Bullying Across the LifeCourse: Redefining Boundaries, Responsibility, and Harm

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BULLYING ACROSS THE LIFE COURSE: REDEFINING BOUNDARIES, RESPONSIBILITY, AND HARM

by NANCY J. KNauer

INTRODUCTION

Over the last fifteen years, our understanding of bullying has experienced a radical redefinition. In our schools, workplaces, and assisted living facilities, behavior that we once dismissed as “horseplay” or “teasing” has increasingly been labeled as unacceptable and, in some instances, criminal. We seem to have reached one of those societal tipping points where we decide that certain behaviors we once took for granted are no longer acceptable. Sexual harassment in the workplace is a recent example of this sort of normative shift. Not that long ago, sexual harassment was simply the cost of being female in the workplace, but the 1970s and 1980s saw a period of redefinition when sexual harassment was reinterpreted and eventually understood to be a form of sex discrimination actionable under Title VII.


2. As Justice Kennedy explained in Lawrence v. Texas: “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” Lawrence v. Texas, 539 U.S. 558, 578 (2003).

3. Another example would be the redefinition of domestic violence. See generally LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, 3 (2008) (charting the historical evolution of the “definition of what constitutes unacceptable domestic violence, and appropriate responses to it”).


The ongoing redefinition of bullying has focused our attention on the targets of bullying, as research has clearly established the debilitating effects of bullying, including significant health problems and even an increased risk of suicide. It has also led to the development of interventions designed to address the bully and to prevent the behavior in the first instance. Research has focused on methods of empowerment and bystander accountability, as well as institutional tone-setting.

For lawyers and policy makers, however, this period of redefinition has raised a host of questions. Judges and legislators have redrawn boundaries between acceptable and unacceptable behavior, rethought questions of responsibility and liability, and recognized a category of harm that has recalibrated our understanding of injury and causality. Although much of the focus on bullying has concentrated on primary and secondary education, it is clear that the phenomenon of bullying exists across the life course, from kindergarten through elder care.

On February 23, 2013, Temple Law School hosted a groundbreaking conference on bullying across the life course, Bullying: Redefining Boundaries, Responsibility, and Harm. Over twenty leading scholars and advocates explored bullying cultures in a variety of different venues, including K-12 education, college and professional schools, the workplace, and senior living environments. Emily Bazelon, a senior editor at Slate, delivered the keynote speech and discussed her newly published book, Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy.

The speakers at the conference presented new research and engaged cutting edge public policy issues regarding public health considerations, innovative legal remedies, best practices, and the special considerations raised by questions of race, gender, ethnicity, disability, sexual orientation and gender identity. The panels were organized chronologically across the life course. The first panel addressed bullying issues that arise in K-12 education, college and professional schools, the workplace, and senior living environments. Emily Bazelon, a senior editor at Slate, delivered the keynote speech and discussed her newly published book, Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy.

The conference website remains active and contains information regarding the participants. Bullying: Redefining Boundaries, Responsibility, and Harm, TEMP. U. BEASLEY SCH. L., http://www.law.temple.edu/bullying [last visited Nov. 1, 2013]. The website also has podcasts of many of the presentations. See id.


education, followed by a panel that explored new empirical research in the area of higher education. The third panel moved to the workforce and discussed developments in employment law and related fields. The fourth panel turned to the question of bullying later in life in the context of elder abuse and bullying in various senior living environments. The final panel of the day addressed ethical issues and outlined pro-active policies to address bullying in our schools, workplaces, and beyond. The life course focus of the conference brought together individuals who specialize in different types of bullying cultures to share ideas and explore commonalities.

The Temple Political & Civil Rights Law Review is proud to publish a number of the papers that were presented at the conference in this special issue. At least one paper from each of the five panels is included, as well as an insightful review of Emily Bazelon’s book, *Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy*. The following discussion provides an overview of the various discussions and panels.

I. KEYNOTE ADDRESS: STICKS AND STONES

As noted above, Emily Bazelon’s keynote address was based on her recently published book, *Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy*. Included in this issue, is an insightful and expansive review of Ms. Bazelon’s book by Professor John G. Culhane. Professor Culhane is a Professor of Law and Director of the Health Law Institute at Widener University School of Law. Drawing on his previous work on bullying, Professor Culhane makes the compelling case for approaching bullying from a populations-based public health perspective. He then turns to *Sticks and Stones* and illustrates how Bazelon’s narrative approach to bullying is consistent with a populations-based public health model. Culhane concludes that Bazelon’s unique qualitative approach — expressed through descriptive story-telling — "enriches . . . the more quantitative approach usually associated with the public health model."

13. Culhane, supra note 11.
15. Culhane, supra note 11, at 264.
II. PRIMARY AND SECONDARY EDUCATION: MEETING THE CHALLENGE IN K-12

The first panel discussion of the day addressed bullying issues arising in the context of primary and secondary education. Moderated by David Rosenblum, Legal Director of the Mazzoni Center, the panel included three speakers: Professor Culhane, Shawn Gaylord, and Robin S. Maril. Professor Douglas E. Abrams was unable to attend the conference, but submitted an article for inclusion in this special issue.

Professor Culhane spoke on the application of a population-based approach to bullying, which he discusses at greater detail in his review of *Sticks and Stones* included in this issue. Shawn Gaylord is the Federal Policy Director of the Gay, Lesbian, Straight Education Network (GLSEN). Mr. Gaylord discussed the *Annual National School Climate Survey*, which assesses the climate for LGBT students in the nation’s schools through an exhaustive, self-reported database that examines the incidence and prevalence of a hostile climate and violence against students who identify as LGBT or who are perceived to be LGBT.

Robin S. Maril is Legislative Counsel for Administrative Advocacy at the Human Rights Campaign. Ms. Maril presented her paper, *Creating an Inclusive Administrative Response to Bullying*, included in this issue. Her paper makes the valuable observation that considerable reform can be accomplished on the federal level through administrative and regulatory measures. Ms. Maril discusses the importance of the “nation’s most powerful bully pulpit” in setting a tone that can play a “critical role in changing the dialogue surrounding bullying, while mobilizing a united front of supporters and advocates behind one message.” She also explores the concrete steps taken by the Department of Health and Human Services, the Department of Education, and the Department of Justice to use “federal policies to equip students, parents, and schools with the obligation and incentive to end bullying.”

17. Id.
20. See MIRIAM SMITH, POLITICAL INSTITUTIONS AND LESBIAN AND GAY RIGHTS IN THE UNITED STATES AND CANADA § (2008) (detailing the history of the Human Rights Campaign, which is currently the largest LGBT civil rights organization in the world).
22. Id. at 392.
23. Id.
Professor Abrams is an Associate Professor at the University of Missouri School of Law and has written frequently on the topic of school bullying.\textsuperscript{24} Professor Abrams’ paper focuses on the impact that bullying can have on its victims, arguing that the targets of bullying are actually experiencing a disability.\textsuperscript{25} From this perspective, Professor Abrams makes the case that bullying victimization should be covered by the Individuals with Disabilities Education Act (IDEA) and that the IDEA provides a number of promising ways to protect bullied students.\textsuperscript{26}

III. HIGHER EDUCATION: AN EMERGING PICTURE

The second panel focused on issues relating to bullying in higher education. Despite the high profile case of Tyler Clementi, bullying in higher education has received relatively little attention.\textsuperscript{27} Moderated by Associate Dean Marylouise Esten from Temple University Beasley School of Law, the panel included one featured speaker, Daniel Weddle, and two commentators: Fay R. Trachtenberg, and Nancy Chi Catalupo. The commentators both have extensive experience in higher education law. Ms. Trachtenberg is Associate University Counsel at Temple University and has taught Employment Law. Ms. Catalupo was a Freedman Fellow, who had previously served as Assistant Dean for Clinical Programs at Georgetown University Law Center and has written on issues related to bullying and campus violence.\textsuperscript{28}

Daniel B. Weddle, Clinical Professor of Law and Director of Academic Support at the University of Missouri-Kansas City School of Law, presented original empirical research regarding “the frequency and intensity of certain behaviors, and consequences of peer mistreatment behaviors that create patterns of bullying within peer relationships at college.”\textsuperscript{29} Included in this issue, his groundbreaking paper, \textit{Cruel Curriculum: Peer-On-Peer Abuse in Law Schools}, is co-authored with Dr.

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\textsuperscript{24} See, e.g., Douglas E. Abrams, \textit{Bullying as a Disability in Public Elementary and Secondary Education}, 77 Mo. L. Rev. (forthcoming 2014).
\textsuperscript{26} Id. at 756–77 arguing that the viewing bullying victimization as a disability “may also provide a readily understood rationale to help school authorities win support and cooperation from students, parents, and other local constituencies”.
\textsuperscript{27} See Kate Zernike, \textit{Son’s Suicide Leads to Aide for Students}, N.Y. Times, Feb. 1, 2013, http://www.nytimes.com/2013/02/02/nyregion/tyler-clementis-parents-work-with-rutgers-through-new-center.html (reporting the creation a center named after the Rutgers freshman, Tyler Clementi, who committed suicide after being cyberbullied, that will help students deal with the transition to college and other difficult issues).
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Jeffrey Traiger, Assistant Dean of Students for the University of Missouri-Kansas City. Professor Weddle and Dr. Traiger developed the Exposure to Peer Mistreatment Survey (EPMS) “in an effort to better understand the frequency and possible consequences of many peer mistreatment behaviors that lead to bullying among law students.” They found that “graduate level professional students are exposed to peer mistreatment or bullying behaviors on a regular basis,” thereby establishing that bullying is not confined to the primary and secondary school context.

IV. WORKPLACE BULLYING

The next panel was organized around the issue of workplace bullying. Moderated by Shannon Minter, Legal Director of the National Center for Lesbian Rights (NCLR), the panel included three speakers: David Yamada, Kerri Stone, and Susan Harthill, all of whom have written widely on the subject.

David C. Yamada, Professor of Law and Director of the New Workplace Initiative at Suffolk University School of Law, is the leading scholar in the emerging field of workplace bullying. His paper, Emerging American Legal Responses to Workplace Bullying, is included in this issue. It outlines the current legal protections for targeted workers, the liability risks for employers, and the latest version of the Healthy Workplace Bill drafted by Professor Yamada.

Kerri Stone, Professor of Law at Florida International School of Law, has also previously written on the topic of workplace bullying. Her paper, Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying

30. Id.
31. Id. at 365.
32. Id. at 366.
37. See, e.g., Kerri Lynn Stone, From Queen Bees and Wanna-Bees to Worker-Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying, 63 N.Y.U. ANN. SURV. AM. L. 35-86 (2009) (addressing the impact of workplace bullying on women).
Movement Pose Challenges to Employers Who Wish To Ban Bullying, is included in this issue. After providing an excellent overview of the workplace bullying movement, Professor Stone examines recent rulings from the National Labor Relations Board that may make it difficult for employers to enforce anti-bullying policies. She identifies these decisions as a “pernicious . . . threat” to anti-bullying policies and concludes that: “There is no simple answer to the question of what should be done when the policy underpinnings of two such bedrock principles of employment law . . . come into conflict.”

Finally, Susan Harthill, Professor of Law at Florida Coastal School of Law, presented her paper, Workplace Bullying as an Occupational and Safety Concern. Professor Harthill makes a compelling and nuanced argument that the OSHA regulatory framework is well suited to tackle the issue of workplace bullying. Her paper touched on some of the same issues raised earlier in the day about the ability of regulatory reform to address school bullying. The ability to use regulatory frameworks in both contexts speaks again to the importance of understanding bullying as a phenomenon that occurs across the life course.

V. BULLYING LATER IN LIFE: OLDER ADULTS

The next panel was dedicated to concerns related to bullying later in life. Moderated by Larry S. Felzer, Director of Development and Finance at the SeniorLAW Center, the panel featured two speakers: Joe Snyder and Aaron Tax. Joe Snyder is the Director of Adult Protective Services at the Philadelphia Corporation for Aging.

39. Id. at 376-81.
40. Id. at 384.
41. Id.
42. Susan Harthill, The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act, 78 UNIV. CINN. L. REV. 1235 (2010); Susan Harthill, Bullying In the Workplace: Lessons From the United Kingdom, 17 MINN. J. INT’L L. 245 (2008).
43. Harthill argues that: “The OSH Act has the major advantage of being an established statutory scheme with an existing regulatory apparatus. The OSH Act requires employers to comply with safety and health standards and has a broad general duty clause that requires employers to maintain a safe workplace.” Susan Harthill, The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act, 78 UNIV. CINN. L. REV. 1250 (2010).
44. Maril, supra note 8, at 296-97 (discussing regulatory and sub-regulatory guidance under Title IV).
45. The SeniorLAW Center was founded in 1978 to provide legal services for older Pennsylvanians. About Us, SENIORLAW CENTER, http://seniorlawcenter.org/about/ [last visited Nov. 1, 2013].
46. The Philadelphia Corporation for Aging was established in 1973 and serves as the
Mr. Synder’s paper, *How Does Bullying Relate to Elder Abuse*, is included in this issue and makes an important connection between our concepts of bullying and that of elder abuse. It establishes a considerable overlap between bullying and elder abuse and describes the different types of bullying behavior exhibited by family members, caregivers, and strangers. Aaron Tax is the Director of Federal Government Relations for Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders (SAGE). His presentation, *It Gets Better, But Then It Gets Worse—Bullying and Older Adults*, makes another important connection by establishing how points of difference, such as sexual orientation or gender identity, can continue to mark individuals as targets of bullying behavior even later in life.

In 2011, the National Senior Citizens Law Center (NSCLC) and NCLR, co-authored a pioneering study, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*. The study documents many ways in which LGBT elders differ from their non-LGBT peers and explains how these differences make them more vulnerable to discrimination and harassment in long-term care settings. It offers heartbreaking examples of same-sex couples and transgender elders who were refused care or subjected to bullying and harassment on account of their sexual orientation or gender identity.

VI. BEST PRACTICES: FINDING THE WAY FORWARD

The final panel was dedicated to the topic of best practices. The panel was moderated by Len Riser, a Lecturer-at-Law at the University of Pennsylvania and expert in education law. The panel had three speakers: Kathleen Conn, Natalie Hrubos, and Rue Landau. Ms. Landau is the Chair of the Philadelphia Human Relation Commission and the Commission for Fair Housing. She spoke about initiatives currently underway to address these issues in the Philadelphia school system.

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48. Id. at 386.
52. Id.
53. Id.
Natalie Hrubos is an attorney with Duane Morris, LLP, where she specializes in employment law. Her presentation, Not in My Workplace! Preventing and Correcting Bullying, provided a valuable practitioner perspective about dealing with bullying behaviors in the workplace.

Kathleen Conn is an Associate Professor at Neumann University in the School of Education and Human Services. She ended the day with her paper, Best Practices in Bullying Prevention: One Size Does Not Fit All, an expanded version of which is included in this issue. After describing the prevalence of bullying and the effects of bullying on victims, bullies, and bystanders, the paper examines responses to cyberbullying, as well as face-to-face bullying. It concludes with wide ranging recommendations to combat bullying in the classroom and beyond.

54. Ms. Hrubos has also written in the area of employment discrimination. See, e.g., Natalie Hrubos, Legitimizing Discrimination Against Trans Employees, 6 TENN. J. L. & POL. 46 (2010).


56. Conn, supra note 6.

57. Id. at 394–404.

58. Id. at 399–32.