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Symposium: Cyberbullying: Emerging Realities and Legal Challenges: Foreword

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Symposium: Cyberbullying: Emerging Realities and Legal Challenges

Foreword

Christina E. Wells^{*}

Bullying and its effects concern many of us in the United States. As many as thirty percent of students in grades five through ten have experienced at least one bullying incident in a given year.¹ Studies further show that up to thirty-five percent of students have been the victims of cyberbullying – i.e., the use of online mediums to bully others.² Most observers agree that this number is likely to rise.³ Such bullying physically and psychologically af-

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1. See, e.g., *School Bullying*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issuesresearch/educ/school-bullying-overview.aspx> (last visited Jan. 19, 2013).

2. See Melissa K. Holt & Dorothy L. Espelage, *Cyberbullying Victimization: Associations with Other Victimization Forms and Psychological Distress*, 77 MO. L. REV. 641, 642 (2012) (citing studies).

3. See, e.g., *Hearing on Cyberbullying and Other Online Safety Issues for Children*; H.R. 1966, the “Megan Meier Cyberbullying Prevention Act”; and H.R. 3630, the “Adolescent Web Awareness Requires Education Act (AWARE Act)” Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary 111th Cong. 1 (2009) (statement of Dean John Palfrey, Harvard Law School), available at <http://judiciary.house.gov/hearings/pdf/Palfrey090930.pdf>; Lisa M. Jones et al., *Trends in Youth Internet Victimization: Findings from Three Youth Internet Safety Surveys 2000-2010*, 50 J. ADOLESCENT HEALTH 179, 184 (2012).

fects students. It can disrupt their education and cause depression, anxiety, self-harm, suicidal thoughts, and suicide attempts.⁴ After several highly-publicized suicides,⁵ there appears to be a national consensus that society can no longer ignore bullying and cyberbullying.⁶

To say that we must “do something” about cyberbullying, however, does little to solve this very difficult problem. Rather, any attempt to tackle this issue raises a host of questions. For example, what conduct amounts to cyberbullying? Although society agrees that cyberbullying is problematic, we do not necessarily agree on a single definition of what constitutes such conduct. The Centers for Disease Control and Prevention, for example, defines bullying as involving “any type of harassment or bullying (teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through email, a chat room, instant messaging, a website (including blogs), or text messaging.”⁷ Other experts define cyberbullying as a “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”⁸ Neither of these definitions is wrong or inappropriate. As a

4. Douglas E. Abrams, *Bullying Victimization as a Disability in Public Elementary and Secondary Education*, 77 MO. L. REV. 781, 794-95 (2012) (citing studies); Holt & Espelage, *supra* note 2, at 644.

5. The suicides of Megan Meier in Missouri, Phoebe Prince in Massachusetts, and Amanda Cummings and Jamie Rodemeyer in New York were widely covered in the press and eventually spurred anti-bullying legislation. *See, e.g., Amanda Cummings' Suicide Prompts Cyberbullying Bill in New York*, HUFFINGTON POST (Jan. 10, 2012), http://www.huffingtonpost.com/2012/01/09/amanda-cummings-suicide-prompts-cyberbullying-bill_n_1195204.html; Erik Eckholm & Katie Zezima, *Questions for School on Bullying and a Suicide*, N.Y. TIMES (Apr. 1, 2010), http://www.nytimes.com/2010/04/02/us/02bully.html?pagewanted=all&_r=0; Sarah Anne Hughes, *Jamey Rodemeyer, Bullied Teen Who Made "It Gets Better" Video, Commits Suicide*, WASH. POST (Sept. 21, 2011), http://www.washingtonpost.com/blogs/blogpost/post/jamey-rodemeyer-bullied-teen-who-made-it-gets-better-video-commits-suicide/2011/09/21/gIQAVVzxkK_blog.html; Scott Michels, *Prosecutors Bringing Charges Under Law Inspired by Megan Meier Suicide*, ABC NEWS (Dec. 24, 2008), <http://abcnews.go.com/TheLaw/story?id=6520260&page=1>.

6. For example, the President and First Lady hosted a bullying summit at the White House in March 2011 to discuss the effects and possible actions to prevent bullying. *See* Press Release, White House, Office of the Press Secretary, *New Details: White House Conference on Bullying Prevention Set for March 10* (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/new-details-white-house-conference-bullying-prevention-set-march-10>.

7. MARCI FELDMAN HERTZ & CORINNE DAVID-FERDON, ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS 3 (2008), <http://www.cdc.gov/violenceprevention/pdf/EA-brief-a.pdf>.

8. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE 1 (2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf; *see also* Bill Belsey, *Cyberbul-*

largely social problem, we are free to define cyberbullying as we perceive it. But these definitions are quite different, with one including a significant amount of seemingly normal adolescent behavior (teasing, mean comments) and the other requiring intentional and repeated harassing conduct. These very differences suggest that we are only beginning the national conversation about the nature, dimensions, and extent of the problem we have come to identify as “cyberbullying.”

While it is difficult enough to tackle a problem when society disagrees as to its exact definition, the myriad responses potentially available to remedy cyberbullying further complicate the issue. There are a variety of possible responses, including criminal penalties punishing bullying or administrative responses to bullying, ranging from discipline by school authorities, to reporting requirements regarding bullying incidents, to attempts at prevention via various educational initiatives. All of these responses come with their own set of concerns. For example, laws criminalizing cyberbullying⁹ seem to be a refreshing attempt to take this significant social problem seriously. On the other hand, given the breadth of many definitions of cyberbullying, criminal statutes present significant constitutional threats to the free speech and due process rights of *all* students.¹⁰ Accordingly, this significant downside to using criminal penalties tempts some to leave enforcement of anti-bullying policies to school officials who are in a better position to determine appropriate disciplinary actions. But this option is not free of problems. Giving school officials broad disciplinary authority over a still-undefined societal problem may result in arbitrary decisions or enforcement of anti-bullying policies.¹¹ Finally, all forms of discipline may be far less effective at remedy-

lying: An Emerging Threat to the “Always On” Generation, CYBERBULLYING, http://www.cyberbullying.ca/pdf/Cyberbullying_Article_by_Bill_Belsey.pdf (last visited Jan. 21, 2013) (defining cyberbullying as involving “the use of information and communication technologies . . . to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm others.”).

9. See, e.g., ARK. CODE ANN. § 5-71-217 (West, Westlaw through 2012 Fiscal Sess.); S.B. 6132, 235th Leg. Sess. (N.Y. 2011), <http://open.nysenate.gov/legislation/bill/S6132-2011>.

10. Vague statutory definitions of cyberbullying may not sufficiently warn students as to when their behavior is punishable. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (discussing problems with vague statutes). Similarly, broad definitions of cyberbullying may punish speech that is clearly protected by the First Amendment. See *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) (discussing problems with overbreadth).

11. The Supreme Court’s jurisprudence regarding the free speech rights of students in elementary and secondary schools gives school officials significant discretion to determine when student speech – including cyberbullying – will be “disruptive” of the school environment. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Many commentators are critical of the Court’s deference to school officials on these matters. See Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 545-46 (2000); S.

ing bullying than programs aimed at preventing it. Not surprisingly, there are also difficulties with this approach as preventive programs tend to cost more time and money than disciplinary approaches, at least in their inception.

Attempting to resolve the problem of cyberbullying thus reveals it to be a bit a Gordian knot¹² – both in its difficulty and in the need for those tackling the issue to think creatively. Given the difficult and layered nature of the problem, this symposium brings together scholars from various disciplines – psychology, education policy, and law – whose insights can inform our decision-making and move us toward solutions regarding the intricate problem of cyberbullying.

Professors Rodkin and Holt provide valuable psychological insight regarding the nature and effects of cyberbullying. Professor Rodkin's article attempts to "find common ground between psychological and legal knowledge with respect to bullying and cyberbullying."¹³ Accordingly, he and his co-author survey psychological definitions of bullying and cyberbullying, including the extent to which certain factors such as intent, repetition of conduct, and power imbalances are, or should be, considered part of those definitions.¹⁴ They further explore the many varied social relationships that complicate our understanding of bullying.¹⁵ Professor Holt's article empirically examines (1) the role that race, sex, and age play in the rates of cyberbullying victimization of youths; (2) the overlap between cyberbullying and other forms of victimization; and (3) the psychological distress resulting from cyberbullying (either alone or in conjunction with other victimization).¹⁶ Both Professor Rodkin's and Professor Holt's articles provide valuable information regarding the definition and effects of cyberbullying for those government officials attempting to grapple with the complexities of regulating cyberbullying.

Professors Waldman, Lidsky, and McDonald discuss the wisdom and constitutionality of some of those official responses to cyberbullying. Professor Waldman focuses on "identity-based aggression" and the special problem

Elizabeth Wilborn, *Teaching the New Three Rs – Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 130-37 (1995). As one observer noted "courts have become very deferential to suppression of student speech by school authorities who can offer *any* reason for their action that is related to some pedagogical objective, however fanciful. This deference leaves open a black hole into which school authorities may cast speech they dislike if the speech is tainted by minor breaches of decorum." Wilborn, *supra*, at 139.

12. A Gordian knot is a "matter of extreme difficulty." OXFORD ENGLISH DICTIONARY 689 (2d ed. 1991). But it also refers to a problem where the solution involves "evading the supposed conditions of the solution" or, as more colloquially known, thinking outside of the box. *Id.*

13. Philip C. Rodkin & Karla Fisher, *Cyberbullying from Psychological and Legal Perspectives*, 77 MO. L. REV. 619, 619 (2012).

14. *Id.* at 621-26.

15. *Id.* at 628-30.

16. Holt & Espelage, *supra* note 2.

that gay and lesbian students in schools face with bullying.¹⁷ Because identity-based aggressors attack and demean “an intrinsic personal characteristic that is salient to a person’s or group’s identity,” Professor Waldman argues the Supreme Court’s existing student speech precedents allow school officials to punish such aggression without significantly threatening free speech values.¹⁸ Professor McDonald similarly explores the place of student cyberbullying within the Court’s student speech framework.¹⁹ Acknowledging the extremely muddled nature of the Supreme Court’s student-speech cases involving cyber disputes, Professor McDonald proposes a possible framework of rules distinguishing between cyberbullying (student-to-student speech) and “cyberdissing” (student speech critical of school officials) which he also hopes will preserve important free speech values.²⁰

Finally, Professor Lidsky tackles the increasingly numerous criminal statutes punishing cyberbullying.²¹ She argues that, although law-makers’ motivations are understandable, laws are often poorly conceived and subject to significant vagueness and overbreadth challenges.²² As a result, they frequently “reflexive[ly] criminaliz[e] . . . common childhood wrongdoing . . . lead[ing] to pernicious consequences.”²³

Professors Weddle and Abrams discuss the implementation issues associated with cyberbullying punishment and prevention in the schools. Professor Weddle discusses numerous statutes requiring schools to implement anti-bullying policies and explains the manner in which the statutes undermine their goal of decreasing bullying.²⁴ Whether they are intricate or superficial, Professor Weddle argues that most such statutes

create fundamental obstacles to effective bullying prevention efforts because legislators are seemingly ignorant of the dynamics of bullying, the nature of school cultures in which bullying flourishes, the characteristics of those who bully, the day-to-day realities of schooling, and the multiple disincentives for schools to address bullying in demonstrably effective ways.²⁵

17. Ari Ezra Waldman, *All Those Like You: Identity Aggression and Student Speech*, 77 MO. L. REV. 653 (2012).

18. *Id.* at 657.

19. Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727 (2012).

20. *Id.* at 728.

21. Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693 (2012); see also *supra* note 9 and accompanying text.

22. *Id.* at 697-98.

23. *Id.* at 697.

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

25. *Id.* at 761.

Professor Weddle then suggests possible changes to legislation that will actually achieve the bullying prevention that legislators seek.

Professor Abrams' article, on the other hand, seeks to empower victims of bullying by proposing a solution that analogizes to existing statutory protections for students with disabilities. Thus, he suggests we view bullying and cyberbullying "as acts that saddle victims with a disability that inhibits learning."²⁶ Surveying literature on the effects of bullying and cyberbullying, Professor Abrams argues that all forms of bullying create an enormous public health problem that impedes youths' access to education and inhibits effective learning.²⁷ Accordingly, he argues that current statutes protecting educational access of students with physical and emotional disabilities are a useful analogy with which to view victims of cyberbullying.

These papers were a pleasure to read both separately and as a complete symposium. They are an illuminating and thought-provoking look at cyberbullying, its definition, effects, and possible solutions. At the very least, the articles that follow are a first step toward untying the Gordian knot that is cyberbullying and the myriad issues related to it.

26. Abrams, *supra* note 4, at 786.

27. *Id.* at 803-04.