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Article abstract

In *AB v. Bragg*, the Supreme Court of Canada ruled that fifteen-year-old AB should be allowed to use a pseudonym in seeking an order to disclose the identity of her online attacker. By framing the case as one pitting the privacy interests of a *youthful* victim of *sexualized* online bullying against principles protecting the free press and open courts, the SCC approached but ultimately skirted the central issue of equality. Without undermining the important precedent that AB achieved for youthful targets of online sexualized bullying, the author explores the case as a missed opportunity to examine the discriminatory tropes and structural inequalities that undergird the power of this kind of bullying. Viewed through an equality lens, enhanced access to pseudonymity for targets is not necessarily about privacy per se, but rather an interim measure to respond to the equality-undermining effects of sexualized online bullying—a privacy mechanism in service of equality.

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"Sexualized Online Bullying" Through an Equality Lens: Missed Opportunity in *AB v. Bragg*?

*Jane Bailey**

In *AB v. Bragg*, the Supreme Court of Canada ruled that fifteen-year-old AB should be allowed to use a pseudonym in seeking an order to disclose the identity of her online attacker. By framing the case as one pitting the privacy interests of a *youthful* victim of *sexualized* online bullying against principles protecting the free press and open courts, the SCC approached but ultimately skirted the central issue of equality. Without undermining the important precedent that AB achieved for youthful targets of online sexualized bullying, the author explores the case as a missed opportunity to examine the discriminatory tropes and structural inequalities that undergird the power of this kind of bullying. Viewed through an equality lens, enhanced access to pseudonymity for targets is not necessarily about privacy per se, but rather an interim measure to respond to the equality-undermining effects of sexualized online bullying—a privacy mechanism in service of equality.

Dans *AB c. Bragg*, la Cour suprême du Canada a statué que AB, âgé de 15 ans, avait le droit d'utiliser un pseudonyme pour demander une ordonnance de divulgation de l'identité de son agresseur en ligne. En voyant dans l'affaire un conflit entre le droit à la vie privée d'un *jeune* victime de la cyberintimidation *sexualisée*, et les principes de la liberté de la presse et du droit à la publicité des débats judiciaires, la CSC a abordé la question mais a contourné finalement la question centrale de l'égalité. Sans ignorer le précédent important que la Cour a rendu pour protéger les jeunes qui sont ciblés par l'intimidation à caractère sexuel en ligne, l'auteure envisage l'affaire comme une opportunité manquée d'examiner le langage discriminatoire et les inégalités structurelles qui sous-tendent la force de ce type d'intimidation. Du point de vu de l'égalité, un accès élargi à l'utilisation d'un pseudonyme pour des jeunes ciblés ne concerne pas forcément la vie privée comme telle, mais est plutôt une mesure provisoire pour répondre aux effets de l'intimidation à caractère sexuel en ligne qui minent l'égalité, c'est-à-dire un mécanisme de la vie privée au service de l'égalité.

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Introduction

In 2010, fifteen-year-old AB was targeted by a fake Facebook profile that an unknown person created about her. The fake profile not only used a variation on AB's name, but also included a photo of her and purported to discuss her allegedly preferred sexual acts, as well as her appearance and weight. AB asked the Nova Scotia Supreme Court (NSSC) to order the Halifax-based Internet service provider (ISP) Bragg Communications Inc. (Bragg) to disclose customer information related to the Internet Protocol (IP) address from which the fake Facebook profile originated. AB also asked to be allowed to proceed with her disclosure application using a pseudonym and requested a ban on the republication of the sexualized attacks made in the fake profile (together, the "publicity-related requests"). Two media representatives, the Halifax Herald Limited (Herald) and Global Television (Global), intervened to oppose her publicity-related requests.

At first instance, Justice LeBlanc ordered Bragg to release the subscriber data sought, but denied AB's confidentiality and partial publication ban requests.[1] In a subsequent judgment, he granted the requests from the Herald and Global for costs, ordering AB to pay $1,500 to the Herald and $750 to Global.[2] The Nova Scotia Court of Appeal (NSCA) unanimously dismissed AB's appeal (per Justices MacDonald, Saunders, and Oland) and again ordered costs in favour of the Herald and Global.[3] AB was partially successful on appeal to the Supreme Court of Canada, which granted her confidentiality request and overturned the cost orders made by the courts below, but denied her partial publication ban request and declined to make any award of costs in relation to the appeal before it.[4]

The Supreme Court's decision to grant AB's confidentiality request turned on the importance of protecting children, privacy, and access to justice in cases in which young victims seek legal redress for "sexualized online bullying".[5] From that perspective, it represents an important step forward for children seeking legal remedies in an era permeated by widespread technologized dissemination of information, misinformation, and reputational attacks. However, my focus here is on something that was

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1 *AB v Bragg Communications Inc*, 2010 NSSC 215 at paras 22, 37, 293 NSR (2d) 222 [*AB* Chambers].

2 *AB v Bragg Communications Inc*, 2010 NSSC 356, 297 NSR (2d) 42 [*AB* Costs].

3 *AB v Bragg Communications Inc*, 2011 NSCA 26, 301 NSR (2d) 34 [*AB* Appeal].

4 *AB v Bragg Communications Inc*, 2012 SCC 46, [2012] 2 SCR 567 [*AB* SCC].

5 *Ibid* at para 14.

not said in this case. Remarkably, given the Supreme Court's focus on the *sexualized* nature of the attacks, the result in *AB* was achieved without a single reference to "equality" in any of the twelve facta filed on the appeal to that Court, nor in any of the decisions written by the NSSC, the NSCA, or the Supreme Court. In this case comment, I explore the case as a missed opportunity to: (i) contextualize "sexualized online bullying"[6] within a framework of structural inequality that disproportionately exposes girls, women, and all members of the LGBTQ community to *sexualized* attack; and (ii) conceptualize an equality-enhancing role for privacy as an interim response to conditions of substantive inequality. Moreover, I suggest the case is symbolic of a larger individuated discourse around bullying that too often neglects the role of structural inequality.

Parts I and II explore in detail the factual background and judicial decisions leading up to AB's appeal to the Supreme Court in order to emphasize both the nature of the online attack at issue and the range of liberties at stake, including freedom of the press, freedom of expression, the open court principle, and privacy. Part III details the Supreme Court decision, focusing on the careful attention paid to child protection and to a largely negative and individuated conception of privacy, and noting the absence of an equality argument. Part IV locates sexualized online bullying within the framework of structural inequality, suggesting not only the central role that equality analysis should play in cases of "online sexualized bullying" (and could play in future cases with respect to many forms of discriminatory online harassment), but also the equality-affirming role that privacy might have played in the case. The conclusion reflects upon the important role that equality should play, not only in future legal cases involving sexualized online bullying, but also in the larger discourse around bullying and cyberbullying.

I. Background

In March 2010, fifteen-year-old AB discovered that someone had created a fake Facebook profile using a photo of her and a slightly modified version of her name. The fake profile discussed AB's appearance and weight[7] and also included explicit references to AB's allegedly preferred sexual acts. Someone who had received a friend request from the fake profile forwarded it to AB. AB printed the request and showed it to her father, CD. AB and CD later learned that the fake profile had been taken down. They retained counsel, who obtained from Facebook the IP address

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6 *Ibid* at para 14.

7 *AB* Chambers, *supra* note 1 at para 3.

from which the fake profile had originated.[8] The IP address was allocated to Bragg, an ISP in Dartmouth, Nova Scotia, doing business under the name Eastlink. Counsel for Bragg indicated that they would not release customer information relating to that IP address without a court order.

In May 2010, AB, through her litigation guardian CD, filed a notice of application in the Nova Scotia Supreme Court for an order compelling Bragg to disclose the customer information relating to the IP address provided by Facebook, hoping that this information would assist her in identifying the person who had posted the fake profile. In addition, she requested that the NSSC allow her disclosure application to proceed under pseudonyms for both herself and her father (the "confidentiality request"), and that the court issue an order prohibiting publication of the words used in the fake profile (the "partial publication ban request"). The thrust of AB's argument was that if these words were republished, she would once again be exposed to the humiliating impact of the defamatory sexualized attack.

Pursuant to the *Nova Scotia Civil Procedure Rules*,[9] the media received abridged notice of AB's publicity-related requests. Upon receiving this notice, the Herald and Global sought leave to intervene to oppose those requests.[10] Bragg did not appear and took no position with respect to AB's application. Only AB and the Herald appeared at the initial chambers hearing, which was adjourned to grant AB time to file supplementary materials relating to the publicity-related requests. The adjournment also allowed Global sufficient time to file its own brief, so that both the Herald and Global appeared at the subsequent continuation of the hearing, again, not to oppose AB's application for disclosure, but to oppose the publicity-related requests.[11]

II. Judgments Below

A. First Instance and Costs Decisions of the Nova Scotia Supreme Court

Justice LeBlanc of the Nova Scotia Supreme Court heard AB's application for disclosure and her publicity-related requests over the course of three days in May 2010 and rendered a decision early in June 2010. Justice LeBlanc permitted AB's motion to abridge the notice period in rela-

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8 *AB* Appeal, *supra* note 3 at paras 10–11.

9 *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, R 85.05.

10 Facts in this section are taken from *AB* SCC, *supra* note 4 (Factum of the Appellant, redacted, at paras 18–23) [*AB* Factum].

11 *AB* Costs, *supra* note 2 at paras 1, 19.

tion to her application.[12] The court had little trouble finding that AB's application for disclosure of customer information should be granted, even taking into account the possible privacy and free expression interests of the anonymous poster. Justice LeBlanc found that: (i) AB had made out a prima facie case of defamation (accepting that the words used in the sexualized attack referred to AB, were communicated to at least one other person, and would tend to lower AB's reputation in the eyes of a reasonable person); (ii) there was no other means by which AB could get the information needed to identify the anonymous poster; and (iii) the public interest was not served by allowing someone to maintain anonymity to libel and destroy the reputation of another person.[13] However, Justice LeBlanc dismissed both of AB's publicity-related requests.

Justice LeBlanc's reasons for the decision with respect to the publicity-related requests do not appear to consider the confidentiality request and the partial publication ban request individually, but rather seemed to evaluate them and their potential effects as a package. The court found that it was bound to apply the test relating to publication bans from the Supreme Court's decision in *Sierra Club*[14] and the Nova Scotia Court of Appeal's decision in *Osif*,[15] which Justice LeBlanc determined allowed for a publication ban only if: (i) the order was necessary to prevent a serious risk to the proper administration of justice, which was both well-grounded in the evidence and went beyond the interests of the applicant because reasonable alternative measures would not prevent the risk; (ii) if an order were necessary, it was tailored to be as narrow as possible without sacrificing prevention of the risk; and (iii) the salutary effects of the ban outweighed its deleterious effects on the rights and interests of the parties and the public, including effects on free expression, the right to a fair and public trial, and efficacy in the administration of justice.[16]

Justice LeBlanc concluded that AB had not established a serious risk to the proper administration of justice on the evidence. He rejected AB's assertions that without the publication ban, those who had downloaded the file would revisit it, noting that those people already knew her identity anyway, that the profile was no longer on the Internet, and that AB had not established a real risk that someone would republish it.[17] Justice

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12 *AB* Chambers, *supra* note 1 at para 2.

13 *Ibid* at paras 17–22.

14 *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522.

15 *Osif v College of Physicians and Surgeons (Nova Scotia)*, 2008 NSCA 113, 271 NSR (2d) 370.

16 *AB* Chambers, *supra* note 1 at paras 25–27.

17 *Ibid* at para 31.

LeBlanc further held that the affidavits filed in support of the application provided no evidence of any "danger to the emotional health" of AB, nor of any "physical, psychological, emotional or mental" effects she may have suffered in connection with the fake profile.[18] Not only did the court find that "embarrassment without additional evidence of harm was insufficient to displace the need to have open courts," it also suggested that publicity surrounding AB's case would be beneficial to the public:

> I believe it is important for people to understand the positive and the negative aspects of chat rooms, social networking, and other such internet resources. A total publication ban would mean that the public would not be aware of how social networking programs work and how they can be destructive to the public and particularly to young persons.
>
> I believe that bullying and this type of pernicious conduct should be exposed and condemned by society. Only if the public know the extent of such conduct and its likely result, will society speak up for better control of such conduct arising from free and unlimited ability to publish such material on internet sites.[19]

In the absence of an evidentiary basis for specific harm likely to be suffered by AB if the publicity requests were not granted, or of evidence as to the harm she had suffered since publication of the fake profile, the court concluded that AB's publicity-related requests should be dismissed.[20] Justice LeBlanc advised the parties that any costs submissions should be made within three weeks.[21]

In fact, both the Herald and Global applied for costs against either CD (as AB's litigation guardian) or AB's counsel. The Herald sought $6,250 based on the trial tariff or, in the alternative, $5,000 for cumulative appearances on the lower tariff, and Global also sought costs of a similar amount.[22] Both media outlets argued that the normal rule that "costs follow the result" should apply and that they had been successful in defeating AB's publicity-related requests.[23] Global argued that AB should not have sought an abridgement of time and that the adjournment to allow AB to file supplementary materials for her publicity-related requests reflected her counsel's failure to properly prepare the original application materials. It also argued that both the abridgement and adjournment "added to the inconvenience of counsel, requiring them to make them-

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18 *Ibid* at para 34.

19 *Ibid* at paras 32–33.

20 *Ibid* at para 37.

21 *Ibid* at para 38.

22 *AB* Costs, *supra* note 2 at paras 5–6.

23 *Ibid* at paras 4–6.

selves available on short order" (even though Global did not appear on the first day of the hearing).[24]

Justice LeBlanc acknowledged that he had allowed the abridgement of time about which the media outlets now complained, but pointed out that AB's counsel had never adequately explained why materials relating to the privacy issue had not been included with the original application.[25] As a result, the Court concluded that this was an appropriate case to depart from the general rule that costs should not be awarded to interveners.[26] Agreeing with the media outlets that the higher tariff was appropriate because the hearing of the matter resembled a trial more than a motion, Justice LeBlanc ordered costs in favour of the Herald ($1,500) and Global ($750). The court stated it was awarding costs

> primarily on account of the need for an adjournment to allow the applicants to file a supplementary brief, requiring the Herald to file a supplementary brief in reply. But for this absence of any meaningful material from the outset there would be no need for an adjournment, thereby avoiding a further half day of court time to dispose of the application.[27]

AB appealed the NSSC's decisions relating to her publicity-related requests and costs to the Nova Scotia Court of Appeal. She was successful in obtaining orders allowing her to proceed with her appeal using a pseudonym and banning publication of the actual words used in the fake profile, pending further order of the court.[28]

B. Decision of the Nova Scotia Court of Appeal

The Nova Scotia Court of Appeal dismissed AB's appeal in March 2011, ordering costs in favour of the Herald ($2,000) and Global ($1,000), plus disbursements.[29] Justice Saunders, writing for the court, opened the reasons for the court's decision by characterizing the case as one pitting "a teenager who finds herself the victim of on-line bullying against the public's right to be informed by a free and independent press given unre-

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24 *Ibid* at para 6.

25 *Ibid* at para 20.

26 *Ibid*.

27 *Ibid* at para 21.

28 See *AB v Bragg Communications Inc*, 2010 NSCA 57 at paras 1, 24.

29 *Ibid* at para 103. Notably, prior to the hearing of the appeal, the NSCA dismissed the intervention application of Beyond Borders, a children's rights organization that was later granted intervener status before the SCC (see *AB v Bragg Communications Inc*, 2010 NSCA 70, 294 NSR (2d) 203).

stricted access to open court proceedings."[30] With this characterization of the interests at stake, one need not have read on to figure out who would prevail in the contest between a bullied teenager and the public in its quest to be informed by a free and independent press.

On appeal, Justice Saunders was asked to decide whether Justice LeBlanc erred by failing to: (i) exercise his *parens patriae* jurisdiction so as to take account of children's distinct vulnerability; and (ii) find that the publication of the allegedly defamatory statements was evidence in itself of a serious risk of harm.[31] The NSCA dismissed both of these arguments.

1. Parens patriae

Justice Saunders rejected AB's *parens patriae* argument for four reasons. First, the court noted that AB had never requested that Justice LeBlanc exercise such jurisdiction, leaving the NSCA "at a loss to understand how fault can be laid at the feet of the judge of first instance for 'failing' to initiate a form of relief which had never been raised in argument."[32] Second, Justice Saunders held that *parens patriae* jurisdiction is to be exercised cautiously and only to help a party under disability, whereas she found no indication in the evidence that AB was so "marked by disability" that the court was obligated to intervene to protect her.[33] Third, the court held that *parens patriae* jurisdiction should only be used to fill legislative gaps or in situations requiring judicial review, whereas the *Nova Scotia Civil Procedure Rules* provided a full scheme for addressing non-publication requests.[34] Finally, the court indicated that *parens patriae* should not be invoked to circumscribe the *Rules*.[35]

Moreover, the court was unpersuaded by AB's arguments that the vulnerability of children had been recognized in legislative spheres such as in family law and criminal law, noting that those instances of recognition reflect legislative choices for specific kinds of proceedings, and that even within these spheres, children's identities and reputations are not protected absolutely.[36] When balanced against the openness of courts as a key underpinning of democracy that is inextricably tied to freedom of expression, the court discounted AB's age as "simply a circumstance, among

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30 *AB* Appeal, *supra* note 3 at para 1.

31 *Ibid* at para 18.

32 *Ibid* at para 56.

33 *Ibid* at paras 58–59.

34 *Ibid* at paras 60–61.

35 *Ibid* at para 62.

36 *Ibid* at paras 69–71.

many factors, for the judge to take into account."[37] Justice Saunders emphasized prior authorities that indicated that embarrassment was not enough to justify restricting the open court principle, and also noted that openness and accessibility were critical to the kind of claim the court found AB intended to advance—defamation.[38] The court held that pursuing this kind of claim under a "cloak of secrecy ... [was] contrary to the quintessential features of defamation law":[39]

> A.B. has chosen to defend her reputation in court. When one makes that election, one is bound by the rules. Actions are tried by judge and jury. The case is heard in open court. The pleadings are available for public inspection. When injury to reputation is alleged, it is hardly surprising that personal and potentially embarrassing details will be disclosed. But that is the reality of pursuing litigation in Canadian courts, where the open-court principle is enshrined.[40]

Nor was the court moved by AB's suggestion that the sexualized nature of the comments on the fake profile in any way rendered her situation parallel to that of a sexual assault complainant, whose identity could be protected:

> With respect, the comparison is misplaced. A.B. is not herself a victim of sexual assault, seeking civil redress for crimes to which she was subjected. On the contrary, she is an intended plaintiff in a defamation case.[41]

Finally, the court suggested that the logical conclusion of AB's argument was that if her alleged defamer was also a child, she or he would also be entitled to anonymity, thereby leading to the "absurd" prospect of an anonymous plaintiff, an anonymous defendant, and a ban on publication of the impugned words—a result that would be "anathema to an action in defamation."[42] In light of this, Justice Saunders found that it would be contrary to the public interest to allow AB to proceed "with her identity kept secret."[43]

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37 *Ibid* at para 68.

38 *Ibid* at paras 73–74, 78–79.

39 *Ibid* at para 80.

40 *Ibid* at para 83.

41 *Ibid* at para 81.

42 *Ibid* at para 84.

43 *Ibid* at para 85.

2. Proof of a Serious Risk of Harm

The Nova Scotia Court of Appeal found that AB's failure to lead evidence of harm or the risk of harm to herself was "fatal"[44] to her publicity-related requests and dismissed AB's argument that once a prima facie case of defamation was established, the presumption of damages in defamation law should also satisfy the requirement of proving a serious risk of harm in order to obtain a publication ban.[45] Justice Saunders suggested it would have been "relatively easy" for AB to file some affidavit evidence to prove that she had been harmed by the fake profile, which could then have been used as a basis for predicting further harm in the future.[46] Instead, the court found that AB had chosen to attempt to displace the rule of open and public access to courts with what amounted to nothing more than "inconvenience or embarrassment", and that she left to pure speculation any true harm to her that would arise from pursuing her defamation claim openly.[47] In addition, the court found that the public interest in this case was best served by the public being able to view the profile in its entirety in order to better understand the nature of the alleged defamation.[48]

Not only did the court reject AB's claims that proceeding without her requested publicity protections would be harmful to her and could deter child victims of online bullying from seeking redress, it also imagined that completely open pursuit of the claim could have quite laudatory effects:

> One could just as easily imagine a salutary result in being required to pursue an action in defamation, by name and in public. Such will serve the public interest by both alerting social networking players to the inherent risk of sharing very personal information among "friends", while at the same time deterring would-be bullies with the threat of retribution once unmasked.[49]

The court went on to suggest that AB might become something of a folk hero:

> Should she be successful, one might expect that she will be lauded for her courage in defending her good name and rooting out on-line bullies who lurk in the bushes, behind a nameless IP address. The public will be much better informed as to what words constitute defamation, and alerted to the consequences of sharing information

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44 *Ibid* at para 94.

45 *Ibid* at paras 93–95.

46 *Ibid* at para 93.

47 *Ibid* at para 98.

48 *Ibid*.

49 *Ibid* at para 99.

> through social networking among "friends" on a 21st century bulletin board with a proven global reach.[50]

The Supreme Court of Canada granted AB leave to appeal this decision, also granting a publication ban pending resolution of the appeal.[51] Prior to the hearing of the appeal, an *amicus curiae* was appointed to represent media interests (as neither the Herald nor Global wished to continue), and ten other organizations were granted intervener status.[52]

III. Analysis of the Supreme Court Decision

The Supreme Court unanimously allowed AB's appeal in part, holding that she should be allowed to proceed under a pseudonym, but that there should be no ban on the publication of non-identifying information about the case. Justice Abella, writing for the Court, held that the issue was whether the confidentiality order and the partial publication ban were necessary to protect an important legal interest, while impairing free expression and the open court principle as little as possible. She found that if alternative measures could just as effectively protect the interests engaged, the restriction would not be justified. If no alternative measures existed, then the Court would have to consider whether a proper balance had been struck between the open court principle and AB's privacy.[53] Justice Abella held that although the open court principle was important, sometimes the protection of other social values "must prevail over openness".[54]

A. The Harm to AB's Privacy

Justice Abella found that AB's privacy interest was tied to her age and to protection from the "relentlessly intrusive humiliation of sexualized online bullying."[55] While evidence of harm to that interest was a relevant

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50 *Ibid* at para 102.

51 *Ibid*, leave to appeal to SCC granted, 350 DLR (4th) 519; publication ban ordered (25 May 2011).

52 The ten groups granted intervener status were the British Columbia Civil Liberties Association, Beyond Borders, BullyingCanada Inc, the Canadian UNICEF Committee, the Canadian Civil Liberties Association, the Samuelson-Glushko Canadian Internet and Public Policy Interest Clinic, Kids Help Phone, the Media Coalition, the Office of the Information and Privacy Commissioner of Ontario, and the Office of the Privacy Commissioner of Canada.

53 *AB* SCC, *supra* note 4 at para 11.

54 *Ibid* at para 13, citing *Attorney General Nova Scotia v MacIntyre*, [1982] 1 SCR 175 at 186–87, 132 DLR (3d) 385, Dickson J (as he then was).

55 *AB* SCC, *supra* note 4 at para 14.

consideration, the Court found that "objectively discernable harm" was identifiable through the application of "reason and logic".[56] Given that recognition of the "inherent vulnerability of children" and concomitant national and international protections are deeply embedded in the law, the Court held that the primary concern was one of age and not of an individual child's specific temperament: "[I]n an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament."[57]

Justice Abella held that the privacy of young persons was well recognized in the law not only as an aspect of their section 7 and 8 *Charter* rights,[58] but also due to their presumed "diminished moral culpability".[59] She cited as an example the protection of child complainants through admission of their testimony by videotape, which reduces the stress and trauma they may suffer as participants in the justice system.[60]

The Court found that it was "logical to infer that children may suffer harm through cyberbullying," relying primarily on the findings from Professor Wayne MacKay's 2012 report for the Nova Scotia Task Force on Bullying and Cyberbullying.[61] Justice Abella referred to the *MacKay Report*'s findings that bullying may have many harmful effects, including loss of self-esteem, anxiety, fear, and a greater risk of suicide for those who are bullied. Justice Abella also highlighted the report's finding that cyberbullying may have even worse effects because it can be "spread widely, quickly—and anonymously."[62] In addition to the evidence of psychological harm, the Court noted the further harms that flow from children declining to take steps to protect themselves, referring to the *MacKay Report*'s statistic that half of all bullying goes unreported, often out of fear that solutions will not be found or that bullies will retaliate. Drawing on MacKay's recommendation that there be anonymous ways of reporting

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56 *Ibid* at paras 15–16, citing *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 72, 127 DLR (4th) 1.

57 *AB* SCC, *supra* note 4 at para 17.

58 See *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]

59 *AB* SCC, *supra* note 4 at para 18, citing *Toronto Star Newspaper Ltd v Ontario*, 2012 ONCJ 27 at paras 40–41, 255 CRR (2d) 207, Cohen J.

60 *AB* SCC, *supra* note 4 at para 19, citing *R v L (DO)*, [1993] 4 SCR 419 at 445–46, 161 NR 1.

61 *AB* SCC, *supra* note 4 at para 20, citing a Wayne MacKay CM, QC, Chair, *Respectful and Responsible Relationships: There's No App for That* (Nova Scotia, The Report of the Nova Scotia Task Force on Bullying and Cyberbullying, 2012) [*MacKay Report*].

62 *AB* SCC, *supra* note 4 at paras 22–23.

cyberbullying as well as the prior Supreme Court finding that privacy for sexual assault victims encourages reporting, Justice Abella found that "[i]t does not take much of an analytical leap to conclude that the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously."[63]

The Court also found support for this conclusion in evidence filed by the Kids Help Phone. Included within that evidence were indications that anonymity could be used to encourage children to obtain assistance and seek therapy and other remedies, as well as references to studies showing that allowing publication of identifying information about child victims could "complicate recovery, discourage future disclosures, and inhibit cooperation with authorities."[64] The Court concluded:

> If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully.[65]

B. The Open Court Principle

Justice Abella noted that the Supreme Court had previously found that use of pseudonyms only minimally harms the open court principle:[66] the public and the media can still attend the hearing, and media can report the facts and conduct of the trial, so long as they do so without releasing identifying information about the person protected by the pseudonym. The Court found that if the identity of a sexual assault victim is relatively unimportant to the open court principle, then the identity of a victim of sexualized cyberbullying is also relatively unimportant.[67]

The Court concluded, however, that once AB was protected from having her identity disclosed, there was no further justification for a partial publication ban relating to the fake profile. As a result, her confidentiality

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63 *Ibid* at paras 24–25.

64 *Ibid* at para 26.

65 *Ibid* at para 27.

66 *Ibid* at para 28.

67 *Ibid* at paras 28–29, citing *Canadian Newspapers Co v Canada (AG)*, [1988] 2 SCR 122, 52 DLR (4th) 690.

request was granted, but the Court held that the media should be allowed to report non-identifying information relating to the case.[68]

IV. Locating "Sexualized Online Bullying" in Structural Inequality

It seems clear from the reasons for its decision that the Supreme Court was concerned with protecting *young* victims of *sexualized* cyberbullying from having their identities disclosed in litigation against their attackers, since disclosure might well discourage victims from seeking legal remedies for this behaviour. And, although Justice Abella referred to a considerable amount of social science evidence concerning the harms of bullying generally and cyberbullying more specifically,[69] nowhere did the Court advert to other findings in those same reports that demonstrate *who* is disparately likely to be victimized by bullying and cyberbullying. Nor did the Court reflect substantively on the foundation of structural inequality that undergirds sexualized attacks and which may partially explain why the targets of these attacks may see privacy as being so important. No one, however, could reasonably hold the Supreme Court primarily accountable for the absence of the "e" word from its judgment. A search of the twelve written submissions filed with the Court reveals that none mentioned the word "equality".

My purpose here is not to undermine the potential importance of *AB* for future victims of online sexualized bullying who may wish to pursue civil legal redress. Having a clear ruling that they need not file evidence of the impact of the harassment on their own emotional, mental, and physical well-being in order to seek disclosure of subscriber information pseudonymously cannot be lightly dismissed. The ruling not only recognizes the humiliating nature of sexualized online attacks, but it could also reduce the cost and delay associated with amassing and filing evidence of such attacks' impact. As a result, AB's admirable perseverance in pressing the case all the way to the Supreme Court should ease the burden of future targets of sexualized cyberbullying who may have been dissuaded from seeking legal redress due to privacy-related fears. The ruling may also enhance substantive equality to the extent that *sexualized* online attacks are likely to disproportionately target members of certain vulnerable groups of young people, including girls and members or perceived members of LGBTQ communities. Nonetheless, my objective here is two-

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[68] *AB* SCC, *supra* note 4 at para 31.

[69] See Christine Dinsmore, ed, *Child Safety Online: Global Challenges and Strategies* (Florence: UNICEF Innocenti Research Centre, 2011) at 3, online: UNICEF <www.unicef.ca/sites/default/files/imce_uploads//TAKE%20ACTION/ADVOCATE/DOCS/Child_Safety_online_Globa_challenges_and_strategies.pdf>; *MacKay Report*, *supra* note 61 at 16.

fold: (i) to explore *Charter*-based equality analyses that might have been advanced in this case, or that could be advanced in future cases of sexualized cyberbullying in lieu of or in tandem with the privacy and protection analyses that were raised in *AB*; and (ii) to suggest some of the ways in which equality analyses could have meaningfully contributed to a better-contextualized understanding of sexualized online bullying and proposed approaches for proactively addressing it.

A. Equality Analyses that Could Have Been Advanced

Given that the litigation at issue involved two private parties, AB could not have argued that her *Charter* equality rights had been violated directly. However, equality might have been raised in much the same way as privacy was—as a guiding constitutional and international law[70] principle for the development and interpretation of the common law relating to the open court principle.[71] Section 15 of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination" based on, among others, the explicitly articulated grounds of sex and age[72] and the analogous ground of sexual orientation.[73] Section 28 confirms that the rights and freedoms referred to in the *Charter* "are guaranteed equally to male and female persons."[74] In the context of young victims of sexualized online bullying, equality interests may be triggered in several ways, including in relation to age, sex, and sexual orientation (and these are only three examples of identity-based forms of online attack, given the central and intersecting roles that other axes of discrimination, such as race, Aboriginal ancestry, and ability can play in undergirding cyberbullying in general and sexualized cyberbullying in particular).

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70 See especially *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 3, 26, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31, 19 ILM 33 (entered into force 3 September 1981, accession by Canada 9 January 1982).

71 See *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 83, 126 DLR (4th) 129.

72 See *Charter*, *supra* note 58, s 15.

73 See *Egan v Canada*, [1995] 2 SCR 513 at 518, 124 DLR (4th) 609 [*Egan*].

74 *Charter*, *supra* note 58, s 28.

1. Age

Children and youth are entitled to equality before and under the law and to equal protection of the law without discrimination on the basis of (among other things) their age.[75] The Supreme Court has clearly indicated that, in some cases, ensuring children's equality may mean treating them differently from adults.[76] Here, counsel could have argued that AB's right to equality as a young person required granting her access to pseudonymity in order to permit her to pursue civil legal redress against her attacker, and that the application of the subjective proof of harm standard, which might otherwise be fairly applied to adults, had discriminatorily negative effects when applied to a child. In fact, the Supreme Court accepted a considerable body of evidence that indicated, among other things, that children were more likely to seek assistance with problems such as cyberbullying if they could do so anonymously, and that protection of children's identities in certain kinds of cases was necessary to facilitate remedies for violations against children.[77] This evidence assisted the Court in determining that the standard of proof for obtaining a pseudonymity order had to be interpreted in a way that better balanced protection of AB's privacy interests with the open court principle. It might similarly have been argued that the Court's approach to pseudonymity was necessary in order to ensure the rights of young people to equal benefit and protection of the law by minimizing the deterrent effects of publicity that disproportionately discourage young people from seeking legal and other forms of redress and assistance.

In addition to AB's age, the other component that Justice Abella deemed essential to AB's claim for enhanced access to pseudonymity was the *sexualized* nature of the attacks.[78] Although I have not seen the words used in the fake Facebook profile of AB,[79] certain information about the nature of the attacks was adverted to in the judgments at all levels of court, as well as in AB's factum for the Supreme Court. The Nova Scotia Supreme Court stated that the profile "discussed the applicant's physical appearance, weight, and allegedly included scandalous sexual commen-

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75 See *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76.

76 *Ibid* at para 51.

77 *AB* SCC, *supra* note 4 at para 25.

78 *Ibid* at para 14.

79 Interestingly, despite media representatives pressing the matter all the way to the Supreme Court of Canada and winning in relation to the publication ban, I have found no indication that the media ever published the words that were alleged to be so important to the open court principle.

tary of a private and intimate nature,"[80] and the Nova Scotia Court of Appeal largely repeated this description.[81] The Supreme Court characterized the attacks as "sexualized", noting that "unflattering commentary about the girl's appearance along with sexually explicit references" were made.[82] In her factum for the Supreme Court, AB indicated that the profile contained references to her "allegedly preferred sexual acts."[83] In the absence of the availability of the exact words used, I will draw on literature and studies relating to online harassment and cyberbullying (including other portions of the MacKay Report and UNICEF Report that were not referred to by the Supreme Court) to illustrate two sorts of discriminatory sexualized attacks that could arguably arise in future cases involving young victims seeking civil redress in relation to sexualized online bullying—that is, sex-based and homophobic attacks (one or both of which may have been at issue in *AB*).[84]

2. Sex

Children and youth, like adults, are entitled to equality before and under the law and to equal protection of the law without discrimination on the basis of sex. In recognition of statistics indicating that females comprise the overwhelming majority of those who are sexually assaulted,[85] the Supreme Court has accepted on more than one occasion that privacy protections for sexual assault complainants are grounded in sex equality.[86] For example, in *Darrach* the Supreme Court acknowledged that restrictions on the admissibility of evidence about complainants' prior sexual conduct in criminal proceedings could be understood as measures for ensuring that sexist beliefs about women are not permitted to distort the trial process and for encouraging women to report crimes of

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80 *AB* Chambers, *supra* note 1 at para 3.

81 *AB* Appeal at para 7.

82 *AB* SCC, *supra* note 4 at para 1.

83 *AB* Factum, *supra* note 10 at para 98.

84 See e.g. Danielle Keats Citron, "Cyber Civil Rights" (2009) 89:1 BUL Rev 61 [Keats Citron, "Cyber Civil Rights"]; Mary Anne Franks, "Unwilling Avatars: Idealism and Discrimination in Cyberspace" (2011) 20:2 Colum J Gender & L 224.

85 Canada, Statistics Canada, *Criminal Victimization in Canada,* 2009, vol 30 (Juristat, 2010) at 11, online: <www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.pdf>.

86 However, the SCC's record of guarding these equality interests in the context of challenges to *Criminal Code* provisions has been less than stellar. See Margaret Denike, "Sexual Violence and 'Fundamental Justice': On the Failure of Equality Reforms to Criminal Proceedings" (2000) 20:3 Canadian Woman Studies/les cahiers de la femme (Women 2000: Eradicating Poverty and Violence in the 21st Century) 151. See also *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193 [*Seaboyer*]; *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

sexual violence.[87] Similarly, the Supreme Court has recognized that complainants' privacy interests with respect to production of counselling records are also tied to the equality rights of women, children, and the disabled.[88] As Justice McLachlin (as she then was) wrote in *Ryan*:

> A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress—redress which in some cases may be part of her program of therapy.[89]

In *AB*, counsel might have argued that AB's right to sex equality required enhanced access to pseudonymity in order for her to pursue civil redress against her attacker. At least one of the reports cited in the SCC's reasons provides support for concluding that females (as well as other vulnerable community members) are disproportionately subject to bullying. The *MacKay Report*, for example, states: "Bullying often results from, and reinforces, discrimination. Marginalized groups may be targeted for issues of racism, sexism, able-ism, xenophobia, and homophobia, among other identities, and are generally considered to be at a higher risk for bullying."[90]

There appear to be some discrepancies in social science findings about whether females are more likely than males to be either the purveyors or the targets of cyberbullying or online harassment.[91] However, mounting

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87 *R v Darrach*, 2000 SCC 46, [2000] 2 SCR 443 at paras 34, 68.

88 See *R v Mills*, [1999] 3 SCR 668 at 727–28, 180 DLR (4th) 1.However, as noted by Lise Gotell, bare recognition of this connection does not appear to have resulted in affirmative substantive equality analyses or results (Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History, Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743).

89 *M (A) v Ryan*, [1997] 1 SCR 157 at para 30, 143 DLR (4th) 1 [*Ryan*].

90 *MacKay Report*, *supra* note 61 at 16; see also Senate, Standing Committee on Human Rights, *Evidence*, 41st Parl, 1st Sess, Issue 11 (30 April 2012) (Chair: SB Jaffer) (Faye Mishna), online: <http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/11ev-49495-e.htm?Language=E&Parl=41&Ses=1&comm_id=77> [Mishna evidence].

91 Witnesses before the Senate Human Rights Committee hearing on cyberbullying "expressed conflicting positions with respect to the involvement of boys and girls in bullying and cyberbullying" Senate, Standing Committee on Human Rights, *Cyberbullying*

social science evidence and published legal research suggest that girls are more likely than boys to be targeted by *sexualized* online bullying in the form of threats of sexual violence[92] and in relation to being (or allegedly being) sexually active or sexually promiscuous.[93] Further, studies suggest that girls understand the severity and long-term risks of being labelled sexually active or promiscuous and having that reputation follow them for the rest of their lives in ways seemingly inapplicable to boys engaged in heterosexual activity.[94]

Attacks based on actual or alleged sexual activity or promiscuity, much like the "Madonna–Whore Complex" referred to by Justice L'Heureux-Dubé in her dissenting reasons in *Seaboyer*,[95] are referred to as "slut-shaming" in the girlhood studies literature.[96] Appeals to these discriminatory myths are a well-known tool for discrediting girls and young women on the basis of their participation in actual or alleged sexu-

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Hurts: Respect for Rights in the Digital Age (December 2012) at 35 (Chair: SB Jaffer), online: Parliament of Canada <www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf> [*Senate Report*]. While Bill Belsey testified that boys were less likely than girls to be involved in online bullying, Wendy Craig testified that girls were more likely than boys to be both victims and perpetrators of cyberbullying, but that boys were catching up to girls in rates of cyberbullying. Offering a distinction, Faye Mishna testified that more girls said they had been both victims and perpetrators, while boys were more likely to have reported being perpetrators only. Finally, Tina Daniels suggested that gender differences were minimal with respect to cyberbullying (*ibid*). Further, while men and women were equally likely to report having been cyberbullied on the 2009 General Social Survey, responses to the same survey indicated that in approximately 70% of reported instances of cyberbullying of children, the targets were girls. See Samuel Perreault, "Self-reported Internet victimization in Canada, 2009" *Juristat* (15 September 2011) at 5, online: Statistics Canada <www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.pdf>.

92 See Keats Citron, "Cyber Civil Rights", *supra* note 84; Franks, *supra* note 84; Shaheen Shariff, *Cyber-Bullying: Issues and Solutions for the School, the Classroom and the Home* (Abingdon: Routledge, 2008) at 40. See also Mishna evidence, *supra* note 90; Danielle Keats Citron, "Law's Expressive Value in Combating Cyber Gender Harassment" (2009) 108:3 Mich L Rev 373.

93 See *ibid*. See also Jessica Ringrose & Emma Renold, "Normative Cruelties and Gender Deviants: The Performative Effects of Bully Discourses for Girls and Boys in School" (2010) 36:4 British Educational Research Journal 573; Jane Bailey et al, "Negotiating with Gender Stereotypes on Social Networking Sites: From 'Bicycle Face' to Facebook" (2013) 37:2 Journal of Communication Inquiry 91.

94 See Valerie Steeves, *Young Canadians in a Wired World, Phase III: Talking to Youth and Parents About Life Online* (29 May 2012) at 34, online: MediaSmarts <mediasmarts.ca/research-policy>; Bailey et al, *supra* note 93.

95 *Seaboyer*, *supra* note 86 at 652, L'Heureux-Dubé J, dissenting, citing Lynda Lytle Holmstrom & Ann Wolbert Burgess, *The Victim of Rape: Institutional Reactions* (New Brunswick, NJ: Transaction Publishers, 1983) at 174–99.

96 See e.g. Jessica Ringrose, *Postfeminist Education?: Girls and the Sexual Politics of Schooling* (New York: Routledge, 2012) at 93.

al activity[97] (or even in contexts in which they were or were alleged to have been sexually assaulted).[98] Viewed from this perspective, counsel might have argued that the Supreme Court's approach to pseudonymity orders, although framed as a privacy issue, was more fundamentally connected to ensuring girls' and young women's rights to sex equality, because these kinds of sexualized attacks and their subsequent repetition are disparately likely to negatively affect females.

3. Sexual Orientation

LGBTQ children and youth, like adults, are entitled to equality before and under the law and to equal protection and benefit of the law without discrimination on the basis of sexual orientation. The Supreme Court in *Egan* held that sexual orientation "is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs"[99] and therefore constitutes an analogous ground of prohibited discrimination under section 15 of the *Charter*. Although there is no direct indication that the attack on AB was homophobic, the description in her factum to the Supreme Court of the part of the fake profile that referred to her "allegedly preferred sexual acts"[100] invites consideration of the possibility that young victims of sexualized online bullying may seek redress for online harassment based on descriptions or allegations of participation in same-sex sexual activities. In these kinds of cases, counsel could argue that a bullying target's right to equality as a member or perceived member of the LGBTQ community requires enhanced access to pseudonymity in order to permit the target to pursue civil legal redress against the online attacker—that is, that the application of a subjective proof of harm standard is inconsistent with a target's right to be free from discrimination on the basis of sexual orientation.

Homophobic and transphobic attacks, used to police gender conformity and maintain gender hierarchy by insisting that boys properly perform masculinity by being sexually interested only in girls and that girls properly perform femininity either by being asexual or by being sexually

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97 See Ringrose & Renold, *supra* note 93; Bailey et al, *supra* note 93.

98 For example, in the Rehtaeh Parsons case, a young woman committed suicide after having alleged she was sexually assaulted and subjected to circulation of the images of the assault online. See "Rape, bullying led to NS teen's death, says mom" *CBC News* (9 April 2013), online: CBC News <www.cbc.ca/news/canada/nova-scotia/story/2013/04/09/ns-rehtaeh-parsons-suicide-rape.html>.

99 *Egan*, *supra* note 73 at 528.

100 *AB* Factum, *supra* note 8 at para 98.

interested only in boys, are all too familiar offline.[101] More recently, a growing body of evidence demonstrates that such attacks are proliferating online. Included within that body of literature are two of the reports cited by the Supreme Court in its reasons in *AB*: the *MacKay Report* referred to above, and the 2011 UNICEF report on child online safety, which states:

> Research from Canada and the United Kingdom identifies children who are at risk of being bullied offline (for example, children who may be perceived as 'different', such as minority ethnic groups, lesbian, gay, bisexual or transgender (LGBT) young people, overweight children, or those with perceived disabilities) to be at greater risk of being bullied online than other children.[102]

In hearings held by the Senate Human Rights Committee in its examination of cyberbullying, Professor Elizabeth Meyer testified: "The issues of sexual orientation, whether you are perceived to be gay, lesbian or bisexual, issues of gender expression, whether you are seen to be as masculine as other boys or as feminine as other girls, those are highly involved reasons that students are targeted."[103]

Further, an Egale study released in 2011 showed that 30.7 per cent of female sexual minority students, 23.2 per cent of gay boys, and 40.7 per cent of transgendered students said they had been victims of online harassment, compared to only 5.7 per cent of the heterosexual population responding to the survey.[104] These results indicate that LGBTQ children and youth may well be at increased risk of sexualized online bullying in the form of attacks focused on actual or alleged engagement in same-sex sexual relationships. Viewed from this perspective, the Supreme Court's approach to the standard of proof for obtaining a pseudonymity order could be understood as necessary to secure LGBTQ children and youth's right to *equality* on the basis of sexual orientation, since homophobic sexualized attacks are disparately likely to affect actual or perceived members of those communities.

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[101] See e.g. *North Vancouver School District No 44 v Jubran*, 2005 BCCA 201, 253 DLR (4th) 294; Donn Short, *"Don't Be So Gay!" Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2013) at 1–2, 41–42.

[102] Dinsmore, *supra* note 69.

[103] *Senate Report*, *supra* note 91 at 28.

[104] See evidence presented by Helen Kennedy, executive director of Egale Canada, before the Senate Standing Committee on Human Rights (Senate, *Fifth meeting on: Issue of cyberbullying in Canada with regard to Canada's international human rights obligations under Article 19 of the United Nations Convention on the Rights of the Child*, 41st Parl, 1st Sess, No 14 (4 June 2012) at 37–42). Further support for this proposition is found in the evidence of experts Elizabeth Meyer and Faye Mishna (*ibid* at 28–29).

It seems that equality based on age, sex, and sexual orientation could conceivably have been raised as a reason for better ensuring the availability of pseudonymity orders for young victims of sexualized online bullying seeking legal redress in the courts. That being the case, it is difficult to avoid speculation about why equality was not even mentioned.

B. Why Wasn't Equality Raised?

Perhaps none of the parties in *AB* advanced an equality argument because a privacy argument seemed so readily available and consistent with the existing case law. Further, given the untidy state of the law with respect to equality for children,[105] perhaps the parties and their counsel felt that privacy and child protection were better suited to achieving a positive result for AB than was equality. Alternatively, even if the parties were aware of social science evidence that could assist in grounding a sex-based equality claim, perhaps there was some concern about the seemingly inconclusive nature of the findings about whether girls or boys are more likely to be cyberbullied and to cyberbully[106]—inconclusiveness that might suggest a level of parity between males and females.

I do not suggest here that any of these reasons are baseless; nor is what follows intended to undermine the important precedent that AB achieved not just for herself, but also for youthful targets of online sexualized bullying who may in the future wish to seek civil legal redress. However, I want to suggest that analyzing sexualized online bullying explicitly through an equality lens could have made a meaningful difference.

C. What Difference Could an Equality Analysis Have Made?

Enhanced access to pseudonymity grounded in privacy alone risks depoliticization and individuation of the interests at stake, especially insofar as privacy has tended to be characterized as an *individual's* right to be left alone.[107] By characterizing AB's privacy interests as being tied to both her age and the "nature of the victimization she seeks protection from," the Supreme Court readily recognized the "relentlessly intrusive humiliation of sexualized online bullying."[108] However, the risk of the Court's re-

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[105] See Katie Sykes, "Bambi Meets Godzilla: Children's and Parents' Rights in *Canadian Foundation for Children, Youth and the Law v. Canada*" (2006) 51:1 McGill LJ 131.

[106] See *Senate Report*, *supra* note 91 at 35.

[107] For these reasons, prominent feminists, such as Catharine MacKinnon and Martha Nussbaum, have argued that women's lived equality is unlikely to be improved through privacy-based approaches. See Jane Bailey, "Towards An Equality-Enhancing Conception of Privacy" (2008) 31:2 Dal LJ 267 at 280, 287.

[108] *AB* SCC, *supra* note 4 at para 14.

sponding to this fact with privacy alone is that it obscures the underlying inequalities that make refuge to privacy necessary.[109] Privacy with respect to sexual intimacy might be understood as affirmatively grounded in dignity rather than negatively grounded in avoidance of shame. However, in AB's case, since the sexualized content on the Facebook profile was alleged to be false, it is more difficult to understand privacy in relation to that content as being grounded in controlling information relating to AB's intimate life.

Moreover, if the real issue at stake in cases like AB's is solely that sex is private and intimate and ought not to be publicized (or re-publicized) without consent, why is it that publicization is understood to be so much more shameful and humiliating for girls and LGTBQ youth than it is for heterosexual boys? Understanding access to pseudonymity as an interim response to conditions of inequality brings us closer to an answer by contextualizing an individual target's claims within a broader, collective framework. Pseudonymity for those seeking legal redress for online sexualized bullying may represent a situation in which privacy protections serve as an interim survival tool for members of vulnerable groups living in a state of structural inequality.[110]

To the extent that girls and members of the LGBTQ community are disproportionately likely to be subjected to sexualized online bullying, a privacy-enhancing measure arguably advances the collective privacy interests of members of these groups. Further, an equality analysis allows us to frame the targeting of girls and members of the LGBTQ community for shaming through sexualized attacks within the broader framework of prejudices such as misogyny and homophobia, which are often cross-cut with racism, classism, and colonialism.[111] A key reason that members of these groups may be more likely to need to resort to privacy-enhanced access to civil redress in relation to sexualized attacks is for protection against the social shame and humiliation that flows from failing (or being

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[109] See Gotell, *supra* note 88.

[110] Ruth Gavison has suggested that concealment may well be an important function of privacy for members of equality-seeking communities for whom exposure may result in severe physical, psychological, and emotional injury ("Privacy and the Limits of Law" (1980) 89:3 Yale LJ 421 at 452–53). While privacy may be an essential tool for protection of members of equality-seeking groups in some cases, framing this as a matter of privacy alone risks perpetuation of the very inequality that can sometimes operate to coerce a "choice" to conceal a fundamental aspect of one's personhood in the first place. Bailey, *supra* note 107 at 292, n 69.

[111] See Ringrose & Renold, *supra* note 93; Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 CJLS 91; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43:6 Stan L Rev 1241.

alleged to have failed) to conform to rigid gender standards. The discriminatory tropes that are used to police gender conformity include the idea that girls are supposed to make themselves "sexy" for boys, yet simultaneously behave in a "feminine" and asexual manner.[112] Axes of discrimination also interlock for girls from racialized and Aboriginal communities, who are frequently depicted as being incapable of appropriate feminine modesty (and thus unworthy of privacy protections at all).[113] In contrast, boys are supposed to be appropriately "masculine", which includes being sexually interested in and active only with girls.[114] Online sexualized bullying will often trade on such misogynistic and homophobic tropes in order to police gender conformity and prop up gender hierarchy by publicizing factual or fictitious breaches of expected performances of femininity and masculinity.[115] Viewed through an equality lens, enhanced capacity for targets of sexualized online bullying to sue pseudonymously is not necessarily about privacy per se, but about ensuring that the law minimizes further abuse of publicity that is disproportionately likely to prevent girls and LGBTQ youth from seeking civil redress for this kind of attack in the first place.

To characterize enhanced access to pseudonymity as being about privacy alone both obscures and risks collusion with the discriminatory myths upon which sexualized online bullying is likely to trade, as well as the systemic inequality that these myths and bullying practices serve to perpetuate.[116] Whether true or false, the allegations in sexualized online bullying work to shame and intimidate targets because these allegations often depend on familiar discriminatory myths that undergird inequality, including that respectable white females are not sexually active,[117] that racialized and Aboriginal females are sexually inviolable,[118] and that

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[112] See Jessica Valenti, *The Purity Myth: How America's Obsession with Virginity is Hurting Young Women* (Berkeley : Seal Press, 2009).

[113] See Gotell, *supra* note 88 at 749; Anita L Allen & Erin Mack, "How Privacy Got Its Gender" (1990) 10:3 N Ill UL Rev 441 at 449.

[114] See Elizabeth J Meyer, *Gender, Bullying, and Harassment: Strategies to End Sexism and Homophobia in Schools* (New York: Teachers College Press, 2009) at 6–9, 21–22.

[115] *Ibid*.

[116] Similar concerns were raised with respect to workplace bullying in Debra L Parkes, "Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda" (2004) 8:2 Employee Rts & Employment Pol'y J 423.

[117] See Gotell, *supra* note 88; Crenshaw, *supra* note 111 at 1251, 1295.

[118] See Gotell, *supra* note 88 at 749; Jane Doe, "What's In a Name?: Who Benefits from the Publication Ban in Sexual Assault Rrials?" in Ian Kerr, Valerie Steeves & Carole Lucock, eds, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press, 2009) 265 at 272.

same-sex sex is shameful and embarrassing.[119] Viewing enhanced opportunity to proceed pseudonymously as a privacy matter *alone* risks reinscribing the depoliticizing and decontextualized message that sex, sexuality, and even sexual violation are necessarily private matters to be kept out of public discourse.[120] In contrast, under an equality analysis, privacy becomes an interim measure for responding to the equality-undermining effects of sexualized online bullying by: (i) better supporting the dignity interests and choices[121] of girls and members of the LGTBQ community disproportionately likely to be targeted; and (ii) refusing to allow engagement with the legal process itself to automatically precipitate targets' continuing public exposure to the discriminatory practice and underlying tropes of online sexualized bullying. In this context, one might even argue that privacy is something of a stopgap measure until something better, like lived equality, comes along.

Reframing access to pseudonymity in *AB* as an interim equality measure goes beyond the interests of individual youthful targets of sexualized online bullying. Recognizing that discriminatory tropes underlie much sexualized online bullying could contribute to ongoing dialogue around cyberbullying more broadly, because it invites an examination of the degree to which systemic group-based discrimination and prejudice undergird actions carried out by individuals online. Developing a better understanding of what differentiates unkind remarks by one individual to another from discriminatory practices grounded in group-based prejudice ought to put us in a better position to construct more targeted, meaningful policy responses, even as we may accept that both kinds of attacks can be extremely damaging.

Conclusion

Cyberbullying and bullying in general are increasingly being recognized as social phenomena with potentially lasting and occasionally devastating consequences that demand some form of redress.[122] Responses to

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[119] See Short, *supra* note 101; Meyer, *supra* note 114 at 5–6.

[120] See Gotell, *supra* note 88.

[121] Here, we need to be conscious of Jane Doe's insightful commentary with respect to state-determined anonymity for sexual assault complainants. She states that "[t]he presumption that she who has had something done to her or against her is the one who must guard against the ruination of her reputation (versus the perpetrator) is indicative of how turned-around we are on the subject of sexual assault" (Doe, *supra* note 118 at 281).

[122] See e.g. "Father of Rehtaeh Parsons pleads for new online harassment law" *Global News* (23 April 2013), online: Global News <globalnews.ca/news/505334/father-of-rehtaeh-parsons-pleads-for-new-online-harassment-law>; Jane Taber, "After Rehtaeh

these problems have been many and varied, including the appointment of task forces[123] and the conduct of public hearings.[124] From an educational perspective, laws have been passed intending to make schools safer and more accepting places and to explicitly extend disciplinary power over cyberbullying to school authorities.[125] While some school boards have focused on "zero tolerance" policies primarily aimed at punishing individual students for bullying behaviours, others have focused more on equality-based approaches aimed at nurturing environments that cultivate respect for diversity.[126] Some experts focus on the psychological and behavioural aspects of bullying and have called for educational efforts to train children to be more empathetic,[127] while others have called for bullying bystanders to become more engaged in defending bullying targets.[128]

From the legal perspective, discussion of using existing criminal offences or creating new ones[129] to prosecute bullies and cyberbullies has intensified.[130] Measures facilitating identification of cyberbullies and creating a civil tort of cyberbullying have recently been adopted in Nova Sco-

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Parsons, justice ministers urge Ottawa to tackle cyberbullying" *The Globe and Mail* (19 April 2013), online: The Globe and Mail <www.theglobeandmail.com/news/national/after-rehtaeh-parsons-justice-ministers-urge-ottawa-to-tackle-cyberbullying/article11421230>; "Nova Scotia to create investigative unit devoted to cyberbully crackdown" *The Globe and Mail* (25 April 2013) online: The Globe and Mail <www.theglobeandmail.com/news/politics/nova-scotia-to-create-investigative-unit-devoted-to-cyberbully-crackdown/article11544187>.

123 See *MacKay Report*, *supra* note 61.

124 See *Senate Report*, *supra* note 91.

125 See *Accepting Schools Act*, SO 2012, c 5; see also *Safe Schools Act, 2000*, SO 2000, c 12.

126 See Short, *supra* note 101 at 30–35.

127 See e.g. Debra Pepler & Wendy Craig, "Binoculars On Bullying: A New Solution to Protect and Connect Children" *VOICES Reports* (February 2007), online: Voices for Children <www.offordcentre.com/VoicesWebsite/library/reports/report-Feb2007-1.htm>.

128 See Christina Salmivalli, Antti Karna & Elisa Poskiparta "Counteracting Bullying in Finland: The KiVa Program and Its Effects on Different Forms of Being Bullied" (2011) 35:5 International Journal of Behavioral Development 405 at 406. For more information on the KiVa program in Finland, see KiVa International, online: <www.kivaprogram.net/evidence-of-effectiveness>.

129 One new offence reportedly under consideration relates to the non-consensual distribution of intimate images of another for a malicious or sexual purpose. See Meagan Fitzpatrick, "Nicholson gets support for June Deadline on cyberbullying" *CBC News* (24 April 2013), online: CBC <www.cbc.ca/news/politics/nicholson-gets-support-for-june-deadline-on-cyberbullying-1.1310238?cmp=rss>.

130 Michael Tutton, "Rehtaeh Parsons' mother to discuss new law with PM" *The Globe and Mail* (21 April 2013), online: The Globe and Mail <www.theglobeandmail.com/news/national/rehtaeh-parsons-mother-to-discuss-new-law-with-pm/article11437892/?service=mobile>; Taber, *supra* note 122.

tia.[131] A handful of bullying targets have brought forward human rights complaints in an effort to press school boards to take action, especially in relation to homophobic bullying.[132] However, civil litigation by targets against bullies presents a rather limited opportunity to redress underlying issues and is fraught with problems, including costs, delays, and the risk of further exposing the target to oftentimes humiliating publicity.

The Supreme Court's decision in *AB* partially addresses one of the limitations of civil litigation for cyberbullying targets, namely that pursuit of redress through the court system tends to lead to a risk of further exposure. As a result of the Supreme Court's judgment, young victims of sexualized online bullying will not have to provide evidence of subjective harm in order to use pseudonyms to obtain court-ordered disclosure of subscriber information from ISPs that may unlock the identity of their otherwise anonymous or pseudonymous attackers. Further, it would seem logical that the Supreme Court's finding about the obviously humiliating nature of online sexualized bullying[133] may well extend the reframed standard for targets to proceed pseudonymously not only with respect to pursuing subscriber information, but also in relation to any subsequent action itself. From this perspective, *AB* represents a victory for the protection of children and youth and their right to privacy, in that it creates a mechanism to better ensure targets' access to justice through civil legal redress with respect to sexualized online bullying. However, like the broader discourse around bullying and cyberbullying more generally, *AB* leaves the arguably central issue of equality unexplored.

Mounting evidence suggests that sexualized online bullying (like other forms of sexual violence before it[134]) is grounded in structural inequality, which was not put in issue in *AB*. While arguments about children's rights to privacy, protection, and dignity were put forward and considered by all levels of court, the ways in which *sexualized* online bullying triggers equality rights against discrimination on the basis of sex and sexual orientation were never considered. Viewing online sexualized bullying through an equality lens enables a clearer, more contextualized understanding of the collective political patterns at play in what might otherwise look like purely individual situations of "bad" or "unkind" behaviour. An equality analysis enables us to understand more clearly that sexual-

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131 See *Cyber-safety Act*, SNS 2013, c 2.

132 See Short, *supra* note 101 at 8.

133 *AB* SCC, *supra* note 4 at para 14.

134 See Christine Boyle & Marilyn MacCrimmon, "The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered" (1998) 41:2 Crim LQ 198; Gotell, *supra* note 88; Christine Boyle, "Publication of Identifying Information About Sexual Assault Survivors: *R. v. Canadian Newspapers Co. Ltd.*" (1989) 3:2 CJWL 602.

ized online bullying reflects social patterns of misogyny and homophobia, which are complicated by intersecting axes of discrimination, including racism, classism, and colonialism. Because of these patterns, heterosexual women and members or perceived members of the LGBTQ community are disproportionately likely to be targeted and may therefore also be disproportionately likely to need enhanced protections in order to feel safer when pursuing civil legal redress.

Recognizing the structural inequalities that undergird the power of sexualized online bullying in the lives of its targets will be essential if we genuinely aim to craft meaningful reactive and proactive responses to it. Empathy training may well be a powerful proactive strategy for addressing some forms of bullying and cyberbullying, but getting at the roots of sexualized online bullying seems to demand more targeted anti-oppression initiatives to address ongoing social and structural inequalities that continue to render certain groups more vulnerable than others. We must question why it is that discriminatory tropes, such as the slut-shaming of females, are so widely understood as a source of social power and control, and we must move as a community toward defusing that power, regardless of the identity of the person wielding it.

I, for one, look forward to the day when being female and dis/interested in sex, refusing to be appropriately "feminine" or "masculine" (as the case may be), and being or being perceived to be LGBTQ no longer constitute potential grounds for shame and reputational ruin—when striving to maintain privacy in relation to them reflects a genuine exercise of individual choice and dignity, rather than a survival tactic. Until then, privacy in service of equality may have to do and, without explicitly referring to equality, the Supreme Court's decision in *AB* could represent a first step in that direction.