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Bullying In Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise

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BULLYING IN SCHOOLS: THE DISCONNECT BETWEEN EMPIRICAL RESEARCH AND CONSTITUTIONAL, STATUTORY, AND TORT DUTIES TO SUPERVISE

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TABLE OF CONTENTS

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INTRODUCTION

"A man's spirit sustains him in sickness, but a crushed spirit who can bear?"
– Proverbs 18:14

At Ohlone Elementary School in Watsonville, California, a boy attacked a younger student in a school restroom, choking him, kicking him repeatedly in the groin, and throwing him to ground so hard that the fall broke the younger boy's leg. The younger boy crawled to the door, pleading for help. According to the victim's mother, the older boy and his brother had attacked the younger boy at school just over one month before; although she had reported the earlier attack to the principal, no disciplinary action ever occurred.[1]

In Boiling Springs, Pennsylvania, Ian Dum was tormented daily from the time he was in fourth grade, when he first began to suffer symptoms of Tourette's syndrome, until well into high school. His classmates taunted him, tied his shoes together, and once followed him around the halls whispering his name and then telling him he was hallucinating. Because they knew he suffered from a severe germ phobia, they poked him in order to aggravate his phobia. Ian eventually left school in his sophomore year, sank into a suicidal depression, and was hospitalized for psychiatric treatment. In his final two years of school, administrators allegedly told him he was overreacting when he reported the bullying.[2]

Nearly two decades of educational research has repeatedly demonstrated that one of the most damaging and pervasive problems in our schools today is bullying. That research has shown that bullying leaves its victims with serious and often life-long emotional problems.[3] It has revealed that bullies are substantially more likely than their peers to commit felonies later in their lives.[4] It has even demonstrated that witnesses to the bullying are often affected in serious, lasting ways.[5] Most importantly, it has proven that school officials can

1. Katherine Morris, *PVUSD Targeted in Student Beating Lawsuit*, REGISTER-PAJARONIAN, April 3, 2004, *available at* http://www/zwire.com/news/newsstory.cfm?newsid=11235289.

2. *Student with Tourette's Sues District over His Treatment*, WASHINGTON OBSERVER-REPORTER, April 4, 2004.

3. *See* Linda S. Lumsden, *Preventing Bullying*, ERIC DIGEST, Mar. 2002, at 1 (noting that many students "are the target of bullying episodes that result in serious, long-term academic, physical, and emotional consequences.").

4. *See* GAYLE L. MACKLEM, BULLYING AND TEASING: SOCIAL POWER IN CHILDREN'S GROUPS 44 (2003) (citing statistics that about 60% of male middle school bullies have at least one criminal conviction by age twenty-three, and 35-40% of male bullies had three or more criminal convictions by this time).

5. *See id.* at 90-92 (noting that feelings of guilt, powerlessness, fear for one's safety, and general learning and adjustment problems in school commonly afflict bystanders).

dramatically reduce the prevalence of bullying if they implement proven bullying prevention strategies.[6] Nevertheless, in most schools today, bullying goes on unabated and virtually unchallenged by school officials.[7]

The educational community knows that these children are being tormented; it knows that they are being damaged in ways that will haunt them – and in some cases, entire communities – for years to come. It also knows how to reduce dramatically the prevalence of the torment; and it knows that school officials must lead the way in doing so. Current legal theories, however, whether found in federal or state law, whether based in statutory or common law, are simply not aligned with what empirical research has shown to be true. Therefore, the law provides those who could stop the torment no real incentive to inform themselves and to act, and it provides victims of the torment no remedy against the school officials who could have protected them.

When victims attempt to hold schools accountable for failing to protect them from peer-on-peer abuse, courts routinely hold that, under theories of negligent supervision, the bullying and associated attacks and injuries were simply unforeseeable to the school officials who could have intervened,[8] even though educational research has repeatedly demonstrated that such abuse is occurring in virtually every school setting. Under Title IX, requirements of actual notice and deliberate indifference sink most claims of peer-on-peer sexual harassment,[9] and they ensure that such gender-based bullying will flourish by its very nature as an underground activity, hidden from school officials who are apathetic about its existence. Constitutional theories are inadequate to produce either remedies or educational change because courts are unwilling to turn bullying into a constitutional tort.[10] Even anti-bullying statutes fail to require the kinds of reforms demanded by the empirical research,[11] so schools continue to function with a blind eye toward the victims' plight, leaving them and future victims at the mercy of other children.

The nation needs a change in its current legal theories. Courts and legislatures need to abandon the fiction that schools do not know how to identify and stop serious bullying. Courts need to redefine negligent supervision with regard to bullying in order to acknowledge the foreseeability of the harms that result from bullying and the causal connection between school officials' inaction and victims' injuries. Legislatures need to enact laws that will reward those schools that implement proven strategies for preventing bullying and penalize

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6. See infra Part I.D.iii. for a description of strategies that have been shown to reduce bullying.

7. *See* ANNE G. GARRETT, BULLYING IN AMERICAN SCHOOLS 49 (2003). According to Garrett, "The most common way that schools deal with bullying is to ignore it .... One Columbine student reported, 'Teachers would see them pushing someone into a locker, and they'd ignore it.' A junior at Columbine said, 'I can't believe the faculty couldn't figure it out. It was so obvious that something was wrong.'"

Id. *(citations omitted).*

8. See *infra* Part II.B.iii. for a discussion of tort liability under state law.

9. See *infra* Part II.A.i. for a discussion of Title IX claims for gender-based bullying.

10. See *infra* Part II.A.ii. for a discussion of claims under 42 U.S.C. § 1983.

11. See *infra* Part II.B.i. for a discussion of state anti-bullying legislation.

those that refuse to do so. The nation needs, in short, to align legal incentives and penalties with the realities of schooling and the seriousness of the problem of bullying. Until that happens, far too many children will suffer needlessly at the hands of their peers, unprotected by the very adults into whose care they have been entrusted.

Part I presents in some detail what current educational research has revealed about bullying, its effects, and its prevention. An understanding of that research is essential to recognizing the flaw common to prevailing legal theories: that those theories define supervision breakdowns in terms of individual instances of bullying but fail to recognize the connection between bullying and school culture. They fail to recognize that school officials can transform a bullying culture, using research-based, whole-school approaches to preventing bullying. Part II critiques current legal avenues available to victims of bullying and current attempts by some state legislatures to curb bullying in their schools. Part III offers conclusions and some recommendations for reforming current definitions of negligent supervision and for creating a package of incentives for schools to change their practices.

I. EMPIRICAL RESEARCH ABOUT BULLYING

Admittedly, for most, "bullying" just does not have the ring of a serious problem. After the horrors of Columbine, bullying seems fairly tame. In a country where metal detectors in schools are becoming increasingly common[12] and where the federal government has had to insist that schools begin to treat seriously the possession of weapons on campus,[13] it is hard to think of bullying as a pressing concern.

Of course, people feel that way because they seldom think of bullying as something that causes any real harm.[14] Even the word itself seems trivial and slightly childish. It conjures up images of the schoolyard bully who picked on Beaver or Opie until the little protagonist stood up to the boy, who turned out to be all bark and no bite and retreated at the first sign of backbone. Adults' own experience suggests that everyone eventually has to deal with people like that and has to learn how to face them down. Parents intuitively recognize that they cannot and should not shelter their children from all such encounters.

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12. Mike Kennedy, *Balancing Security and Learning*, 74 AM. SCH. & U. (School Security Supplement) at SS10 (2002).

13. *See* Gun-Free schools Act, 20 U.S.C. 7151(b)(1) (2004) (providing that states receiving federal funds under Chapter 20 "shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State shall allow the chief administrative officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case bases if such modification is in writing").

14. *See* GARRETT, *supra* note 7, at 55 (refuting as myth the notion that bullying or being bullied is part of growing up and without serious consequences).

A. A Working Definition of Bullying

Perhaps, then, it would be best to begin by defining "bullying." Bullying is not the garden-variety trouble all children have with others from time to time. It is not mere teasing or even being pushed around a little by another child. It is not occasional insults or exclusion by the popular students. All of those encounters are suffered by all children on one level or another, and they may be ultimately harmless or at least limited in their impact. Of course, they may also be the sparks that signal a forest fire of ongoing torment that is either coming or has already arrived for some child. By themselves, however, they are not what educational research has identified as truly damaging.

Bullying, as it is usually defined in the educational research, is a persistent pattern of intimidation and harassment directed at a particular student in order to humiliate, frighten, or isolate the child.[15] The victim usually has no effective way to resist or end the torment, either because of an imbalance of power[16] or because the bully can so effectively lie his way out of trouble when necessary[17] and return to retaliate. Bullying is a sustained, cruel, and inescapable torment that sometimes continues for years.[18] It is, in fact, a form of child abuse perpetrated by the child's peers.[19] Given bullying's effects on victims, one researcher places bullying "in the same league as harassment, discrimination, racism, violence, assault, stalking, physical abuse, sexual abuse, molestation, and rape."[20] It isn't Opie's nemesis.

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15. *Id.* at 9-11

16. Raymond T. Chodzinski & Fran Burke, *Bullying: A Conflict Management Issue for Teachers, Parents, and Child Caregivers*, MOSAIC, Spring 1998, at 1, 2.

17. GARRETT, *supra* note 7, at 54.

18. *Id.* at 53. Although most bullying lasts about one week, bullying may go on much longer, especially in older students. *Id.*

19. *See* SUELLEN FRIED & PAULA FRIED, BULLIES, TARGETS & WITNESSES: HELPING CHILDREN BREAK THE PAIN CHAIN 3-4 (1989) (analogizing bullying to child abuse).

20. GARRETT, *supra* note 7, at 54. Nan Stein, on the other hand, finds significant danger in grouping many of these behaviors under the definition of bullying. Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783 (2003). Applying the term bullying to sexual and racial harassment, for example, "may dilute the discourse of rights by minimizing or obscuring harassment" in favor of a focus only upon individual motivations. *Id.* at 786. That dilution may encourage educators to ignore institutional reforms that are contributing to such harassment, *id.* at 798, and erode the protections that now exist under anti-harassment laws. *Id.* at 787.

Her concerns are legitimate. Harassment inspired by gender, sexual orientation, or race is a particularly invidious kind of problem that the nation has been correct to address directly. Approaches to bullying prevention should complement, rather than replace, efforts focusing on the added injuries and the cultural biases that make such harassment a special concern. In addition, the larger school community, quite apart from the context of bullying, should continue to focus upon harassment and discrimination traditionally addressed in civil rights discourse.

In the same way that school culture fosters and protects bullying, whether inspired by cultural prejudices or not, the larger culture is a breeding ground for harassment based upon gender, sexual orientation, race, and other identity characteristics. Failing to recognize and address how those forces from the larger culture are affecting the institution itself and fueling not just harassment but other discriminatory behavior at all levels of the school community would be legally and educationally

Nor is bullying limited to boys bullying boys. Both boys and girls engage in bullying – boys most often in physical intimidation and girls most often in psychological intimidation.[21] Girls' bullying tends to be less visible, consisting of "social alienation, intimidation, malicious gossip, note writing, and peer manipulation."[22] Although girls' bullying typically lacks the physical threat usually associated with boys' bullying, its effects are just as debilitating because it tends to force its victims into social isolation and despair.[23] Bystanders are as reluctant to challenge the female bully who can effectively destroy their peer relationships as boys are to challenge the male bully who can beat them physically.

Whether perpetrated by girls or boys, however, bullying has three consistent characteristics according to Raymond Chodzinski and Fran Burke:

1) Repetitive negative actions targeted at a specific victim,
2) Direct confrontation caused by a perpetrated imbalance of power, and
3) Effective manipulation of emotional responses such as fear, inadequacy, etc.[24]

Fundamental to a working definition of bullying is that "the physical or psychological intimidation occurs repeatedly over time to create an ongoing pattern of harassment and abuse."[25]

B. The Effects of Bullying

The effects of bullying, as defined above, are well documented and disturbing. They are long lasting and debilitating, not only for the victims, as one might expect, but also for the bullies themselves, as well as bystanders.

The effects on victims are, the most disturbing. Not only do victims suffer the immediate pain and humiliation of being the subject of a bully's torment,

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foolish.

On the other hand, recognizing the connections between bullying and abusive behavior acknowledged by traditional notions of harassment has the potential to underscore the ugliness and danger of both. The proper approach to bullying is neither to sweep traditional notions of harassment into a definition that focuses only on individual motivations nor to avoid directly addressing bullying as a serious and pervasive threat to children. The school community should explicitly and consistently counter both individually motivated bullying and culturally motivated harassment and discrimination. That there will be significant overlap between the two should come as no surprise and should not justify diluting the discourse or the prevention of either.

21. *But see* FRIED & FRIED, *supra* note 19, at 98 (suggesting that "there is growing evidence that some girls are becoming more physically aggressive").

22. Chodzinski & Burke, *supra* note 16, at 4-5.

23. This sort of bullying has an especially powerful effect on girls. In researcher Rachel Simmons's interviews with girls, " [t]he fear of being alone, of being isolated or ostracized, was repeatedly identified as the greatest hardship one could endure." FRIED & FRIED, *supra* note 19, at 95 (citing Simmons's research).

24. Chodzinski & Burke, *supra* note 16, at 2.

25. Ron Banks, *Bullying in Schools*, ERIC DIGEST, April 1997 (citing Batsche, G.M. & Knoff, H.M., *Bullies and their Victims: Understanding a Pervasive Problem in the Schools*, 23 SCH. PSYCHOL. REV., 165-174 (1994)), *available at* http://www.ericfacility.net/ericdigests/ed407154.html.

they suffer emotional and psychological effects that can remain with them well into their adult lives,[26] as well as physical ailments and academic problems.[27] One study showed that nearly fifteen percent of the middle and high school children surveyed believed that "bullying had severely impacted their physical, social, and academic well-being."[28]

These effects occur despite the fact that a victim may have been an otherwise confident and well-adjusted individual with adequate coping skills before becoming the target of a bully. Though one might imagine that bullying offers a child an opportunity to stand up for himself and thus gain confidence, those who are unable to effectively defend themselves and therefore remain at the mercy of the bully may suffer a serious "erosion of self-confidence and self-esteem" that lasts into adulthood.[29]

These children often begin to believe that the bullies' derogatory remarks are deserved and that they themselves are weak and inferior because they cannot effectively stop the aggression.[30] These reactions are not limited to children who might have been predicted to become victims because of their timidity or other behaviors one might imagine would invite the aggression of bullies.[31] Rather, even those who are "physically and psychologically robust" may suffer severe reactions to being victims of bullying as they recognize their vulnerability.[32] Despite their earlier psychological and emotional health, their coping skills often deteriorate and are reflected in nervousness, an inability to concentrate, and problems with "flashbacks" of being bullied.[33] They suffer physical problems that include "more frequent stomachaches, headaches, and problems with bed-wetting than their non-bullied peers."[34]

In addition, they become increasingly isolated, both socially and psychologically, as the bullying persists. Because victims of bullying often regard themselves as being "at the bottom of the social heap," they are often ashamed

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26. *See id.* (noting such effects as depression and low self-esteem).

27. See Susan P. Limber et al., *Bullying Among School Children in the United States*, in CROSS-CULTURAL PERSPECTIVES ON YOUTH AND VIOLENCE 159, 164 (Meredith W. Watts ed., 1998) (citing problems such as increased stomach aches, headaches, bed-wetting, nervousness, inability to concentrate and suicide).

28. *See id.* (citing H.J. Hoover et al., *Bullying: Perceptions of Adolescent Victims in the Midwestern USA*, 13 SCH. PYSCHOL. INT. 5 (1992).

29. VALERIE E. BESAG, BULLIES AND VICTIMS IN SCHOOLS: A GUIDE TO UNDERSTANDING AND MANAGEMENT 5 (1989).

30. *Id.* at 53.

31. *Id.* at 56. Victims are often lacking in physical strength and social skills, as compared to their peers, and may have difficulty finding acceptance in the larger group. *See* Banks, *supra* note 25, at 1. But such characteristics do not necessarily predict which children will find themselves the target of bullies. Similarly, research does not support the notion that bullies suffer from low self-esteem; rather they lack empathy for their victims and have a need to "feel powerful and in control." *Id.*

32. *See* BESAG, *supra* note 29, at 53 (noting that victims of bullying are harmed as much by their own perceptions of inadequacy at their inability to correct the problem as they are by actual incidents of bullying).

33. Limber et al., *supra* note 27, at 164.

34. *Id.*

to admit what is happening to them and fail to seek help or to alert adults to the source of their problems.[35] Their peers, on the other hand, steer clear of them to avoid the bully's attention.[36] Victims begin to avoid school to escape the torment that accompanies it.[37] Left alone to find ways to cope with the bullying and to defend themselves against it, they begin to accept the bullying as inevitable and deserved.[38] The pattern of victimization does not confine itself to a single school year for a child; many students who are victims early in their schooling are still being victimized years later.[39] Ultimately, victims begin to view the world as a "horrible and unsafe place,"[40] where they will not live – and perhaps do not deserve to live – happily.

Not surprisingly, victims eventually become desperate and depressed to the point of entertaining suicide.[41] It was, in fact, the suicides of three Norwegian teens in the early 1980's that inspired the landmark work of Dan Olweus in identifying the problem of bullying and its effects.[42] In each of the Norwegian cases, bullying was given as the reason for the child's taking of his own life.[43] Studies around the world since have confirmed that bullying often plays a central role in children's thoughts of suicide.[44]

These dark thoughts sometimes turn outward and move from suicide to violence against the teachers and peers who make up the victims' worlds. Several school shootings in the United States, including the violence at Columbine High School in Colorado, have been tied to the shooters' having been bullied.[45] Where bullying flourishes and protection seems lacking from school officials, it should be no surprise that some victims and even bystanders begin to look for protection where they can find it – in weapons, fighting, tough

35. *See* BESAG, *supra* note 29, at 53 (discussing how degradation, shame, humiliation, and intense anger felt by children who are bullied causes emotional turmoil leading the bullied to internalize their deep distress). This internalization manifests itself in the student's desire to keep the bullying to themselves, thus they will not notify parents or teachers to spare themselves embarrassment and further distress. *Id.*

36. *See* Banks, *supra* note 25, at 2 (noting behavior of the victim's peers).

37. Research has shown that "[a]s many as 7% of America's eighth-graders stay home at least once a month because of bullies." *Id.* at 2.

38. *See* Chodzinski & Burke, *supra* note 16, at 7.

39. Limber, *supra* note 27, at 165.

40. *See* KEITH SULLIVAN, THE ANTI-BULLYING HANDBOOK 38 (2000) (describing the feelings of victims in the last of five stages of the "downward spiral" of bullying).

41. *See* Chodzinski & Burke, *supra* note 16, at 4 (citing DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (1993) (finding that persistent bullying can result in depression and suicide)).

42. Dorothy L. Espelage & Susan M. Swearer, *Research on School Bullying and Victimization: What Have We Learned and Where Do We Go from Here?*, 32 SCH. PSYCH. REV. 365, 365 (2003).

43. *Id.*

44. Joseph A. Dake et al., *Teacher Perceptions and Practices Regarding School Bullying Prevention*, 73 J. SCH. HEALTH 347, 347 (2003).

45. Douglas Stewart & Charles J. Russo, Comment, *Maintaining Safe Schools*, 151 EDUC. L. REP. 363, 363 (2001).

images, and retaliation.[46]

Bystanders, like victims, may also develop a deep sense of vulnerability as they see their peers victimized by bullies.[47] Despite believing that they should aid the victim, bystanders typically remain passive in the face of another's victimization.[48] At the outset, they may not approve of the bullying they are witnessing, but they are not likely to engage the bully and become his next target.[49] Given time, some even begin to join in the "fun."[50] Research has demonstrated that many students who persistently witness bullying begin to approve of the behavior and begin to blame the victim for the problem.[51] Many go further and begin to participate in the bullying. One study of 164 students in a large urban area revealed that peers cooperated in more than 85% of the incidents of bullying identified in the study.[52] Their world view begins to coarsen as they accept victimization of others as a normal part of life and learn to ignore what they see happening to their peers or join with those who perpetrate the injuries.[53]

The potential effect of such participation cannot be ignored, given what research has shown about the effects of bullying upon bullies themselves. Those who are bullies as children are more likely to become adult bullies, both in their homes and in the wider world. Their experience tells them that intimidation and harassment are tolerated in the world, only to find later that the real world outside school is less likely to endure their brutalities without response.[54] Studies have revealed that as many as sixty percent of boys identified as bullies have been convicted of a criminal offense by the time they are twenty-four years old, and as many as forty percent have had three or more criminal convictions by

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46. *See* Wayne N. Welsh, *The Effects of School Climate on School Disorder*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 88, 89-90 (2000) (discussing the relationship between fear of violence and external defense mechanisms).

47. *See* BESAG, *supra* note 29, at 5 (noting that uninvolved witnesses may become "anxious and distressed").

48. While students in one study often blamed the victim for not fighting back or for perceived personality flaws, 76% believed that they should come to the victim's aid but often failed to help. *See* Banks, *supra* note 25, at 2 (noting a study finding that 43% of students tried to help the victim and 33% of students said they should have helped, but did not). In an Omaha, Nebraska, middle school, fifteen students gathered around while six girls, four of whom had named themselves the "S.M.A.K. girls," kicked and beat a thirteen-year-old girl on a hill near the school track. The onlookers taunted and chanted as the beating went on. No one went for help. Joe Dejka, *Another Beating Witnessed by Crowd: Teen Violence Is Turning into a "Spectator Sport,"* OMAHA WORLD HERALD, March 2, 2004, at 1A.

49. *See* SULLIVAN, *supra* note 40, at 38 (discussing the common bystander mentality of self-protection).

50. *Id.*

51. *See* Chodzinski & Burke, *supra* note 16, at 7 (describing research showing that those who repeatedly witness bullying often join the "bandwagon" mentality and condemn the victim).

52. *Id.* at 7.

53. *See* SULLIVAN, *supra* note 40, at 38 (reasoning that, as bullying escalates, a bystander's lack of action is motivated either by fear for his or her own safety or by the idea that the victim is not worth supporting).

54. *Id.* at 37.

that age.[55] Children identified as bullies are less likely to finish school than are their peers and, as a result, find their career prospects greatly reduced.[56] Even in the workplace, many of these adult bullies continue their patterns, often more quietly than in their youth, but with the same effectiveness.[57]

C. *The Prevalence of Bullying in Schools*

Bullying has increased in frequency and seriousness in schools in recent years and now constitutes a significant problem.[58] Most studies suggest that as many as fifteen percent of all students are either victims or perpetrators,[59] and one survey suggested that the figure may be as high as twenty percent.[60] Bullying seems to be most prevalent in the junior high and middle school years, but it is also present in both elementary and high schools.[61]

The public, however, despite its recent concern for violence in schools, often fails to appreciate the significance of bullying as a problem in the schools and in the lives of students. When violence is defined as a continuum from threats at one end to fatalities on the other, it is not deadly force that most students will encounter; rather, it is fighting and bullying, along with confrontations by gang members, which constitute the most likely violence that students will encounter.[62]

Nevertheless, teachers and other school personnel seldom address bullying directly with students, and many believe that bullying is nothing more than a normal part of growing up that should be ignored unless it "crosses the line into assault or theft."[63] Several studies have shown, however, that when teachers' perceptions are compared with those of students, the teachers' assumptions about bullying underestimate the prevalence and severity of the problem.[64]

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55. *See* JAMES ALAN FOX ET AL., FIGHT CRIME: INVEST IN KIDS, BULLYING PREVENTION IS CRIME PREVENTION 9 (2003) (citing a 1998 survey of 15,686 students in grades six through ten conducted by the National Institute of Child Health and Human Development), *available at* http://www.fightcrime.org/reports/ ullyingReport.pdf.

56. *See* SUELLEN FRIED AND PAULA FRIED, BULLIES & VICTIMS 91 (1996) (citing a study by Leonard Eron, Ph.D., finding that adults identified as childhood bullies were more likely to have dropped out of school and to be working in jobs that were below their skill levels).

57. *See* GARRETT, *supra* note 7, at 75 (noting the tendency of some bullies to use the art of bullying in their professional lives, particularly in situations where there is a power imbalance).

58. *See* Chodzinski & Burke, *supra* note 16, at 1-2 (describing bullying as "mild violence" and noting its prevalence).

59. Banks, *supra* note 25, at 1

60. *See* Chodzinski & Burke, *supra* note 16, at 3 (citing Fran Burke's 1998 projects analyzing rates of bullying).

61. *See* Banks, *supra* note 25, at 1 (discussing studies to find that physical bullying increases through the elementary school years, peaks in middle school/junior high, then ebbs during the high school).

62. *See* Ira M. Schwartz et al., *School Bells, Death Nells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 10 (2000) (discussing the most likely forms of violence faced by students).

63. Banks, *supra* note 25, at 2.

64. *See* DEREK GLOVER ET AL., TOWARDS BULLY-FREE SCHOOLS 59 (1998) (citing Kauser Pervin & Anthony Turner, *An Investigation into Staff and Pupil's Knowledge, Attitudes and Beliefs*

Among children, the most common and pressing fear has long been the fear of being bullied.[65]

This relative ignorance on the part of adults creates a perfect environment for bullying because bullying "is a problem which flourishes best on a bed of secrecy, hidden from those who could help."[66] It occurs behind the backs of adults who might intervene and depends upon the immaturity or fear that prevents victims and bystanders from finding help for the victims.[67] Although exposing the problem and addressing it directly most often tends to discourage further bullying,[68] student victims themselves tend not to trust adults enough to ask for help because they perceive little chance of real help and fear that adult intervention will inspire more bullying.[69] In addition, victims are often unwilling to tell adults of their plight because doing so seems like a humiliating admission of their own weakness, as well as an admission of their unpopularity.[70] Adults often do not realize the intensity or duration of bullying against a particular child, and therefore fail to respond adequately to the child's plight, even when an incident does finally bring the problem to the adults' attention.[71]

Unfortunately, children do not typically know how to intervene in a bullying situation and need the adults in their lives to model and encourage intervention.[72] Adults, on the other hand, often fear that intervening will exacerbate the problem, resulting in better-hidden retribution against the victim.[73]

D. The School as the Solution

Because both the child and the parents may feel (and may be) powerless to change the situation, the school may be the only entity able to intervene effectively to stop the bullying and remedy its effects.[74] One of the most

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About Bullying in an Inner City School, 12(3) PASTORAL CARE IN EDUCATION 16 (1994) (citing a 1991 study by Ziegler and Rosenstein-Manner and a 1994 study by Pervin and Turner noting this discrepancy in awareness of the problem).

65. *See, e.g.*, BESAG, supra note 29, at 111 (suggesting that children "put bullying at the top of their list of fears").

66. *Id.* at 6.

67. *See* Banks, *supra* note 25, at 2 (noting that bullying occurs in social contexts in which teachers and parents are unaware of the bullying while other children are reluctant to get involved).

68. *See* BESAG, *supra* note 29, at 6 (finding that exposure of the bullying problem "can go a long way in curtailing the bully's activities").

69. *See* Banks, *supra* note 25, at 2 (describing fear that adult intervention will lead to more bullying).

70. *See* Chodzinski & Burke, *supra* note 16, at 7 (discussing reasons that victims do not publicize that they are being bullied).

71. *See* BESAG, *supra* note 29, at 53 (noting that parents or teachers, not fully understanding the emotional turmoil that victims of bullying experience, may subject victims to intense interrogation).

72. *See id.* at 5 (noting that both witnesses and victims of bullying remain silent about problem due to stigma against "telling tales").

73. *See id.* (noting the author's personal experience that reluctance to act stems from a fear of making it worse on the victim).

74. *Id.* at 99.

effective things a school can do is to "establish clearly that bullying in school, in any form, will not be tolerated and, indeed, will be dealt with firmly."[75] Further, the school must ensure that there is little opportunity for children to become victims of bullying.[76] After all, it is in the school that the majority of bullying occurs, under the supervision of school personnel rather than under the supervision of parents.[77] Children are aware of this dynamic; studies have shown that children – for all their protesting and resistance – may actually appreciate good supervision because it creates an atmosphere of safety.[78]

i. Bullying as a Function of School Climate

What students appreciate intuitively is what research has demonstrated empirically: bullying is more a function of school climate – which is controlled by the faculty and staff – than it is a function of the student population or the external community from which that population springs. Studies have demonstrated that despite similarities in populations and surrounding communities, schools vary widely in their abilities to prevent bullying.[79] The implication of these studies is that the school exerts more control over the presence or absence of bullying than the external environmental factors or even the psychology of individual students.[80] It turns out, contrary to popular belief, that "[s]chool size, racial composition, and school setting (rural, suburban, or urban) do not seem to be distinguishing factors in predicting the occurrence of bullying."[81] Rather, school climate is a greater factor than community crime or community instability in determining whether there exists in a given school the disorder in which bullying flourishes.[82]

School climate refers to the "unwritten beliefs, values, and attitudes that become the style of interaction between students, teachers, and administrators."[83] It includes "communication patterns, norms about what is appropriate behavior and how things should be done, role relationships and role perception, patterns of influence and accommodation, and rewards and sanctions."[84] Because school climate defines what constitutes acceptable behavior on the part of everyone in the school – including faculty and

75. *Id.* at 103.

76. *See* BESAG, *supra* note 29, at 100.

77. *See* GARRETT, *supra* note 7, at 41 (noting that most bullying occurs on school grounds).

78. *See, e.g.*, BESAG, *supra* note 29, at 111 (citing a 1975 study done by Hargreaves, Hester, and Mellor).

79. *See id.* at 101-02 (citing MORTIMORE ET AL., SCHOOL MATTERS: THE JUNIOR YEARS (1988), which found that while there are mechanisms in place at some schools to protect pupils from bullying, others leave their pupils more at risk).

80. *See id.* (noting that the findings of "diverse studies" suggest that specific school variables may have a greater impact on a school's prevention of bullying activity than the family and environmental factors that originally contributed to the problem).

81. Banks, *supra* note 25, at 1.

82. *See* Welsh, *supra* note 46, at 101 (emphasizing the importance of school climate).

83. *Id.* at 89.

84. *Id.* at 92.

administrators – and, as a result, defines who is actually responsible for school safety,[85] a healthy school climate can be crucial in actually *mitigating* the effects of community factors such as crime and neighborhood violence.[86]

For that reason, researchers are increasingly identifying the school itself as being responsible for antisocial behavior where the school has failed to invest in the prevention strategies that could curb such behavior. In educational circles, focusing only upon the individual is giving way to focusing on the organization as an important factor in the existence of such behaviors in the school building.[87] This change is due to research indicating that attempting to address the problem only at the individual level is relatively ineffective and that it perhaps even exacerbates the problem of bullying.[88]

The culture of a school contains two basic components that determine whether bullying can flourish – social control and social cohesion.[89] A school climate that is effective in discouraging bullying and limiting victimization provides both high social control and high social cohesion.[90] High control depends upon clear structures and rules as well as a set of immediate and increasingly severe consequences for bullying and the requirement that the bully accept responsibility for the victim's pain.[91] High cohesion, on the other hand, depends upon a culture of mutual respect among students, discipline policies that students believe in, and an approach to disputes that provides those involved ways to move forward.[92] The most effective approaches combine "optimal control with optimal cohesion" where creativity to adapt to each situation exists "within a framework of control."[93]

Strong social control is critical because children who bully other children most often do so when adults who might stop them are either complacent about

85. See *id.* at 89 (noting that "[s]chool climate sets the parameters of acceptable behavior among all school actors, and it assigns individual and institutional responsibility for school safety").

86. *See id.* at 101 (finding that "[r]esearch in progress suggests that school climate . . . strongly mediates the effects of community variables (poverty, residential stability, and community crime rate) on school disorder (as measured by school incident and dismissal rates)").

87. *See* BESAG, *supra* note 29, at 101 (noting recent case work that considers the school as an organizational complex as opposed to trying to reach a resolution by focusing on individual students).

88. *See* Welsh, *supra* note 46, at 103 (finding that efforts to change individuals without focusing proper attention on school policies contributing to the increased levels of misconduct can be unproductive or counterproductive).

89. *See* GLOVER ET AL., *supra* note 64, at 48-49 (citing D. Hargreaves, *School Culture, School Effectiveness and School Improvement*, 6 SCH. EFFECTIVENESS AND SCH. IMPROVEMENT 23 (1995)).

90. *Id.*

91. *See id.* at 48 (citing Hargreaves' 1995 findings that "[s]chools which are high in control offer procedures when dealing with anti-bullying based upon a 'succession of punishments,' 'immediate suspension until the difficulties are resolved' and 'the requirement that the bully should recognize his or her debt to the victim.'").

92. *See id.* (citing Hargreaves' 1995 findings that schools high in cohesion "appear to be more 'concerned to develop a policy which the youngsters want to follow,' to 'base relationships in the school on a shared understanding of respect' and to 'offer both sides in any dispute the opportunity to find a way forward.'").

93. *Id.* at 49.

the behavior or are not around to intervene.[94] A school climate that does not include strong supervision on the one hand and a consistent condemnation of bullying on the other, creates an atmosphere where bullying becomes an accepted part of the social culture in which it exists.[95] Where rules are not clear and are not consistently enforced and where teachers and administrators fail to act when misconduct occurs, discipline problems are the worst and victimization is highest.[96] In such situations, students "enact their own codes of behavior" because teachers and administrators fail to control the school climate.[97] Those codes are often driven by aggressive attitudes and actions.[98]

The "insidious breakdown of law and order" in the culture of a school in which bullying, threats, thefts, and fights occur erodes both the sense and the reality of safety that students and parents expect at school.[99] Case study results concerning schools where students reported that "rules and sanctions are unclear, that discipline is lax or inconsistent, and that neither teachers nor teaching assistants effectively monitor behavior or protect the smaller and weaker students in the school" support the conclusion that under such conditions aggressive behavior increases.[100] In fact, where students perceive that victims will not receive serious support from the adults in the school, bullies "could" conclude that they have "permission for further attacks."[101] In addition, where the school does not strongly support good behavior and punish misconduct, students in that school may reject conventional values because embracing those values may be perceived as placing the child at risk.[102]

On the other hand, in schools where rules are enforced, aggressive behavior is consistently confronted and condemned, and victims are protected while their tormentors are stopped, students are more likely to embrace conventional values regarding their behaviors toward one another because the school climate makes doing so sensible and beneficial.[103] The result is that social cohesion can be fostered because the kinds of behaviors that destroy cohesion are limited by

94. *See* BESAG, *supra* note 29, at 56 (suggesting that because "opportunity stimulates crime . . . sound supervision helps to prevent bullying . . . .").

95. Chodzinski & Burke, *supra* note 16, at 5 (describing how school climate can facilitate bullying).

96. *See* Welsh, *supra* note 46, at 93 (citing 1985 reanalysis of Safe School Study data by Gottfredson & Gottfredson).

97. *Id.* at 100-01.

98. *See id.* at 100 (noting that codes of behavior adopted by students "may only fuel a vicious circle in which aggressive postures adopted for self-defense all too easily convert to a higher incidence of aggressive behavior").

99. Schwartz, *supra* note 62, at 10.

100. Welsh, *supra* note 46, at 100.

101. BESAG, *supra* note 29, at 139.

102. *See* Welsh, *supra* note 46, at 100 (explaining that when schools do not support good behavior and discipline bad behavior students will "lower their risk of victimization" by adopting defensive strategies that may result in higher incidence of aggressive behavior).

103. *Id.* "Those who believe in conventional rules believe that school rules can and will be upheld by responsible adults to maintain a safe learning environment, and children thus maintain a certain 'stake in conformity' by believing in the validity of those rules." *Id.*

caring and watchful adults. Consistently, schools where students have reported high levels of satisfaction with the climate have also tended to be characterized by "high expectations and clear codes of work and behavior."[104]

Central to those expectations are policies and practices that condemn bullying and limit its existence in the school culture. One British study of adolescents found a strong correlation between students' perceptions of the school culture as positive and the existence of vigorous anti-bullying policies that were well known by the students.[105] In that study, students consistently ranked as positive the cultures in those schools with well-developed anti-bullying policies that were enforced consistently by the entire school staff.[106]

ii. Proactive, Whole-School Approaches to Preventing Bullying

In other words, healthy school climates are not an accident of geography or economics – they are the result of deliberate and informed planning on the part of school staff and administration. They are the result of sustained, consistent attention to providing high social control on the one hand, and promoting high social cohesion on the other. The teachers and administrators, then, must be willing to engage in a comprehensive and ongoing process that includes evaluating the school climate and providing the necessary direction, training, and coordination to reform that climate if needed.

As a result, everyone in the school must be involved in and should take responsibility for consistently and deliberately developing an anti-bullying culture. Everyone includes the principal, teachers, students, office staff, and maintenance staff – anyone who is a part of the school – if the sort of community is to exist that will allow students to mature in healthy ways and without fear of victimization.[107]

One program identified by the U.S. Department of Health and Human Services as a "Model Program," because of its demonstrated effectiveness in reducing bullying, illustrates the kind of process that transforms a school culture.[108] The Olweus Bullying Prevention Program has consistently been shown to reduce bullying in all types of school settings by thirty to seventy percent in the first year of implementation.[109] It begins with the administering of an anonymous questionnaire to students to gather data on the prevalence of bullying in the school.[110] That data is then shared with the entire school

104. GLOVER ET AL., *supra* note 64, at 47.

105. *See id.* at 41 (discussing research findings upon which the book is based).

106. *Id.* at 47.

107. *See* Stewart & Russo, *supra* note 45, at 365 (noting that "[a]ll educational staff from the principal to the maintenance worker should work to foster a sense of community in a school as this should help to reduce tensions that can give rise to violence").

108. Substance Abuse and Mental Health Services Administration, SAMSHA Model Programs: Olweus Bullying Prevention Program, *at* http://www.Modelprograms.samhsa.gov (last visited April 5, 2004).

109. *Id.* at 5.

110. *Id.* at 4.

community through school-wide meetings with parents and through classroom-level meetings with both parents and students.[111] To drive home the seriousness of the problem, teachers and administrators can present information detailing the effects of bullying upon victims, bullies, and bystanders.[112]

A conference day is set aside to continue discussion of the bullying problem and to begin planning the implementation of an anti-bullying program.[113] Ongoing discussions continue through the school year as the entire school community participates in developing school-level and classroom-level anti-bullying policies.[114] In addition, school personnel receive ongoing training in bullying prevention throughout the school year.[115]

Central to the implementation of the program is a Bullying Prevention Coordinating Committee that includes students, teachers, administrators, parents, and other school staff.[116] The widespread involvement reflected in the makeup of the committee is replicated throughout the school in order to create a shared sense of ownership of the problem and its solutions, and to develop a community-wide change in attitudes towards bullying.[117]

E. Redefining Supervision

What such programs and their successes demonstrate is that supervision can no longer be viewed as mere monitoring and intervention. If it is to have any real impact on the hidden dynamics of bullying and victimization, supervision must be viewed as a global approach to creating a school climate in which students are physically and emotionally safe and in which children learn to treat each other with respect and to protect each other from bullying and victimization.

Because bullying is conducted mostly "underground," passive supervision is unlikely to uncover it.[118] Rather, teachers and administrators must actively supervise, constantly alert for indications that bullying is going on behind their backs and constantly ready to stop bullying in its initial stages.[119] Perhaps the greatest deterrent to bullying behavior is the presence of adults who are

111. *Id.*

112. *See id.* (explaining that "[s]tudents participate in a series of regular classroom meetings about bullying and peer relations" which "are used to teach students how to identify bullying and how to mitigate its effects in school").

113. SAMSHA Model Programs: Olweus Bullying Prevention Program, *supra* note 108, at 5 (noting that a first step in the implementation of the Olweus Bullying Prevention Program is to establish a Bullying Prevention Coordinating Committee composed of administrators, teachers, students, parents, and the program's onsite coordinator).

114. *Id.* at 4.

115. *Id.* at 6.

116. *Id.* at 5.

117. *See id.* (noting that implementation of the plan requires a serious and ongoing commitment for different members of the school community).

118. BESAG, *supra* note 29, at 113.

119. *See id.* (suggesting that teachers keep "a keen but friendly eye on the happenings around the building").

watching and are willing to intervene.[120] Importantly, that intervention must take place early in the development of bullying relationships if it is to be truly effective. To wait until a child has been subject to extensive harassment is to wait too long. Both the individual child and the overall school climate have already been damaged whenever bullying behavior is allowed to develop.[121]

Ultimately, for supervision to succeed in preventing victimization, all of the actors in the school – administrators, teachers, support staff, and students – must be clear about the behavioral standards that all of the adults will enforce and how those standards will be enforced. The standards of behavior expected of students should be communicated clearly and enforced consistently throughout the school.[122] Students should be able to know what is expected of them and what will happen if they misbehave, regardless of where they are in the school and who is supervising them.[123] The discipline policy regarding bullying should be written, should outline practical strategies for dealing with bullying, and should articulate consequences for bullying.[124] The policy should leave the administrators and staff room to consider all of the factors in an incident, but it should not suggest that misbehavior will be treated lightly.[125]

In addition, the administration should ensure that all of the areas where students are likely to gather are actively supervised at all times.[126] Where adults are absent or inattentive, intervention cannot take place, and those students who are willing to bully are going to be waiting for opportunities to do so without incurring the consequences of a staff member willing and ready to intervene.

While it is true that good supervision is often the key difference between schools in the same community that have significantly different levels of success in preventing bullying, the supervision need not be – indeed, should not be – simply authoritarian, heavy-handed intervention and punishment.[127] Students should find that teachers are routinely engaged in friendly ways with students, and yet are always alert to what is going on in the hallway or classroom.[128] Supervision, in other words, is more than monitoring and responding: it is a concerted effort to create a healthy community within the building.

The staff should seek, therefore, to create among students a sense of community within the school, based upon shared values of personal

120. See Chodzinski & Burke, *supra* note 16, at 11 (discussing an earlier survey that concluded that increased direct supervision is the best deterrent to bullying).

121. *See* Banks, *supra* note 25, at 2 (noting that bullying has negative consequences for the general school climate and negative lifelong consequences for the student).

122. BESAG, *supra* note 29, at 111.

123. *Id.*

124. GLOVER ET AL., *supra* note 64, at 52.

125. Stewart & Russo, *supra* note 45, at 365-66.

126. *See* BESAG, *supra* note 29, at 103 (recommending that schools require student supervision on "bus queues, bus journeys, outbuildings, changing rooms and other isolated areas, plus possible timetable adjustments").

127. *See id.* at 113 (suggesting a form of "constructive supervision" in which teachers maintain a friendly atmosphere).

128. *Id.*

responsibility and mutual respect and concern for one another's welfare.[129] When students feel that they are members of a school community, they avoid those behaviors that would harm that community.[130] Teachers should attempt to establish genuine relationships with their students[131] while helping the students to develop social bonds among one another and, in doing so, develop the attitudes and behaviors upon which healthy communities depend.

Where schools, in good faith, put in place such positive, directed, and sustained efforts to change school climate, bullying drops dramatically. Fewer children are victimized, fewer bullies develop life-long antisocial perspectives, and the school as a whole becomes a safer environment for everyone involved.

Unfortunately, too few schools have taken such serious steps because, apparently, too few school officials truly believe what the research reveals about the effects of bullying, its prevalence, and its prevention. Courts and legislatures suffer from the same lack of understanding and do too little to force schools to change. Educators know what to do;[132] they know it can be done;[133] they know it is not prohibitively expensive;[134] they know it will have positive collateral effects on the entire educational process;[135] and they know it will save children from injuries that may well last their entire lives.[136]

Nevertheless, courts and legislators stop short of requiring schools across the country to make the necessary changes. State and federal laws fail to create the incentives that will force reluctant school officials to move aggressively against a culture of bullying in their schools. Causes of action under federal statutory and constitutional law seldom succeed, nor do actions based in state statutory and common law. Where states have enacted legislation to require schools to implement vigorous anti-bullying policies, the statutes fail to require the kinds of processes that make those policies effective.

II. THE FAILURE OF CURRENT LEGAL APPROACHES TO COMPENSATE VICTIMS OF BULLYING AND TO INSPIRE SCHOOL CHANGE

Current legal theories and approaches to bullying suffer from a common flaw: they view bullying from an incident-based perspective rather than from a

129. *Id.* at 104-05.

130. Stewart & Russo, *supra* note 45, at 365.

131. BESAG, *supra* note 29, at 107.

132. See *supra* Part I.D.ii. for a discussion of a program with demonstrated effectiveness in decreasing the prevalence of bullying.

133. *Id.*

134. *See* FOX ET AL., *supra* note 55 at 17. For example, the Olweus Bullying Prevention Program, one of the most proven bullying prevention programs worldwide, requires as little as one thousand dollars to train a trainer who can then administer the program district-wide for several years for little additional cost. See *supra* notes 108–117 and accompanying text for a discussion of the Olweus Bullying Prevention Program.

135. See *supra* Part I.C. for a discussion of the negative effects of bullying on the entire school community.

136. See *supra* Part I.B. for a discussion of the effects of bullying on victims, bullies and bystanders.

school culture perspective.[137] They focus on what school officials knew about a specific bullying incident rather than addressing what school officials have done to ensure a culture where bullying is unacceptable to everyone in the school.[138] A serious gap exists between what educational research reveals about bullying prevention and what the law defines as inadequate supervision.[139] As a result, victims are left without protection in the schools they must attend; and then, under both state and federal law, they are left without redress when their tormentors inflict serious and long-lasting injury.

A. Bullying and Federal Law

Federal law has failed to provide any serious incentive for change or any basis for recovery when children are victimized in the very schools they are compelled to attend under state law. Title IX, the federal law most naturally applicable to gender-based bullying situations, has ultimately provided little relief to victims because it does not hold school officials accountable unless they have been deliberately indifferent to known patterns of harassment – a claim that is hard to prove.[140] Nor have claims under section 1983 been effective in either compensating victims or holding school officials accountable for allowing children to be tormented by their peers. A variety of theoretical barriers doom most federal claims from the outset; and even where a claim might lie, the standard of liability is set so high that plaintiffs will recover only in the most egregious situations.[141] The No Child Left Behind legislation addresses violence in school, but offers little help to children who are subjected to ongoing bullying.[142] At best, it provides a right to escape the bullying by allowing the child to switch schools if the harassment escalates into an outright assault.[143] The bottom line is that the federal law that might ostensibly apply to peer-on-peer bullying is simply not designed to serve as a spur to research-based reform or to give children any real avenue for redress except in the most outrageous situations.

i. Title IX Claims for Gender-based Bullying

The most notorious form of bullying today is gender-based bullying, and

137. See *infra* Part II.A.i-II.B.iii.b. for a discussion of current legal theories and approaches to the problem of bullying.

138. See *infra* notes 146-151 and accompanying text for a discussion of the standard of liability applied in Davis v. Monro County Board of Ed., 526 U.S. 629 (1999) and its focus on a school's response to specific incidents of harassment.

139. See *infra* Part II.C. for a discussion of aligning the definition of reasonable supervision with empirical educational research.

140. See *infra* Part II.A.i. for a discussion of *Davis*, where the Supreme Court interpreted Title IX.

141. See *infra* Part II.A.ii. for discussion of roadblocks facing plaintiffs who bring claims under § 1983 of the Civil Rights Act.

142. See *infra* Part II.A.iii. for discussion of the inherent deficiency of the No Child Left Behind Act.

143. *Id.*

legislatures have made some attempts to curb its prevalence in the schools. Under this article's working definition of bullying, sexual harassment is simply a form of bullying with gender as its inspiration or excuse. Non-gender-based bullying, in fact, often serves as the forerunner of more specific kinds of harassment such as peer sexual harassment.[144] The added aspect of a gender-based motivation sweeps such behavior into the concerns of Title IX, which prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance."[145]

Title IX, however, as the Supreme Court interpreted it in *Davis v. Monroe County Board of Education*,[146] offers little incentive for schools to respond proactively even to gender-based bullying. Under *Davis*, school officials are liable for damages "only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[147] Like other standards of liability involving bullying generally, the *Davis* standard focuses on the school's response to specific incidents of known harassment rather than on the school's response to an overall climate that allows such behavior to flourish. Thus, while it certainly requires schools to act when gender-based harassment

144. *See* GAYLE L. MACKLEM, BULLYING AND TEASING: SOCIAL POWER IN CHILDREN'S GROUPS 44-46 (2003) (discussing the connection between bullying and sexual harassment).

145. 20 U.S.C. § 1681(a).

146. 526 U.S. 629 (1999). From December of 1992 to May of 1993, fifth grader LaShonda Davis was continually sexually harassed, both verbally and physically, by a male classmate; but despite repeated appeals to several school officials, including the classroom teacher and the school's principal, virtually nothing was done to stop the harassment. The harassment was sufficiently severe that the harasser was eventually charged with sexual battery; nevertheless, it had taken three months of complaining to school officials before LaShonda was even allowed to move to a seat in another part of the classroom away from the boy. LaShonda's grades began to suffer, and she eventually wrote a suicide note as a result of the unchecked harassment. *Davis*, 526 U.S. at 633-35.

147. *Id.* at 650. For a thoughtful and thorough discussion of how current Title IX liability standards are playing out in the courts, see Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387 (2002). Professor Davies' review of lower court decisions suggests significant confusion among the courts as to what constitutes actual notice, deliberate indifference, and severe and pervasive harassment leading to a denial of educational benefits. *Id.* at 420-34. As a result, some courts are willing to impose institutional liability where the conduct has been clearly unreasonable, but other courts "have viewed *Gebser* and *Davis* as a license to insulate entity responses from review and to protect against liability on the most technical of grounds." *Id.* at 434.

Professor Davies also notes that peer-on-peer harassment cases are filed much less frequently than adult-on-student cases, and she concludes that further study is needed to determine whether *Davis* has spurred schools to enact preventative strategies which have reduced students' need to resort to the courts. *Id.* at 432-33. My own suspicion, however, is that the same dynamics that prevent victims of non-gender-related peer-on-peer bullying from seeking help from adults accounts for the discrepancy.

A much more discouraging statistic, however, is that in only twenty-five percent of peer-on-peer harassment cases have plaintiffs prevailed on institutional liability issues. *Id.* at 432. That statistic seems to support the view that the *Davis* standard makes Title IX a generally ineffective recourse for plaintiffs who have been targeted for sexual bullying at the hands of their peers.

becomes known to school officials, it does not place any affirmative duty upon schools to anticipate such behavior and take effective steps to prevent it. Therefore, the standard fails to inspire serious, proactive efforts by school officials for two reasons.

First, because it requires that officials have actual knowledge that harassment exists in particular circumstances,[148] officials are under no requirement to act until harassment comes to their attention. Empirical research, however, has made clear that unless school officials actively evaluate the prevalence of bullying in their schools, they are seldom aware of the bullying – gender-based or otherwise – that is happening in their schools.[149] Research has also demonstrated that the victims are unwilling to report such harassment even to their parents because of the stigma attached to it and the fear of reprisals.[150] While forcing school officials to respond to known instances of harassment is laudable, the *Davis* standard provides no disincentive for educators to continue to ignore what the educational community knows concerning prevention of bullying, and by extension, sexual harassment.

Second, the *Davis* standard of deliberate indifference requires very little action on the part of administrators to avoid liability. Because an administrator's actions must be "clearly unreasonable in light of the known circumstances" to amount to deliberate indifference,[151] it is difficult to imagine what beyond almost complete inaction would qualify as violating the standard. Because courts are reluctant to second-guess the disciplinary decisions of school administrators, any attempt to address the behavior would likely be viewed as not "clearly unreasonable."[152]

The *Davis* standard rests upon the principle that recipients of federal funds should be held liable only for their own actions and not the actions of others.[153] The recipient's conduct must have "effectively 'caused' the discrimination."[154] The Court reasoned that earlier Title IX decisions had firmly rejected any standard that would hold a recipient liable for "its failure to react to teacher-student harassment of which it knew or *should have* known."[155] For misconduct to incur liability, it must be the misconduct of the recipient, not the misconduct

148. *Davis*, 526 U.S. at 650.

149. *See* ANNE G. GARRETT, BULLYING IN AMERICAN SCHOOLS 49 (2003) (discussing the attitudes of teachers towards bullying).

150. See *supra* notes 66-70 and accompanying text for a discussion of the fears that prevent the disclosure of victimization to adults.

151. *Davis*, 526 U.S. at 648.

152. *See* Michele Goodwin, *Sex, Theory, & Practice: Reconciling* Davis v. Monroe *& the Harms Caused by Children*, 51 DEPAUL L. REV. 805, 817-18 (2002) (suggesting that even "minimal actions to acknowledge the problematic behavior would seem to overcome the deliberate indifference standard").

153. *See Davis*, 526 U.S. at 640-41 (explaining that a "recipient of federal funds may be liable in damages under Title IX only for its own misconduct").

154. *Id.* at 642-43 (quoting Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274, 291 (1998)).

155. *Id.* at 642 (emphasis in original).

of third parties,[156] and the misconduct of the recipient must consist of an "'official decision by the recipient not to remedy the violation.'"[157] No such decision can be made absent some knowledge that a violation has occurred. Therefore, where the violation is caused by the hidden acts of third parties, the recipient cannot logically be viewed as having made an official decision not to remedy that violation.

The difficulty with this formulation is that it assumes that school officials do not already know that harassment is occurring in their schools and cannot respond to it unless specific circumstances of harassment are brought to their attention. It is disingenuous, however, to suggest that either assumption is true. Research makes clear that bullying occurs in every school, and it is no great leap to conclude some of it is gender-based.[158] Educators know as well that schools exert significant control over the prevalence and severity of bullying.[159] To require actual notice of and deliberate indifference to gender-based bullying is to turn a blind eye toward the facts of modern schooling. Even the *Davis* Court recognized that schools "exercise[] significant control over the harasser"[160] and that "'[t]he maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities.'"[161]

To argue, as do the *Davis* dissenters, that "[t]he limited resources of our schools must be conserved for basic educational services"[162] and that "[s]ome schools lack the resources even to deal with serious problems of violence and are already overwhelmed with disciplinary problems of all kinds"[163] misses the point. Creating an atmosphere in which students are emotionally and physically safe *is* a basic educational service; and where a school is dealing with "serious problems of violence" and dealing with "serious disciplinary problems of all kinds," that school is failing at a level that ought to be considered misconduct "causing" illegal discrimination.

Nevertheless, the *Davis* standard falls far short of such an approach and keeps the focus squarely on an incident-driven view of school officials' responses

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156. *See id.* at 641 (explaining that the scope of the government's enforcement power does not extend to third parties).

157. *Id.* at 642 (quoting *Gebser*, 524 U.S. at 290).

158. See MACKLEM, *supra* note 144, at 44-46, for a discussion of how early bullying evolves into sexual harassment in later years. The prevalence of sexual harassment against girls in the schools is alarming: "An American Association of University Women survey of 1,600 eighth- through eleventh-grade students found that four out of five students had experienced sexual harassment at school. Sixty-five percent of the girls had been physically touched, grabbed, or pinched in a sexual manner." NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 48 (1998) (citing HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993)).

159. See *supra* Part I.D. for a discussion of the school environment and its effects on bullying.

160. *Davis*, 526 U.S. at 646.

161. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 342, n.9 (1985)).

162. *Id.* at 666 (Kennedy, J., dissenting).

163. *Id.* (Kennedy, J., dissenting).

to gender-based bullying. Therefore, the standard contains little that would force a school to work proactively to protect its students from the cruelty and brutality that is at work in the schools.

ii. Section 1983 Claims for Deprivations of Federal Rights

Claims brought under section 1983 of the Civil Rights Act[164] have fared no better – and, in fact, have fared much worse – than Title IX claims. Whether alleging that the school has deprived the victimized student of her right to substantive due process under the Fourteenth Amendment's Due Process Clause or her right to equal treatment under the Amendment's Equal Protection Clause, the plaintiff faces a tough road in demonstrating that a constitutional violation by the school flows from a tort committed by a fellow student. While some have been successful in finding relief with such approaches, most cannot clear the substantial doctrinal hurdles courts have placed in the path of those seeking to hold state actors liable for injuries inflicted in the first instance by private actors.

1. Due Process Approaches

The theory most often put forward by plaintiffs is that by allowing the student to be tormented or injured by his peers, the school has deprived the student of his liberty or property interests under the Fourteenth Amendment's Due Process Clause.[165] That deprivation may be characterized as a deprivation of the student's liberty interest in bodily integrity[166] or in personal security.[167] The difficulty with the substantive due process approach lies with the

164. Section 1983 grants plaintiffs a private right of action for injuries suffered as a result of violations of the constitution or other federal law. The section provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (2000).

165. The Fourteenth Amendment's Due Process Clause provides in relevant part that:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

166. *See, e.g.*, Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996) (rejecting a student's attempt to characterize the school's failure to protect him from assaults by his teammates as a violation of right to bodily integrity under the Due Process Clause), *remand'g* 864 F. Supp. 1111 (D. Utah 1994), *rev'd in part* 206 F.3d 1021 (10th Cir. 2000).

167. *See, e.g.*, Spivey v. Elliott, 29 F.3d 1522, 1526-27 (11th Cir. 1994) (holding that a student's right to personal security under the Fifth and Fourteenth Amendments had been violated when the student was repeatedly raped by a fellow student in a residential school for the deaf, but rejecting the student's section 1983 claim because the school's duty to protect the student was not clearly established when the offenses occurred), *withdrawn in part* 41 F.3d 1497 (11th Cir. 1994).

unwillingness of courts to recognize a constitutional duty on the part of school officials to prevent harassment or other injuries inflicted upon students by their peers. The doctrinal hurdles make it virtually impossible for victims of bullying to succeed in establishing a section 1983 claim.

In claims based upon the Due Process Clause, plaintiffs most often put forward two theories:[168] (1) that compulsory education laws have placed the student in a custodial relationship with the school and thereby created a duty on the part of school officials to protect the student from attacks by other students[169] or (2) that school officials have created or increased the danger of attacks by other students.[170] The first theory has been consistently rejected by the courts;[171] the second theory requires an almost impossible showing that school officials took affirmative, conscience-shocking steps to create or increase the danger.[172] As a result, substantive due process approaches generally fail.

a. The Custodial or Special Relationship Theory

The Achilles heel of the custodial relationship approach is that the school must have so limited the victim's freedom to seek help that he could not protect himself from his attacker without the affirmative intervention of the school. In other words, the victim must show that he was so cut off from outside aid that there was no one in the victim's life that he could turn to for aid other than school officials themselves. The U.S. Supreme Court has defined such circumstances far too narrowly to include the typical public school: generally, the state must take a person "into its custody and hold[] him there against his will" before an affirmative duty arises to protect him from harms inflicted by private

168. Plaintiffs sometimes also claim that school officials with final policymaking authority have exhibited a policy, practice, or custom of deliberate indifference to their subordinates' failure to respond adequately to threats of harm to the plaintiff and have thereby deprived the plaintiff of his right to substantive due process. Because the theory requires that the injury be inflicted by a state actor, however, it is unavailable to those alleging injuries inflicted in the first instance by private actors, such as students. *See, e.g.*, Page v. Sch. Dist. of Philadelphia, 45 F. Supp. 2d 457, 466-67 (E.D. Pa. 1999) (rejecting plaintiffs section 1983 claim because private actors caused the plaintiff's injury).

169. E.g., Spivey, 29 F.3d at 1527 (holding that a student attending a residential school for hearing impaired children had a special relationship with the school and that the school had a duty to protect the student from harm).

170. *E.g.*, Doe v. Sabine Parish Sch. Bd., 24 F. Supp. 2d 655, 661 (W.D. La. 1998) (holding that school officials' refusal to intervene to prevent one elementary school child from repeatedly committing sexual battery against another, despite their knowledge of the offender's propensities and complaints from the victim's parents over the course of a year, could not "satisfy the demanding standards of the [state-created danger] theory"). Although the plaintiffs had not actually argued that the theory applied, the court apparently believed it necessary to analyze their due process claims in light of the possible exception to the general rule that state actors are not liable for the acts of private actors under the Due Process Clause. *See id.* at 659-60.

171. See *infra* Part II.A.ii.1.a. and accompanying notes for a discussion of the Custodial and Special Relationship Theory.

172. See *infra* Part II.A.ii.1.b. and accompanying notes for a discussion of the State-Created Danger Theory.

persons.[173]

In *DeShaney v. Winnebago County Department of Social Services*, the Court concluded that a state social services agency could not be held liable under section 1983 where it had allowed a father custody of his young child despite the fact that the agency was repeatedly made aware the father was abusing the child.[174] The father eventually beat the child so badly that he suffered extensive brain damage and would likely remain institutionalized for the remainder of his life.[175] Nevertheless, the agency could not be held liable under section 1983 for failing to remove the child from the home because the Due Process Clause does not require the state to protect an individual from violence perpetrated by private actors, even when it knows of the danger.[176]

The Court explained that such a duty might arise where the "State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety."[177] In such a case, the State must act to protect the individual because it has affirmatively prevented the individual from protecting himself.[178] Persons held in prison or in police custody and persons involuntarily committed to mental institutions are examples of those to whom the State might owe, under the Due Process Clause, a duty of protection against private actors.[179]

While plaintiffs have often argued that children in school settings are similarly restrained, the courts have been unwilling to characterize the students' plight so darkly. Although children are required to attend school under state compulsory education statutes, they leave school each night to return to their parents.[180] Therefore, students cannot be deemed to be "unable to act on [their] own behalf;"[181] they can freely turn to their parents and even to law enforcement officials, if necessary, for aid and protection.[182] They are not so dependent upon

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173. *See* DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989) (finding a State's affirmative deprivation of an individual's freedom to act on his or her own behalf confers a duty to protect, such as in cases involving prisoners and committed mental patients).

174. *DeShaney*, 489 U.S. at 191.

175. *Id.* at 193.

176. *Id.* at 201.

177. *Id.* at 200 (emphasis in original).

178. *Id.*

179. *Deshaney*, 489 U.S. at 200.

180. D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992). In *Middle Bucks*, the female plaintiffs were sexually assaulted as many as four times per week from January to May in a darkroom and a bathroom that were part of a graphics arts classroom. *Middle Bucks*, 972 F.2d at 1366. There was evidence that school officials knew the graphics arts classroom was out of control, and that the teacher had witnessed repeated lewd acts in the classroom and on at least one occasion had seen several boys touch the breasts of one of the plaintiffs before pushing her down and dragging her into the bathroom. *Id.* at 1378 (Sloviter, J., dissenting). The court nevertheless held that because the plaintiffs could leave each day and seek outside help, no custodial relationship existed and, thus, no claim existed under the Due Process Clause. *Id.* at 1372.

181. *DeShaney*, 489 U.S. at 200.

182. *Middle Bucks*, 972 F.2d at 1372. The No Child Left Behind Act, discussed *infra* at Part

school officials for help that the state has effectively cut off all other avenues of aid by the exercise of its power to compel school attendance.

While there is something disturbing about the fact that the state can compel children to attend school yet not incur a duty to protect them from their peers, the Court's approach actually makes a good deal of constitutional sense. After all, if school officials have a constitutional duty to protect children from injuries inflicted by private actors, then conceivably such a duty could arise whenever citizens are engaged in the performance of a state-imposed duty, especially if that duty must be performed in a building or on the grounds of a state agency. Such a duty would arise, not from a state's affirmative acceptance of liability for its citizen's torts against one another, but from an inescapable imposition of duty under the federal Constitution.

On the other hand, such a formulation ignores the significant disability placed upon school children during the school day and upon parents who cannot afford to school their children at home or in a private academy. Each day, the child must attend school or be considered truant, with the potential penalties that truancy can bring upon parents deemed to be in violation of the compulsory attendance laws.[183] If the child and the parent cannot convince the school to act in the face of daily torment and threats, the child and the parent often have very few practical options at their disposal. They cannot simply keep the child home indefinitely, and if they cannot afford private schooling and are unable to move to another district, the child is doomed to return to the school where the danger exists. The police will be of little help unless an outright assault occurs, and even then the bully will shortly end up right back in the same hallways and classrooms as the victim and the bully's friends. In essence, the child must remain in the school where the torment is carried out, and the parents can do nothing to shield him from the torment, short of attending school with the child.

b. The State-Created Danger Theory

The state-created danger theory has fared no better in the courts than has the custodial relationship theory. Under this theory, for the court "to find liability 'the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'"[184] Most courts have required some sort of affirmative act on the part of the state actor that increased or enhanced the danger to the

II.A.iii., offers some options where a school has been deemed "dangerous" or where the child has been the victim of an assault. The practical result, however, is that most children will be unable to escape the bullying typical of most schools.

183. In Missouri, for example, a parent who violates the state's compulsory attendance law is guilty of a class C misdemeanor and can face fines and imprisonment. MO. REV. STAT. § 167.061 (2000).

184. *Sabine Parish*, 24 F. Supp. 2d at 660 (citing Doe v. Hillsboro, 113 F.3d 1412, 1415 (5th Cir. 1997).

plaintiff.[185] Where the state actor merely fails to act in the face of a known danger, the courts have been unwilling to view the inaction as a danger-enhancing affirmative act absent deliberate indifference to the plaintiff's plight.[186] Even where some affirmative act has arguably created or enhanced the danger, courts will not recognize liability unless the conduct "shocks the conscience of the court."[187] In other words, the actions that increase the danger must be substantial and extraordinary. As the Sixth Circuit put it, "[i]t cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely."[188]

So far, plaintiffs have had little success convincing courts that the conduct of school officials in the face of severe bullying has been so shocking that the state could be characterized as having created or enhanced the danger. Even where a coach allegedly participated in some of the bullying and he and other school officials turned a blind eye to ongoing harassment and retaliation, a U.S. district court concluded that the school officials' conduct did not shock the conscience.[189]

In that case, members of a basketball team mercilessly targeted a freshman boy, Derek, until his graduation from high school.[190] They began by calling him

185. Courts have varied in their articulation of the theory. The Tenth Circuit, for example, has formulated a six-part test for determining whether such a danger has been created or enhanced.

The first five parts consider:

> 1) whether plaintiff was a member of a limited and specifically definable group; 2) whether defendant's conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; 3) whether the risk to plaintiff was obvious or known; 4) whether defendant acted recklessly in conscious disregard of that risk; and 5) if such conduct, when viewed in total, "shocks the conscience" of federal judges.

Sanders v. Bd. of County Comm'rs, 192 F. Supp. 2d 1094, 1109 (D. Colo. 2001) (citing Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995)).

The sixth part of the test comes from Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1263 (10th Cir. 1998): "'[A] plaintiff must also show that the charged state entity and the charged individual defendant actors created the danger or increased . . . the danger in some way.'" *Sanders*, 192 F. Supp. at 1109.

The Third Circuit, on the other hand has constructed a four-part test:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Page, 45 F. Supp.2d at 465 (citing Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996)). The *Page* court added that "[t]he requirement of a 'relationship' in [the third factor] is distinct from the 'special relationship' required under the [custodial relationship exception to *DeShaney*]." *Id.* at 465 n.5. The *Kneipp* court had also "noted that a 'deliberate indifference' standard had generally been employed by courts applying a state-created danger standard." *Id.* at 465.

186. *See Kneipp*, 95 F.3d at 1208 (noting that lack of specific knowledge of plaintiff's condition does not constitute a liable "deliberate indifference" on behalf of the state actor).

187. See *supra* note 185 for a discussion of the *Uhlrig* factors.

188. Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995).

189. Snelling v. Fall Mountain Reg. Sch. Dist., No. CIV.99-448-JD., 2001 WL 276975 at *9 (D.N.H. Mar. 21, 2001).

190. *Id.* at *1-3.

"'fag,' 'jew boy,' all of which were said harshly and with hatred."[191] In addition, they nicknamed him "Stiffy," a name that originated when Derek was the only player to take a shower one night after practice; the next day, one of the other players "walked up to Derek and said, 'How are you, Stiffy? I saw you in the showers last night with another guy and you had a stiffy.'"[192] The abuse escalated from name calling to physical abuse that occurred "in the presence of the coaches who did nothing."[193] Even his brother, Joel, became a target of the abuse.[194]

The coach joined in when the two brothers "bought weight vests to wear during practices to enhance their jumping ability in games. At practice, coach Weltz referred to the vests as 'bras' and would tell them to take their 'bras' off. Weltz said that Derek could take his 'bra' off faster than Joel could."[195] The high school principal told Derek that "Stiffy" was just a nickname and that he should just "accept [it] and move on."[196] During one practice, another coach and the athletic director did nothing while twenty feet away a player "repeatedly hit Derek in the head with the basketball" so many times that Derek had to be treated at a hospital;[197] the player was retaliating for Derek's complaining to the assistant principal about Weltz's "bra" remarks.[198]

Despite the inaction of the principal and the coaches and despite the participation of Coach Weltz in the bullying, the court concluded that the school officials' behavior did not so enhance the danger to the boys that the officials' conduct could be viewed as conscience shocking.[199] Said the court,

> Taken in the broader context of the harassment the plaintiffs endured, Coach Weltz's remarks appear to be unprofessional, insensitive, and even cruel. The coach's apparent participation in the harassment may have emboldened others to continue or even increase their harassment of the plaintiffs. Weltz's conduct, however, does not sink to the level of conscience-shocking behavior.[200]

This conclusion was compelled said the court, even if a link could be inferred between Weltz's remarks and the assault with the basketball.[201] The court relied in part on a Tenth Circuit case which held that "a teacher who repeatedly called a female sixth grade student a prostitute for a month and a half and encouraged the other students to harass her did not violate her substantive due process rights."[202]

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191. *Id.* at *1.
192. *Id.*
193. *Id.*
194. *Snelling*, 2001 WL 276975, at *2-3.
195. *Id.* at *2.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Snelling*, 2001 WL 276975, at *8.
200. *Id.*
201. *Id.* at *9.
202. *Id.* at *8 (citing Abeyta v. Chama Valley Indep. Sch. Dist., 77 F.3d 1253, 1258 (10th Cir.

The result is consistent with most courts' treatment of the state-created-danger theory in bullying and harassment cases. Ignoring a pattern of harassment or taking ineffective disciplinary steps against it will generally not be held to satisfy the state-created danger theory because the state has theoretically done nothing to make the danger any worse. For example, a boarding school superintendent, who was aware of frequent sexual assaults over a period of years against a handicapped resident student by other students in the school, neither intervened nor informed the child's parents of the assaults;[203] the Seventh Circuit concluded that such inaction could not support a due process claim based upon a theory of state-created danger.[204] Similarly, the Fourth Circuit rejected the state-created-danger theory where school officials' disciplinary actions toward students failed to deter repeated beatings of a middle school student.[205] The school had suspended one attacker twice and two others once, but the beatings continued with renewed force.[206] Characterizing the beatings as "frequent and brutal," the court nevertheless concluded that the school officials did not "intentionally or recklessly [take] steps to contribute to the violence" and could therefore not be held liable under a state-created-danger theory.[207] These results perhaps beg the question whether failing to intervene in school-based harassment actually encourages further harassment, but courts are extremely reluctant to travel down that road, in part no doubt, because the same argument could be made anytime the state fails to thwart or discourage tortious or criminal acts.

In at least one case, however, a court was willing to accept the theory where a school official threatened disciplinary action if a victim sought to protect herself.[208] A principal warned a student who had been subjected to several violent assaults "that, as a female, she had no right to defend herself against attacks by male students and that she would be punished if she attempted to [defend herself]."[209] The girl eventually suffered a severe spinal injury and lost her sight in one eye when a boy threw her over his shoulder, swung her around, and threw her against a steel pole while a teacher looked on and did nothing to intervene.[210] After reviewing the Third Circuit's standards for finding a state-created danger, the court held such actions by school officials could support a claim that the stated had created, "aided and fostered the dangerous environment."[211]

While victims of bullying may occasionally find success under the state-

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1996).

203. Stevens v. Umsted, 131 F.3d 697, 699-700 (7th Cir. 1997).

204. *Stevens*, 131 F.3d, at 705.

205. Stevenson v. Martin County Bd. of Educ., No. 99-2685, 2001 WL 98358, at *6-7 (4th Cir. Feb. 6, 2001).

206. *Stevenson*, 2001 WL 98358, at *1-2.

207. *Id.* at * 6-7.

208. Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618 (S.D.W. Va. 1998).

209. *Caroll K.*, 19 F. Supp. 2d at 624.

210. *Id.* at 620.

211. *Id.* at 624.

created-danger theory, the trend has been for courts to reject it even in the face of seemingly egregious conduct on the part of school officials. Courts will usually conclude that any danger of peer-on-peer bullying and violence existing in the victim's school is not the fault of school officials, despite the officials' inaction concerning – or, in some cases, even their participation in – the harassment.[212]

Viewed from the perspective of children and parents, it must seem perverse that the state may compel a child to attend school several hours a day, effectively stripping her during the school day of any protection, other than that of school employees, yet the state cannot be viewed as having restricted her freedom sufficiently to create a concurrent duty to protect her.[213] Nor can the state be viewed as having created or enhanced the danger the child faces each morning by failing to act in the face of it while forcing the child to endure it.[214] In effect, the state has created for the child a property interest in a free education, compelled her to avail herself of it, and then has acquired no duty to protect either that property interest or her liberty interest in bodily integrity, at least so far as those interests are threatened by others who themselves have been brought into her life by state compulsion.

2. Equal Protection Approaches

Bullying victims bringing claims against school officials under the Equal Protection Clause face the additional hurdle of proving that the school officials' response to the bullying constituted discrimination on the basis of the victims' membership in a definable class. Their hope lies in the principle that "although the Equal Protection Clause does not ordinarily impose upon government entities an affirmative duty to protect, it does limit the government's authority to deny protective services on the basis of an individual's disfavored class status."[215]

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212. *See, e.g.*, *Snelling*, 2001 WL 276975, at *8 (requiring behavior that "shocks the conscience" to find liability).

213. See *supra* Part II.A.ii.1.a. for a discussion of the lack of a custodial relationship between schools and students.

214. See *supra* Part II.A.ii.1.b. for a discussion of the state created danger theory.

215. Montgomery v. Independent Sch. Dist., 109 F. Supp. 2d 1081, 1097 (D. Minn. 2000). In *Montgomery*, a child was mercilessly and often brutally harassed by other students from the time he was in kindergarten through his tenth grade year; most of the harassment was based upon his perceived sexual orientation. The court refused the school district's motion for summary judgment on the plaintiff's equal protection claim because an issue of fact existed as to whether school officials had responded to females' and heterosexuals' complaints much more aggressively than they had to the plaintiff's numerous complaints over the years. According to the court,

> [W]hen girls filed sexual harassment complaints based on name-calling or inappropriate touching, the School District responded more strongly than it did to plaintiff's complaints. The School District's responses appear to range, depending on severity and the number of reported offenses against a particular student, from verbal reprimands along with mandatory group counseling to revocation of bus privileges and in-school and out-of-school suspensions. In each case, no matter how small the offense, the School District notified the alleged harasser's parents about the complaint, any disciplinary action taken, and its intent to refer any future complaints to the City of Duluth Police Department. With the exception

Unfortunately, many victims are hard pressed to demonstrate that they are part of a disfavored class at all or, if they can show membership in such a class, that the inaction of school officials was motivated by that class status. As the Seventh Circuit put it, the plaintiff "must show that the defendants acted with a nefarious discriminatory purpose."[216] The fact is that much of the time, teachers and administrators fail to take action because they are ignorant of the harms faced by victims of bullying or are indifferent to the victims' plights,[217] regardless of their class status.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[218] The Clause does not guarantee that every individual will be treated alike; rather "[t]he gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action."[219] The victim must therefore show that, compared to other students similarly situated, he was afforded a lower level of protection against harassment[220] and that he received that lower level of protection because he was a member of an identifiable class.[221] He must then demonstrate that the disparate treatment he received was not merely negligently discriminatory but rather was intentionally discriminatory or given with deliberate indifference to his rights because of his class status.[222]

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of the School District's response to the complaint plaintiff filed when he was in the tenth grade, there is absolutely no evidence in this case that it ever responded to his complaints by notifying the offending students' parents or threatening to notify the police about any future misconduct.

Id. at 1097.

216. Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996). Under facts much like those of *Montgomery*, the court held that homosexuals constitute an identifiable minority for equal protection purposes and that school officials' repeated refusals to intervene effectively to protect a student who was being harassed and beaten because of his sexual orientation violated the Equal Protection Clause. The court concluded that the school officials could offer no "rational basis for permitting one student to assault another based on the victim's sexual orientation." *Id.* at 458.

217. *See, e.g., id.* at 460 (finding a likelihood that a policy existed in the school district not to help battered homosexuals).

218. U.S CONST. amend. XIV, § 1.

219. *Nabozny*, 92 F.3d at 453 (quoting Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982)).

220. *See Snelling*, 2001 WL 276975, at *9 (defining liability for disparate treatment under the Equal Protection Clause).

221. *Nabozny*, 92 F.3d at 454.

222. *Id.*; *see also* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 871, 874 (N.D. Ohio 2003) (explaining that a state actor's "desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause" (quoting Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997)). *Schroeder* additionally held that a school official's failure to respond to a students' homophobic attacks against a fellow student whose brother was gay could support a claim of discrimination under the Equal Protection Clause where the principal had allegedly combined his indifference to the plaintiff's plight with comments to the plaintiff such as, "'So are you a fag, too?'" and, "'[Y]ou can learn to like girls. Go out for the football team.'" *Schroeder*, 296 F. Supp. 2d at 871.

While *Montgomery*, *Nabozny*, and *Schroeder* provide hope that some children may be able to hold schools accountable when they are brutalized by their peers while school officials stand by and do

The problem for most victims, of course, is that the motivation behind the school officials' inaction is not the victims' membership in some identifiable class. Instead, the inaction is rooted in the officials' apathy about bullying generally or their inability or unwillingness to recognize the extent of the problem or the seriousness of the victim's plight.[223] As is true under the Due Process Clause, mere apathy and incompetence are simply not constitutionally significant, regardless of the victim's status as a member of a class. If a female's plight is ignored as routinely as a male's, there is simply no violation of the Equal Protection Clause, however repugnant the inaction may be from a moral or educational point of view.

Ultimately, then, victims of bullying and even victims of substantial violence will find little help under section 1983. In the end, most courts are reluctant to conclude that school officials should be saddled with the responsibility, under the Constitution, to protect students from one another. Like the *DeShaney* Court, these courts are deeply resistant to attempts under the Due Process Clause to "transform every tort committed by a state actor into a constitutional violation."[224] Claims under the Equal Protection Clause fail, on the other hand, because victims of bullying are not necessarily members of a definable class who find less protection than others because of their membership in that class; they are simply the random victims of inaction borne out of school officials' ignorance, incompetence, or apathy.

iii. The No Child Left Behind Act

The federal No Child Left Behind Act provides a way of escape for any child who has been the victim of a violent criminal act in school. However, the Act does not force the school's hand with respect to remedying the problem in the unsafe school other than to require that children who attend schools designated as "persistently dangerous" be allowed to transfer to a "safe" school "within the local education agency, including a public charter school."[225]

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nothing, the reality is that the victims face significant hurdles even where there is some sort of animus motivating the school officials' indifference. The victims must be able to show that they are members of an identifiable minority, that they were treated differently with regard to harassment than were other students outside that minority, and that their minority status was the motivating factor. In *Nabozny* and *Schroeder*, the students were able to allege facts supporting each of those requirements, in part because the officials were foolish enough to vocalize their prejudices. *Nabozny*, 92 F.3d at 451-52; *Schroeder*, 296 F. Supp. 2d at 874. In *Montgomery*, the child was tormented for over ten years without being helped by school officials and could produce evidence of a clear pattern of dissimilar treatment of other children. 109 F. Supp. 2d at 1097. Most victims of bullying are unlikely to have available to them the kind of evidence available to the plaintiffs in *Montgomery*, *Nabozny*, and *Schroeder* because school officials are unlikely to be so targeted in their indifference to bullying as to offend the Equal Protection Clause or, when they are, so foolish as to make smoking-gun statements or leave paper trails to reveal the animus.

223. See *supra* notes 63-64 and accompanying text for a discussion of normative attitudes of teachers and other school district personnel towards bullying.

224. DeShaney v. Winnebago County Dep't. of Soc. Servs, 489 U.S. 189, 202 (1989).

225. The No Child Left Behind Act provides that:

Each State receiving funds under this chapter shall establish and implement a statewide

Such an approach at least helps a child escape physical assaults and a particularly dangerous school, but it is ultimately a recognition of defeat that places the primary burden of correcting the situation on the victim. In other words, it is the victim who must flee rather than the victimizer.[226] It is the victim who must accept that she has been run off from her school and her friends because of an attack by another student, while the attacker remains in the original school after sending an unmistakable and frightening message to the other students in the school. The victim is not moving to a new school because her parents have moved to a new neighborhood or have been transferred to a job in another city; she is moving because another child has literally beaten out of her the right to stay. Giving the victim a way out is certainly better than leaving her to suffer in a dangerous situation, but it hardly remedies the real problem existing in the original school and actually exacerbates the victimization of the child who is assaulted. In addition, it does nothing to help in a bullying situation unless the bullying escalates to a violent criminal act.

In the end, federal remedies for victims of bullying are simply all but nonexistent. What remedies do exist are useful only where there have been the most egregious breakdowns in supervision, but they are useless to combat the routine apathy of school officials in the face of the daily torment significant numbers of children face. If victims of bullying have any recourse at all against apathetic or incompetent school officials or any leverage to force real change in the schools where their victimization is occurring, they must find it under state law. Their search will be largely futile.

B. Bullying and State Law

State law typically contains the same theoretical flaw that makes federal law so ineffective with regard to on-going harassment: it is incident-specific; therefore, it provides little or no incentive for substantive change in the way school officials address bullying. Statutory attempts to address bullying directly fail, for the most part, to require the processes that are critical to effective prevention, leaving schools the option of creating anti-bullying policies, but not anti-bullying cultures.[227] Zero-tolerance approaches to violence in schools, whatever their attractiveness at first blush, are often too misguided and

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policy requiring that a student attending a persistently dangerous public elementary school or secondary school, as determined by the State in consultation with a representative sample of local educational agencies, or who becomes a victim of a violent criminal offense, as determined by State law, while in or on the grounds of a public elementary school or secondary school that the student attends, be allowed to attend a safe public elementary school or secondary school within the local educational agency, including a public charter school.

No Child Left Behind Act of 2001, 20 U.S.C § 7912 (2004).

226. Ironically, in employment settings, employers may not require adult victims of harassment to move in order to escape harassment from fellow workers. *See, e.g.*, Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (stating in dicta that an employer may not disadvantageously move a victim of harassment in order to prevent further harassment).

227. See *infra* Part II.B.i. for a discussion of anti-bullying legislation.

draconian to be sustained or to be effective.[228] Tort actions for negligent supervision face a variety of obstacles: immunity for school officials, flawed and unrealistic definitions of negligent supervision, and theoretical problems with foreseeability and causation.[229] Therefore, little fear of liability exists to inspire serious reform and thereby reduce the prevalence of victimization.

i. Anti-Bullying Legislation

A handful of states have made attempts to address the problem of bullying head-on by passing legislation requiring schools to develop anti-bullying policies,[230] but these statutes are unlikely to force real reform. The statutes vary in their requirements, with some incorporating the principles found in the current educational research better than others.[231] Most require policies with specified consequences for students who bully,[232] and most require some mechanism for reporting suspected incidents of bullying.[233] Where they tend to fall down, however, is that they seldom require a substantial and inclusive process that would result in the kind of cultural change that is required to significantly reduce the prevalence of bullying. What is actually required of the schools is something akin to the anti-harassment policies promulgated in response to sexual harassment;[234] the policies are good as far as they go, but whether they will be effectively enforced is another matter.

Most of the statutes begin with a definition of bullying that reaches fairly broadly and is consistent with the definitions found in anti-bullying literature. Washington state's definition is typical:

"Harassment, intimidation, or bullying" means any intentional written,

228. See *infra* Part II.B.ii. for a discussion of zero tolerance approaches to bullying problems.

229. See *infra* Part II.B.iii. for a discussion of tort liability as a solution to bullying.

230. At the time of this writing, the following states had passed anti-bullying legislation of one sort or another: Arkansas, ARK. CODE ANN. §§ 6-18-514, -1005(a)(5)(C) (Michie Supp. 2003); California, CAL. EDUC. CODE §§ 32261, 32265, 32270, 35294.21 (West Supp. 2004); Colorado, COLO. REV. STAT. ANN. § 22-32-109.1(2)(a)(X) (West 2003); Connecticut, CONN. GEN. STAT. §§ 10-222d, -263e (Supp. 2004); Georgia, GA. CODE. ANN. §§ 20-2-145, -751.4, -751.5 (2001 & Supp. 2004); Illinois, 105 ILL. COMP. STAT. 5/10-20.14 (West Supp. 2004); Louisiana, LA. REV. STAT. ANN. §§ 17:416.13, .17 (West Supp. 2004); New Hampshire, N.H. REV. STAT. ANN. §§ 193-F:2, 3 (2004); New Jersey, N.J. STAT. ANN. §§ 18A:37-13 to -18 (West Supp. 2004); New York, N.Y. EDUC. LAW § 2801-a(2)(j) (McKinney Supp. 2004); Oklahoma, OKLA. STAT. tit. 70, §§ 24-100.2 to .5 (Supp. 2004); Oregon, OR. REV. STAT. §§ 339.351, .353, .356, .359, .362, .364 (2003); Vermont, VT. STAT. ANN. tit. 16, §§ 165(a)(8), 565 (Supp. 2003); Washington, WASH. REV. CODE §§ 28A.300.285, 28A.600.480 (Supp. 2004); and West Virginia, W. VA. CODE §§ 18-2C-1 to -6 (2003). *See also* No Child Left Behind Act of 2001, 20 U.S.C § 7912 (2004).

231. *Compare* OKLA. STAT. tit. 70, § 24-100.5 (compelling school administrators to generate school-specific action requirements), *with* CONN. GEN. STAT § 10-263e (creating a voluntary grant program for safe school initiatives).

232. See *infra* note 236 and accompanying text for an example of a statute that requires school policy to list specific consequences of bullying.

233. See *infra* note 237 and accompanying text for a statute that has reporting requirements.

234. See *supra* note 146 and accompanying text for a description of a school's response to sexual harassment.

verbal, or physical act, including but not limited to one shown to be motivated by any characteristic in RCW 9A.36.080(3), or other distinguishing characteristics, when the intentional written, verbal or physical act:

a) Physically harms a student or damages the student's property; or

b) Has the effect of substantially interfering with a student's education; or

c) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or

d) Has the effect of substantially disrupting the orderly operation of the school.

Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying.[235]

Such definitions are helpful because they target behavior that is much more damaging than the bullying faced by Opie and Beaver, and they recognize that severe, pervasive harassment is damaging regardless of the bully's motive. Additionally, while the definition does not suggest that sexual, religious, or racial harassment is not repugnant on another level or that those forms of bullying need no special attention, it does recognize the damage being done to thousands of students who can find no protection under traditional definitions of harassment.

Anti-bullying statutes also typically require that the school policy define bullying and spell out specific consequences for those who engage in bullying, that the policy be posted conspicuously, and that a copy of the policy be sent to all parents and students.[236] In addition, the policies generally must require that school employees report any suspected bullying to the principal and encourage

235. WASH. REV. CODE § 28A.300.285(2).

236. The Arkansas anti-bullying statute is typical:

a) The school board of directors in every school district shall adopt policies to prevent pupil harassment, also known as bullying.

b) The policies shall: (1) Clearly define conduct that constitutes bullying; (2) Prohibit bullying while on school property, at school-sponsored activities, and on school buses; (3) State the consequences for engaging in the prohibited conduct, which may vary depending on the age or grade of the student involved; (4) Require that a school employee who has witnessed or has reliable information that a pupil has been a victim of bullying as defined by the district shall report the incident to the principal; (5) Require that notice of what constitutes bullying, that bullying is prohibited, and the consequences of engaging in bullying be conspicuously posted in every classroom, cafeteria, restroom, gymnasium, auditorium, and school bus in the district; and (6) Require that copies of the notice of what constitutes bullying, that bullying is prohibited, and consequences of engaging in bullying be provided to parents, students, school volunteers, and employees. Each policy shall require that a full copy of the policy be made available upon request.

ARK. CODE. ANN. § 6-18-514 (a)-(b)(Michie Supp. 2003).

others to so, and the policies must explicitly prohibit retaliation based upon reported incidents.[237] Some states require their departments of education to develop model policies for use in formulating local school policies.[238]

Such requirements are certainly a step in the right direction if they are consistently and firmly enforced. At the least, they may inform parents of the problems existing in most schools and may encourage teachers and administrators to be more vigilant.

The difficulty, however, is that written policies are only as effective as the efforts to enforce them, and those efforts generally turn on whether the school culture has embraced the policies.[239] To the extent the policies are developed without the intensive involvement of the whole school community, they will likely be enforced only in egregious situations.[240] Model policies may be helpful in guiding conversations among members of a school community, but they are just as likely – perhaps more likely – to encourage boards to adopt the policies with little real involvement of the school community. School-wide discussions and intensive information gathering are time consuming and difficult;[241] it is the most natural thing in the world for administrators and board members to find the simplest and least difficult path to satisfying the state's requirements.

Oklahoma legislators seem to have recognized this tendency in school officials. The Oklahoma statute requires the schools to attempt to involve the school community; requires the department of education to provide lists of research-based approaches to bullying prevention; and requires the creation of a safe school committee in each school to review and recommend to the principal proven anti-bullying programs, approaches to staff training, and methods for involving the school community in preventing bullying.[242] Such an approach

237. *See, e.g., id.* (requiring school employees to report known or suspected incidents of bullying to school principal.

238. West Virginia's anti-bullying statute, for example, requires that the state department of education "develop a model policy applicable to grades kindergarten through twelfth" as a way of assisting school boards in developing their own policies. W. VA. CODE § 18-2C-3(d) (2003).

239. See *supra* Part I.D. for a discussion of the impact of school culture on bullying.

240. See *supra* Part I.D.ii. for a discussion of the importance of the participation of the entire school in developing policies to prevent bullying.

241. *See, e.g.*, SAMSHA Model Programs: Olweus Bullying Prevention Program, *supra* note 108 (requiring between 6 and twelve months to deliver, including weekly meetings and periodic parent-teacher contact).

242. The Oklahoma anti-bullying statute provides that "the district board of education shall make an effort to involve the teachers, parents, and students affected." OKLA. STAT. tit. 70, § 24-100.4(A) (Supp. 2004). Most statutes have similar language, but Oklahoma further requires that a safe school committee for each school be created to:

> study and make recommendations to the principal regarding . . . [m]ethods to encourage the involvement of the community and students, the development of individual relationships between students and school staff, and use of problem-solving teams that include counselors and/or school psychologists. In its considerations, the Safe School Committee shall review traditional and accepted harassment, intimidation, and bullying prevention programs utilized by other states, state agencies, or school districts . . . . The State Department of Education shall compile and distribute to each public school site a list of research-based programs appropriate for the prevention of harassment, intimidation, and bullying of students at

makes substantially more sense than simply handing a school board or principal a model policy that can be photocopied and distributed to staff, students, and parents.

Some states have added a requirement that schools report annually to the state the number of bullying incidents that have resulted in disciplinary action in that year; the reports are then made available to the legislature.[243] Presumably, such a requirement is intended to create accountability and an incentive for reducing the prevalence of bullying in each school. Given the underground nature of bullying, however, the requirement makes little sense. Schools that have taken a proactive approach to bullying will likely report more disciplinary actions than those that have taken a passive approach because proactive schools will be identifying and confronting bullies as a matter of course. The appearance will be, however, that the proactive school has a serious problem and the passive school has little or no problem at all.

Such reporting requirements – at least those based upon disciplinary actions rather than anonymous gathering of data about the true prevalence of bullying in each school – provide, in fact, a disincentive for discovering problems. Why would a school want to discover bullying incidents if state legislators might later use those discoveries to point fingers at those same schools while praising and rewarding passive schools? The answer, of course, is that they would not; and the underground bullying will remain underground and unopposed.

Most statutes also include an immunity provision for those staff members who in good faith notify administrators of bullying incidents, some shielding the staff members from liability arising from the reporting of the incident,[244] and some shielding staff members for failing to remedy the reported incident.[245] In states where a real danger of being held liable exists for failing to intervene, the latter provisions would make sense. Defendants, however, are seldom at risk of such liability; so it is difficult to discern what protection is really being afforded.[246] One could argue, of course, that such a provision has created an implied cause of action for failing to remedy where the staff member has failed to report the bullying; however, many anti-bullying statutes include a provision that nothing in the statute has altered current tort law or created a new cause of action.[247]

Finally, most statutes contain a provision encouraging or requiring training

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school.

OKLA. STAT. tit. 70, § 24-100.5(B–C) (2004).

243. *See, e.g.*, COLO. REV. STAT. ANN. § 22-32-109.1(b) (West 2003) (stating Colorado's requirements for safe school reporting).

244. *See, e.g.*, W. VA. CODE § 18-2C-4 (2003) (granting tort claim immunity for prompt reporting of bullying in accordance with school policy).

245. *See, e.g.*, ARK. CODE ANN. § 6-18-514(c) (Michie Supp. 2003) (granting school employee immunity from tort liability if employee reports violations, even if employee fails to remedy such violation).

246. See *infra* Part II.B.iii. for a discussion of school's tort liability.

247. *E.g.*, OR. REV. STAT. § 339.364 (2003) (stating that no statutory cause of action exists under Oregon's laws for preventing bullying, harassment, and intimidation).

for school employees in how to identify and prevent bullying.[248] Unfortunately, the requirement for training is generally conditioned upon the existence of funds to carry it out,[249] and those funds are not necessarily guaranteed to the schools. Teachers and administrators are generally poorly equipped to address the problem of bullying without training,[250] so the anti-bullying statutes that do not guarantee funding and do not explicitly require effective training will likely be rendered impotent by school officials' lack of expertise. In addition, "training" in a school setting can mean many things from the occasional in-service to substantial and ongoing instruction in bullying prevention. Unless the funds are guaranteed and the level of instruction is required to be research-based, rigorous, and ongoing, the schools' attempts to mount serious and sustained efforts against bullying will probably be doomed at the outset, despite everyone's best intentions.[251]

It is that sort of fatal flaw that seems to characterize the majority of the anti-bullying legislation. The statutes seem clearly to be based, at least in part, on current educational research; but they too often stop short of forcing the schools to engage in the kind of cultural reform that the educational literature consistently says must take place.[252] They may encourage something like a whole-school process guided by research-based principles, but they do not require it and may not fund it. Often the only real requirement is that a written policy be developed that spells out consequences for bullying and retaliation. Because most states direct their departments of education to provide a model anti-bullying policy, the schools can easily bypass the arduous and complicated task of reforming the school climate and instead, post a policy that will likely be combined with uninformed, clumsy enforcement, if it is enforced at all.

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248. West Virginia's anti-bullying statute, for example, provides that:

a) Schools and county boards are encouraged, but not required, to form bullying prevention task forces, programs and other initiatives involving school staff, students, teachers, administrators, volunteers, parents, law enforcement and community members.

b) To the extent state or federal funds are appropriated for these purposes, each school district shall:

1) Provide training on the harassment, intimidation or bullying policy to school employees and volunteers who have direct contact with students; and

2) Develop a process for educating students on the harassment, intimidation or bullying policy.

c) Information regarding the county board policy against harassment, intimidation or bullying shall be incorporated into each school's current employee training program.

W. VA. CODE § 18-2C-5 (2003).

249. *Id.*

250. *See supra* note 108-12 and accompanying text for an illustration of the types of extensive programs that have the ability to reduce or eliminate bullying in a school.

251. *See supra* Part I.D.ii. and accompanying text for a discussion of the serious time and resource commitments necessary to facilitate a successful anti-bullying program.

252. See *supra* note 107 and accompanying text for a discussion of the need for a school-wide commitment to developing an anti-bullying culture.

The anti-bullying statutes, though they are intended to be serious attempts to recognize and confront a serious problem in our schools, typically all but guarantee their own ineffectiveness. The flaw, like the flaw in the various liability theories available to victims of bullying, is rooted in a fundamental misunderstanding of the dynamics of bullying and the dynamics of effective supervision. The statutes seem to be based on the premise that bullying is easily discovered and that a list of consequences for bullying will address the problem. Those premises, as the educational research has demonstrated repeatedly, are false: bullying is largely an underground phenomenon, and only a cultural shift for everyone involved is likely to produce the kind of supervision by school officials that will bring it to the light and stop it.[253]

ii. "Zero Tolerance" Approaches

A controversial development in recent years has been the so-called "zero tolerance" approaches to a variety of dangerous student behaviors such as possession of firearms or drugs on the school site. These approaches are beginning to show up in bullying prevention programs and legislation.[254] They are a strict liability approach to the breaking of rules, an approach that ignores mitigating circumstances and individual acts in favor of certainty and uniformity of punishment.[255] While they may seem reasonable at first blush – after all, why would schools go easy on students who show up to school packing guns? – they suffer serious flaws in practice and lead to absurd results. As they expand to cover other behaviors, the lack of proportionality and even rationality in the punishments imposed upon students reveals the approaches to be fatally flawed. They seldom distinguish between the forest fire and the match, so they degenerate into putting out matches with fire hoses. In addition, where state law ties bullying to zero tolerance approaches, expulsion and suspension of individuals may replace educating offenders about the evils of bullying and gender and racial harassment.[256]

Many zero tolerance policies in schools are extensions of the requirements of the 1994 Gun Free School Act.[257] The Act requires expulsion for bringing weapons to school, but administrators can make case-by-case determinations to deviate from the expulsion requirement.[258] Every state has complied with the Act, which conditions federal money on compliance.[259]

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253. See *supra* notes 105-06 and accompanying text for a discussion of a British study showing a strong correlation between a culture of anti-bullying and students' perceptions of a positive school culture.

254. *See* Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 787 (2003) (stating that many state bullying and anti-harassment laws were written within the zero-tolerance framework and are thus punitive in nature).

255. *See* James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 371 (2001) (explaining the concept of zero tolerance).

256. Stein, *supra* note 254, at 792.

257. Peden, *supra* note 255, at 372.

258. *Id.*

259. *Id.*

Zero tolerance policies, however, often cover conduct that goes beyond the original intent behind the Act, which was to deal firmly with guns and violence in the nation's schools.[260] One California school, for example, has implemented a zero tolerance policy that targets "teasing, taunting or bullying for any reason."[261] Such an extension is troublesome, because even when the policies have targeted guns and drugs, there have been results that are staggeringly unjust.

For example, a school district suspended a girl involved in a discussion of the Columbine horrors for saying that she could imagine how one might "snap" under the pressure of relentless teasing.[262] A high school student was suspended for sixteen weeks for placing a knife in his locker rather than turning it in after talking a friend out of committing suicide.[263] A six-year-old was suspended for offering a classmate a lemon drop because the teacher did not know what the candy was.[264] The list goes on, of course – tales abound of draconian punishments of otherwise innocent, or at least harmless, behavior under inflexible zero tolerance policies that drain discipline policies (and, apparently, administrators) of common sense. While legislatures must be sympathetic to the difficulties facing school administrators, they need not abandon the requirement for rational, sensible approaches to the prevention of bullying, harassment, and violence.[265]

Not only are such policies often nonsensical, they lead to costly litigation when students challenge their suspensions and expulsions in court.[266] Such challenges are hardly frivolous and may prove to be increasingly successful in undermining zero tolerance policies. Zero tolerance policies raise substantive due process concerns because they often lack specificity concerning what constitutes an offense.[267] Where punitive consequences are imposed upon rule violators, it is fundamental that the violators be able to discern what would constitute a violation.[268]

Similarly, it is fundamental that the violator know he is committing the prohibited act. For example, where a student's friend left a knife in the student's car without the student's knowledge, the Sixth Circuit held that the student's subsequent expulsion violated his right to substantive due process because the expulsion bore no rational relation to any legitimate government interest.[269]

260. *Id.* at 369-70.

261. Richard C. Demerle, Note, *The New Scylla and Charybdis: Student Speech vs. Student Safety After Columbine*, 10 B.U. PUB. INT. L.J. 428, 430-31 (2001).

262. *Id.* at 431.

263. Peden, *supra* note 255, at 373.

264. *Id.*

265. Francis A. Allen, *A Matter of Proportion*, 4 GREEN BAG 2D 343, 348-49 (2001).

266. *See* Stewart & Russo, *supra* note 45, at 366 (illustrating an example where a school administrator's lack of discretion in the school district's zero tolerance policy forced a student to endure unnecessary and costly litigation appealing his sanction).

267. Peden, *supra* note 255, at 375.

268. Allen, *supra* note 265, at 348.

269. Robert C. Cloud, *Say Yes to Due Process Before Saying No to Weapons*, 153 EDUC. L.

Indeed, it is difficult to imagine what state interest could justify teaching a student that the state can punish its citizens though they have intended no wrong and were unaware they were committing a violation of any rule. While it is true that strict liability criminal statutes exist in the real world and that intent is not a necessary element of offenses under such statutes, unknowing or unintentional offenses under zero tolerance policies differ from those under strict liability statutes in that the former often incur serious punishments, create stigma for the offender, and are not offenses a reasonable person would necessarily recognize as a violation.[270]

In addition, zero tolerance policies may raise Eighth Amendment concerns, given the lack of proportionality in the penalties for otherwise minor violations.[271] Zero tolerance, as one commentator has noted, "represents the ultimate rejection of penal proportionality" by focusing only on the result of the conduct at the exclusion of other factors.[272] While the courts have yet to go so far in applying the Eighth Amendment to school discipline settings,[273] a willingness to do so may exist in light of recent decisions that have recognized Eighth Amendment protections that reach beyond criminal settings.[274]

Beyond the patent injustices often perpetrated under these policies, they serve to acclimate students to the unnecessary sacrifice of individual rights for the needs of a state institution.[275] If the nation's public schools have any central mission, surely it is to prepare each generation for participation in a vital democratic society; the schools cannot fulfill that mission with policies that lack the basic fairness and rationality that should underlie all of the actions of a state subject to the rule of law. To subject students to the irrationality and injustice of zero tolerance policies is a betrayal of the core mission of the public schools and of the core values that underlie the nation's laws. Such policies erode students' respect for and understanding of the principles that govern American society[276] and guarantee injustice and injury in the process.

As an approach to the problem of bullying, zero tolerance policies simply provide confirmation to children that some people and some groups can lord their power over others and that there is nothing anyone can or will do about the abuses. In fact, the institution most able to intervene becomes itself an

REP. 833, 834 (2001) (citing Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000)). The author warns that school leaders and attorneys must recognize that suspending a student for an unknowing violation of the rules may not pass constitutional muster under a due process analysis. *Id.* at 834.

270. *See* Peden, *supra* note 255, at 377 (questioning the reasonableness of the strict liability standards from criminal statutes within zero tolerance policies).

271. *Id.* at 375-76.

272. Allen, *supra* note 265, at 348.

273. The Court in *Ingraham v. Wright*, in fact, rejected the opportunity to do so in a spanking case, explaining that the Amendment had always been interpreted to apply in criminal settings. 430 U.S. 651, 664-71 (1977).

274. *See* Peden, *supra* note 255, at 375-76 (stating that courts may be required to extend Eighth Amendment protection to non-criminal situations given recent Supreme Court decisions).

275. *Id.* at 370.

276. *Id.* at 389-90.

additional bully, picking its victims on the basis of irrational and arbitrary criteria and handing out punishments all out of proportion to the alleged wrongs. To initiate a policy of "zero tolerance" for bullying is to do much more than to make a commitment to stop bullying; it is to do the same damage in a new way.

Finally, zero tolerance approaches tend to strip educators of the power to educate students. Rather than applying appropriate levels of punishment and taking advantage of the "teachable moment" when children engage in bullying behaviors, educators are forced to apply a "one strike – you are out" approach to misbehavior.[277] Students may learn a great deal about punishment for particular behaviors, but they learn little about rethinking the values and motivations that inspired those behaviors or, in fact, about what makes those behaviors wrong in the first place. Unlike whole-school approaches to bullying prevention – which force a sustained discussion about bullying in all its forms, its roots, and its effects[278] – zero tolerance approaches simply remove the offender without teaching anyone anything deeper than that the rules had better be observed.

Happily, states may be recognizing the problematic nature of zero tolerance policies and retreating from their directionless application.[279] The American Bar Association has also weighed in with a blistering renunciation of zero tolerance policies.[280] Lawmakers and educators should welcome such trends as a return to sanity and resist the temptation to employ zero tolerance policies as a tool against bullying.

Lawmakers and educators should also recognize that, ironically, zero tolerance policies likely encourage rather than discourage bullying behavior because they create an atmosphere in which "putting out matches" is even less likely to occur than it does now. The average teacher will be reluctant to address the harsh teasing and taunting that are often symptomatic of a bullying situation if the consequences for the offender are excessive and unjust. Knowing that her job may be on the line if she intervenes in a reasonable way but does not report the violation, and unwilling to subject a child to suspension or expulsion for what could be corrected with a more reasonable response, the teacher will avoid "seeing" the behavior and hope something more damaging is not occurring out of her sight. In other words, the thinking teacher will let the match burn and take her chances on a possible forest fire to prevent the damage that comes from using a fire hose to put out a match.

iii. Tort Liability

Liability-based solutions offer little help to victims either. Tort theories are currently so lopsided in favor of schools[281] that there can be no real fear of

277. Stein, *supra* note 254, at 792.

278. See *supra* Part I.D.ii. for a discussion of the benefits of a school wide approach.

279. Peden, *supra* note 255, at 387.

280. *See* Ralph C. Martin, *Zero Tolerance Report to Membership*, 2001 A.B.A. SEC. CRIM. JUST. (calling for individualized responses to students' behavior), *available at* http://www.abanet.org/crimjust/juvjus/zerotolreport.html.

281. See *infra* Part II.B.iii.1. for a discussion of schools' immunity from suit and subsequent lack

damage awards for ignoring best practices in the face of what schools should know is a dangerous and pervasive problem. Immunity and problems with foreseeability and causation doom most attempts by victims to obtain remedies from schools that have allowed the victimization to occur.[282] As a result, no urgency exists for schools to clean up their supervision approaches and undertake serious efforts to change the school culture.

1. The Barrier of Immunity

Various forms of immunity from tort liability often serve as substantial shields against school liability for injuries that occur as a result of questionable supervision decisions by school officials. The rationales underlying such immunity rest on the legitimate need to protect the state treasury from being raided by floods of damage awards and on the need to protect school officials from being hamstrung by fears of lawsuits concerning their decision-making.[283] In protecting those interests, however, immunity often precludes parents and students from effectively holding schools and their employees accountable for inadequate supervision that has led to students' injuries at the hands of their peers. As a result, immunity severely weakens incentives that might otherwise exist in tort theories to inspire care among school officials who fail to take seriously enough their role in protecting students from violence or harassment by other students.

At its most protective, the doctrine of sovereign immunity offers blanket immunity to defendants regardless of the level of negligence displayed by the officials. The doctrine typically applies to the state and the various governmental entities serving as arms of the state and may include school boards themselves. Where the doctrine applies, the state cannot be sued in tort and cannot be held vicariously liable for the acts of its agents. As such, immunity can act as a complete bar to actions against a school. For example, under Virginia law, school boards "act in connection with public education as agents or instrumentalities of the state, in the performance of a governmental function, and consequently they partake of the state's sovereignty with respect to tort liability."[284] The immunity enjoyed by Virginia school boards is thus "absolute" and can bar suit even as to grossly negligent actions by school officials.[285] Whether a school board enjoys such sweeping immunity depends upon how the jurisdiction views its relationship to the state. In Kentucky, for example, the school board is not viewed as standing on the same footing as the state itself and therefore does not enjoy the same level of immunity as the state.[286]

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of accountability for negligent supervision by school officials.

282. See *infra* note 284 and accompanying text for a discussion of sovereign immunity and its application to public schools.

283. See *infra* note 286 and accompanying text for an example of a school decision that is protected by immunity.

284. B.M.H. v. Sch. Bd. of City of Chesapeake, Va., 833 F. Supp. 560, 573 (E.D. Va. 1993).

285. *Id.* at 573.

286. Yanero v. Davis, 65 S.W.3d 510, 527 (Ky. 2001). In explaining the immunity that shields

School boards and school officials sued in their individual capacities often do not enjoy a complete shield against liability for their actions, but the shield can be very difficult to penetrate nonetheless. Such immunity is typically "qualified" in that it applies only to acts that can be considered "discretionary" or to acts performed negligently as opposed to those performed with gross negligence, recklessness, malice, etc. Nevertheless, few disciplinary decisions would fall outside those protected categories.

For example, an Oklahoma school was immune from liability where a student was injured in a fight while no teacher was scheduled to supervise the hall at the beginning of a lunch period.[287] An Oklahoma statute provided that "[t]he state or a political subdivision shall not be liable if a loss or claim results from . . . [p]erformance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees . . . ."[288] The court reasoned that whether and how to provide supervision required discretion on the part of school officials, and was therefore exactly the sort of judgment call that the state legislature had explicitly sought to protect from second-guessing by courts and juries.[289] The Texas Supreme Court defined a discretionary act under a similar statute as one that involves "personal deliberation, decision and judgment,"[290] and held immune a teacher who failed to act upon reports of threats by one of her students against another.[291] The threatened student was eventually attacked and injured so badly that she required several surgeries and ten days in the hospital.[292] The court concluded that the Texas Education Code did not define classroom supervision duties "with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[293] Therefore, the code's grant of immunity for acts involving "the exercise of judgment or discretion" protected the teacher from liability.[294]

Even where such discretion is not completely protected, immunity may apply unless the school officials' fault exceeds ordinary negligence. An Ohio school district, one of whose teachers left several sixth-grade students unattended in a classroom after school while she attended a meeting in another

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local boards of education from actions in tort, the Kentucky Supreme Court distinguished between sovereign immunity, which creates a complete shield of immunity, and governmental immunity, which provides a shield for discretionary acts but not for ministerial or proprietary acts:

> A local board of education is not a "government," but an agency of state government. As such, it is entitled to governmental immunity, but not sovereign immunity . . . . Thus . . . whether the Jefferson County Board of Education is subject to tort liability in this case partially depends upon whether it was performing a governmental function or a proprietary function . . . .

Id.

287. Franks v. Union City Pub. Schs., 943 P.2d 611 (Okla. 1997).

288. *Franks*, 943 P.2d at 613.

289. *Id.*

290. Downing v. Brown, 935 S.W.2d 112, 112 (Tex. 1996).

291. *Id.* at 113.

292. *Id.*

293. *Id.* at 114 (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 654 (Tex. 1994)).

294. *Id.*

building, was shielded from liability for an extended assault upon one of the students by his peers because "[a] classroom teacher has wide discretion under [Ohio law] to determine what level of supervision is necessary to ensure the safety of the children in his or her care."[295] To be liable for the student's injuries, the teacher's discretion needed to be "exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."[296] The court concluded that her decision was "within the scope of her discretionary authority" under Ohio law.[297]

In *B.M.H.*,[298] teachers who were aware of a threat of sexual assault by one student against another and apparently did nothing to prevent it would be liable to the victim for damages only if a jury were to conclude that their actions were grossly negligent.[299] The court defined "gross negligence" under Virginia law as the "absence of slight diligence, or the want of even scant care."[300]

Such protections may be rooted in the common law or in statutory schemes that seek to protect schools and school officials from constant exposure to liability for the myriad daily decisions educators must make. Virginia's immunities, for example, are rooted squarely in the common law doctrine of sovereign immunity and adapted to modern rationales.[301] Texas, on the other hand, legislatively mandated for teachers qualified immunity that had not previously existed under the common law in that state.[302]

Whether an act by a school official is covered by some level of immunity must often be analyzed against a backdrop of waivers and exceptions embedded in a statutory scheme that attempts to reduce the effects of sovereign immunity's extensive sweep. Typical of many state statutory schemes of immunity is the Kansas Tort Claims Act.[303] First, the Act provides that

> [e]ach governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of [Kansas].[304]

It then exempts governmental agencies and their employees from liability for damages under a series of exceptions, including "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."[305]

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295. Marcum v. Talawanda City Schs., 670 N.E.2d 1067, 1070 (Ohio Ct. App. 1996).

296. *Id.*

297. *Id.*

298. 833 F. Supp. at 573.

299. *Id.* at 574.

300. *Id.* (citing Frazier v. City of Norfolk, 362 S.E.2d 688, 691 (Va. 1987)).

301. Carr v. Salem City Schs., No. CL98-125, 1999 WL 104800, at *1 (Va. Cir. Ct. Jan. 27, 1999).

302. *Downing*, 935 S.W.2d at 114.

303. KAN. STAT. ANN. §§ 75-6103 to 6120.

304. *Id.* at § 75-6103(a).

305. *Id.* at § 75-6104(e).

Disciplinary decisions generally fall within one of the exceptions to waiver so that the softening of sovereign immunity's effects will not expose public education, one of the largest and most complex activities of state government, to a debilitating and potentially enormously costly threat of liability for the thousands of disciplinary decisions made every day in the system's schools.

Protecting state treasuries and insulating educators from threats of lawsuits for legitimate judgment calls are two of the most common rationales for covering school officials with immunity. As a Virginia court explains, immunity "preserves [the state's] control over state funds, property and instrumentalities" and "protects the state from burdensome interference with the performance of its governmental functions."[306] With respect to schools, the first rationale is eminently reasonable. Without immunity for ordinary negligence in everyday decision-making, the sheer number of educators in any state's public system would create a potentially devastating liability exposure that could ultimately leave the state incapable of providing a free public education system to its citizens.

The second rationale is also rooted in a legitimate need to free teachers from the fear of liability as they take on the significant responsibilities of educating large groups of young people. The *Davis* dissent, though not discussing directly the doctrine of immunity, captures the sense of the disciplinary challenge that faces teachers every day:

> Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to establish an understanding of appropriate behavior. The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend.[307]

For that reason, courts and legislatures are uncomfortable subjecting the "personal deliberation, decision and judgment"[308] of typically overburdened and under-compensated teachers to the 20/20 hindsight of juries, especially when those juries are attempting to conclude whether disciplinary or security measures were reasonable in light of severe injuries resulting from a level of student brutality that surprised the adults who were in charge. After a student was fatally shot by another student in an Oklahoma high school, the Oklahoma Supreme Court framed the dilemma well:

> A great deal of discretion is involved in determining what security measures are needed. Is the School Board to be held as acting in bad faith and therefore liable because it thought three guards would be sufficient, if a jury finds that four were needed and not three, or are the Board Members to be held individually liable if they determine that twenty hours of instruction is sufficient, when the jury believes that twenty-four is? We think not. The decisions required to be made by

306. *Carr*, 1999 WL 104800, at *1 (citing Hinchey v. Ogden, 307 S.E.2d 891, 894 (Va. 1983)).

307. *Davis*, 526 U.S. at 672-73 (Kennedy, J., dissenting) (citing Brief of Amici Curiae Nat'l Sch. Bds. Ass'n et al., at 10-11).

308. *Downing*, 935 S.W.2d at 114.

the School Board and its employees and agents called for legitimate judgment calls.[309]

In other words, it hardly seems fair to shoulder school officials with the responsibility for controlling often unpredictable and hidden actions of school children and then subject those same officials to liability if on a particular day and in a particular situation a decision could be characterized as unreasonable, given the injury a child suffered at the hands of another child. Simply examining the daily decisions of parents would make reasonable people balk at such a standard.

On the other hand, research has made clear that children are being brutalized on a daily basis in schools across the country; insulating school officials from liability for failing to intervene effectively leaves those who are tormented under their care from any significant recourse against those who were in the best position to protect them.[310] It is not difficult to argue, in fact, that "[t]here is nothing fair about the principle that the [state] is immune from lawsuits for its acts of simple negligence when performing its governmental function. The doctrine of sovereign immunity causes extreme hardships in individual cases."[311] While states protect, through doctrines of immunity, the adults in whose care parents have placed their children, states leave the children unprotected against the brutalities of their peers – brutalities the educational community surely knows are occurring,[312] even if administrators cannot always identify the specific instances.

Thus, immunity solves one problem at the expense of another and protects adults at the expense of the most vulnerable children. Characterizing the result in that way is in some ways unfair and in some ways exactly accurate. It is not the protecting of teachers and administrators that is deplorable; the alternative could cripple education. It is the failing to protect the children that cannot continue if the nation is to take seriously its obligations to them.

2. The Problem of Foreseeability

Even when immunity is not a bar, tort actions against schools in response to injuries from bullying still face significant hurdles. A school generally cannot be held liable for injuries resulting from a student's "impulsive, unanticipated acts"[313] because such acts are usually viewed as unforeseeable – therefore, courts either impose no duty to prevent the act, or they deem the act to be a superseding cause that has broken the chain of causation.[314] Because bullying is

309. Truitt v. Diggs, 611 P.2d 633, 635 (Okla. 1980).

310. *See supra* notes 287-94 and accompanying text for a discussion of how immunity has been used in various states to protect school officials from liability for failure to prevent the harm.

311. *Carr*, 1999 WL 104800 at *1.

312. *See supra* Part I.C. for a discussion of the frequency of bullying in schools.

313. Carl Silverman, *School Violence: Is It Time to Hold School Districts Responsible for Inadequate Safety Measures?*, 145 EDUC. L. REP. 535, 539 (2000).

314. See *infra* Part II.B.iii.2.b. for a discussion of causation when the act of the child is deemed unforeseeable.

an underground activity,[315] school officials seldom see glaring evidence that would alert them to a particular pattern of bullying which is occurring or to a particular violent incident which is imminent. Therefore, plaintiffs are in trouble from the outset because they can seldom establish the foreseeability of the act that created their particular harm.

a. Duty as a Function of Foreseeability

It may seem counterintuitive to most parents that school officials have little duty to protect their children from the violence of other children[316] because most believe that schools act *in loco parentis*, at least in terms of protecting their children from violence.[317] The lack of maturity in students would seem to justify an expectation that teachers will supervise their students to ensure that students' immature judgments and actions are kept in check to avoid injuries.[318] To some extent, these parents are correct: the doctrine of *in loco parentis* is arguably still the prevailing view in American courts, and professionals are expected to do all that is reasonably necessary to ensure that students learn in a safe environment.[319]

Even so, schools can logically be required to prevent only "such risks of harm as are foreseeable;"[320] they cannot be asked to prevent what they could not have anticipated. As a result, most courts deem students' tortious acts foreseeable only where prior knowledge of a threat existed; only then will a school be liable for failing to take reasonable precautions to prevent injury.[321] Many courts, it is true, state that schools have a duty to "protect the pupils in [their] custody from dangers reasonably to be anticipated;"[322] and many of those courts have been willing to consider that duty, under some circumstances, to include a duty on the part of schools to "protect [their] students from assaults by other students."[323] Those courts, however, are also careful to point out that

315. See *supra* notes 66 to 71 and accompanying text for a discussion of the secretive nature of bullying and factors that contribute to this secretiveness.

316. *See* Silverman, *supra* note 313, at 550 (discussing the obligations of schools to their students).

317. *Id.*

318. *See* NATHAN L. ESSEX, SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS 105 (1999) (citing Miller v. Griesel, 308 N.E.2d 701, 706 (Ind. 1974)). The doctrine, however, has lost some of its force in recent decades, as the standard of care generally imposed upon schools has moved from "that of a reasonable parent" to the more common standard of conduct not involving "willful or wanton misconduct." *Id.* at 106.

319. *See id.* at 94-95 (stating that most courts require professional educators to act prudently when supervising children in order to ensure safety in schools).

320. J.N. v. Bellingham Sch. Dist., 871 P.2d 1106, 1111 (Wash. Ct. App. 1994).

321. ESSEX, *supra* note 318, at 100-01 (stating that school personnel may be liable for injury to a child from a fight at school when the personnel were aware the child had been threatened or had some other prior knowledge that the fight was going to take place).

322. *J.N.*, 871 P.2d at 1111.

323. Garufi v. Sch. Bd. of Hillsborough County, 613 So. 2d 1341, 1342 (Fla. Dist. Ct. App. 1993). In *Garufi*, a student severely injured a parent when he struck her in the mouth without warning. She

schools are not insurers of their students' safety against all possible harms.[324] Therefore, before liability attaches, specific facts must have warned authorities that a particular threat existed and have indicated that action on the part of the school could have prevented injury.[325]

For example, where a female student had alerted school officials that she had been threatened by other students on her school bus and that a "boy named 'Andy'" had been threatened for trying to defend her,[326] a Louisiana court of appeals held the school partially responsible for failing to intervene to prevent Andy from being assaulted and badly beaten at a bus stop soon after the officials were alerted.[327] The court reasoned that the school officials had failed to take the necessary steps to alert the bus driver of the potential problems and thereby give him a chance to intervene when several more students than normal got off the bus at a particular bus stop.[328]

Similarly, where a high school student was beaten and raped on school grounds before the start of the school day, the Oregon Supreme Court held that a reasonable fact-finder could conclude that the school had a duty to provide either supervision of the area in front of the school or a warning concerning the danger of assault.[329] Only fifteen days before the student was raped, a woman had been sexually assaulted on the school grounds; in addition there had been several other attacks of various sorts on school grounds.[330]

After a lengthy discussion of the historical and theoretical underpinnings of current concepts of duty as a function of foreseeability of harm,[331] the *Fazzolari* court concluded first that schools have a "special duty arising from the relationship between educators and children entrusted to their care apart from any general responsibility not unreasonably to expose people to a foreseeable

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was at the school picking up homework for her ill son, and her purse had brushed against her attacker's arm, apparently provoking the attack. *Id.* Because the attacker had "an extensive disciplinary history, which included unprovoked attacks of violence on other students, as well as insubordination, and a general lack of respect for authority," a genuine issue of fact existed as to whether his attack on a visiting parent was foreseeable and the school subsequently liable. *Id.* at 1342-43. In its explanation, the court explicitly noted that the school board had a duty to protect students from reasonably foreseeable assaults by other students. *Id.* at 1342.

324. *See, e.g.*, Frazer v. St. Tammany Parish Sch. Bd., 774 So. 2d 1227, 1232 (La. Ct. App. 2000) (finding that a school's duty to supervise does not make it the insurer of a student's safety).

325. Those facts need not always point to a specific actor or victim or a specific injury. As one court put it, "[F]oresight does not demand the precise mechanical imagination of a Rube Goldberg nor a paranoid view of the universe." Fazzolari v. Portland Sch. Dist., 734 P.2d 1326, 1338 (Or. 1987). The facts, however, need to be specific enough to alert the school to the existence of a particular level and type of threat and to the steps the school must take to thwart it. Where such specific facts exist, there will probably be a duty to intervene. *See id.* (noting that the character and probability of the claimed risks bears on the administrators' responsibility to avert the risk).

326. *Frazer*, 774 So. 2d at 1232.

327. *Id.* at 1233.

328. *Id.*

329. *Fazzolari*, 734 P.2d at 1338.

330. *Id.*

331. *Id.* at 1327-36.

risk of harm."[332] It noted that the state's compulsory education law "virtually mandates that children be so entrusted to a school and, for most families, leaves little choice to which school;" therefore, the relationship itself between schools and their students creates a duty to protect children from harm.[333]

That duty is not unlimited, however: "negligence toward a student is tested by an obligation of reasonable precautions against foreseeable risks beyond those that might apply to other persons."[334] In further defining the standard of care, the court explained that "[t]his does not mean that schools, . . . are strictly liable for a student's injury on proof of causation alone."[335] The court then held that the earlier sexual assault on school grounds could support a fact-finder's conclusion that the later attack was foreseeable and that the school's duty included a requirement to take precautions against such attacks on its students.[336]

The key to the extent of the duties recognized in *Frazer* and *Fazzolari* is that in both instances, school officials were aware of specific dangers that had arisen. Under those circumstances, the need to provide supervision should have been plainly evident to the officials. Without such warnings, however, the dangers from third parties are usually deemed unforeseeable,[337] and the duty to prevent injuries inflicted by third parties – even students – is limited accordingly.

b. Causation as a Function of Foreseeability

Similar reasoning guides those courts that view foreseeability to be a key to causation. They reason that when an injury is inflicted by the unforeseen tortious act of a third party, a failure to supervise cannot be the legal cause of the injury. For these courts, the third party's conduct functions as an intervening cause of the injury, cutting the line of causation between the defendant's omissions and the plaintiff's injuries. Therefore, while a school may have been derelict in its duty to supervise the children in its care, the legal cause of the plaintiff's injury will generally be attributed completely or in large measure to the student or students who actually attacked the plaintiff.

For example, the Supreme Court of Louisiana reversed a lower court's decision to apportion to a school district seventy percent of the fault where a child was injured in an unsupervised locker room because, without a clear warning that fights were occurring in the locker room during the particular class in which the plaintiff was injured, the school could not have foreseen the incident

332. *Id.* at 1337.

333. *Id.*

334. *Fazzolari*, 734 P.2d at 1337.

335. *Id.*

336. *Id.* at 1338-39.

337. *See, e.g., J.N.*, 871 P.2d at 1112 (finding harm caused by a fellow student is not foreseeable unless the school knew or should have known through the exercise of reasonable care that the danger existed).

and prevented it.[338] Although the trial court found that "'[b]y failing to adequately supervise, the incident complained of . . . was allowed to happen, and in fact, was invited to happen,'"[339] the majority concluded that despite reports of "daily fights in certain gym classes,"[340] the school had received no reports about the specific class in which the injury occurred and therefore could not have foreseen and subsequently prevented the roughhousing that led to the injury.[341] Therefore, any failure to supervise could not have been the legal cause of the injury.[342]

The Supreme Court of Kansas has flatly rejected the notion that school officials should have to anticipate the tortious acts of their students, virtually guaranteeing that a lack of supervision will never be the legal cause of an injury inflicted by other students unless the school had very specific knowledge of the threat. In *Sly v. Board of Education of Kansas City*,[343] two students attacked another student outside the school doors one morning before school.[344] Although the attack occurred in a racially charged atmosphere where tensions had been running high, the school had provided no morning supervision for students who routinely gathered outside the locked school doors each morning.[345] In addition, one of the attackers "had the reputation of a troublemaker and a bully."[346] Nevertheless, because teachers who were aware of prior confrontations between the victim and one of the two attackers had not reported the incidents to the administration and because there had been no prior incidents of fighting outside the school doors in the mornings, the court concluded that school officials could not have foreseen the attack.[347] Rather, said the court, "the sudden, unexpected, unprovoked, wrongful assaults upon"

338. Wallmuth v. Rapides Parish Sch. Bd., 813 So. 2d 341, 350 (La. 2002).

339. *Id.* at 350 (Weimer, J., dissenting) (quoting trial court).

340. *Id.* (Weimer, J., dissenting). In fact, according to the dissent, there had been numerous incidents and complaints about fighting and rough housing in the coach's gym classes:

> Significantly, on a couple of occasions the plaintiff told Coach Brasher that someone had gotten hurt as a result of locker room violence, but the coach advised him not to worry about it. The coach testified that there had been five fights that year in the gym or locker area . . . [The students who had injured the plaintiff] all had prior discipline reports involving incidents in the locker room or the gym. The assistant principal did recall receiving calls from parents regarding daily fights in certain gym classes although he testified that he was never informed of daily fights in the physical education class in which the plaintiff was injured. Seventh graders in another of Coach Brasher's physical education classes testified about fights in the locker room every day. After one of these students was struck in such an incident, his mother complained to the school board and was advised the problem would be addressed.

Id. at 350 (Weimer, J., dissenting).

341. *Id.* at 349.

342. *Id.*

343. 516 P.2d 895 (Kan. 1973).

344. *Sly*, 516 P.2d at 897.

345. *Id.* at 897-98.

346. *Id.* at 898.

347. *Id.* at 903-04.

the victim were the direct cause of the victim's injuries.[348] The court explained that "[d]eliberate malicious assaults by students should not be required to be anticipated by school personnel in the absence of notice of prior misconduct of that nature or the likelihood thereof. To hold otherwise would virtually cast school authorities in the role of insurers of the safety of all pupils in their charge."[349]

Even those courts that seem at first blush more readily to accept the foreseeability of students' misconduct toward each other usually do so only in the context of facts that demonstrate a complete absence of supervision or in the context of facts that should have alerted the defendant school to the specific dangers facing the victim. In *Rupp v. Bryant*,[350] the Florida Supreme Court quotes with approval the California Supreme Court's view:

> [W]e should not close our eyes to the fact that . . . boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years. Recognizing that a principal task of supervisors is to anticipate and curb rash student behavior, our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence.[351]

In both cases, however, extenuating circumstances prompted the courts to deem the third-person misconduct as foreseeable. In the California case quoted by the *Rupp* court, a student died during a "slap boxing" incident when he was slapped and fell, hitting his head on asphalt pavement.[352] The incident took place in an area that school officials acknowledged was supposed to be supervised but was not monitored on that day; the physical education department had supervisory responsibility, but no one had ever created a schedule of supervisory assignments for the area.[353] The slap boxing had gone on for five to ten minutes, with a crowd of thirty students looking on, but there was a complete absence of supervision by any adult.[354] Under those circumstances, the court was willing to conclude that the lack of supervision was a proximate cause of the student's death.[355]

Rupp concerned injuries sustained in an off-campus high school hazing incident. In that case, however, the student organization that conducted the hazing had a reputation for violating school rules; the high school had enacted a specific rule against hazing; and the faculty sponsor knew that the hazing was

348. *Id.* at 903.

349. Sly, 516 P.2d at 903-04.

350. 417 So. 2d 658 (Fla. 1982).

351. *Rupp*, 417 So. 2d at 668-69 (quoting Dailey v. Los Angeles Unified Sch. Dist., 470 P.2d 360, 364 (Cal. 1970)).

352. *Dailey*, 470 P.2d at 362.

353. *Id.* at 362.

354. *Id.*

355. *Id.* at 365.

planned and absented himself from meeting where the initiation was to occur.[356] The court had little difficulty concluding that the school officials had, in fact, anticipated such behavior by enacting a rule against it and requiring supervision of school clubs and that it had actual knowledge of the impending hazing ritual because the sponsor knew it was planned.[357] Because, under those facts, the planned hazing was clearly foreseeable, the court concluded that the school's conduct could be seen as the proximate cause of the student's injuries, and reserved this issue for the factfinder.[358]

Under both duty and causation analyses, then, some specific warning or circumstance normally has to have existed before an injury intentionally inflicted by a third person can be deemed foreseeable. Absent such warnings, supervision will likely be deemed negligent only where a complete lack of supervision existed. Therefore, a negligent supervision claim based upon an injury resulting from a pattern of bullying by particular students is likely to fail on the foreseeability element alone unless school officials actually knew of a pattern of bullying by a specific perpetrator against a specific victim. Of course, given that bullies, victims, and even bystanders seldom voluntarily reveal the victimization to adults,[359] such explicit warning signs are unlikely to exist.

Even if a court concludes that a student's tortious act was foreseeable, it may nevertheless conclude that the negligent supervision is still not the legal cause of the victim's injury because the student's tortious conduct was the predominant factor in causing the injury, cutting the link between the supervision and the injury. *Castaldo v. Stone*,[360] a case based upon the shootings at Columbine, is instructive in this regard. A victim of the shootings attempted to hold the school officials at Columbine liable for failing to react to warning signs that Dylan Klebold and Eric Harris intended to attack the school and had the means to do so.[361]

After holding that the attackers' actions were foreseeable to several of the school defendants and that those defendants had a duty to intervene,[362] the court held that the plaintiffs, as a matter of law, had "failed to allege that the individual School Defendants' conduct was a legal cause of Plaintiffs' injuries."[363] The court explained that it was empowered to determine the issue of causation where plaintiffs have alleged a "chain of causation . . . too attenuated to impose liability."[364] Under Colorado law, said the court, a defendant must cause the harm "'in the natural and probable sequence of

356. *Rupp*, 417 So. 2d at 669.

357. *Id.*

358. *Id.*

359. *See supra* notes 63-71 and accompanying text for a discussion on the lack of adult involvement in incidents of school bullying.

360. 192 F. Supp. 2d 1124 (D. Colo. 2001).

361. *Castaldo*, 192 F. Supp. 2d at 1136.

362. *Id.* at 1167-70.

363. *Id.* at 1171.

364. *Id.* at 1170.

things'" and must be "the cause without which the claimed injury would not have been sustained."[365] The court then concluded that the school officials' conduct could not be connected to the shootings except by "connecting a series of 'if . . . then . . .' propositions which are speculative at best."[366]

> For example, the proposition that if the School Defendants had initiated disciplinary proceedings against Harris and Klebold, then the attack would have been prevented, begins with the uncertain assumption that students may be suspended or expelled for submitting work with dark themes or violent images, and concludes with the assumption that suspending or expelling students from school effectively eliminates their ability to return with firearms. Similarly, the proposition that if these Defendants had contacted Harris' and Klebold's parents, then the attack would have been prevented is contradicted by the allegation that Ms. Kelly did contact the Klebold family about the story their son submitted in her class.[367]

Further, said the court, because the defendant's conduct must be a substantial factor in causing the harm,[368] a separate event that stands as the predominant factor in the injury precludes the defendant's conduct from being deemed a substantial factor.[369] The court concluded the Columbine assailants' actions were "the predominant, if not sole, cause" of the plaintiffs' harms.[370] In other words, their actions were foreseeable but in all likelihood unpreventable, given the disciplinary options available to the school.

Ironically, however, the plaintiffs had also argued in a separate claim under section 1983 that the school's toleration of "student-on-student teasing, intimidation, bullying, and verbal harassment by Columbine students other than Klebold and Harris" motivated the two "to resort to the extreme measures of revenge" and thereby constituted a state-created danger to Castaldo "in violation of his right to life, liberty, and personal security."[371] The court, while describing the school's failures as "reprehensible," concluded that the failures were not "conscience shocking in a Fourteenth Amendment substantive due process sense."[372] What is striking in the juxtaposition of these two theories is the disconnect between the court's view of the school's supervision failures and the court's view of the causes of the violence.

The court is probably correct that, with respect to the disciplinary options that might have been exercised against Harris and Klebold, little could have been done to prevent the violence. That logic, however, misses a key point about a central cause of the violence. By the time the school acted by calling

365. *Id.* (citing Aurora v. Loveless, 639 P.2d 1061, 1063 (Colo. 1981) and Schneider v. Midtown Motor Co., 854 P.2d 1322 (Colo. Ct. App. 1992)).

366. *Castaldo*, 192 F. Supp. 2d at 1170.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 1171.

371. *Castaldo*, 192. F. Supp. 2d at 1171, 1173.

372. *Id.* at 1173.

Klebold's parents, it had waited far too long: it had allowed a culture of peer-on-peer abuse to create a breeding ground for retaliation. The school then failed to make the connection between the warning signs from Harris and Klebold and the abusive culture of the school; therefore, the school failed to intervene aggressively where it might have done the most good – in the culture of the school itself.

Unfortunately, in most schools and in most courts, that connection is still not being made, despite the lessons of Columbine and a mounting body of research that underscores those lessons. As long as prevailing legal theories view bullying in incident-specific terms, the failure of school officials to intervene in a particular bullying situation is unlikely to be viewed as the predominant cause of the injury to the plaintiff. After all, bullying is an intentional act by a third party almost certain to take place where no teacher is likely to spot it. In fact, single incident interventions may themselves exacerbate the bullying by inspiring retaliation against the victim.[373] Finally, courts are unlikely to consider bullying injuries foreseeable when those injuries are analyzed separately from the culture that made them possible, even probable.

The flaw in such approaches is that they ignore what the educational research has made clear; bullying is almost certainly occurring in every school,[374] and a whole-school approach based on current best practices will dramatically reduce it and its consequences.[375] It is therefore not only foreseeable that absent such best practices significant numbers of children who might otherwise have been protected from bullies will suffer serious and often life-long harms; it is very nearly an inescapable conclusion.

In addition, appropriate supervision, when defined as producing a school culture in which bullying is unacceptable to the entire school community, will prevent most of the bullying and its consequent harms from occurring.[376] To continue to hold that schools cannot foresee injuries from bullying and that schools' failure to implement effective prevention strategies is not a substantial factor in producing those injuries is to ignore reality and maintain a legal fiction that leaves victims to their own devices and schools with little incentive to abandon their ineffective practices.

C. Aligning the Definition of Reasonable Supervision with Empirical Educational Research

Courts and legislatures should abandon that fiction and align the definition of supervision with the conclusions of more than a decade of educational research. Ironically, in doing so, courts would be extending to minor students the kinds of legal protections that have been extended to their adult counterparts on university campuses. The Massachusetts Supreme Court, for example, was

373. *See supra* notes 15-20 and accompanying text for a general discussion of bullying.

374. *See supra* Part I.C. for a discussion of the prevalence of bullying in schools.

375. *See supra* Part I.D.ii. for a discussion on the "whole school approach to prevent bullying."

376. *Id.*

willing to impose liability on a college for failing to provide a student proper security against an unknown intruder who raped her.[377] In addition, courts have been perfectly comfortable in finding liability on the part of universities when adult students have been subjected to hazing by student organizations.[378] The reasoning of those courts is striking because they recognize the power of schools to foresee and prevent such injuries, and they recognize the relative powerlessness of the adult victims to protect themselves.

The Massachusetts Supreme Court recognized a duty upon on the part of a college, Pine Manor, to protect its adult students from criminal or tortious behavior of third parties, even when the third parties were not identifiable and where no previous incidents on the campus had provided special warning.[379] Rather than confining the analysis to what specific warnings might have alerted the school to the danger, the court examined the "existing social values and customs" in the higher education community to hold that the rape of one of the college's students was foreseeable and that the school had a duty to provide reasonable security to prevent such attacks and to exercise due care in doing so.[380] The court noted that several area colleges had taken specific steps to protect their students against criminal attacks and that, in fact, the defendant college itself had taken several such steps, although it had done so negligently.[381] In addition, the larger college community had developed standards determining appropriate precautions.[382]

Based on those findings, the court concluded that there was a community consensus among colleges and universities that certain precautions should be taken routinely to protect resident students from attacks by third parties.[383] Moreover, said the court, such a consensus arose from the nature of college campuses, where young people are gathered and are natural targets for criminal behavior and yet are not empowered with the ability to protect themselves properly because many of the protections lie solely in the power of the school.[384]

377. Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).

378. *E.g.*, Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1115 (La. Ct. App. 1999) (finding that universities have an obligation to monitor and regulate fraternal organizations, and the failure to do so constitutes liability on the part of the university).

379. *See Mullins*, 449 N.E.2d at 335 (concluding that there existed a consensus among colleges that reasonable precautions should be taken "to protect [students] against the criminal acts of third parties"); *see also* Stanton v. Univ. of Maine Sys., 773 A.2d 1045, 1051 (Me. 2001) (holding that the university's security measures suggested the foreseeability of an attack by a third person and that a jury question remained as to whether those measures were adequate).

380. *Mullins*, 449 N.E.2d at 334-36.

381. *Id.* at 334-38.

382. *Id.* at 334-36.

383. *Id.* at 335.

384. *Id.* The court noted that "[n]o student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors. Resident students typically live in a particular room for a mere nine months and, as a consequence, lack the incentive and capacity to take corrective measures. College regulations may also bar the installation of additional locks or chains." *Mullins*, 449 N.E.2d at 335.

Therefore, "[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm."[385]

Given the college community's consensus as to what constituted adequate precautions, along with Pine Manor's own inadequate attempts to provide protection, "[t]he risk of such a criminal act was not only foreseeable but was actually foreseen."[386] Significantly, no violent crimes had been reported in the year prior to the rape, so there was no specific history of crime that would suggest a particular danger of rape.[387] The possibility of such an attack, said the court, was simply "self-evident" in the context of a residential college.[388]

In the hazing context, courts have relied in part on similar reasoning to find a duty on the part of universities.[389] The community consensus reflected in the fact that legislatures and universities have taken affirmative steps to prevent hazing has bolstered courts' willingness to recognize a duty on the part of universities to monitor student organizations and intervene effectively when hazing is suspected.[390] The duty exists even though the victims are adults, because universities know that even adult students may be "willing to submit to physical and psychological pain, ridicule and humiliation in exchange for social acceptance which comes with membership in a fraternity" and may underestimate hazing's dangers.[391] Given the universities' familiarity with hazing, they can better foresee those dangers than can their students and

385. *Id.* at 336.

386. *Id.* at 337.

387. *Id.* at 334. There had been a burglary a year or so prior to the rape, and the night before the rape, an unknown person had climbed over the wall surrounding the campus and had wandered into a building. *Id.* The court mentions these facts, but seems not to rely upon them in finding that the rape was foreseeable to the college.

388. *Mullins*, 449 N.E.2d at 335; *see also Stanton*, 773 A.2d at 1049-50 (holding that a university owed a duty of protection to a seventeen-year-old student visiting the campus at the school's invitation and staying in a campus dormitory). Relying on *Mullins*, the court explained, "[t]hat a sexual assault could occur in a dormitory room on a college campus is foreseeable and that fact is evidenced in part by the security measures that the University had implemented"). *Id.* at 1050.

389. See *supra* notes 356-58 and accompanying text for a discussion of the hazing cases, which require some specific notice of hazing activities to trigger liability; noting, however, that the courts often reject the contention that a student's adult status somehow removes the duty to protect him from the dangers of a hazing ritual to which he has voluntarily submitted. *See e.g.*, Morrison, 738 So. 2d at 1115 (holding that universities have an obligation to assure that prohibited hazing activities are not occurring within fraternal organizations); *see also, e.g.*, Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (rejecting the university's argument that, as an adult, the plaintiff student "could not have reasonably relied upon the University" to protect him from injuries incurred in a hazing incident gone awry). For a general discussion of hazing and the potential liability of schools and colleges where such rituals occur unchecked, see Daniel B. Weddle, *Dangerous Games: Student Hazing and Negligent Supervision*, 187 ED. L. REP. 373 (2004).

390. *E.g.*, *Morrison*, 738 So.2d at 1115 (looking to Fox v. Bd. of Supervisors of La. State Univ., 576 So. 2d 978 (La. 1991), where the Supreme Court of Louisiana recognized that although an adult generally is capable of protecting his or her own interests, nevertheless the legislatures and universities have worked to monitor and prohibit hazing activities).

391. *Id.*

therefore have a resulting duty to protect the students.[392]

Similarly, the larger educational community has effectively reached a consensus that bullying is a prevalent and damaging phenomenon existing in virtually all elementary and secondary school settings.[393] That consensus arises directly from the nature of elementary and secondary schools, where children, who are less mature than their adult counterparts on college campuses, are natural targets for bullies and lack the power to control the bullying behavior of their peers. School officials, on the other hand, suffer no such lack of control; they possess the power to curb bullying, and they know that identifiable standards exist to guide schools in providing precautions against bullying.[394]

It is true that individual schools, like the college in *Mullins*, often ignore the consensus of the larger educational community regarding adequate precautions against third-party harms or implement haphazard approaches;[395] but that fact certainly should not support a conclusion that bullying is unforeseeable. Rather, the plethora of empirical data concerning bullying should make its foreseeability all the more clear, and school officials should not be rewarded for ignoring that data. In addition, because standards of adequate prevention are clear, thoroughly supported by empirical research, and well-known in the educational community,[396] schools that fail to implement those approaches with due care breach a duty to parents and students who justifiably rely on schools to take reasonable precautions against foreseeable injuries.

Under a *Mullins*-type analysis, that breach would also be viewed as the proximate cause of the bullying victim's injuries. In *Mullins*, the attacker would likely have been discovered or thwarted at any one of several points during the evening had the school's security procedures been implemented consistently with precautions accepted by the larger college community.[397] Gates and doors were unlocked; the fence around the campus contained blind spots that allowed entry without being seen by the security guards; there were not enough guards; and those guards that were there that night were inattentive or absent.[398] The court held that because the school's security lapses permitted the assailant to move freely about the campus throughout the attack, a reasonable jury could trace a chain of causation from those lapses to the victim's injuries.[399] Finally, given the foreseeability of the attack, the attacker's actions could not be viewed as a superseding cause that excused the negligence of the school.[400]

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392. *See generally* Weddle, *supra* note 389 (surveying the standard of care applied to universities in hazing cases).

393. See *supra* Part I.C. for a discussion of the prevalence of bullying in schools.

394. See *supra* Part I.D. for a discussion of the school's ability to intervene to stop bullying.

395. See *supra* notes 377-88 and accompanying text for a discussion of *Mullins*.

396. See *supra* Part I.D.i. for a discussion on empirical research showing that bullying is a function of school climate.

397. *Mullins*, 449 N.E.2d at 338.

398. *Id.*

399. *Id.* at 339-41.

400. *Id.* at 341.

In the same way, a school's failure to implement reasonable bullying prevention strategies should be viewed as the proximate cause of a bullying victim's injuries. In a school where accepted prevention strategies have been implemented, bullies cannot operate freely because the culture of the school will not tolerate their behavior.[401] Students will be willing to seek help on behalf of their classmates, and teachers will be trained to look for and to spot signs of bullying going on behind their backs.[402] School officials will feel compelled to act decisively in accordance with the anti-bullying policy developed by the school community. Where such a culture exists, bullies are likely to be discovered and thwarted at several points.[403]

Where schools eschew such strategies in favor of anti-bullying pronouncements and half-hearted or haphazard efforts at alerting teachers to the problem of bullying, they all but guarantee that bullies will operate free of any interference from school officials who have the power to stop them.[404] Like the attacker in *Mullins*, bullies will slip by unnoticed and unchallenged. Once juries are made aware of the precautions and processes that should have been in place had the school paid serious attention to the consensus of the educational community, they should be allowed to trace a chain of causation through the schools' lapses to the injuries inflicted on the victims; and the courts should refuse to hold that the bullies' actions constitute a superseding cause that breaks the chain of causation.

There is something perverse in recognizing a duty on the part of universities to provide protection to adults against third-party acts but recognizing no such duty on the part of elementary and secondary schools to provide protection against bullying to students who are neither adults nor capable of protecting themselves from the abuse. Courts are willing to hold colleges to the standards of the larger university community in preventing injuries to adults who have willingly participated in illegal hazing rituals; and some have been willing to hold colleges to such standards in preventing violent attacks by unknown intruders, even where no specific violent criminal acts have previously occurred. No principled distinction between colleges and lower schools justifies allowing elementary and secondary schools to leave children vulnerable to foreseeable and preventable injuries by their peers despite the consensus of educational researchers and the wealth of data concerning bullying, its harms, and its prevention.

III. CONCLUSIONS AND RECOMMENDATIONS

Courts and legislatures must create real incentives for schools to address bullying with the effective whole-school approaches that over a decade of

401. *See supra* Part I.D.ii. for a discussion on the schools' intervention techniques that effectively prevent bullying.

402. *Id.*

403. *Id.*

404. *See supra* Part I.C. for a discussion of the effects that school officials' inaction has on bullying in school.

empirical research has identified. Those incentives should come from several directions and should include carrots, sticks, and genuine help. Funding, accreditation, and standards of liability should be designed to reward schools that implement proven bullying prevention strategies, and to penalize schools that do not.

A. A New Standard of Liability

Perhaps it is time states took a more honest and empirically informed view of bullying and violence: bullying and violence flourish in particular kinds of school climates, and those climates are largely within the control of school officials.[405] School officials, then, should be forced to take control of the climates in their schools and to reduce the prevalence of bullying and related peer-on-peer violence. No one expects schools to eliminate all bullying; but educators no longer have any excuse for turning a blind eye to the problem and ignoring the research in their own field.

Therefore, courts and legislatures should reformulate definitions of reasonable supervision and align them with what educational research has demonstrated. In jurisdictions where immunity does not require a showing of wanton or reckless disregard for children's welfare, judges and juries should hold schools to standards consistent with educational research and best practices. Plaintiffs should enlist educational experts who can explain to juries what research has consistently shown concerning the damage bullying does and the steps schools can and should be taking to prevent that damage. Courts should then hold schools accountable for ignoring that research.

In lieu of such action on the part of courts and in jurisdictions where immunity is an obstacle, legislatures should carve out an exception to immunity and create a new standard of liability for negligent supervision where students are injured by the intentional torts of their peers, including bullying. That standard should provide both a carrot and a stick, each of which will get the attention of school boards and school officials.

If the school, non-negligently and in good faith, has implemented a serious, research-based bullying prevention strategy aimed at transforming the school climate, school officials should enjoy a presumption that their actions were reasonable if a child is injured by the tortious actions of another student, absent substantial evidence of deliberate indifference to known threats or harassment directed at the victim. If the school has failed to implement such strategies in good faith and in a reasonable manner, school officials should be subject to a presumption that their actions were negligent and were the proximate cause of

405. Researchers are increasingly viewing the school as responsible for antisocial behavior where the school has failed to invest in the prevention strategies that could curb such behavior. Focusing only upon the individual is giving way in educational circles to focusing on the organization as an important factor in the existence of such behaviors in the school building. VALERIE E. BESAG, BULLIES AND VICTIMS IN SCHOOLS: A GUIDE TO UNDERSTANDING AND MANAGEMENT 101-02 (1989) (noting that recent scholarship at the time of writing was beginning to consider "the school as a whole . . .to be partly responsible for any maladaptive behaviour").

the victim's injuries, absent substantial evidence that actions by school officials, including the implementation of effective bullying prevention strategies, could have done nothing to prevent the injury.

The first presumption would serve as a strong incentive to implement such reforms immediately by rewarding those schools with a safe harbor when they have implemented serious reform. The presumption should take effect the moment the school begins an earnest process of reform by assessing the prevalence of bullying in its building. As long as that process is begun and continued in good faith as a whole-school approach to bullying consistent with the current educational research, any cause of action that arose after that implementation began would be subject to the presumption.

The presumption of reasonable supervision should arise only upon sufficient evidence that practices and outcomes exist that are characteristic of competent, good-faith implementation of effective programs. Of course, outcomes would be relevant only where sufficient time has passed since program implementation to measure them. The state department of education could designate and continually update a list of effective, research-based programs from which schools could legitimately choose to form the basis for a potential presumption.

Victims would likely be foreclosed, in most cases, from a remedy against schools enjoying a presumption of reasonable supervision because it is unlikely that school officials in such a school would be indifferent to a known bullying situation. Such a result is not unfair, however, because the specific injury could not reasonably be attributed to the school's failure to incorporate best practices in preventing such injuries. The injury would likely occur only because of the truly "unanticipated, impulsive acts" of another student. Even if the injury were a result of ongoing bullying by another student, the school would have done all that the research indicates can be reasonably expected. Thus, schools would not be forced to ensure their students' safety, but they would be required to take all reasonable steps to reduce the likelihood that their students are being subjected to ongoing physical and emotional abuse by other students.

The second presumption would penalize those schools that fail to take the educational research seriously and move effectively to protect their students from others' brutality. Given the empirical evidence that now exists, not only with respect to the prevalence and damaging effects of bullying but also with respect to effective prevention, schools have no reason to operate as if their students are somehow immune from what is common in schools across the nation and, in fact, across the world.

A presumption of negligence would also recognize the foreseeability of such injuries in a school culture that permits bullying to flourish. Research has demonstrated that bullying exists in nearly every school setting and that the most potent indicator of its prevalence and strength is the leadership of the administration and staff of the school. It is therefore neither fair nor rational to exempt school officials from a duty to prevent bullying, and it is neither truthful nor logical to ignore the causal connection between the failure to supervise children and the likelihood they will bully and injure each other.

B. Additional Specific Recommendations

State legislatures should require schools to implement research-based bullying prevention strategies that are consistent with the key principles underlying whole-school approaches. There should be enough flexibility in the requirements to allow adaptability of approaches to local school settings, and enough specificity to prevent pro forma development of policies that will never themselves create the fundamental changes in school climate that are at the heart of effective bullying intervention.

State and federal agencies, along with the private sector, should provide the resources to make that implementation affordable. While implementation of effective bullying prevention processes is actually not financially prohibitive for most local schools,[406] schools need no more unfunded mandates from the state or federal governments. Rather, state and federal governments should put their own financial muscle behind reducing the prevalence and intensity of bullying in the nation's schools.

Any state or federal aid, of course, should be tied directly to the good-faith implementation of bullying prevention strategies. As long as schools take the principles underlying effective implementation seriously, the payoff to the nation from such efforts will far outstrip the costs of the efforts themselves. School disorder will be reduced, improving learning for students and working conditions for teachers. Bullying and associated behaviors will become less likely to develop in children who would otherwise be prone to bullying. Finally, and most importantly, fewer children suffer the life-long effects of victimization.

State and regional accrediting agencies should condition accreditation of public schools upon the implementation of effective bullying prevention strategies. The educational community should begin to treat bullying as the damaging force that it is and begin to define effective schooling to include serious, sustained, and demonstrably effective anti-bullying efforts. The prevalence of bullying can be measured and its reduction demonstrated in local schools. In addition there is enough empirical research to show what kinds of efforts are likely to be effective. Accreditation should therefore be tied both to implementation and to measured results of the strategies used.

Higher education accrediting agencies should condition accreditation of schools of education upon inclusion of bullying and violence prevention courses in the schools' teacher and administrator preparation programs. Because emotionally and physically safe school settings are fundamental to effective teaching and learning, schools of education should be expected to train educators in how to improve that safety. No school of education should be allowed to eschew serious and in-depth study of the bullying literature and training in bullying prevention. If ignorance concerning the literature and its implications is already a serious problem among current educational

406. *See* FOX ET AL., *supra* note 55, at 17 (2003) (recognizing that "relatively little investment is needed to accomplish these goals," and the programs actually "will pay for themselves through reduced violence, fewer placements for special education, fewer suicides, and less future crime").

practitioners, no rational justification can exist for sending new generations of educators into the field with similar deficiencies.

C. Conclusion

No one believes that any school can eliminate all bullying among school children; but research has demonstrated that schools can eliminate a very large percentage of it, and lawmakers should now require schools to do so. State legislatures should create a new standard of liability incorporating a presumption of reasonable supervision where schools have engaged in a good-faith implementation of research-based, whole-school approaches to bullying prevention, as well as a presumption of negligence where schools have failed to implement those strategies or have done so negligently or in bad faith.

Two decades of research has provided schools the knowledge they need to address the problem of bullying. The will of every school community to protect its children will provide schools the power they need to be successful. The damage being done to children every day should provide schools the moral imperative they need to act. All that seems lacking is the incentive to shake off an unacceptable and cruel status quo. It is time to provide that incentive.