

# New Technologies, New Problems, New Laws

Patricia R. Recupero, JD, MD

Forensic psychiatrists in the 21st century can expect to encounter technology-related social problems for which existing legal remedies are limited. In addition to the inadequate protection of adolescents using social media as outlined by Costello *et al.*, current laws are often poorly suited to remedy problems such as cyberharassment, sexting among minors, and the publication of threatening or harmful communications online. Throughout history, technological developments have often preceded the introduction of new laws or the careful revision of existing laws. This pattern is evident in many of the newer social problems that involve technology, including cyberbullying, online impersonation, and revenge porn. As specialists working at the intersection of human behavior and the law, forensic psychiatrists are uniquely situated to help legal professionals and others understand the impact of internet-related problematic behaviors on victims and, perhaps, to assist in the development of new legal remedies that are better tailored to our increasingly digital society.

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Drs. Costello, McNiel, and Binder<sup>1</sup> call attention to a very important problem that has received surprisingly little attention in peer-reviewed academic journals: the long-term risks posed to adolescents when social media and technology companies treat them as if they were adults for the purposes of entering into contracts. As Costello *et al.* note, the law in other areas does not permit minors to enter into binding contracts without the consent of a parent or legal guardian. However, in the internet era, poor decisions made by adolescents who have not yet reached developmental maturity may have lasting repercussions for the remainder of these young people's lives. As technology and social media continue to play increasingly central roles in our lives, the sizes of our future digital footprints are expanding beyond what we might have anticipated a mere five years ago.

Different aspects of information and communication technology in the past few decades have led to problems that existing laws have been poorly equipped to handle. In addition to the problems discussed by Costello and colleagues, many other

technology-related concerns with particular relevance to psychiatrists have severely limited legal remedies, including sexting among minors,<sup>2,3</sup> cyberbullying,<sup>4</sup> and cyberstalking.<sup>5</sup> As Costello *et al.* suggest, we as forensic psychiatrists may be able to play an important role in proposing solutions to these difficulties and in helping legal professionals to understand the nuanced and complicated psychiatric aspects of technology-related social problems.

Other commentators have noted the law's failure to match the rapid pace of technological developments,<sup>6</sup> a phenomenon that is by no means new. In fact, some of the laws we have today were created in response to problems that arose in the wake of new technologies and the social changes they facilitated. For example, copyright laws developed in part as a response to problems that arose after the introduction of the printing press.<sup>6</sup> Similarly, many of today's labor laws are rooted in social changes tied to technologies introduced during the industrial revolution. Numerous forms of health care information technology, such as the proliferation of mobile health applications for smartphones and tablet computers (mHealth apps),<sup>7</sup> also demonstrate this pattern of a new technology preceding calls for some type of legal or regulatory response to address problems that were not anticipated before such technology became available.

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Dr. Recupero is Clinical Professor of Psychiatry, Alpert Medical School of Brown University, Senior Vice President, Education & Training, Care New England Health System, Address correspondence to: Patricia Recupero, MD, Care New England Health System, 345 Blackstone Boulevard, Providence, RI 02906. E-mail: precupero@butler.org.

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## Cyberbullying

The confusing legal proceedings and public outcry that followed the suicide of 13-year-old Megan Meier in 2006<sup>8</sup> are illustrative of the problems that forensic psychiatrists may encounter as the law struggles to catch up with technology. In that case, two adult women and the teenage daughter of one of the women (a classmate of Meier's) had created a false profile for a teenage boy, calling him "Josh Evans," and used his profile and fictional identity to communicate with Meier through the social networking website MySpace.<sup>9</sup> Meier and "Josh" flirted for several weeks, until the women using the account had "Josh" send Meier a message stating that "the world would be a better place without you."<sup>9</sup> After responding "You're the kind of boy a girl would kill herself over," Megan Meier hanged herself in her bedroom closet and was found later by her mother.<sup>8</sup> The case illustrates the devastating emotional impact that cyberharassment can have on its victims.<sup>10</sup>

After the suicide, Meier's parents learned that "Josh" was a false identity created by an adult, initially believed to be 47-year-old Lori Drew, the mother of one of Meier's classmates. Drew was aware of Megan's history of depression.<sup>11</sup> When details of the case were made public, the ensuing controversy illustrated how poorly equipped the current laws were to address cases like this:

That an adult would plot such a cruel hoax against a 13-year-old girl has drawn outraged phone calls, e-mail messages and blog posts from around the world. Many people expressed anger because St. Charles County officials did not charge Ms. Drew with a crime. But a St. Charles County Sheriff's Department spokesman, Lt. Craig McGuire, said that what Ms. Drew did 'might've been rude, it might've been immature, but it wasn't illegal.' In response to the events, the local Board of Aldermen on Wednesday unanimously passed a measure making Internet harassment a misdemeanor punishable by up to a \$500 fine and 90 days in jail . . . St. Charles County's prosecuting attorney, Jack Banas, said he was reviewing the case to determine whether anyone could be charged with a crime. State Representative Doug Funderburk, whose district includes Dardenne Prairie, said he was looking into the feasibility of introducing legislation to tighten restrictions against online harassment and fraud.<sup>11</sup>

Ultimately, Drew *was* prosecuted, not for harassment, but for three counts of misdemeanor computer fraud, for having violated the terms of the MySpace service agreement. The case<sup>12</sup> was argued in federal court in California, rather than in Drew's home state, because "law enforcement officials in Missouri determined Ms. Drew had broken no

local laws."<sup>9</sup> Drew was initially convicted, but she appealed, and a federal judge overturned her conviction.<sup>13</sup>

Following the Megan Meier case, a number of jurisdictions introduced new laws or amended existing laws to facilitate the prosecution of cyberbullying perpetrators and others who engage in internet-based harassment.<sup>8</sup> The problem is by no means resolved or settled in the law, however. Cyberharassment law is still a very new, rapidly changing development in our society.

## First Amendment Challenges

Similar difficulties and controversy surrounded the prosecution of William Francis Melchert-Dinkel, a former nurse who sought out depressed, suicidal persons online through suicide chat forums, baited them, engaged them in suicide pacts, and coached them in suicide methods with high lethality.<sup>14,15</sup> Although he was a middle-aged man, Melchert-Dinkel posed as a suicidal young female nurse online to gain the trust of those with whom he chatted.<sup>16</sup> He typically encouraged these persons to kill themselves via hanging and asked to watch them via webcam during their suicides. Commentators had expressed doubts that he could be held accountable for the suicides of persons he had chatted with online, citing the likelihood of First Amendment challenges.<sup>17,18</sup>

Initially, Melchert-Dinkel was charged and convicted on two counts of violating a Minnesota statute that made it a crime to advise, encourage, or assist another in completing suicide,<sup>19</sup> and a state appellate court rejected his First Amendment challenge to the statute.<sup>20</sup> On appeal to the state Supreme Court, the conviction was overturned on First Amendment grounds<sup>21</sup>; however, the statute's prohibition of "assisting" in suicide was upheld.<sup>16</sup> The court remanded the case for consideration of whether Melchert-Dinkel's actions could be considered "assisting" in the victims' suicides. Adolescents may be more vulnerable to internet suicide suggestion or support of suicide and, conversely, may not be as sensitive to the impact of their posts on other adolescents.

The existence of prosuicide<sup>15,18</sup> and proanorexia<sup>22</sup> communities on the Internet has also generated controversy over potential conflicts between the First Amendment and protecting vulnerable persons from harmful speech. While the right to free speech is not absolute, there is still a considerable ethics debate

over which forms of speech on the Internet ought to be protected and which should be restricted. The very novelty of questions raised by electronic communication contributes to the legal and ethics controversies about how best to respond to them:

Modern First Amendment law unequivocally denies First Amendment protection to child pornography. As a result, legislators have become adept at regulating child pornography without running afoul of the Constitution. In contrast, the practice known as ‘cyber-bullying’ is so novel that in addition to the lack of authoritative precedent on the subject, no current legislator or judge has much firsthand knowledge of the subject” [Ref. 15, p 157].

The Supreme Court recently encountered analogous difficulties in the *Elonis* case.<sup>23</sup> In *Elonis v. United States*, the Court considered whether threatening language a man posted on his Facebook page constituted “true threats” or constitutionally protected speech.<sup>24</sup> The Supreme Court reversed his conviction,<sup>25</sup> essentially holding that in order for the conviction to be upheld, the prosecution would have to prove somehow that *Elonis* had intended for his Facebook posts to be taken as threats. The use of Facebook by adolescents can raise similar concerns.

### Problematic Behaviors Involving the Internet

Forensic psychiatrists should be familiar with some of the other problems that have arisen in recent years through information and communication technologies, including catfishing, revenge porn, doxing, and swatting (discussed below). Similarly, it is important to learn about new tactics and practices in cyberharassment, as they emerge and spread. One example is online impersonation or “e-personation.”<sup>13</sup> Adolescents can easily fall victim to many of these techniques; they also can violate some laws by doing what adolescents have traditionally done in person, but now are doing online.

Catfishing is “[t]he phenomenon of internet predators that fabricate online identities and entire social circles to trick people into emotional/romantic relationships (over a long period of time)” (Ref. 26, p 13). The practice of assuming a fictitious identity online to perpetrate a romantic hoax of some kind is older than the Internet itself; one of the earliest cases on the Internet involved a prominent psychiatrist posing as a young disabled woman online.<sup>10,27</sup> As public awareness of online romantic hoaxes has increased, thanks in part to sensationalistic television shows and a recent documentary *Catfish*, those who wish to mis-

represent themselves online to woo a virtual lover often must invest considerable time and effort into the scam. Today, the perpetrator often creates a whole social networking profile for the persona across multiple platforms, collecting and using photographs (typically stolen from another person’s social networking profile), and even amassing a network of “friends” who post content and comment on their Facebook walls or Twitter feeds to make the persona more convincing.

Although targets who fall for catfishing hoaxes are often legitimately distressed, prosecuting the imposters is especially difficult, because catfishing and similar behaviors often inhabit the “gray area” between fraud and First Amendment–protected speech akin to practical jokes.<sup>13,28,29</sup> Although several states have enacted laws making it a criminal offense to impersonate someone online (a recent development), these statutes typically relate specifically to stealing or using the identity of a real person rather than the creation of a fictitious persona.<sup>13,28</sup> Furthermore, such laws are vulnerable to the same challenges that resulted in the U.S. Supreme Court’s (*United States v. Alvarez*<sup>30</sup>) striking down the Stolen Valor Act of 2005,<sup>31</sup> which had made it a crime to lie about military honors.<sup>29</sup> In many catfishing cases, the “perpetrator” of the hoax does not intend to cause emotional harm to the target and may, conversely, feel sincere affection for the person, even if perpetrator and target have never met offline.

Attempts to address the problem of revenge porn have also encountered difficulties.<sup>32</sup> “Revenge porn” typically refers to the dissemination (without the subject’s knowledge or consent) of sexually explicit media, such as digital photographs or videos, which were originally obtained with the subject’s consent, typically in the context of an intimate romantic relationship. Colloquially, the term “revenge porn” may also refer to nonconsensual pornography in general.<sup>32</sup> On revenge porn websites, the victim’s real name and contact information frequently appear alongside the images, often resulting in severe harassment of the victim by strangers, even offline.<sup>32</sup> Where the medium in question is a video, its distribution without the subject’s consent is likely a violation of the Federal Video Voyeurism Prevention Act of 2004<sup>33</sup> in addition to state antivoyeurism laws,<sup>32</sup> and prosecution of such offenses may be fairly straightforward.<sup>34</sup> Similarly, if the media contain any depiction of a minor, numerous laws to protect chil-

dren may come into play. However, when the medium is a digital photograph that an adult subject obtained and sent willingly to an intimate partner or other person(s), prosecution may be more complicated. Some states have passed legislation specifically to criminalize revenge porn,<sup>32</sup> but this is a recent development.

Doxing is another problem for which existing legal remedies are limited. Doxing (or “doxxing,” as it is sometimes spelled) refers to the publication online of a target’s personal information or documents, including things like the victim’s full name, private e-mail addresses, phone numbers, work and home addresses, social security number, user names and passwords for specific websites, and so forth.<sup>35</sup> A victim’s family, friends, or workplace may also become doxing targets.<sup>35</sup> Doxing is a common practice in cyberharassment campaigns and Internet shaming,<sup>36</sup> and it appears to be growing more frequent.<sup>35,37</sup> Doxing incidents, particularly when private information was obtained via computer hacking, are often attributed to the loose “hactivist” collective known as Anonymous. Legal research on the subject lags behind the growing frequency of the practice; recent searches by this author on LexisNexis for law reviews on “doxing” or “doxxing” resulted in only nine articles. (Searches for variations of the wordier term “dropping documents” yielded only articles irrelevant to the topic.)

A somewhat recent trend in cyberharassment is the practice of “swatting,”<sup>38</sup> named for the SWAT acronym (Special Weapons and Tactics) describing the heavily armed paramilitary units within police departments. Swatting is “the act of making a false report to the police with the intention of having a heavily armed response team sent to the target’s home.”<sup>35</sup> Such an experience not only wastes the resources of law enforcement personnel but surely inflicts considerable emotional distress on most victims. Trauma survivors may be at greater risk for retraumatization through swatting tactics or similar cyberharassment practices, and Internet trolls often deliberately target vulnerable persons with a history of trauma or recent emotional distress.<sup>39</sup> Although making false reports to emergency services was already established as criminal conduct before the spread of swatting, several legislators have recently sponsored bills intending to criminalize swatting hoaxes.<sup>38</sup> Not long after introducing a proposed an-

tiswattling bill, Representative Katherine Clark herself was the victim of a swatting hoax.<sup>40</sup>

### Barriers to Resolution

Even when laws criminalizing certain Internet-related problematic behaviors have been passed, law enforcement agencies do not always have the necessary resources, experience, or interest to pursue an investigation.<sup>32,41,42</sup> Enforcement of stalking laws, for example, is low.<sup>43</sup> Furthermore, investigation and prosecution of internet-based problems often face numerous hurdles that can be fatal to the successful argument of a case. For example, in the context of pro- and how-to suicide information online, “[t]here is very little precedent for prosecuting those who advocate and counsel suicide in online forums; problems of interstate and international jurisdiction, as well as of causation and proof, exacerbate the lack of clarity in this area of the law” (Ref. 15, pp 164–165) Concerns about jurisdiction can arise in many other types of Internet-related cases.<sup>34</sup> Where criminal laws are nonexistent or insufficient to address the problem, victims are sometimes encouraged to pursue a civil suit against the perpetrator(s), but civil law remedies are often inadequate.<sup>13</sup> The burdensome nature of acquiring and interpreting digital evidence and the likelihood that neither the plaintiff nor the defendant has significant assets to cover legal costs or respond to damages are strong disincentives to attorneys’ taking on such cases.<sup>13,32</sup>

### Vulnerable Persons, Cybershaming, and the Permanence of Electronic Data

Costello and colleagues also raise the question of what can or should be done to protect vulnerable persons from the potential long-term impacts of electronic data about them. Consider the case of Dr. Anjali Ramkissoon. In early 2016, Dr. Ramkissoon, a fourth-year neurology resident, was filmed during a confrontation with an Uber driver. During the confrontation, she physically assaulted the driver and created a public disturbance, shouting profanities and throwing things from the driver’s car while apparently intoxicated. Someone posted the video online, it went viral, and Dr. Ramkissoon was reportedly fired from her position.<sup>44</sup> Although it is true that practicing medicine is a privilege, not a right, who among us has not had cringe-worthy moments during our stressful years as young, sleep-deprived residents? Today’s students and young professionals

must contend with a world not unlike the nightmarish dystopia envisioned by George Orwell; wherever they go, whatever they do, someone may be watching and filming. Targets of public cybershaming campaigns frequently experience devastating and permanent consequences from the publicity and the vicious harassment that often follows.<sup>45</sup> Forensic consultation to victims and perpetrators requires familiarity with the impact of these technological changes on adolescents today.

The popularity of covert filming via smartphones is also leading to increased risks for persons with mental illness and substance use disorders who experience episodes of decompensation or symptom exacerbation while in public settings. Fifty years ago, a patient in the acute manic phase of bipolar disorder may have been reported anonymously in a newspaper as “Naked Man Seen Climbing Statue in City Center.” The man’s immediate family, his psychiatrist, and several police officers may have been aware of the identity of the “naked man,” but it was less likely that his employer, neighbors, and future social contacts would know this detail from his past unless he chose to disclose it to them. Today, however, it is just as likely that a teenager with a cell phone will film the man, post the video on YouTube (or another video-sharing site), and that someone will eventually identify the man in the comments feed.<sup>45</sup>

Recent advances in face-recognition technology further increase the likelihood of such outcomes. This information may then become part of the permanent record that data brokers maintain about him and may also remain public information on the web. Because video sharing for entertainment is popular on social networking sites like Facebook, high view counts for the video (or other negative information) may result in its being ranked among the top search results for the person’s name in the major search engines.

The facility with which an anonymous stranger can create a damaging permanent record for another person is a new phenomenon that distinguishes the Internet era.<sup>45</sup> As Korenis and Billick explain, “[t]he social interactions of the twentieth century did not carry the dire consequences of this use of newer modern technology” (Ref. 3, p 98). Readers may have had their own unpleasant introductions to this facet of digital communication in the form of negative reviews posted by troubled patients. The growing importance of online doctor ratings and reviews seems

to be another area where the law has not yet caught up with technologically facilitated social change. Although patients and others are free to post critical reviews anonymously on web forums like Healthgrades, Vitals, and Yelp, health care providers often have little recourse against defamatory or libelous reviews,<sup>46</sup> as illustrated by the cybershaming campaign against the Minnesota dentist who killed Cecil the lion.<sup>36</sup> A psychiatrist who rightly avoids prescribing opiates or benzodiazepines to patients with substance use disorders may garner low patient-satisfaction ratings and angry reviews from patients who did not receive the prescriptions they were hoping for. Unfortunately, the psychiatrist would have to tread very carefully in dealing with such reviews, as HIPAA and other laws and ethics codes protecting patient confidentiality severely limit what physicians can say about their practices online.

In the European Union, the Court of Justice of the European Communities (ECJ) formalized a “right to be forgotten,” in the 2014 case of *Google Spain v. AEPD & González*.<sup>47</sup> Although the details of that case and its relationship to U.S. law are beyond the scope of this commentary, forensic psychiatrists may be able to help inform the debate surrounding the limits and application of this right in the future. As mental health professionals, our training enables us to appreciate the devastating psychological impact of humiliation or cyberstalking on victims. As forensic specialists, we strive continually to understand the complicated interactions between the law and mental health. Our professional activities thus give us a unique perspective on the issue.

## Concluding Thoughts

Costello and colleagues should be commended for calling attention to this problem and for proposing strategies to help mitigate the risks posed to adolescents by social media. Forensic psychiatrists could play an important role in helping to develop solutions to some of the other problems that have arisen as a result of technology’s outpacing existing legal remedies.

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