



# Independent Democratic Conference

## **CYBERBULLYING**

**A Report on Bullying in a Digital Age**

SEPTEMBER 2011



## INTRODUCTION

AT LEAST HALF OF ALL AMERICANS HAVE BEEN BULLIED AT ONE POINT IN THEIR LIVES. WHETHER IT WAS TEASING ON THE PLAYGROUND, TAUNTING IN THE SCHOOL YARD, OR TACKLING IN THE HALLWAYS, BULLYING HAS BEEN PART OF "GROWING UP" FOR GENERATIONS. NOT OFTEN DID PARENTS, EDUCATORS, OR LEGISLATORS THINK OF INTERVENING; BUT TIMES HAVE CHANGED. AND IF EVER YOU HAVE HEARD THAT "BULLYING IS NOTHING BUT A RITE OF PASSAGE TO ADULTHOOD," THINK AGAIN.

WITH THE RAPID DEVELOPMENT OF INFORMATION AND COMMUNICATION TECHNOLOGIES, A NEW FORM OF HARASSMENT HAS EMERGED. CELL PHONES AND SOCIAL NETWORKING SITES SUCH AS FACEBOOK MAY HAVE ENABLED PEOPLE TO BECOME MORE CLOSELY CONNECTED AND INTERWOVEN, BUT THEY HAVE ALSO AMPLIFIED STANDARD ADOLESCENT CRUELTY TO A LEVEL UNPRECEDENTED. FROM "FLAMING"<sup>1</sup> TO "HAPPY SLAPPING,"<sup>2</sup> THOUSANDS OF TEENAGERS ACROSS THE NATION HAVE EXPERIENCED "CYBERBULLYING" IN ONE WAY OR ANOTHER<sup>3</sup> – AND THE NUMBERS ARE ONLY RISING.<sup>4</sup>

In addition to causing substantial psychological harm and emotional distress, cyberbullying has been blamed for nearly a dozen teen suicides. Just last week, New Yorker Jamey Rodemeyer, a 14-year old boy from Williamsville, near Buffalo, NY, took his life after what

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<sup>1</sup> Sending angry, rude, or obscene messages to a person, either privately, or through an online group.

<sup>2</sup> Recording a victim's physical assault, then distributing videos and/or pictures to others.

<sup>3</sup> Forty-two percent of kids have been bullied while online. One in 4 have had it happen more than once. Thirty-five percent of kids have been threatened online. Nearly 1 in 5 have had it happen more than once. Twenty-one percent of kids have received mean or threatening e-mail or other messages. Fifty-eight percent of kids admit someone has said mean or hurtful things to them online. More than 4 out of 10 say it has happened more than once. Fifty-three percent of kids admit having said something mean or hurtful to another person online. More than 1 in 3 have done it more than once. Fifty-eight percent have not told their parents or an adult about something mean or hurtful that happened to them online. *Based on 2004 i-SAFE survey of 1,500 students grades 4-8*

<sup>4</sup> Adam Duvernay, "La. Cyberbullying law takes effect," retrieved 18 August 2010 from Shreveport Times website, available at: <http://www.shreveporttimes.com/fdcp/?1282141201218>.

his parents claim was years of bullying because of struggles with his sexuality. His tragic death has gained national attention, including from superstar Lady Gaga, who said cyberbullying must be outlawed.

IN JANUARY 2010, A 15-YEAR OLD GIRL NAMED PHOEBE PRINCE KILLED HERSELF AFTER WEEKS OF BULLYING, BOTH ONLINE AND AT SCHOOL. EVEN AFTER HER DEATH, STUDENTS CONTINUED TO LEAVE VINDICTIVE COMMENTS ON HER FACEBOOK MEMORIAL PAGE. THIS PAST SEPTEMBER, TYLER CLEMENTI, AN 18-YEAR-OLD RUTGERS STUDENT, COMMITTED SUICIDE BY JUMPING OFF THE GEORGE WASHINGTON BRIDGE AFTER TWO CLASSMATES SECRETLY TAPED HIM DURING A SEXUAL ENCOUNTER WITH A MAN AND BROADCAST IT OVER THE WEB.<sup>5</sup>

CYBERBULLYING IS A SERIOUS THREAT TO SOCIETY, AND THIS RECENT STRING OF "BULLYCIDES" ONLY REINFORCES THE NEED FOR ACTION. AS WE EMBARK ON NATIONAL BULLYING PREVENTION MONTH IN OCTOBER<sup>6</sup>, IT IS TIME TO STOP AND THINK ABOUT THE STATE OF CYBERBULLYING OF YOUTH IN THE STATE OF NEW YORK AND WHAT TOOLS WE HAVE TO ADDRESS THIS GROWING PROBLEM.

IN NEW YORK, VICTIMS OF CYBERBULLYING CAN SEEK SOME JUSTICE THROUGH EXISTING CRIMINAL AND TORT LAWS, BUT THESE LEGAL REMEDIES ARE NOT ADEQUATE TO SOLVE THIS NEW AND EMERGING PROBLEM. IN ORDER TO ADDRESS CYBERBULLYING, THE INDEPENDENT DEMOCRATIC CONFERENCE WILL INTRODUCE LEGISLATION THAT WILL BRING OUR STATE'S STALKING AND MANSLAUGHTER STATUTES UP TO DATE, GIVE BULLIES A CONCRETE REASON TO QUIT THEIR ONLINE ANTICS, AND PROVIDE VICTIMS AND PROSECUTORS WITH LAWS THAT CAN BE ENFORCED AGAINST THIS NEW BREED OF BULLY.

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<sup>5</sup> Kaitlyn Piccoli, "Tyler Clementi Suicide Result of Cyber Bullying? Video," Long Island Press, published 30 September 2010, retrieved 30 November 2010 from Long Island Press website, available at: <http://www.longislandpress.com/2010/09/30/tyler-clementi-suicide-result-of-cyber-bullying-video/>.

<sup>6</sup> National Bullying Prevention Month is a campaign in the United States founded in 2006 by Pacer's National Center for Bullying Prevention. This campaign unites communities nationwide to educate and raise awareness of bullying prevention.

## WHAT IS BULLYING?

GENERALLY SPEAKING, A SITUATION MAY BE CLASSIFIED AS "BULLYING" WHEN IT SATISFIES THE FOLLOWING THREE CONDITIONS:

- (1) NEGATIVE OR MALICIOUS BEHAVIOR;
- (2) BEHAVIOR THAT OCCURS REPEATEDLY OVER A PERIOD OF TIME; AND
- (3) AN ASYMMETRY OF POWER BETWEEN THE PARTIES INVOLVED.

ACCORDING TO THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (JAMA), "THIS ASYMMETRY OF POWER MAY BE PHYSICAL OR PSYCHOLOGICAL, AND THE AGGRESSIVE BEHAVIOR MAY BE *VERBAL* (E.G. NAME CALLING, THREATS, TAUNTING, MALICIOUS TEASING), *PHYSICAL* (E.G. HITTING, KICKING, SPITTING, PUSHING, TAKING PERSONAL BELONGINGS), OR *PSYCHOLOGICAL* (E.G. SPREADING RUMORS, ENGAGING IN SCHOOL EXCLUSION, EXTORTION, OR INTIMIDATION)."<sup>7</sup>

A 2001 STUDY REVEALED THAT AS MANY AS 30 PERCENT OF STUDENTS IN GRADES 6 THROUGH 10 IN PUBLIC AND PRIVATE SCHOOLS ACROSS THE UNITED STATES WERE MODERATELY OR FREQUENTLY INVOLVED IN BULLYING – EITHER AS A BULLY (13 PERCENT), A VICTIM (10.6 PERCENT), OR BOTH (6.3 PERCENT). THE STUDY FURTHER DISCOVERED THAT BULLYING WAS MORE FREQUENT AMONG MIDDLE SCHOOL STUDENTS (GRADES 6 THROUGH 8) THAN AMONG HIGH SCHOOL STUDENTS (GRADES 9 AND 10).<sup>8</sup>

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<sup>7</sup> Warren J. Blumenfeld & R.M. Cooper, "LGBT and Allied Youth Responses to Cyberbullying: Policy Implications," *International Journal of Critical Pedagogy*, 3 (1) (2010) p.115.

<sup>8</sup> Tonja R. Nansel et al., "Bullying Behaviors Among US Youth: Prevalence and Association with Psychological Adjustment," *Journal of the American Medical Association*, 285 (16), April 25, 2001, retrieved 30 August 2010 from JAMA website, available at: <http://jama-ama-assn.org/cgi/content/abstract/285/16/2094>.

WHILE THERE IS NO PLACE SAFE FROM BULLYING THERE ARE AREAS WHERE BULLYING IS WORSE. SCHOOL BULLYING STATISTICS AND CYBERBULLYING STATISTICS IN 2007 REVEALED THE FIVE TOP WORST STATES TO LIVE IN TO AVOID BULLIES IN K-12 WERE 1. CALIFORNIA **2. NEW YORK** 3. ILLINOIS 4. PENNSYLVANIA 5. WASHINGTON.

## **BULLYING IN A DIGITAL AGE**

AS TECHNOLOGY HAS EVOLVED, SO HAS THE PROBLEM OF BULLYING. THE RISE OF THE INTERNET MAY HAVE BEEN HAILED AS ONE OF THE GREATEST TECHNOLOGICAL INNOVATIONS OF ALL TIME, BUT IT HAS ALSO RADICALLY CHANGED THE NATURE OF SOCIAL INTERACTIONS. IT SHOULD COME TO NO SURPRISE THEN THAT TODAY'S YOUTH "HAVE FOUND A WAY TO ENGAGE IN BULLYING THROUGH THE SAME TECHNOLOGY AS THE ONE THEY USE TO INTERACT WITH EACH OTHER AND WITH THE WORLD."<sup>9</sup>

AS ONE AUTHOR SO CLEVERLY NOTED:

*"TAKE THE DYNAMIC OF TRADITIONAL BULLYING AND SUPERIMPOSE A GENERATION OF KIDS WHO ARE FULLY WIRED – FREQUENT AND SAVVY USERS OF THE INTERNET, EMAIL, INSTANT MESSAGING, AND SOCIAL NETWORKING SITES (...) – AND YOU HAVE THE PERFECT STORM FOR CYBERBULLYING."*

*"THE BRIEF TAUNT ON THE PLAYGROUND OR THE BUS HEARD ONLY BY A FEW [HAS BECOME] A NASTY, PROFANITY-LACED COMMENT ON A WEB PAGE, OFTEN ANONYMOUS, COMPLETE WITH AN EMBARRASSING PHOTO, AND VIEWED BY A POTENTIALLY UNLIMITED NUMBER OF PEOPLE, BOTH KNOWN AND UNKNOWN."*

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<sup>9</sup> Mary Sue Backus, "OMG\*! Missing the Teachable Moment and Undermining the Future of the First Amendment – TISNF!"; *Case Western Law Review*, 60 (1), 2009, p.155.

*"IN SHORT, BULLYING HAS ENTERED THE DIGITAL AGE."*<sup>10</sup>

TECHNOLOGY PLAYS A CRITICAL ROLE IN TEENAGERS' LIVES, AND "THE INTERNET IS THE BACKBONE OF THEIR OVERALL MEDIA MILIEU."<sup>11</sup> MORE THAN 84 PERCENT OF TEENS OWN DEVICES THAT PROVIDE ACCESS TO THE INTERNET, INCLUDING COMPUTERS, AND CELL PHONES.<sup>12</sup> MORE AND MORE TEENAGERS TAKE ADVANTAGE OF EXISTING TECHNOLOGICAL INNOVATIONS TO MAKE PLANS WITH FRIENDS, JOKE AROUND, OR CHECK IN WITH PARENTS. NETWORKING SITES CURRENTLY DOMINATE THE ONLINE SOCIAL WORLD, BUT RECENT RESEARCH SUGGESTS THAT CELL PHONES ARE STILL THE MOST POPULAR TECHNOLOGY UTILIZED, WITH ALMOST 83 PERCENT OF YOUTH BETWEEN THE AGES OF 10 AND 18 USING ONE AT LEAST WEEKLY.<sup>13</sup>

## **WHAT IS CYBERBULLYING?**

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<sup>10</sup> Mary Sue Backus, p.158.

<sup>11</sup> Ibid.

<sup>12</sup> Marcy Sue Backus, p.156.

<sup>13</sup> Cyberbullying Research Center (CRC), "Research: 2010 – February," retrieved 12 November 2010, from CRC website, available at: <http://www.cyberbullying.us/research.php>.

WHILE DEFINITIONS OF CYBERBULLYING OFTEN VARY, ALL OF THEM TYPICALLY INCLUDE AN ELEMENT OF DELIBERATE, HOSTILE BEHAVIOR INTENDED TO INFLICT EMOTIONAL DISTRESS OR HARM. THE CYBERBULLYING RESEARCH CENTER, FOR EXAMPLE, DEFINES CYBERBULLYING AS "WILLFUL AND REPEATED HARM INFLICTED THROUGH THE USE OF COMPUTERS, CELL PHONES, AND OTHER ELECTRONIC DEVICES."<sup>14</sup> ANOTHER DEFINITION INCLUDES "THE USE OF INFORMATION AND TECHNOLOGY SUCH AS E-MAIL, INSTANT MESSAGING, THE PUBLISHING OF DEFAMATORY PERSONAL WEB SITES, AND ONLINE PERSONAL POLLING WEB SITES (...) TO SUPPORT CONSCIOUS, WILLFUL, DELIBERATE, REPEATED, AND HOSTILE BEHAVIOR BY ONE OR MORE PEOPLE WITH THE INTENT TO HARM OTHERS."<sup>15</sup>

CYBERBULLYING DIFFERS FROM CYBERHARASSMENT OR CYBERSTALKING IN THAT THE ACT IS PERPETRATED *BY MINORS AGAINST MINORS*. ONCE ADULTS ARE INVOLVED, THE OFFENSE IS REFERRED TO AS CYBERHARASSMENT OR CYBERSTALKING. THE NATIONAL CENTER FOR VICTIMS OF CRIME (NCVC) DEFINES CYBERSTALKING AS "THREATENING BEHAVIOR OR UNWANTED ADVANCES DIRECTED AT ANOTHER USING THE INTERNET AND OTHER FORMS OF ONLINE AND COMPUTER COMMUNICATIONS."<sup>16</sup> CYBERSTALKING IS ALSO OFTEN REFERRED TO AS ELECTRONIC STALKING, WHERE STALKING "GENERALLY INVOLVES HARASSING OR THREATENING BEHAVIOR THAT AN INDIVIDUAL ENGAGES IN REPEATEDLY"<sup>17</sup> AGAINST THE VICTIM, SOMETIMES EVEN THE VICTIM'S FAMILY.

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<sup>14</sup> Cyberbullying Research Center (CRC), "News," retrieved 25 August 2010 from CRC website, available at: <http://www.cyberbullying.us/index.php>.

<sup>15</sup> Kentucky Center for School Safety (KYSS), "Cyber bullying," retrieved 25 August 2010 from KYSS website, available at: <http://www.kysafeschools.org/cyberbullying.html>.

<sup>16</sup> National Center for Victims of Crime (NCVC), "Cyberstalking," retrieved 25 August 2010, from NCVC website, available at: <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32458>.

<sup>17</sup>

CyberGuards, "What is Cyberstalking? From the U.S. Department of Justice," retrieved 25 August 2010, from CyberGuards website, available at: <http://www.cyberguards.com/CyberStalking.html>.



CYBERHARASSMENT AND CYBERSTALKING ARE OFTEN USED INTERCHANGEABLY, THOUGH THEY DIFFER BASED ON THEIR FREQUENCY: CYBERSTALKING TYPICALLY REQUIRES TWO OR MORE CONTACTS WHEREAS CYBERHARASSMENT MAY ONLY INVOLVE A SINGLE INCIDENT. THE MAIN MOTIVE, AS WITH CYBERBULLYING, IS USUALLY ONE OF CONTROL; "IT IS A WAY FOR THE CRIMINAL TO INSERT HIMSELF FORCEFULLY INTO THE VICTIM'S LIFE."<sup>18</sup>

ONLINE HARASSMENT CAN AFFECT ANY AGE GROUP, BUT ADOLESCENTS SEEM TO BE ESPECIALLY VULNERABLE TO ONLINE ATTACKS. PEER ACCEPTANCE IS CRUCIAL TO YOUNG PEOPLE, SO "BEING CYBERBULLIED BY THEIR PEERS MAY CREATE STRESS, FRUSTRATION, AND ANGER THAT NEGATIVELY IMPACTS OTHER AREAS OF PSYCHOLOGICAL AND COGNITIVE DEVELOPMENT."<sup>19</sup> THE EMOTIONAL CONSEQUENCES GO BEYOND THE SCHOOLYARD AND VIRTUALLY SPILL INTO EVERY ASPECT OF VICTIMS' LIVES.

## **METHODS OF CYBERBULLYING**

BOTH CYBERBULLYING AND CYBERSTALKING CAN TAKE PLACE IN INTERNET CHAT ROOMS, ON SOCIAL NETWORKING WEBSITES, AND VIA EMAIL, BBM (BLACKBERRY MESSAGES) OR TEXT MESSAGE, AMONG OTHERS. WITH RAPIDLY EVOLVING TECHNOLOGY, IT IS ONLY A MATTER OF TIME UNTIL THE NUMBER OF VENUES AND OPPORTUNITIES FOR CYBERBULLYING INCREASE EVEN FURTHER.

CYBERBULLYING AND CYBERSTALKING CAN CONSIST OF THE DIRECT SENDING OF THREATENING OR HARASSING EMAILS TO THE VICTIM, THE PROLIFERATION TO OTHERS OF A SINGLE MESSAGE, IMAGE OR VIDEO ABOUT THE PERSON, OR THE MORE COMPLEX ACT OF INFECTING THE VICTIM'S COMPUTER WITH ELECTRONIC VIRUSES AND HACKING PROGRAMS IN ORDER TO GAIN CONTROL OF AND ACCESS INTO THE VICTIM'S LIFE. TYPICAL METHODS OF CYBERSTALKING INCLUDE:<sup>20</sup>

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<sup>18</sup> Officer.com, "Cyber Harrassment," retrieved 27 August 2010, from Officer.com, available at: <http://www.officer.com/publication/printer.jsp?id=30373>.

<sup>19</sup> Alison Virginia King, pp.851-852.

- SENDING INTIMIDATING, THREATENING, OBSCENE AND/OR UNSOLICITED EMAILS, TEXT MESSAGES, OR OTHER ELECTRONIC COMMUNICATION;
- "SPAMMING" (SENDING COUNTLESS EMAILS OR TEXT MESSAGES CONTAINING PORNOGRAPHIC OR MARKETING MATERIAL);
- "HATE MAIL" (HATE-INSPIRED AND OPPRESSIVE HARASSMENT, BASED ON RACE, ETHNICITY, RELIGION, SEX, GENDER, SEXUALITY, SOCIOECONOMIC CLASS, AND OTHERS);
- LEAVING IMPROPER MESSAGES ON ONLINE MESSAGE BOARDS OR SENDING HURTFUL AND DAMAGING MESSAGES TO OTHERS;
- INFECTING THE VICTIM'S COMPUTER WITH VIRUSES OR SPYWARE; AND
- TRACING THE VICTIM'S ACTIVITY ON THE INTERNET, THEN STEALING HIS OR HER IDENTITY.

CYBERBULLYING EXHIBITS SIMILAR CHARACTERISTICS AS CYBERSTALKING, YET ALSO ENCOMPASSES BEHAVIOR THAT IS MORE REFLECTIVE OF A YOUNGER AGE GROUP:<sup>21</sup>

- "FLAMING" (HURTFUL, CRUEL, AND OFTENTIMES INTIMIDATING MESSAGES INTENDED TO INFLAME, INSIGHT, OR ENRAGE);
- "HAPPY SLAPPING" (RECORDING PHYSICAL ASSAULTS ON MOBILE PHONES OR DIGITAL CAMERAS, THEN DISTRIBUTING THEM TO OTHERS);
- "TROLLING" (DELIBERATELY AND DECEITFULLY POSTING INFORMATION TO ENTICE GENUINELY HELPFUL PEOPLE TO RESPOND (OFTEN EMOTIONALLY), OFTEN DONE TO PROVOKE OTHERS);
- POSTING MALICIOUS STATEMENTS OR COMPROMISING PICTURES OF THE VICTIM ON A WEBSITE ("BASH BOARD");

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<sup>20</sup> (1) Christa Miller, "Cyber Harassment: Its Forms and Perpetrators," *Law Enforcement Technology*, April 2006, 33 (4), pp.26-30; and (2) Adam Duvernay.

<sup>21</sup> (1) Adam Duvernay and (2) Nancy Willard, "Educator's Guide to Cyberbullying and Cyberthreats," Center for Safe and Responsible Use of the Internet, published April 2007, p.2.

- "OUTING" (SHARING ANOTHER PERSON'S SECRETS OR EMBARRASSING INFORMATION/IMAGES ONLINE);
- "DISSING" (SENDING OR POSTING GOSSIP OR RUMORS ABOUT A PERSON TO DAMAGE HIS/HER REPUTATION OR FRIENDSHIPS);
- IMPERSONATION (PRETENDING TO BE SOMEONE ELSE AND SENDING OR POSTING MATERIAL TO GET THAT PERSON INTO TROUBLE); AND
- EXCLUSION (INTENTIONALLY AND CRUELLY EXCLUDING SOMEONE FROM AN ONLINE GROUP).

## **IMPACT OF CYBERBULLYING**

THE NATIONAL CRIME PREVENTION COUNCIL (NCPC) REPORTS THAT CYBERBULLYING IS AT A ALL TIME HIGH WITH 43% OF TEENAGERS REPORTING BEING VICTIMS OF CYBERBULLYING. CYBERBULLYING INSPIRES PSYCHOLOGICAL REACTIONS THAT ARE VERY SIMILAR TO TRADITIONAL BULLYING: LOW SELF-ESTEEM, FRUSTRATION, SHOCK, DEPRESSION, AND ANXIETY ARE ONLY SOME OF THE MANY CONSEQUENCES,<sup>22</sup> OFTEN LEAVING THE VICTIM WITH LONG-LASTING EMOTIONAL SCARS THAT EXTEND FAR INTO ADULTHOOD. NOT JUST VICTIMS, HOWEVER, ARE AFFECTED BY CYBERBULLYING. STUDIES SUGGEST THAT BULLIES, TOO, ARE MORE LIKELY TO DROP OUT OF SCHOOL AND MORE LIKELY TO BE INVOLVED IN CRIMINAL BEHAVIOR AS ADULTS. THE CYCLE OF BULLYING IS ALLEGEDLY PERPETUATED INTO THE NEXT GENERATION WHEN BULLIES BECOME OLDER AND HAVE MORE AGGRESSIVE CHILDREN.<sup>23</sup>

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<sup>22</sup> National Center for Victims of Crime (NCVC).

<sup>23</sup> Mary Sue Backus, p.158.

IN MANY WAYS, THE HARM CAUSED BY CYBERBULLYING MAY BE GREATER THAN THE HARM CAUSED BY TRADITIONAL BULLYING. ONLINE BULLYING CAN BE ESPECIALLY VICIOUS BECAUSE THE ANONYMITY OF THE INTERNET ALLOWS CYBERBULLIES TO MASK THEIR TRUE IDENTITY AND THEREBY SOLICIT THE INVOLVEMENT OF UNKNOWN "FRIENDS" – ALL WITHOUT FEAR OF RETALIATION. WITH THE CLICK OF A MOUSE, HARMFUL MATERIAL CAN BE DISTRIBUTED TO MILLIONS OF PEOPLE AROUND THE WORLD WHO HAVE THE ABILITY TO VIEW AND DOWNLOAD IT BEFORE IT HAS THE CHANCE TO DISAPPEAR. OFTENTIMES, SPITEFUL COMMENTS CAN REMAIN ONLINE, FORCING VICTIMS TO RELIVE THE PAIN EVERY TIME THEY TURN ON THEIR COMPUTERS OR VISIT A CERTAIN WEBPAGE.<sup>24</sup> THOSE WHO ARE BEING CYBERBULLIED HAVE VIRTUALLY NO ESCAPE: THEIR VICTIMIZATION IS ONGOING.<sup>25</sup>

VICTIMS OF CYBERBULLYING ARE ALSO LESS LIKELY TO COME FORWARD OR TELL THEIR PARENTS. AS NANCY WILLARD, FOUNDER OF THE CENTER FOR SAFE AND RESPONSIBLE INTERNET USE, NOTES, "TEENS MAY BE RELUCTANT TO TELL ADULTS WHAT IS HAPPENING ONLINE OR THROUGH THEIR CELL PHONES BECAUSE THEY ARE EMOTIONALLY TRAUMATIZED, THINK IT IS THEIR FAULT, FEAR GREATER RETRIBUTION, OR FEAR ONLINE ACTIVITIES OR CELL PHONE USE WILL BE RESTRICTED."<sup>26</sup>

## **EMPIRICAL STUDIES**

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<sup>24</sup> Alison Virginia King, "Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech," *Vanderbilt Law Review*, Volume 63 (3), p.850.

<sup>25</sup> Nancy Willard, p.5.

<sup>26</sup> Ibid.

ACCORDING TO THE LATEST NATIONAL STUDY, CONDUCTED BY THE IOWA STATE UNIVERSITY (ISU) RESEARCH INSTITUTE FOR STUDIES IN EDUCATION (RISE) AND PUBLISHED IN MARCH 2010,<sup>27</sup> 54 PERCENT - OR ONE OUT OF EVERY TWO – LESBIAN, GAY, BISEXUAL, TRANSGENDER (LGBT) AND ALLIED YOUTHS ARE REGULAR VICTIMS OF CYBERBULLYING<sup>28</sup>. AMONG THE NON-HETEROSEXUAL RESPONDENTS, 45 PERCENT REPORTED FEELING DEPRESSED AS A RESULT OF BEING CYBERBULLIED, 38 PERCENT FELT EMBARRASSED, AND 28 PERCENT FELT ANXIOUS ABOUT ATTENDING SCHOOL. MORE THAN ONE QUARTER (26 PERCENT) OF RESPONDENTS WHO REPORTED BEING VICTIMS OF CYBERBULLYING WITHIN THE 30 DAYS PRIOR TO THE SURVEY SAID THEY EXPERIENCED SUICIDAL THOUGHTS.

THE RESULTS INDICATE A DISTURBING TREND WITH EVEN MORE TROUBLESOME CONSEQUENCES. ACCORDING TO WARREN BLUMENFELD, THE STUDY'S LEAD AUTHOR, THE OLD SAYING, "STICKS AND STONES MAY BREAK MY BONES," IS NO LONGER APPLICABLE IN THE TRADITIONAL SENSE, AS THE POWER OF THE INTERNET HAS CHANGED THE REACH, LONGEVITY, AND FORCE OF THE WRITTEN WORD. ESPECIALLY IN CASES WHERE IT IS INTENDED TO CAUSE PSYCHOLOGICAL AND EMOTIONAL DISTRESS, WORDS CAN NOW DO MORE THAN JUST HURT THE OTHER PERSON – "THEY CAN KILL."<sup>29</sup> NEARLY A DOZEN CASES OF SUICIDE BY BULLYING (ALSO KNOWN AS "BULLYCIDE") HAVE ALREADY OCCURRED AMONG CHILDREN BETWEEN THE AGES OF 12 AND 15 – INCLUDING THE MOST RECENT ONE OF TYLER CLEMENTI IN SEPTEMBER 2010.

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<sup>27</sup> Warren J. Blumenfeld & R.M. Cooper, pp.114-133.

<sup>28</sup> Earlier this month the California State Senate passed "[Seth's Law](#)" a measure designed to curb anti-gay bullying in schools.

<sup>29</sup> Iowa State University, "ISU researchers publish national study on cyberbullying of LGBT and allied youths," news release, published 4 March 2010, retrieved August 30, 2010, from ISU website, available at: <http://www.news.iastate.edu/news/2010/mar/cyberbullying>.

WHILE THIS LATEST STUDY HAS FOCUSED ON THE IMPACT OF CYBERBULLYING ON LGBT AND ALLIED STUDENTS BETWEEN THE AGES OF 11 AND 22, IT IS CERTAINLY NOT LIMITED TO NON-HETEROSEXUAL YOUTHS. A DIFFERENT STUDY, CONDUCTED IN FEBRUARY 2010 BY THE CYBERBULLYING RESEARCH CENTER, DISCOVERED THAT APPROXIMATELY 20 PERCENT OF THE STUDENTS SAMPLED EXPERIENCED CYBERBULLYING IN THEIR LIFETIMES.<sup>30</sup> MORE THAN THIRTEEN PERCENT OF STUDENTS HAD BEEN SUBJECTED TO MEAN OR HURTFUL COMMENTS AND 12.9 PERCENT TO RUMORS WITHIN THE PAST 30 DAYS. SEVENTEEN PERCENT OF THE STUDENTS INTERVIEWED REPORTED BEING CYBERBULLIED AT LEAST TWICE DURING THAT SAME TIME PERIOD. ADOLESCENT GIRLS WERE PARTICULARLY MORE PRONE TO BEING CYBERBULLIED IN THEIR LIFETIMES THAN WERE BOYS (25.8 PERCENT VS. 16 PERCENT).

ON THE OTHER END OF THE SPECTRUM WERE THOSE WHO ADMITTED TO CYBERBULLYING OTHERS: APPROXIMATELY 20 PERCENT IDENTIFIED THEMSELVES AS BULLIES. THE MOST COMMON METHODS OF CYBERBULLYING INCLUDED POSTING MEAN OR HURTFUL COMMENTS AND SPREADING RUMORS. ELEVEN PERCENT OF THE SAMPLE ADMITTED TO CYBERBULLYING A VICTIM AT LEAST TWICE OVER THE PAST 30 DAY. ACCORDING TO THE CYBERBULLYING RESEARCH CENTER, GIRLS WERE MORE LIKELY TO SPREAD RUMORS, WHILE BOYS WERE MORE LIKELY TO POST HURTFUL PICTURES OR VIDEOS.

## **WHAT IS BEING DONE ABOUT CYBERBULLYING?**

### SCHOOL POLICIES

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<sup>30</sup> Cyberbullying Research Center (CRC), "Research: 2010 – February."

AS CYBERBULLYING CONTINUES TO SPREAD THROUGHOUT THE COUNTRY, THE DEBATE HAS INTENSIFIED OVER WHO SHOULD TAKE THE LEAD IN COMBATING THE THREAT. SCHOOLS HAVE BEEN ESPECIALLY UNDER FIRE FROM PARENTS TO TAKE APPROPRIATE ACTION, BUT WHEN IS THE SCHOOL'S INTERVENTION APPROPRIATE, AND WHEN DOES IT INFRINGE ON STUDENTS' PRIVACY? THE TRUTH IS THAT, BACK IN THE DAYS OF TRADITIONAL BULLYING, SCHOOLS WERE MUCH BETTER PREPARED AND ABLE TO HANDLE INAPPROPRIATE BEHAVIOR. CYBERBULLYING GOES WAY BEYOND YOUR AVERAGE SCHOOLYARD BRAWL OR HALLWAY SCUFFLE.

FOR ONE, CYBERBULLYING HAS NO GEOGRAPHIC BOUNDARIES. STUDENTS ENGAGING IN CYBERBULLYING MAY BE DOING SO USING PERSONAL DIGITAL DEVICES SUCH AS CELL PHONES OR LAPTOPS WHILE ON SCHOOL PROPERTY; OR THEY MAY BE USING A SCHOOL'S INTERNET SYSTEM FROM HOME, IF ACCESS IS ALLOWED. SOMETIMES THE PERSON WHO IS BEING BULLIED AT SCHOOL IS ALSO BEING BULLIED ONLINE. IN OTHER CASES, THE CYBERBULLY MAY BE A PERSON WHOM THE VICTIM DOES NOT KNOW, OR AN ONLINE STRANGER.<sup>31</sup> ALL OF THESE SITUATIONS MAY BE TRICKY, SINCE NOT ALL CYBERBULLYING OCCURS ON-CAMPUS OR USING SCHOOL-OWNED PROPERTY.

THE SECOND PROBLEM FACING SCHOOL ADMINISTRATORS IS ACTUALLY IDENTIFYING THE CYBERBULLY AND DETERMINING APPROPRIATE PUNISHMENT. JUST AS CYBERBULLYING TRANSCENDS THE WALLS OF A CLASSROOM OR HOME, IT ALSO HAS THE ABILITY TO BLUR THE LINES BETWEEN VICTIMS AND BULLIES. "SOMETIMES THE STUDENT WHO IS VICTIMIZED AT HOME IS ALSO BEING BULLIED ONLINE. BUT OTHER TIMES, THE PERSON WHO IS VICTIMIZED AT SCHOOL BECOMES A CYBERBULLY AND RETALIATES ONLINE. STILL OTHER TIMES, THE STUDENT WHO IS VICTIMIZED WILL SHARE HIS OR HER ANGER OR DEPRESSION ONLINE AS DISTRESSING MATERIAL."<sup>32</sup> THE POINT IS THAT SCHOOL OFFICIALS INVESTIGATING CASES OF CYBERBULLYING NEED TO MAKE SURE THAT THEY THOROUGHLY ANALYZE THE SITUATION, TAKING INTO ACCOUNT BOTH IN-PERSON AND ONLINE ENCOUNTERS, BEFORE TAKING MATTERS INTO THEIR OWN HANDS.

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<sup>31</sup> Nancy Willard, p.4.

<sup>32</sup> Nancy Willard, p.4.

FINALLY, CYBERBULLYING BRINGS FORTH A WIDE ARRAY OF LEGAL ISSUES. ONCE CYBERBULLYING IS SUSPECTED, WHEN CAN A SCHOOL MONITOR AND SEARCH A STUDENT'S INTERNET USE RECORDS? DID THE STUDENT HAVE TO BE PHYSICALLY LOCATED ON SCHOOL PROPERTY AT THE TIME OF THE INCIDENT? WHAT IF CYBERBULLYING WAS CONDUCTED FROM A PERSONAL DIGITAL DEVICE? WOULD SCHOOL POLICIES CONFLICT WITH WIRETAPPING LAWS? NONE OF THESE QUESTIONS ARE EASY TO ANSWER; YET, SCHOOLS HAVE A DUTY TO IMPLEMENT SENSIBLE PRECAUTIONS. IN THE END, IT IS UP TO THEIR DISCRETION HOW THEY ADDRESS CYBERBULLYING CONDUCTED THROUGH THEIR DISTRICT'S INTERNET SYSTEM, THE USE OF SCHOOL-OWNED PROPERTY, AND ON CAMPUS, AS LONG AS IT RESONATES WITH STATE AND MUNICIPAL LAWS, IF SUCH LAWS EXIST.

MOST IMPORTANTLY, HOWEVER, AND PERHAPS THE MOST CONTENTIOUS DEBATE SURROUNDING CYBERBULLYING POLICIES HAS BEEN THE ISSUE OF FREE SPEECH. FOR YEARS, SCHOOLS CONFRONTED CYBERBULLYING BY APPLYING THE " *TINKER* STANDARD," WHICH AROSE FROM *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*,<sup>33</sup> THE LANDMARK CASE THAT DEFINED THE FIRST AMENDMENT RIGHTS OF STUDENTS IN 1969. OVER THE COURSE OF THE YEARS, *TINKER* WAS ADAPTED TO RESPOND TO NEW CHALLENGES CONCERNING STUDENT SPEECH. HOWEVER, IN ALL OF THOSE CASES STUDENT SPEECH TOOK PLACE *ON* CAMPUS. ONCE CYBERBULLYING IN AN *OFF*-CAMPUS ENVIRONMENT CAME INTO PLAY, HOWEVER, THINGS BECOME A LITTLE MORE COMPLICATED.

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<sup>33</sup> *Tinker v. Des Moines Independent Community School District*, the Supreme Court ruled that neither students nor teachers should be expected to abandon their First Amendment rights in the classroom. The ruling was a direct response to a case in which three high school students had been prohibited from expressing their opposition to the Vietnam War by wearing black armbands to class.



MANY HAVE ARGUED THAT SCHOOLS' AUTHORITY OVER SPEECH, AS DEFINED IN *TINKER*, SHOULD BE EXPANDED BECAUSE ONLINE HARASSMENT OFTEN ORIGINATES OUTSIDE OF SCHOOL BUT THEN CARRIES ITS "STING" INTO THE CLASSROOM.<sup>34</sup> SINCE THEN, COURTS HAVE GENERALLY RULED THAT, IN ORDER FOR SCHOOLS TO REGULATE ONLINE OR ELECTRONIC SPEECH, **IT MUST HAVE CAUSED OR THREATENED TO CAUSE A SUBSTANTIAL AND MATERIAL DISRUPTION OF THE SCHOOL ENVIRONMENT, OR AN INTERFERENCE WITH THE RIGHTS OF STUDENTS TO BE SECURE.**<sup>35</sup>

## STATE LAWS

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<sup>34</sup> Shira Auerbach, p.1653.

<sup>35</sup> Nancy Willard, p.9.

IN ADDITION TO ESTABLISHING VOLUNTARY CYBERBULLYING POLICIES IN THE SCHOOLS, AT LEAST 42 STATES ACROSS THE COUNTRY HAVE PASSED LAWS TO ENSURE THESE POLICIES ARE BOTH STREAMLINED AND SET IN STATUTE.<sup>36</sup> NEW HAMPSHIRE AND PENNSYLVANIA, FOR EXAMPLE, REQUIRE SCHOOL BOARDS TO ADOPT POLICIES THAT INCLUDE CYBERBULLYING PREVENTION AND INTERVENTION TRAINING FOR STUDENTS AND SCHOOL EMPLOYEES. RHODE ISLAND TAKES A STEP FURTHER BY CALLING FOR THE ESTABLISHMENT OF A CYBERBULLYING TASK FORCE COMPRISED OF PARENTS, VOLUNTEERS, COMMUNITY REPRESENTATIVES, AND ENFORCEMENT AGENCIES.<sup>37</sup> IN NEW JERSEY, A LAW TOOK EFFECT SEPTEMBER 1, WHICH IS CONSIDERED THE TOUGHEST LEGISLATION AGAINST BULLYING IN THE NATION. PROPELLED BY PUBLIC OUTCRY OVER THE SUICIDE OF RUTGERS UNIVERSITY FRESHMAN TYLER CLEMENTI NEARLY A YEAR AGO, THE NEW LAW, KNOWN AS THE ANTI-BULLYING BILL OF RIGHTS, DEMANDS THAT ALL PUBLIC SCHOOLS ADOPT COMPREHENSIVE ANTIBULLYING POLICIES (THERE ARE 18 PAGES OF "REQUIRED COMPONENTS"), INCREASE STAFF TRAINING AND ADHERE TO TIGHT DEADLINES FOR REPORTING EPISODES.

ANOTHER POPULAR APPROACH IS THAT OF CRIMINALIZING CYBERBULLYING BY AMENDING EXISTING HARASSMENT LAWS OR DRAFTING NEW LAWS ENTIRELY. A REVIEW OF STATE LAWS CONDUCTED BY THE CYBERBULLYING RESEARCH CENTER IN JULY 2010 FOUND THAT AT LEAST 30 STATES HAVE LAWS THAT INCLUDE THE TERM "ELECTRONIC HARASSMENT," AND 5 STATES HAVE LAWS THAT INCLUDE THE TERM "CYBERBULLYING."<sup>38</sup>

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<sup>36</sup> Sameer Hinduja & Justin W. Patchin, "State Cyberbullying Laws," Cyberbullying Research Center (CRC), retrieved 16 November 2010 from CRC website, available at:

[http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws\\_20100701.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf).

<sup>37</sup> National Conference of State Legislatures (NCSL), "Cyberbullying and the States," published July 7, 2010, retrieved 25 August, 2010, from NCSL website, available at: <http://www.ncsl.org/default.aspx?tabid=20753>.

<sup>38</sup> Sameer Hinduja & Justin W. Patchin.

TENNESSEE'S TN CODE ANN. §39-17-308, FOR EXAMPLE, MAKES ANY COMMUNICATION, INCLUDING ELECTRONIC COMMUNICATION, WITH A "MALICIOUS INTENT TO FRIGHTEN, INTIMIDATE OR CAUSE EMOTIONAL STRESS" A CLASS A MISDEMEANOR PUNISHABLE BY UP TO \$2,500 IN FINES AND UP TO ONE YEAR IN JAIL.<sup>39</sup> LOUISIANA WAS THE MOST RECENT STATE TO ADDRESS CYBERBULLYING AND, IN AUGUST 2010, CREATED A LAW PRESCRIBING A PUNISHMENT OF UP TO \$500 IN FINES AND/OR UP TO SIX MONTHS IN JAIL FOR OFFENDERS OVER THE AGE OF 17; THOSE UNDER 17 WILL BE FORCED TO UNDERGO COUNSELING FOR A FIRST OFFENSE AND SUBJECT TO MISDEMEANOR CHARGES FOR SECONDARY OFFENSES.<sup>40</sup>

THE MOST COMPREHENSIVE CYBERBULLYING LAWS BY FAR CAN BE FOUND IN ILLINOIS, WHICH INCLUDES DEFINITIONS FOR CYBERHARASSMENT, CYBERSTALKING, AND, MOST RECENTLY, CYBERBULLYING, WHICH WAS ADDED IN AN AMENDMENT OF THE HARASSING AND OBSCENE COMMUNICATIONS ACT IN 2008. ILLINOIS NOW PROHIBITS "HARASSMENT THROUGH ELECTRONIC COMMUNICATIONS"<sup>41</sup> AT LARGE, INCLUDING THE USE OF ELECTRONIC COMMUNICATION TO MAKE "ANY COMMENT, REQUEST, SUGGESTION OR PROPOSAL WHICH IS OBSCENE WITH AN INTENT TO OFFEND." THE STATUTE ALSO SETS FORTH SPECIAL TERMS FOR VICTIMS UNDER THE AGE OF 13 AND CYBERBULLIES OVER THE AGE OF 16.

## FEDERAL LAWS

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<sup>39</sup> NCSL.

<sup>40</sup> Adam Duvernay.

<sup>41</sup> 720 ILCS 135/1-2.

IN THOSE CASES WHERE STATES LACK APPROPRIATE LAWS, VICTIMS OF CYBERBULLYING LOOK TO THE FEDERAL GOVERNMENT FOR RELIEF. YET, EVEN FEDERAL LAW IS OFTEN UNABLE TO OFFER COMPREHENSIVE REDRESS. THE MOST INFAMOUS EXAMPLE IS THE CASE OF MEGAN MEIER, WHO COMMITTED SUICIDE SHORTLY BEFORE HER 14<sup>TH</sup> BIRTHDAY IN 2006. FOLLOWING COMMENTS MADE BY ONLINE FRIEND "JOSH," A 16-YEAR OLD BOY WHOM SHE HAD BEFRIENDED ON SOCIAL NETWORKING SITE MYSPACE, MEIER HUNG HERSELF IN HER BEDROOM CLOSET AND WAS PRONOUNCED DEAD THE FOLLOWING DAY. SIX WEEKS AFTER HER DEATH, A TIP-OFF REVEALED THAT "JOSH" WAS FABRICATED AS A PRANK BY LORI DREW, A CLASSMATE'S MOTHER.<sup>42</sup>

ABSENT SUITABLE STATE LAWS, THE ONLY WAY DREW COULD BE CONVICTED WAS BY USING THE *COMPUTER FRAUD AND ABUSE ACT*,<sup>43</sup> WHICH PROHIBITS ACCESSING A COMPUTER WITHOUT AUTHORIZATION AND VIA INTERSTATE COMMERCE TO OBTAIN INFORMATION TO INFLICT EMOTIONAL DISTRESS. ORIGINALLY INTENDED TO COMBAT COMPUTER HACKING, IT WAS THE FIRST TIME THE ACT HAD EVER BEEN APPLIED IN A SOCIAL NETWORKING CASE. DREW WAS CONVICTED ON THREE COUNTS OF MISDEMEANOR COMPUTER FRAUD FOR USING MYSPACE TO SET UP A PHONY ACCOUNT, BUT WAS ACQUITTED OF FELONY CHARGES OF UNAUTHORIZED COMPUTER ACCESS TO INFLICT EMOTIONAL DISTRESS. A HIGHER COURT LATER OVERTURNED THE MISDEMEANOR CONVICTIONS CITING CONSTITUTIONAL CONCERNS.

FOLLOWING PUBLIC OUTRAGE OVER THE INABILITY TO CHARGE DREW WITH AN OFFENSE THAT FIT HER CRIME, CONGRESS INTRODUCED A BILL IN AN EFFORT TO PATCH UP THAT LOOPHOLE IN THE LAW. ALSO KNOWN AS THE *MEGAN MEIER CYBERBULLYING PREVENTION ACT* (H.R. 1966), THE BILL SOUGHT TO PROHIBIT "[THE TRANSMISSION] IN INTERSTATE OR FOREIGN COMMERCE [OF] ANY COMMUNICATION, WITH THE INTENT TO COERCE, INTIMIDATE, HARASS, OR CAUSE SUBSTANTIAL EMOTIONAL DISTRESS TO A PERSON, USING ELECTRONIC MEANS TO SUPPORT SEVERE, REPEATED, AND HOSTILE BEHAVIOR."<sup>44</sup>

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<sup>42</sup> Megan Meier Foundation, "Megan Meier's Story," retrieved 22 November 2010 from Megan Meier Foundation website, available at: <http://meganmeierfoundation.cwsit.org/megansStory.php>.

<sup>43</sup> 18 USC 371, 18 USC 1030 (a)(2)(C), (c)(B)(ii), and 18 USC 2(a),(b)

<sup>44</sup>

UNFORTUNATELY, WHILE THE BILL WAS WELL INTENTIONED, ITS LANGUAGE WAS TOO VAGUE TO PASS THE FIRST AMENDMENT TEST. IN A HEATED DEBATE, CIVIL RIGHTS GROUPS AND POLITICIANS ACROSS THE COUNTRY ARGUED THAT CREATING SUCH A LAW WOULD NOT ONLY INFRINGE ON FREE SPEECH RIGHTS BUT ALSO CREATE A HEAVY BURDEN FOR THE FEDERAL GOVERNMENT. IN ORDER TO AVOID ANY FIRST AMENDMENT CONFLICTS, THE BILL LANGUAGE WOULD HAVE TO BE SIGNIFICANTLY REFINED, THEY CONTENDED, AND GIVEN MONITORING AND ENFORCEMENT ISSUES, IT WOULD BE BEST TO RELEGATE AUTHORITY OVER CYBERBULLYING LAWS TO THE STATE LEVEL.<sup>45</sup>

SOME OTHERS HAVE ARGUED THAT IT IS INTERNET SERVICE PROVIDER (ISPS) WHO SHOULD BE HELD ACCOUNTABLE FOR ALLOWING BULLIES TO POST HURTFUL LANGUAGE AND IMAGES ONTO THEIR SERVERS. THE PROBLEM, HOWEVER, IS THE FOLLOWING: UNDER STANDARD COMMON-LAW PRINCIPLES, BOOK PUBLISHERS AND NEWSPAPER PUBLISHERS ARE HELD LIABLE FOR ANYTHING THAT APPEARS ON THEIR PAGES BECAUSE ARGUABLY THEY HAVE "THE KNOWLEDGE, OPPORTUNITY, AND ABILITY TO EXERCISE EDITORIAL CONTROL OVER THE CONTENT OF [THEIR] PUBLICATIONS."<sup>46</sup> CONTRARY TO PUBLISHERS, HOWEVER, DISTRIBUTORS SUCH AS NEWSSTANDS, BOOK STORES, AND LIBRARIES ARE GENERALLY NOT RESPONSIBLE FOR THE CONTENT OF THE MATERIAL THEY DISTRIBUTE. THE ARGUMENT IS THAT IT WOULD BE IMPOSSIBLE FOR DISTRIBUTORS TO READ EVERY

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Library of Congress, "H.R.1966 – Megan Meier Cyberbullying Prevention Act (Introduced in House – IH)," retrieved 19 November 2010 from THOMAS Library of Congress website, available at:

<http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966:>

<sup>45</sup>

Jonathan Strickland, "Is Cyber Bullying Illegal?" Discovery News (1 April 2010), retrieved 19 November 2010 from Discovery News website, available at: <http://news.discovery.com/tech/is-cyber-bullying-illegal.html>.

<sup>46</sup> Citizen Media Law Project, "Immunity for Online Publishers Under the Communications Decency Act," retrieved 22 November 2010 from Citizen Media Law Project website, available at: <http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act>.

SINGLE PUBLICATION BEFORE THEY SELL OR DISTRIBUTE IT, AND THE SAME CONCEPT APPLIES TO INTERACTIVE ONLINE SERVICES, SUCH AS BLOGS, FORUMS, AND LISTSERVS.<sup>47</sup>

ALSO KNOWN AS THE *COMMUNICATIONS DECENCY ACT (CDA)*, THIS FEDERAL LAW WAS PASSED IN 1996 TO GRANT IMMUNITY FROM TORT LIABILITY TO ALL ONLINE PROVIDERS, AS LONG AS THE INFORMATION UNDER CONSIDERATION ORIGINATED FROM THIRD PARTIES. THE ACT OFFERS "PROTECTION FOR GOOD SAMARITAN BLOCKING AND SCREENING OF OFFENSIVE MATERIAL" BY STATING THAT "NO PROVIDER OR USER OF AN INTERACTIVE COMPUTER SERVICE SHALL BE TREATED AS THE PUBLISHER OR SPEAKER OF ANY INFORMATION PROVIDED BY ANOTHER INFORMATION CONTENT PROVIDER." SECTION 230 FURTHER PROVIDES THAT "[N]O CAUSE OF ACTION MAY BE BROUGHT AND NO LIABILITY MAY BE IMPOSED UNDER ANY STATE OR LOCAL LAW THAT IS INCONSISTENT WITH THIS SECTION."<sup>48</sup> FOR BETTER OR FOR WORSE, THE GOAL OF THE CDA WAS TO PROMOTE THE INTERNET AS A "FORUM OF DIVERSITY OF POLITICAL DISCOURSE AND AN AVENUE FOR INTELLECTUAL ACTIVITY BY MINIMIZING GOVERNMENT INTERFERENCE THEREIN."<sup>49</sup>

SO, WHILE NEITHER EXISTING FEDERAL LAW NOR LEGISLATION HAVE SUCCEEDED IN OFFERING THE PUBLIC WITH ADEQUATE LEGAL TOOLS TO COMBAT CYBERBULLYING, EFFORTS TO DO SO HAVE NOT STOPPED. ON AUGUST 11, 2010, LEGISLATORS, ADVOCATES, AND CIVIC LEADERS GATHERED AT A FEDERAL PARTNERS IN BULLYING PREVENTION SUMMIT AND MADE SEVERAL RECOMMENDATIONS TO REDUCE THE THREAT OF CYBERBULLYING. AMONG THEIR SUGGESTIONS WAS THE IMPLEMENTATION OF COMPREHENSIVE LEGISLATION THAT FOCUSES ON INCLUSIVE ANTI-BIAS EDUCATION,

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<sup>47</sup> Citizen Media Law Project, "Immunity for Online Publishers Under the Communications Decency Act," retrieved 22 November 2010 from Citizen Media Law Project website, available at: <http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act>.

<sup>48</sup> Ibid.

<sup>49</sup> Shira Auerbach, p.1656.

## HATE CRIME PREVENTION AND BULLYING, CYBERBULLYING, AND HARASSMENT EDUCATION.<sup>50</sup>

### NEW YORK'S LAWS

A SIMILAR LAW ALREADY PASSED IN NEW YORK AND WILL TAKE EFFECT ON JULY 1, 2012. ALSO KNOWN AS THE *DIGNITY FOR ALL STUDENTS ACT (DASA)*, THE ACT IS INTENDED TO PROVIDE STUDENTS WITH A SAFE SCHOOL ENVIRONMENT BY REQUIRING SCHOOL DISTRICTS TO ADOPT POLICIES, TRAINING PROGRAMS, AND GUIDELINES TO COMBAT HARASSMENT "BASED ON A PERSON'S ACTUAL OR PERCEIVED RACE, COLOR, WEIGHT, NATIONAL ORIGIN, ETHNIC GROUP, RELIGION, RELIGIOUS PRACTICE, DISABILITY, SEXUAL ORIENTATION, GENDER, OR SEX."<sup>51</sup> DASA EXPLICITLY DEFINES "HARASSMENT" AS "THE CREATION OF A HOSTILE ENVIRONMENT BY CONDUCT OR BY VERBAL THREATS, INTIMIDATION OR ABUSE THAT HAS OR WOULD HAVE THE EFFECT OF UNREASONABLY AND SUBSTANTIALLY INTERFERING WITH A STUDENT'S EDUCATIONAL PERFORMANCE, OPPORTUNITIES OR BENEFITS, OR MENTAL, EMOTIONAL OR PHYSICAL WELL-BEING; OR CONDUCT, VERBAL THREATS, INTIMIDATION OR ABUSE THAT REASONABLY CAUSES OR WOULD REASONABLY BE EXPECTED TO CAUSE A STUDENT TO FEAR FOR HIS OR HER PHYSICAL SAFETY."<sup>52</sup>

DASA was first introduced in 1999..<sup>53</sup> Yet, with all of the benefits that come with prohibiting the kind of overt bullying that faculty, staff or students might see in classrooms, hallways, or the cafeteria, it could have gone much further. What the law does not explicitly tackle is the kind of bullying that takes place on the Internet and via cell phones, and therefore often

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<sup>50</sup> Adam Duvernay.

<sup>51</sup> Governor David A. Paterson, "Governor Paterson Signs 'Dignity for All Students Act,'" Press Release, published 8 September 2010, retrieved 22 November 2010 from Governor's website, available at: <http://www.state.ny.us/governor/press/090810-DignityStudentsAct.html>.

<sup>52</sup>

Bill Language retrieved from S.1986-B (Duane); signed into law on 8 September 2010.

<sup>53</sup> Governor David A. Paterson.

goes undetected.<sup>54</sup> The missing component of cyberbullying leaves the door open for a ferocious type of harassment that can be even more damaging than a physical confrontation.

So what other recourse do victims of cyberbullying have in New York? While New York does not have a specific statute dedicated solely to cyberbullying, it does criminalize harassment and stalking, as provided under section 240 of the Penal Law. Some of these laws include elements that could be used to prosecute cyberbullying, but they still have many loopholes that make them ill-suited to address the issue in the long-run.

### Harassment Laws

New York's harassment laws<sup>55</sup> address any course of conduct that is perpetrated repeatedly "with [the] intent to harass, annoy or alarm another person"<sup>56</sup> without any legitimate purpose other than to "[place] such person in reasonable fear."<sup>57</sup> While cyberbullying could certainly be interpreted to fall into the realm of such conduct, the burden falls on the victim to prove that he or she was subject to more than just unpleasant speech.<sup>58</sup> Harassment must also have occurred repeatedly and, if convicted, the offense only carries a violation or a class B misdemeanor at the most – a punishment that, in many cases, does not come close to bringing justice to cyberbullying victims.

Unlike general harassment, *aggravated* harassment<sup>59</sup> is treated more sternly with up to a class E felony (for aggravated harassment in the first degree) and no stipulations on the

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<sup>54</sup> Ithaca Journal, "Bullying Prevention Falls Short," retrieved June 29, 2010, from Ithaca Journal website:

[http://www.google.com/#hl=en&q=bullying+prevention+falls+short+-+ithaca+journal&aq=f&aql=&oq=&gs\\_rfai=&fp=37132dca8f7438ee](http://www.google.com/#hl=en&q=bullying+prevention+falls+short+-+ithaca+journal&aq=f&aql=&oq=&gs_rfai=&fp=37132dca8f7438ee).

<sup>55</sup> Penal Code §240.25 harassment in the first degree and §240.26 harassment in the second degree.

<sup>56</sup> Penal Code §240.26 harassment in the second degree.

<sup>57</sup> Penal Code §240.25 harassment in the first degree.

<sup>58</sup> Shira Auerbach, p.1665.



frequency of such behavior (in other words, it could have been a one-time incident). Instead of *conduct*, it also specifically addresses *communication* – “anonymously or otherwise, by telephone” or “any other form of written communication” and “with [the] intent to harass, annoy, threaten or alarm another person.”<sup>60</sup> The statute further includes a section to deal with communication by mechanical or electronic means.

The problem with this approach, however, is that the communication must have been made “to an ‘unwilling recipient’ whose privacy interests [were] being intolerably invaded.”<sup>61</sup> The communication must have been initiated by the harasser, but in the complex world of cyberbullying where the roles of victims and bullies are often cloudy, it is impossible to know how their interaction first started.

The second problem is that the aggravated harassment statute was not created to prevent the distribution of harmful material about an individual.<sup>62</sup> In *People v. Dupont*<sup>63</sup> the First Department emphasized in its ruling that §240.30 was not a substitute for defamation laws, a concept explored in more detail later on in this report. Since then, prosecutors have been essentially blocked from successfully bringing aggravated harassment claims on behalf of cyberbullied victims.

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<sup>59</sup> Penal Code §240.30 aggravated harassment in the second degree and §240.31 aggravated harassment in the first degree.

<sup>60</sup> Penal Code §240.30 aggravated harassment in the second degree and §240.31 aggravated harassment in the first degree.

<sup>61</sup> Shira Auerbach, p.1666.

<sup>62</sup> Shira Auerbach, p.1667.

<sup>63</sup> In *People v. Dupont*, 486 N.Y.S.2d 169 (App. Div. 1985), the court overturned a defendant’s conviction under §240.30 for aggravated harassment after distributing a magazine containing cartoons that depicted his previous attorney in an uncomplimentary light. “The court held that, as offensive as the defendant’s activities may have been, they did not violate §240.30, which was designed neither to prevent dissemination or publication of displeasing material about an individual, nor to substitute for defamation laws” (Shira Auerbach, p.1666).

## Stalking Laws

Besides harassment and aggravated harassment, victims of cyberbullying could potentially also seek recourse under the state's stalking laws. As with harassment, however, they are not suitable in the context of cyberbullying:

Penal Law section 120.45, stalking in the fourth degree (a class B misdemeanor), addresses conduct that "causes material harm to the mental or emotional health of such person," but only in cases where such communication was initiated by the stalker and the stalker "was previously clearly informed to cease such conduct."

Section 120.50, stalking in the third degree (a class A misdemeanor), includes the element of intent, where the stalker must have intentionally engaged in a course of conduct to cause the victim "to reasonably fear physical injury or serious physical injury" – yet no mention of psychological or emotional harm.

And finally, §120.55 stalking in the second degree (a class E felony) adds an age requirement where the stalker must be 21 years of age or older and "repeatedly [commit] acts over a period of time intentionally placing or attempting to place [a] person who is under the age of fourteen in reasonable fear of physical injury, serious injury, or death." This age stipulation limits the applicability of the statute to cyberbullying victims and their perpetrators, and as with stalking in the third degree, the statute only refers to injuries that are physical in nature.<sup>64</sup>

## Surveillance & Dissemination Laws

Other related offenses under which cyberbullying may be prosecuted are unlawful surveillance and dissemination of an unlawful surveillance image in the first and second degree (NY Penal Law §250.45, §250.50, §250.60 and §250.55, respectively). These, however,

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<sup>64</sup> §120.60 stalking in the first degree (a class D felony) adds intention and recklessness to §120.55 stalking in the second degree (a class E felony).

only apply to cases in which a photo or video footage was recorded and then intentionally published or distributed.

The caveats are three-fold: (1) the images must have been recorded for the purpose of degrading or abusing the victim and without such victim's knowledge or consent; (2) the images must be of the victim dressing or undressing or his/her sexual or other intimate parts at a place and time when he or she had a reasonable expectation of privacy; and (3) dissemination of such images can only be prosecuted under these statutes if the offender had knowledge of the unlawful conduct satisfying the essential conditions of unlawful surveillance in the first or second degree. The likelihood of successfully charging a cyberbully for either of these offenses is, therefore, slim to none.

### Civil actions

There are a couple of means by which to go after a cyberbully civilly. Two specific torts come to mind: defamation and intentional infliction of emotional distress (IIED). Yet, there are several reasons why they, too, cannot provide sweeping relief for cyberbullying victims.

The private civil action against a tortfeasor for *defamation* was originally created to protect a person from false statements that damage his or her reputation. Defamation consists of two parts: *slander* (spoken defamation) and *libel* (printed and broadcast defamation). For speech to be considered defamatory, a person must have made a factual assertion, "or a statement of opinion that brings about a factual interference"<sup>65</sup> and that assertion must be proven false and to have caused damages. Because of the gray area between a statement of fact and one of opinion, courts have developed a 'totality of the circumstances' test to examine the language, content, and context of the publication.<sup>66</sup> " If the publication is

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<sup>65</sup> Shira Auerbach, p.1667.

<sup>66</sup> "Since '[a] word is not a crystal, transparent and unchanged, [but] is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used,' the facts surrounding the publication must also be carefully considered" (Lectric Law Library, "Fact or Opinion re Defamation," retrieved 30 November 2010 from Lectric Law Library website, available at: <http://www.lectlaw.com/def/f087.htm>).

construed in a manner that is “reasonably susceptible of a defamatory meaning and [can] be reasonably understood in the defamatory sense,” then the statement is actionable.<sup>67</sup>

For cyberbullying victims, this means that any expression of opinion that cannot be convincingly proven as falsely stating an actual fact – no matter how offensive, negative, or abusive – is not actionable in civil court.

A second drawback to the tort of defamation is that it can only be used in instances where offensive material was published to a third party. Often times, cyberbullying occurs in a private communication between the bully and the victim, in which case a defamation suit would be ineffective. The cause of action would, however, be useful in instances involving social networking websites and blogs, as evidenced in the case of David Knight in Canada. Knight’s classmates had created a website entitled “Welcome to the page that makes fun of David Knight” in which they accused him of pedophilia and the use of date rape drugs to take advantage of young boys.<sup>68</sup>

A final option for victims of cyberbullying lies in the tort of *intentional infliction of emotional distress* (IIED), which American jurisprudence has recognized for decades as a basis for civil liability. To succeed in an IIED claim, a cyberbullying victim must demonstrate that (a) the bully either intended to cause emotional stress or should have reasonably known that his/her actions would result therein; (b) the bully’s conduct was so outrageous and extreme that it could never be tolerated by civilized society; (c) the bully’s actions are what prompted the victim’s psychological injuries; and (d) the mental anguish suffered by the victim is so severe that no reasonable person could ever be expected to endure it.<sup>69</sup>

While IIED seems like the best legal remedy for cyberbullying victims under existing law, courts are often hesitant to allow such claims to move forward. First, courts fear that allowing plaintiffs to seek damages every time their feelings are hurt will open the floodgates to excessive litigation, all in the name of “protecting mental interests.” It is

<sup>67</sup> Ibid.

<sup>68</sup> Shira Auerbach, pp. 1667-1668.

<sup>69</sup> Shira Auerbach, p.1669.

already difficult to prove the level of “psychological damage” caused by cyberbullying, and the exaggeration of harm is a concern when financial reward is involved.

The second drawback to the IIED approach is that it requires courts to distinguish “the trifling insult or annoyance from the serious wrong.” Some have argued that “a certain toughening of the mental hide is a better protection than the law could ever be.”<sup>70</sup> But at what point does cyberbullying cross the line from teaching teenagers how to “grow a thick skin” to “causing a serious injury”? This is a question that not just courts, but also legislators, school administrators, and parents all across the country have been trying to grapple with as they seek to address the cyberbullying threat.

While the tort of IIED has four elements, courts have traditionally focused on that of outrageousness. In the context of cyberbullying, an IIED claim can only be successful if a narration of the facts to a reasonable person “can arouse a significant amount of resentment against the bully, and ‘lead him to exclaim, Outrageous!’”<sup>71</sup> The problem is that, until now, the tort of IIED has provided little guidance as to what constitutes “outrageous” conduct, so the scope of behavior that falls outside of the realm of acceptable behavior is difficult to define. Indeed, most IIED claims in New York have failed because of insufficient evidence to pass the “outrageous conduct” test.<sup>72</sup>

## **INDEPENDENT DEMOCRATIC CONFERENCE LEGISLATION AND INITIATIVES**

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<sup>70</sup> Shira Auerbach, p.1670.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

THE LESSON TO BE LEARNED IS THAT NEW YORK'S EXISTING CRIMINAL AND TORT LAWS ARE INSUFFICIENT TO OFFER COMPREHENSIVE REDRESS TO THE COMPLEX AND EMERGING PROBLEM OF CYBERBULLYING. THE INDEPENDENT DEMOCRATIC CONFERENCE WILL:

1. INTRODUCE A BILL TO FURTHER PROTECT OUR CHILDREN FROM CYBERBULLIES, AND
  
2. SETS FORTH A RESOLUTION TO CREATE MORE PUBLIC AWARENESS OF CYBERBULLYING BY MEMORIALIZING GOVERNOR ANDREW M. CUOMO TO PROCLAIM OCTOBER 2011 BULLYING PREVENTION MONTH IN THE STATE OF NEW YORK.

#### THE BILL

SPECIFICALLY, THE BILL WILL DO TWO THINGS: (1) EXPAND THE CRIME OF STALKING IN THE THIRD DEGREE TO INCLUDE CYBERBULLYING; AND (2) EXPAND THE CRIME OF MANSLAUGHTER IN THE SECOND DEGREE TO INCLUDE THE EMERGING PROBLEM OF BULLYCID. WHILE NEITHER CYBERBULLYING NOR BULLYCID IS EXPLICITLY DEFINED IN THE BILL, BOTH CONCEPTS ARE ADDRESSED IN PENAL LAW SECTIONS 120.50 AND 125.15.

#### CYBERBULLYING: §120.50 STALKING IN THE THIRD DEGREE (A CLASS A MISDEMEANOR)

A PERSON IS GUILTY OF STALKING IN THE THIRD DEGREE WHEN HE OR SHE INTENTIONALLY, AND FOR NO LEGITIMATE PURPOSE, ENGAGES IN A COURSE OF CONDUCT USING ELECTRONIC COMMUNICATION DIRECTED AT A CHILD UNDER THE AGE OF TWENTY-ONE YEARS, AND KNOWS OR REASONABLY KNOW THAT SUCH CONDUCT:

- A) IS LIKELY TO CAUSE REASONABLE FEAR OF MATERIAL HARM TO THE PHYSICAL HEALTH, SAFETY OR PROPERTY OF SUCH CHILD; OR
  
- B) CAUSES MATERIAL HARM TO THE MENTAL OR EMOTIONAL HEALTH, SAFETY OR PROPERTY OF SUCH CHILD .

TO AVOID SOME OF THE CAVEATS IN NEW YORK'S EXISTING STALKING LAWS, THE BILL DOES NOT REQUIRE THAT THE OFFENDER INITIATE THE COMMUNICATION. FURTHER, IT CLARIFIES THAT A SINGLE ELECTRONIC COMMUNICATION CAN BE CONSIDERED A "COURSE OF ACTION" IF IT IS DIRECTED AT A CHILD UNDER THE AGE OF TWENTY-ONE YEARS AND TRANSMITTED TO MULTIPLE RECIPIENTS – EVEN IF THE CHILD IS NOT ONE OF THEM.

SIMILAR TO CURRENT STALKING LAWS, THIS BILL DOES NOT REQUIRE THAT THE CYBERSTALKER INTEND TO FRIGHTEN OR HARM THE VICTIM, JUST THAT THEY INTEND TO ENGAGE IN A COURSE OF CONDUCT TARGETED AT A SPECIFIC PERSON UNDER THE AGE OF 21 VIA ELECTRONIC COMMUNICATION. IN OTHER WORDS, THERE NEED NOT BE INTENT TO CAUSE A SPECIFIC RESULT, SUCH AS FEAR.

THE STATUTORY REQUIREMENT THAT THE OFFENDER KNOW OR "REASONABLY SHOULD KNOW" THAT HIS OR HER CONDUCT CAUSES "REASONABLE FEAR OF HARM" OR ACTUAL HARM ADDRESSES THE CONCERN THAT A PARTICULAR CONDUCT WILL BE DEEMED CRIMINAL BASED ON SUBJECTIVE FEAR OF THE ALLEGED VICTIM. THE FEAR MUST BE REASONABLE AND NOT IDIOSYNCRATIC AND THE HARM MUST BE MATERIAL.

THE BILL DEFINES "ELECTRONIC COMMUNICATION" AS "ANY TRANSFER OF SIGNS, SIGNALS, WRITINGS, IMAGES, SOUNDS, DATA OR INTELLIGENCE OF ANY NATURE TRANSMITTED IN WHOLE OR IN PART BY A WIRE, RADIO, ELECTROMAGNETIC, PHOTO-ELECTRONIC OR PHOTO-OPTIONAL SYSTEM, [INCLUDING], BUT NOT LIMITED TO, THE TRANSFER OF SUCH COMMUNICATIONS THROUGH THE INTERNET" (NY PENAL LAW §120.40).

BULLYCIDIC §125.15 MANSLAUGHTER IN THE SECOND DEGREE (A CLASS C FELONY)

WHILE THE ACT OF CYBERBULLYING WOULD BE ADDRESSED BY EXPANDING STALKING IN THE THIRD DEGREE, THE BILL ALSO EQUIPS PROSECUTORS WITH LEGAL TOOLS TO BRING LEGAL ACTION AGAINST PERPETRATORS OF BULLYCID. UNDER THE PROPOSED BILL, A PERSON IS GUILTY OF MANSLAUGHTER IN THE SECOND DEGREE WHEN [...] HE OR SHE COMMITS THE OFFENSE OF STALKING IN THE THIRD DEGREE [...] AND, IN THE COURSE AND FURTHERANCE THEREOF, HE OR SHE INTENTIONALLY OR RECKLESSLY CAUSES THE VICTIM OF SUCH OFFENSE TO COMMIT SUICIDE.

### THE LEGISLATIVE RESOLUTION

THE LEGISLATIVE RESOLUTION IS PART OF A MULTIDISCIPLINARY APPROACH. SCHOOL TEACHERS, PARENTS, PEERS, ADVOCATES, ORGANIZATIONS AND LEGISLATORS ALL MUST BE INVOLVED IN ORDER TO RAISE AWARENESS OF THE CONSEQUENCES OF CYBERBULLYING, ENACT APPROPRIATE POLICIES AND LAWS, AND CREATE AN ENVIRONMENT THAT PROMOTES TOLERANCE AND RESPECT.

THE IDC IS CALLING ON THE GOVERNOR TO PROCLAIM THE MONTH OF OCTOBER AS BULLYING PREVENTION MONTH IN THE STATE OF NEW YORK IN CONJUNCTION WITH NATIONAL BULLYING PREVENTION MONTH, WHICH IS A CAMPAIGN IN THE UNITED STATES FOUNDED IN 2006 BY PACER'S NATIONAL BULLYING PREVENTION CENTER. HELD DURING THE MONTH OF OCTOBER EVER SINCE, THIS CAMPAIGN UNITES COMMUNITIES NATIONWIDE TO EDUCATE AND RAISE AWARENESS OF BULLYING PREVENTION AND THE IDC HOPES THE STATE OF NEW YORK WILL DO THE SAME THING STATEWIDE.

### **WHY CRIMINALIZE CYBERBULLYING?**



SOME PESSIMISTS HAVE MADE THE CASE THAT CYBERBULLYING LAWS SUCH AS THIS ONE ARE A WASTE OF TIME AND MONEY BECAUSE THEY ARE REACTIONARY RATHER THAN PREVENTATIVE. THEY MAY GIVE OFFICIALS THE ABILITY TO CHARGE BULLIES UNDER A SPECIFIC LAW, THEY SAY, BUT AT THAT POINT THE DAMAGE HAS ALREADY BEEN DONE.<sup>73</sup> THESE PEOPLE HAVE ALSO ARGUED THAT EDUCATION IS THE MOST EFFECTIVE MEANS FOR CREATING CHANGE. INDEED, SCHOOL DISTRICTS THROUGHOUT THE STATE HAVE ALREADY BEGUN TO IMPLEMENT POLICIES TO EDUCATE STUDENTS AND FACULTY ABOUT THE DANGERS OF CYBERBULLYING. AND ONCE DASA GOES INTO EFFECT, IT WILL CERTAINLY BOLSTER EDUCATIONAL INITIATIVES TO CREATE A SAFE AND RESPECTABLE LEARNING ENVIRONMENT.

BUT ALL THE DRIVER'S ED CLASSES IN THE WORLD HAVE NOT STOPPED RECKLESS DRIVING, AND AWARENESS TRAINING ALONE WON'T PUT AN END TO CYBERBULLYING EITHER. THE KEY IS TO TACKLE THE PROBLEM FROM ALL SIDES – AND FROM A LEGISLATIVE STANDPOINT, CYBERBULLYING LAWS ARE ONE WAY OF INCENTIVIZING BULLIES TO REFRAIN FROM ONLINE HARASSMENT WHILE PROVIDING THE TOOLS FOR PROSECUTION IF THEY DON'T.

## **FREEDOM OF SPEECH**

THE CHALLENGE LIES IN PROTECTING TEENAGERS FROM CYBERBULLYING WITHOUT TRAMPLING ON THE FREE SPEECH PROTECTIONS AFFORDED BY THE FIRST AMENDMENT. THIS PROPOSED LEGISLATION ACCOMPLISHES THAT IN THE FOLLOWING WAY:

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<sup>73</sup>

Jonathan Strickland.

PROPONENTS OF FREE SPEECH HAVE LONG ARGUED THAT A SOCIETY THAT PUTS PEOPLE ON TRIAL FOR THINGS THEY HAVE WRITTEN OR SAID IS NO LONGER A TRULY DEMOCRATIC SOCIETY. THE POWER OF THE WORD HAS BEEN UNDISPUTABLE; IT HAS BEEN ESSENTIAL TO PRESERVING DEMOCRACY AND, IN FACT, ITS FOUNDING PREMISE WAS TO PRESERVE THE EXCHANGE OF IDEAS: A "MARKET PLACE" WHERE CITIZENS COULD SORT THROUGH BELIEFS AND IDEAS WHICH BEST RESONATED WITH THEM AND DISCARD THOSE THAT DID NOT,<sup>74</sup> THEREBY ALLOWING FOR THE CREATION OF AN EVER-EVOLVING, OPEN SOCIETY. MOREOVER, THEY CONTEND THAT FREEDOM OF SPEECH IS RECOGNIZED AS A HUMAN RIGHT UNDER ARTICLE 19 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS,<sup>75</sup> SO IT CANNOT AND MUST NOT BE LIMITED.

AND YET, PROPONENTS OF A MORE REFINED FIRST AMENDMENT ARGUE THAT THIS FREEDOM SHOULD BE TREATED NOT AS A RIGHT BUT AS A PRIVILEGE – A SPECIAL ENTITLEMENT GRANTED BY THE STATE ON A CONDITIONAL BASIS THAT CAN BE REVOKED IF IT IS EVER ABUSED OR MALTREATED. BRITISH PHILOSOPHER JOHN STUART MILL LONG ARGUED THAT "THE ONLY PURPOSE FOR WHICH POWER CAN BE RIGHTFULLY EXERCISED OVER ANY MEMBER OF A CIVILIZED COMMUNITY, AGAINST HIS WILL, IS TO PREVENT HARM FROM OTHERS."<sup>76</sup> HIS "HARM PRINCIPLE" WAS ARTICULATED IN AN ANALOGY BY OLIVER WENDELL HOLMES, JR. (1841-1935), AND STILL HOLDS TRUE TODAY: "THE RIGHT TO SWING MY FIST ENDS WHERE THE OTHER MAN'S NOSE BEGINS," OR, A PERSON'S RIGHT TO FREE SPEECH ENDS WHEN IT SEVERELY INFRINGES UPON THE SAFETY AND WELL-BEING OF ANOTHER.

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<sup>74</sup> "Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States," *Information & Communications Technology Law*, 18 (2), June 2009, p.236.

<sup>75</sup> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." – Universal Declaration of Human Rights, Article 19.

<sup>76</sup> John Stuart Mill's *On Liberty* (1859), considered a radical piece of work to Victorian readers at the time as it supported individuals' moral and economic freedoms from the state.

IN THE CASE OF CYBERBULLYING, THE PERCEIVED PROTECTIONS OF FREE SPEECH ARE EXACTLY WHAT ENABLE HARMFUL SPEECH AND CRUEL BEHAVIOR ON THE INTERNET. IT IS THE NOTION THAT PEOPLE CAN POST ANYTHING THEY WANT, REGARDLESS OF THE HARM IT MIGHT CAUSE ANOTHER PERSON THAT HAS PERPETUATED, IF NOT CREATED, THIS CYBERBULLYING CULTURE. BUT "HATE SPEECH" THAT CAUSES MATERIAL HARM TO CHILDREN SHOULD HAVE CONSEQUENCES.

IN SUMMARY, ALTHOUGH SPEECH IS GENERALLY PROTECTED UNDER THE FIRST AMENDMENT, THERE ARE INSTANCES IN WHICH RESTRICTIONS ARE WARRANTED. IN *VIRGINIA V. BLACK*,<sup>77</sup> FOR EXAMPLE, THE COURT RULED THAT "THE PROTECTIONS AFFORDED BY THE FIRST AMENDMENT (...) ARE NOT ABSOLUTE, AND WE HAVE LONG RECOGNIZED THAT THE GOVERNMENT MAY REGULATE CERTAIN CATEGORIES OF EXPRESSION CONSISTENT WITH THE CONSTITUTION. THE FIRST AMENDMENT PERMITS 'RESTRICTIONS UPON THE CONTENT OF SPEECH IN A FEW LIMITED AREAS, WHICH ARE OF SUCH SLIGHT SOCIAL VALUE AS A STEP TO TRUTH THAT ANY BENEFIT THAT MAY BE DERIVED FROM THEM IS CLEARLY OUTWEIGHED BY THE SOCIAL INTEREST IN ORDER AND MORALITY.'"<sup>78</sup>

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<sup>77</sup> *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>78</sup> Shira Auerbach, p.1664.

UNTIL 1989, NEW YORK'S HARASSMENT LAWS WERE SO BROAD THAT, IN ORDER TO PREVAIL IN A CLAIM OF VERBAL HARASSMENT, THE PLAINTIFF ONLY HAD TO PROVE THAT THE SPEECH WAS "ABUSIVE OR OBSCENE."<sup>79</sup> IN *PEOPLE V. DIETZE*<sup>80</sup>, HOWEVER, THE NEW YORK COURT OF APPEALS FOUND THAT PORTION OF THE STATE'S HARASSMENT LAW UNCONSTITUTIONAL EXPLAINING THAT SPEECH MAY BE "ABUSIVE," EVEN "VULGAR, DERISIVE, AND PROVOCATIVE," AND STILL NOT FALL WITHIN THE REALM OF "CONSTITUTIONALLY PROSCRIBABLE EXPRESSION."<sup>81</sup> THE COURT FURTHER EXPLAINED THAT **SPEECH COULD ONLY BE RESTRICTED WITH REGARDS TO "WORDS THAT INFLICT INJURY OR OTHERWISE INCITE IMMEDIATE VIOLENCE OR [BREACHES] OF PEACE,"**<sup>82</sup> **AND THAT IS WHAT REMAINS THE LAW NOW.**

THE INDEPENDENT DEMOCRATIC CONFERENCE BELIEVES THERE SHOULD BE CONSEQUENCES FOR THOSE WHO CYBERBULLY AND COMMIT BULLYCID AND THAT THOSE CONSEQUENCES PROPOSED IN THIS BILL ARE WITHIN THE ABOVE STATED PARAMETERS OF CONSTITUTIONAL LAW.

### **Cyberbullying: A Multilateral Approach**

While this IDC bill is a crucial and much-needed step to combating the problem of cyberbullying, it can only be truly eradicated with the help of citizens, leaders, and activists at all levels of society. As with most things in life, the most effective solution calls for a multidisciplinary and multifaceted approach. School teachers, parents, peers, advocates, organizations and legislators – all must be involved in order to raise awareness of the consequences of cyberbullying, enact appropriate policies and laws, and create an environment that promotes tolerance and respect.<sup>83</sup>

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<sup>79</sup> Shira Auerbach, p.1665.

<sup>80</sup> *People v. Dietze*, 549 N.E.2d 1166 (NY 1989).

<sup>81</sup> Shira Auerbach, p.1665.

<sup>82</sup>

*Ibid.*

### *Awareness Campaigns & Non-Profit Organizations*

- Organizations such as the Anti-Defamation League, the Cyberbullying Research Center, or CyberBully Alert must continue their initiatives to raise awareness and educate people about the dangers of cyberbullying and how to effectively tackle the problem once it is identified.
- As discussed above, setting aside an official month to recognize and increase awareness of cyberbullying will assist in public awareness and addressing this serious issue.

### *Monitoring By Online Providers*

- Message board, chat room, and social networking website administrators should more effectively monitor their sites in order to limit harmful behavior and protect the privacy of their users.

### *Parental Control*

- Parents and guardians need to become more involved in monitoring young people's online activities. They need to make an effort to teach their children responsibility and respect.
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- Parents, guardians, and educators must explain to their children the importance of reporting offensive or abusive behavior, whether it is online or in person.

### *School Environment*

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<sup>83</sup> Suggestions (excluding "Awareness Campaigns & Non-Profit Organizations") retrieved from Warren J. Blumenfeld and R.M. Cooper (2010), pp.124-129.

- Faculty, teachers, and other educators should enact and enforce policies to create an open and secure learning environment for students at all educational institutions, including middle school, high school, and college. Students must be educated on the harmful consequences of bullying and cyberbullying and learn how to prevent it from happening, both to themselves and to others.

#### *Peer Leadership*

- Young people (peers) who witness acts of bullying or cyberbullying must learn to intervene. "Bystanders" must to be empowered to help prevent cyberbullying by becoming "upstanders."

#### **Conclusion**

CYBERBULLYING IS A SERIOUS PROBLEM THAT MUST BE ADDRESSED FOR THE SAKE OF ALL YOUNG PEOPLE AND GENERATIONS TO COME. A ROLE EXISTS FOR MEMBERS AT EVERY LEVEL OF SOCIETY TO CONFRONT THE PROBLEM HEADS-ON. OUR STATE'S LAWS ARE THE FRAMEWORK THAT DEFINE ACCEPTABLE BEHAVIOR WITHIN OUR SOCIETY, AND IT IS WITHIN THAT FRAMEWORK THAT LEGISLATORS, SUCH AS MEMBERS OF THE IDC, CAN MAKE THE BIGGEST IMPACT. SOCIAL NORMS, WHICH TOGETHER WITH TECHNOLOGY HAVE ALLOWED BULLYING BEHAVIORS TO EVOLVE INTO WHAT THEY ARE TODAY, WILL CERTAINLY TAKE TIME TO CHANGE. BUT TOGETHER WE CAN CREATE A UNITED FRONT TO COMBAT CYBERBULLYING AND TURN OUR SOCIETY INTO ONE THAT EMBRACES RESPECT, CIVILITY, AND TOLERANCE. CYBERBULLYING IS A UNIQUE THREAT THAT CALLS FOR UNIQUE SOLUTIONS. NEW YORK'S LAWS MUST BE BROUGHT UP TO SPEED WITH THE 21<sup>ST</sup> CENTURY. THE TIME FOR LEGISLATIVE ACTION IS NOW. THE TIME FOR GREATER AWARENESS IS NOW.