.htm> (last visited Dec. 18, 2014).

77. DAVID BODENHAMER & ROBERT G. BARROWS, *ENCYCLOPEDIA OF INDIANAPOLIS 1296-97* (1994).

78. *Indiana Klan*, WIKIPEDIA (Oct. 9, 2014, 7:00 PM), http://en.wikipedia.org/wiki/Indiana_Klan.

79. WILLIAM LUTHOLTZ, *GRAND DRAGON: D.C. STEPHENSON AND THE KU KLUX KLAN* 43, 89 (1993).

80. *Id.* See also Karen Abbott, "Murder Wasn't Very Pretty": *The Rise and Fall of D.C. Stephenson*, SMITHSONIAN.COM (Aug. 30, 2012), <http://www.smithsonianmag.com/history/murder-wasnt-very-pretty-the-rise-and-fall-of-dc-stephenson-18935042/?no-ist>.

81. *Id.*

82. *Stephenson v. State*, 179 N.E. 633, 635 (Ind. 1932).

83. *Id.*

slowly and to perhaps make it look less like a suicide.⁸⁴

Madge asked Stephenson to let her leave the hotel to purchase sundry items. With one of Stephenson's colleagues escorting her, she went to a drug store, where she bought poison, which she secretly took back at the hotel. She died on April 14, 1925, after giving a dying declaration that recounted what had happened to her. Medical experts laid the cause of death to a combination of the poison she took and the injuries Stephenson inflicted during the rape.

Stephenson was arrested and charged with rape and murder. At trial, he argued that it was Madge's own act that caused her death. The jury rejected this claim and found Stephenson guilty of killing her. The finding was affirmed by the Supreme Court of Indiana, which undertook a detailed analysis of the causation issue, raised once again by Stephenson on appeal. The court agreed that an independent, intervening cause will eliminate defendant's acts as a proximate cause of death. Nevertheless, the court noted well-settled primary and secondary authority that established where a victim takes her own life because she has been physically attacked by the defendant, and is therefore "rendered irresponsible by the wound," the defendant is responsible for causing her death.⁸⁵ Similarly when a victim is trying to flee from further attack and exposes herself to harm, the causal link remains.⁸⁶

The significance of the *Stephenson* ruling is that the court stated that the injury that renders the victim irresponsible is not limited to physical wounds. Thus, when Stephenson repeatedly attempted to rape her and inflicted both physical and mental wounds upon Madge that rendered her "distracted by pain and shame so inflicted upon her,"⁸⁷ he was guilty of causing her death, notwithstanding her suicide. Moreover, the court stressed that Stephenson was ever-present because of his cohorts (and, I believe, because of the power he held in Indiana,) Madge could feel that she had no viable alternative to

84. *Id.*

85. *Id.* at 648-49.

86. *Id.* (citing *Rex v. Beech*, [1912] 23 Cox Crim. Cas. 181 (Crim. App. 1912), *accord* *Rex v. Valade*, [1915] 26 Can. Cr. Cas. 112 (Can. Que.)).

87. *Id.* at 655.

escape continued sexual assault than by committing suicide. The court stated that her situation was no different than throwing oneself out of window to escape. It concluded that Stephenson, “rendered the deceased distracted and mentally irresponsible, and that such was the natural and probable consequence of such unlawful and criminal treatment.”⁸⁸

Some early scholars have criticized *Stephenson* on the grounds that “shame and disgrace” rather than prevention of further harm was the reason for Madge’s suicide and that this was insufficient to hold Stephenson culpable.⁸⁹ Their criticism rests on a reluctance to acknowledge that defendant’s acts could have rendered her irresponsible or that mental harm is a sufficiently natural and probable consequence of rape so as to lead to suicide. Whether this is because of archaic notions of mental injury is unclear, but one can hazard a guess that at the time of the *Stephenson* case in 1932, there was considerable skepticism about mental impairments.

We can sum up with the uncontroversial rule that when the defendant constrains the victim’s free will by inflicting great physical or mental pain, he has caused the victim to commit suicide and is therefore guilty of a homicide.⁹⁰

88. *Id.* at 649. As a coda to the case, the outrage over his conduct toward Madge led to the downfall of the KKK in Indiana and nationwide, so that from its height of popularity in 1924 when the KKK’s membership numbered 6,000,000, it plunged to 30,000 by 1930—with most scholars in agreement that the Oberholzer case was the catalyst for Klan disenchantment. *The Various Shady Lives Of The Ku Klux Klan*, 85 TIME 32, Apr. 9, 1965, <http://web.a.ebscohost.com/ehost/detail/detail?sid=c1f7385a-0077-4f00-b242-eaac089e9e7f%40sessionmgr4003&vid=2&hid=4114&bdata=JnNpdGU9ZWWhvc3QtbGl2ZSZzY29wZT1zaXRl#db=a9h&AN=54030426>.

89. Lester P. Schoene, et al., *Homicide- responsibility for Victim’s Suicide Following Assault*, 45 HARV. L. REV. 1261 (1932).

90. In contrast to scenarios where the victim wants to die, the law recognizes instances where a victim’s actions will be charged back to a defendant even where the victim has free will. The criteria are joint activity and a victim who risks, rather than seeks, death. The classic example is the Russian roulette scenario. Here players who jointly agree to play a game that involves spinning a gun’s cylinder, then pointing the gun to one’s own head, and firing. Should death occur, courts have held that the game participants are guilty of reckless homicide on the theory that the defendants’ participation and encouragement caused the victim’s death. The free will of the victim in choosing to engage in the risky behavior does not break the causal chain when death is foreseeable. See, e.g., *State v. McFadden*, 320 N.W.2d 608 (Iowa 1982); *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass.

III. Comparative Liability

As described above, traditional rules cut off a defendant's responsibility for a person's suicide unless he rendered the victim mentally irresponsible or otherwise compromised the victim's free will, such as by inflicting serious physical or mental injuries. At issue is whether the law should move from this "all-or-nothing" causation approach to one of comparative culpability.

When the bullying victim intentionally kills himself, the current law relieves the bully of any responsibility in causing the suicide unless he rendered the victim irresponsible or inflicted serious physical injuries. Yet there is clearly some connection between the bully and bullied. Professor Vera Bergelson advocates that the relationship between victim and perpetrator be formally recognized in the criminal law, rather than in merely these few isolated examples via a principle of "conditionality of rights."⁹¹ She explains that, "Pursuant to this principle, the perpetrator's liability should be reduced to the extent the victim, by his own acts, has diminished his right not to be harmed."⁹² By that principle, a person may lose some rights due to his own actions. If that happens, the perpetrator may not be guilty of violating the rights that have been lost.

Should Professor Bergelson's conditionality of rights principle work in reverse to inculcate rather than to exculpate?⁹³ In situations such as *Stephenson* that involve the involuntary reduction of rights, she acknowledges causation is "almost never an all-or-nothing issue,"⁹⁴ yet the criminal law traditionally has refused to acknowledge this fact. She suggests that tort law approaches to comparative causation

1963). *But see* Commonwealth v. Root, 170 A.2d 310 (Pa. 1961). Since the victim only risks death in these cases, they are not squarely on point.

91. Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 387 (2005).

92. *Id.* at 390.

93. A special thanks to my former colleague, Professor Luis Chiesa for his help on this point.

94. Bergelson, *supra* note 91, at 479.

may work well in the criminal law context.⁹⁵ Helpful tort approaches include examining the relative responsibility of victim and perpetrator.⁹⁶ Thus in the criminal law context, the questions a jury would need to answer are two-fold: (1) the difference a particular act makes to an outcome and (2) the legal and moral weight we assign to different types of behavior.

According to Professor Bergelson, comparative causation analysis best explains the *Stephenson* outcome.⁹⁷ For the first question, the jurors would be likely to conclude that Stephenson's actions were at least as important a cause of Madge Oberholtzer's death as her own—but for him, she would not have taken the poison, or have been denied medical assistance.⁹⁸ On the second question, Professor Bergelson suggests the defendant is the cause of death because, “the jurors would have to compare the legal and moral significance of cold-blooded, premeditated criminal acts committed by Stephenson and hysterical, semi-rational acts of Madge Oberholtzer committed in response to the attack she had suffered.”⁹⁹ In her view, this is a better analysis of the result than the one employed by the *Stephenson* court that stretched to find guilt under traditional causation principles.¹⁰⁰

95. *Id.* at 453.

96. *Id.* at 481. She suggests other tort-based tests, such as counterfactual similarity, and the “necessary element of a sufficient set.” *Id.* at 480. Professor Simons is most critical of applying these two tests to criminal law analysis. See Simons, *infra* note 102.

97. See Bergelson, *supra* note 91, at 482.

98. *Id.* at 483.

99. *Id.*

100. *Id.* As further support for her conditionality of rights principle, Professor Bergelson examines scenarios where the victim has voluntarily reduced his rights, such as by drag-racing or playing Russian Roulette. Courts have reached divergent results in these cases with some finding the defendants caused the victims' deaths and others holding they have not. *Id.* at 422. She posits her comparative culpability formula supports inculcating defendants for the victim's death. She proposes that, “A more realistic and fair approach [than to completely absolve or blame defendants] would be to apportion responsibility among all parties who have contributed to the criminal outcome,” by punishing the survivors of risky games of a type of reckless endangerment offense. *Id.* at 472. She does not go so far as to say the defendants caused the victim's death, but does propose that defendants have a connection to the victim's actions and should be punished based on this connection.

Another scholar, Professor Kenneth Simons, is mostly critical of Professor Bergelson's theory as applied to defenses such as consent, self-defense and provocation.¹⁰¹ Nevertheless, he agrees that Professor Bergelson's concept of relative causal contribution "is indeed a coherent and plausible approach."¹⁰² He further acknowledges that while the law "currently employs proximate cause criteria in an all-or-nothing manner, but it would indeed be possible to employ such criteria flexibly, not dichotomously."¹⁰³

Professor Bergelson supports a comparative approach as support for her position that a victim's actions should be considered to mitigate a defendant's culpability, rather than artificially ignoring the victim's role in crimes. My contention is that a conditionality of rights principles can work equally well to inculcate. Accordingly, we should not treat victim suicide as automatically breaking the causal chain and defendant's contribution to the harm. Whether we use causation principles or create other crimes to punish a defendant's part in causing the death of one who kills himself, what we are saying is that there is a connection between them that needs recognition.

Applying Professor Bergelson's test to the *Clementi* and *Drew* cases, we would ask first whether the bullies were the but-for cause of death. For the first question, a jury is likely to conclude that Drew's action of creating a false web persona that taunted the victim "w[as] at least as important a cause of Meghan Meier's death as her own act of hanging herself."¹⁰⁴

101. Kenneth W. Simons, *The Relevance Of Victim Conduct In Tort And Criminal Law*, 8 BUFF. CRIM. L. REV. 541 (2005). His position is that the conditionality of rights principle does not provide a singular, helpful theory by which to judge victim culpability; instead it merely gives different means of addressing consent, self-defense and provocation. *Id.* at 562-63.

102. *Id.* at 551-52.

103. *Id.* at 552.

104. Traditional but-for causation analysis does not require the defendant's act be the sole cause of death; it is sufficient for it to be a "substantial factor" in the death. See WAYNE LAFAVE, CRIMINAL LAW § 6.4(b), at 653-65 (5th ed. 2010). Whether Meghan Meier had pre-existing emotional problems would not relieve the defendant of culpability as the law requires that one "takes the victim as she finds her." *Id.* § 6.4(f)(2), at 364. Thus, if a defendant stabs a person who because of a blood-clotting disorder bleeds to death, the defendant is not relieved of responsibility for causing the victim's

Similarly, Ravi's act of secretly taping and tweeting about Tyler's homosexual encounter was a substantial factor in the suicide.

Under a comparative causation approach, the second prong assesses the "legal and moral weight we assign to different types of behavior."¹⁰⁵ Lori Drew, an adult repeatedly preyed on a young girl via fake web postings to perform a sick act of revenge for a supposed slight on her own daughter. Drew is the epitome of a cyberbully because of the imbalance of power between her and Meghan, and the repeated acts of bullying.¹⁰⁶ A jury should have been asked to assess whether Drew's acts was a cause of Meghan's death; this would have been possible if the prosecution had pursued homicide charges against Drew rather than asserting that there were no state cyberbullying or harassment laws under which to charge Drew.¹⁰⁷

The *Clementi* case is less likely to result in finding Ravi culpable for homicide under a comparative causation analysis. At first blush, there are many similarities between the *Clementi* and *Stephenson* cases. First, in both cases the victims suffered shame and humiliation- *Clementi* by his publicly outing as a homosexual, and *Oberholtzer* by being raped. Second, both could be said to be under their tormentors' control with no means of escape. *Stephenson* physically controlled his victim by kidnapping her and keeping her under the watch of his cronies and employees. She knew he was the powerful head of the KKK who bragged about controlling the courts and law enforcement in his state. *Clementi* was virtually controlled by Ravi because the pervasive nature of the internet made it impossible for him to escape.

Despite these similarities, *Stephenson's* violent beating, biting and raping of *Oberholtzer* is the decisive difference between the situations. The weight a jury gave to these actions

death. *Id.* Even if the defendant does not intend to inflict a deadly injury, courts have found them responsible, despite victim's pre-existing condition, although the rule is less definitive. *Id.* § 3.12(h), at 317.

105. *See* *United States v. Drew*, 259 F.R.D. 449, 451 (C.D. Cal. 2009).

106. *Id.*

107. The outrage over the *Drew* case led the Missouri legislature to pass a criminal harassment law. *See* MO. ANN. STAT. § 565.090 (2012). Critics have attacked the law as unconstitutionally vague. One wonders why the prosecutors did not charge Drew with reckless child endangerment.

was a major factor in convicting him of Oberholtzer's death by suicide. What Ravi did to Clementi was less nefarious. It most likely would appear to a jury as an extremely stupid, juvenile act that, under the conditionality of rights test, would not inculcate Ravi for Clementi's death.¹⁰⁸ In this scenario, a better result in measuring the interrelationship between the defendant and the victim is to say defendant deserves punishment, but not for a homicide.¹⁰⁹

IV. Conclusion

Bullying and suicide are an ever-increasing problem in the Internet age. Studies have shown that bullying victims have a higher suicide rate than their non-bullied contemporaries. Prosecutions that paint victims of bullying who have committed suicide as mentally unstable may reinforce the sense of hopelessness and helplessness others who are bullied feel. The goal should be to empower bullying victims to seek other avenues to escape their bullies, to feel that they have choices and that suicide is not a good option. A comparative causation analysis would not treat the suicide as an automatic break in the causal chain or mark the victim as mentally unstable. Instead, it would look to a person's role in another's death; by inculcating the bully, we are saying that he deserves punishment because his actions had an effect on the suicide victim.

For egregious bullying cases, prosecutors can and should consider possible homicide charges. Whether a jury will be able to properly assess the defendant's role in a victim's death requires us to reject victim suicide as either an automatic break in the causal chain or the product of mental irresponsibility. Instead, a jury should consider factors such as

108. While Ravi and Clementi do not fit squarely within the definitions of bully and victim since there was not an obvious power imbalance between them, we could posit that a gay young adult is in powerless situation in a majoritarian heterosexual world. However, to fit squarely within the *Stephenson* model, the prosecution would have to paint Clementi as mentally irresponsible, an undesirable option.

109. See Foderaro, *supra* note 39 and accompanying text. Ravi's thirty-day sentence provoked much public outrage as too lenient; appeals of the verdict and the sentence by the defense and prosecutions, respectively, are pending.

the imbalance of power between the bully and his victim, the nature and severity of the bullying, and whether avoidance is possible.