City of Carson
Report to Mayor and City Council

May 6, 2014
New Business Discussion

SUBJECT: CONSIDER ORDINANCE NO. 14-1535 ADDING CHAPTER 16 TO TITLE 4 OF THE CARSON MUNICIPAL CODE ADOPTING AN ANTI-BULLYING ORDINANCE

Submitted by William W. Wynder
City Attorney

Approved by Jacquelyn Acosta
Acting City Manager

I. SUMMARY

The item has been continued from the April 1, 2014 meeting at the request of Councilmember Gipson.

This item has been jointly requested by Councilmember Gipson and Mayor Dear. The City Attorney's Office was tasked with drafting an ordinance that makes bullying, including cyberbulling, an infraction or misdemeanor, depending of the severity of the conduct, in the City.

That draft ordinance was then "vetted" through the Human Relations Commission, and revisions to the draft were made in light of recommendations from this commission. It is now in a form ready for City Council consideration and possible action.

II. RECOMMENDATION

CONSIDER and PROVIDE direction.

III. ALTERNATIVES

1. WAIVE further reading and INTRODUCE Ordinance No. 14-1535, "AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, ADDING CHAPTER 16 TO TITLE 4 OF THE CARSON MUNICIPAL CODE ADOPTING AN ANTI-BULLYING ORDINANCE."

2. TAKE such other action as the City Council deems appropriate that is consistent with the requirements of law.

3. RECEIVE and FILE this report and take no action on the same.

IV. BACKGROUND

A. The Bullying Problem

This growing problem within our nation has been the topic of numerous studies, the data from which has identified the prevalence and negative impacts of bullying on individuals and communities. These are well summarized in three of the principal sources utilized in preparing this report and the attached ordinance:

(1) A May 2012 report prepared by the Huntington Beach Human Relations Task Force, titled, "Bullying: A Report from the Huntington Beach Human Relations Task Force." (Found at http://www.surfcity-hb.org/files/users/community_services/ Bullying). ("HB Report".)

(2) A 2011 article in the Berkeley Journal of Criminal Law, "Out of the Principal's Office and Into the Courtroom: How Should California Approach Criminal Remedies for School Bullying?" (Found at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi? article=1048&c). ("Berkeley Law Review Article.")

(3) The website, www.stopbullying.gov, which is managed by the U.S. Department of Health and Human Services. ("Stop Bullying Website.")

1. Bullying is a Widespread Problem

Federally collected data in two studies indicates that, nationwide, 28% of students in 6-12th grades experience bullying and 20% of students in 9-12th grades experience bullying. (Stop Bullying Website.) One study by the National Education Association estimated that 160,000 students miss school daily nationwide for fear of being bullied. (HB Report at 8.)

Bullying can and does occur to people of all demographics. However, specific populations tend to be bullied at a significantly higher rate, such as obese, chronically ill, disabled, gifted, sexual minority youth. (HB Report at 9.) In particular, sexual minority youth (including, gay, lesbian, bisexual and transgender) have been found to be significantly more bullied than other groups.

Sexual minority youth are bullied two to three time's more than heterosexual minors. Over 85% of sexual minority youth experience harassment at some point and are three times more likely to not feel safe at school than other minors. It is estimated that 90% of sexual minority youth have been harassed or assaulted during the past year. (HB Report at 9-10.)

This is particularly problematic for this group as they are much less likely overall to report to parents or a supervising adult. Additionally, 20% to 40% of homeless youth fall within the sexual minority group and, once homeless, 62% will attempt suicide at least once. (HB Report at 10).

2. Bullying Has Serious Detrimental Impacts to its Victims, its Perpetrators, and Even its Witnesses

Bullying is often under-reported and is a significant safety problem for school age children. Bullying has been statistically linked to serious health and safety impacts to the bullied and, in some cases, the bully. In a 2010 study of 2,000 high school students, it was found that both victims and perpetrators of bullying were more likely to have attempted suicide than those who were neither bullied nor bullied anyone else. (Berkeley Law Review Article at 178.) Suicide has been identified by the Center for Disease Control as the third leading cause of death in teenagers. (HB Report at 9.)

Victims of bullying are statistically more likely to have suicide ideation and attempts, have mental health problems, including depression, use drugs and alcohol, skip school, have poor academic performance, and have low self-esteem. (Berkeley Law Review Article at 178-79.) Some mental health issues of those who have been bullied can extend into the victims adult lives. One study conducted by the National Institute of Child Health and Human Development found that victims of bullying were at a greater risk of developing mental health problems, including depression, as adults. (Berkeley Law Review Article at 178.)

In addition to the bullying victims suffering problems, research has shown that the bullying perpetrators also may suffer from the bullying act. People who bully others have been shown to have a higher risk of abusing alcohol and drugs; be more likely to get into fights and vandalize property and drop out of school; be more likely to engage in early sexual activity, and are more likely to have criminal convictions as adults. (HB Report at 9.) One study showed that 60% of boys who bullied others in middle school were convicted of at least one crime as an adult, compared to 23% of boys who did not bully. (Berkeley Law Review Article at 178-79.)

Finally, even those who witness bullying may suffer from the act. People who have witnessed bullying have been shown to have an increased use of tobacco, alcohol and drugs; have increased mental health problems, including depression and anxiety; and be more likely to miss or skip school. (HB Report at 9.)

3. Bullying Has Negative Societal Impacts

Bullying also has been shown to have significant negative societal consequences and results in costs to taxpayers and the government. As noted above, bullying is correlated to an increase in student drop-outs, drug and alcohol use by minors, mental health issues (sometimes lifelong), and criminal activities. All of these impacts have societal costs and real economic costs to the taxpayers and the government. (Berkeley Law Review Article at 178-79.)

4. Cyberbullying is an Especially Pernicious Form of Bullying

The proliferation of computers, tablets and smart phones with internet access has led to a dangerous form of bullying known as cyberbullying that occurs outside of the traditional schoolyard or locker room. (HB Report at 7.) Cyberbullying may include sending hurtful, rude and mean text messages; spreading rumors or lies about others by email or social networks; and creating websites, videos or social medial profiles that embarrass, humiliate or make fun of others. Cyberbullying is especially pernicious because it can be conducted 24 hours a day, 7 days a week with very little effort by the person doing the bullying.

Harassing, embarrassing, humiliating or threatening messages and pictures can be shared with a group of people, an entire school or anyone with access to the internet, and there are no practical means to remove a messages and pictures once posted to the internet. (HB Report at 7-8; Berkeley Law Review Article at 176.) Most members of the public can probably remember at least one of the headlines in the last few years of suicides that have occurred as a result of cyberbullying.

In 2006, Megan Meier committed suicide after her bully (the mother of an acquaintance) created a fictional alias on MySpace, pretended to become Megan's boyfriend and then subsequently "dumped" her online and told her the world would be a better place without her in it. (Berkeley Law Review Article at 171.) In January of this year, Viviana Aguirre, a 14 year old El Paso girl committed suicide after receiving constant taunting by four girls, ages 14 to 18, which left messages on her Facebook page telling her "to kill herself, that nobody would miss her if she died and that she was worthless." (*See* article, at http://www.elpasotimes.com/news/ci_24895008/activist-lawmakers-battle-increasing-threat-cyber-bullying.)

B. The Legal Structure

There are no federal laws that address bullying. The State of California has several laws that address bullying in schools under the Education Code that are some of the best in the nation. (Berkeley Law Review Article.) These laws, including the most recently adopted "Seth's Law," (AB 9 (2011)) require schools to adopt policies to recognize and investigate bullying when it occurs. However, for purposes of punishment, bullying under these statutes is limited to suspension, expulsion, or some other form of school discipline.

There are no penal codes in the state that deal specifically with bullying, and those that are on the books cover several types of bullying behavior but "leave meaningful gaps." (Berkeley Law Review Article at 206-07.) These include the following: assault (CPC 240), stalking (CPC 646.9), identity theft (CPC 528.5(a)), child cruelty (CPC 273a(b)), disturbing the peace (CPC 415), criminal threats (CPC 422), and annoying/threatening communication (CPC 653(m)). (Berkeley Law Review Article at 206-07; HB Report at 16.)

So far as our research has determined, no city in the California has yet adopted an ordinance establishing criminal penalties for bullying in their jurisdiction. In 2011, the City of Huntington Beach considered adopting an anti-bullying ordinance, but their Human Relations Task Force recommended against it on the basis that their police department was concerned that there was inadequate staff to investigate reports of bullying and because they found that the State criminal laws were sufficient to handle conduct that was beyond the school district's purview.

We were able to locate, and to study for purposes of developing the attached ordinance, anti-bullying ordinances from the following cities: Detroit, Michigan; Milton, Wisconsin; and Monona, Wisconsin, each of which was carefully reviewed in drafting the Proposed Anti-Bullying Ordinance.

C. Draft Anti-Bullying Ordinance

The Proposed Anti-Bullying Ordinance, which proposes to add Chapter 16 to Title 4 of the Carson Municipal Code, was principally developed by considering the unique needs of Carson and by looking at a "sister" ordinance from Monona, Wisconsin, as well as California Penal Code section 646.9 related to stalking. As the Berkeley Law Review Article summarizes, the California Penal Code would only penalize bullying "where a bully makes an actual threat to the life or safety of his or her victim." (Berkeley Law Review Article at 209.)

However, several states have laws on the books that make "harassment" a crime, or stalking that does not require the element of a threat of physical harm, but only requires that the victim feel "terrorized, frightened, intimidated, threatened, harassed or molested." (Berkeley Law Review Article at 209.)

The attached ordinance is intended to fill the gap left in the California criminal justice system, by criminalizing harassment that is engaged in willfully or intentionally and in a course of conduct that demonstrates an intent to harass or abuse or create an environment of terror to a particular minor.

The definition of "course of conduct" and "harassment" used in the ordinance are similar to that used in the State of California stalking law, which defines harassment as: "harasses" means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. (Penal Code section 646.9(e).)

In addition to defining bullying, including cyberbulling, and making it unlawful, the attached Ordinance also includes provisions that would make retaliation for reporting a crime under the ordinance a violation. Finally, similar to the Monona, Wisconsin ordinance, the attached Ordinance would make the parent or legal guardian responsible for the bullying acts of the child provided the parent or guardian had been made aware within the last ninety (90) days that the child has violated the ordinance by bullying another minor. Violations may be charged as misdemeanors or infractions, at the City's discretion.

V. FISCAL IMPACT

There will be certain enforcement costs from adoption of any new ordinance, the amount of which is unknowable as of the presentation of this staff report.

VI. EXHIBITS

1. Ordinance No. 14-1535. (pgs. 8-13)
2. Berkley Journal of Criminal Law, Volume 16, Issue 1. (pgs. 14-67)
3. Bullying: A Report from the Huntington Beach Human Relations Task Force. (pgs. 68-83)

Prepared by: William W. Wynder, City Attorney

Reviewed by:

City Clerk	City Treasurer
Administrative Services	Public Works
Community Development	Community Services

Action taken by City Council

Date_____ Action_____

_____

ORDINANCE NO. 14-1535

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, ADDING CHAPTER 16 TO TITLE 4 OF THE CARSON MUNICIPAL CODE ADOPTING AN ANTI-BULLYING ORDINANCE

WHEREAS, bullying and cyberbullying are a serious and widespread problem and generally have been found to occur in all cities and states in the country; and,

WHEREAS, federally collected data indicates that nationwide, 28% of students in grades 6-12 are victims of an incident of bullying; and,

WHEREAS, bullying and cyberbullying are often underreported and are a significant safety problem; and,

WHEREAS, bullying and cyberbullying have been statistically linked to serious health and safety impacts to those who are bullied and, in some cases, those who bully; and,

WHEREAS, in a 2010 study of 2,000 high school students, it was found that both victims and perpetrators of bullying were more likely to have attempted suicide than those who were neither bullied nor bullied anyone; and,

WHEREAS, suicide has been identified by the Center for Disease Control as the third leading cause of death in teenagers, and,

WHEREAS, victims of bullying and cyberbullying are statistically more likely to have suicide ideation and suicide attempts, have mental health problems, including depression, use drugs and alcohol, skip school, have poor academic performance, drop-out of school, cheat, and have low self-esteem; and,

WHEREAS, people who bully others have been shown to have a higher risk of abusing alcohol and drugs; be more likely to get into fights and vandalize property and drop out of school; be more likely to engage in early sexual activity and are more likely to have criminal convictions as adults; and,

WHEREAS, one study showed that 60% of boys who bullied others in middle school were convicted of at least one crime as an adult, compared to 23% of boys who did not bully; and,

WHEREAS, witnesses of bullying also suffer negative consequences, including using more tobacco, alcohol and drugs, having increased mental health problems, including depression and anxiety, and being more likely to miss or skip school; and,

WHEREAS, bullying and cyberbullying have negative societal consequences and results in costs to taxpayers and the government; and,

WHEREAS, although, bullying and cyberbullying tend to victimize specific populations at a significantly higher rate (such as obese, chronically ill, disabled, gifted, sexual minority youth), people of all demographics can be subject to bullying; and,

WHEREAS, sexual minority youth (including, gay, lesbian, bisexual and transgender) have been found to be bullied two to three times more than heterosexual minors; and,

WHEREAS, over 85% of sexual minority youth experience harassment and are three times more likely to not feel safe at school; and,

WHEREAS, 90% of sexual minority youth have been harassed or assaulted during the past year; and,

WHEREAS, the proliferation of computers, tablets and smart phones with internet access has led to a dangerous form of bullying known as cyberbullying; and,

WHEREAS, cyberbullying may include sending hurtful, rude and mean text messages; spreading rumors or lies about others by email or social networks; and creating websites, videos or social medial profiles that embarrass, humiliate or make fun of others; and,

WHEREAS, cyber bullying is especially pernicious because it can occur 24 hours a day, 7 days a week with little effort by the person doing the bullying; and,

WHEREAS, in cyberbullying, harassing, embarrassing, humiliating or threatening messages and pictures can be shared with a group of people, an entire school or anyone with access to the internet, and there are no practical means to remove a messages and pictures once posted to the internet; and,

WHEREAS, there are no federal laws that address bullying and cyberbullying; and,

WHEREAS, the State of California has several laws that address bullying and cyberbullying in schools under the Education Code that are some of the best in the nation, but the ultimate punishment for bullying and cyberbullying under these statutes is limited to expulsion or some other form of school discipline; and,

WHEREAS, there are no penal codes in the State that deal specifically with bullying and cyberbullying, and such laws that do exist address some types of bullying activities; assault (CPC 240), stalking (CPC 646.9), identity theft (CPC 528.5(a)), child cruelty (CPC 273a(b)), disturbing the peace (CPC 415), criminal threats (CPC 422), and annoying/threatening communication (CPC 653(m)); but leave significant and unregulated gaps; and,

WHEREAS, case law has demonstrated that courts are reluctant to find minors guilty of the "adult" crimes such as, stalking or threatening communication, even when bullying actions appear to fall within the defined crime; and,

WHEREAS, bullying and cyberbullying can and do take place in many places not limited to the traditional schoolyard or locker room, including on buses, on streets and sidewalks and in front of computers in homes and in libraries; and

WHEREAS, the City Council of the City of Carson, desires to provide a criminal penalty for those who engage in bullying of school age children from kindergarten through age 25, at a level and in such a manner that it may be expected to lead to physical and mental harm to the subject of the bullying and cyberbullying.

WHEREAS, the City of Carson will work with state lawmakers to create a Penal Code that will address bullying and cyberbullying; and

NOW, THEREFORE, the CITY COUNCIL of the CITY of CARSON, CALIFORNIA, does hereby ordain as follows:

Section 1. Chapter 16 is added to Title 4 of the Carson Municipal Code to read as follows:

"CHAPTER 16
ANTI-BULLYING, INCLUDING CYBERBULLING, AND HARASSMENT

Sections:

41601 Findings and Purpose.

The City Council finds and determines the following:

A. Bullying and cyberbullying are a serious public health and safety issue for the nation, the state and the city.

B. Bullying and cyberbullying are associated with serious mental and physical health issues, up to and including suicide. Suicide is the third leading cause of deaths in teenagers.

C. Bullying and cyberbullying are associated with societal problems that result in costs to the taxpayers, including through minors dropping out of school, abusing drug and alcohol and engaging in criminal activity.

D. This ordinance is intended to provide additional tools to law enforcement officers and schools to address the worst cases of bullying and cyberbullying that may lead to physical and mental harm to minors in the City of Carson.

E. This ordinance should be interpreted to comply with all federal and state laws, including those intended to protect the rights of individuals, including minors, in freedom of speech.

41602 Definitions.

As used in this section, the following terms shall have the following meanings, unless the context clearly indicates that a different meaning is intended:

A. "Bullying," including bullying by means of electronic communication devise(s) (commonly referred to as "cyberbullying") shall mean a willful course of conduct which involves harassment of a person(s) from kindergarten through age 25.

B. "Course of Conduct" shall mean a pattern of conduct composed of a series of overt acts over a period of time, however short, evidencing a continuity of purpose.

C. "Harassment" shall mean any conduct, whether verbal, physical, written, or by means of any mode of communication (including, but not limited to, harassment by means of electronic communication devise(s) [commonly referred to as "cyberbullying"]) which:

1. Would cause a person to feel terrorized, frightened, intimidated, threatened, harassed or molested and which serves no legitimate purpose; or

2. Is prohibited by California Penal Code Sections 240, 242, 273a(b), 415, 422, 528.5(a), 646.9, and 653(m); and is intended to seriously alarm, annoy, torment, or terrorize a person with no legitimate purpose.

41603 Prohibited Conduct.

A. It shall be unlawful for any person to engage in any bullying or cyberbullying of a person or induce another person to engage in such bullying.

B. It shall be unlawful for any person to retaliate against any person that reports any conduct which is prohibited by this chapter.

41604 Constitutionally Protected Activity.

This chapter shall not be construed to apply to any constitutionally protected activity or freedom of speech.

41605 Parental Responsibility.

It shall be unlawful for any custodial parent or guardian of any unemancipated person under eighteen (18) years of age to allow or permit such person to violate the provisions of Section 41603. The fact that prior to the present offense a parent, guardian or custodian was informed in writing by a law enforcement officer of a separate violation of Section 41603 by the same minor occurring within ninety (90) days prior to the present offense shall constitute a rebuttable presumption that such parent, guardian or custodian allowed or permitted the present violation.

It shall be unlawful for any person age 18-25 to engage in or encourage any person to engage in bullying or cyberbullying or in violation of section 41603. Any person who violates section 41603 will be subject to the enforcement of Section 41606

41606 Enforcement.

Any person who violates this chapter shall be guilty of a misdemeanor, unless charged as an infraction, at the discretion of the enforcing officer."

Section 2. Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this section, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this section, or its application to any other person or circumstance. The City Council declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

Section 3. The City Clerk shall cause this ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage, in accordance with Section 36933 of the Government Code, and shall certify to the adoption of this ordinance.

Section 4. This ordinance shall be in full force and effect thirty (30) days after its second reading and adoption.

PASSED, APPROVED and **ADOPTED** at a regular meeting of the City Council on this ____ day of _____, 2014.

_____
Mayor Jim Dear

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

Berkeley Journal of Criminal Law

Volume 16 | Issue 1 Article 4

2011

Out of the Principal's Office and Into the Courtroom: How Should California Approach Criminal Remedies for School Bullying

Tracy Tefertiller

Out of the Principal's Office and Into the Courtroom:
How Should California Approach Criminal Remedies for School Bullying?

Tracy Tefertiller*

INTRODUCTION

School bullying is a hot-button issue. A recent spate of high-profile teen "bullycides"[1]—suicides by students who are apparently driven to kill themselves in response to relentless bullying by their peers—has spawned a nationwide outpouring of outrage and sympathy,[2] accompanied by vocal demands for schools and law enforcement to "get tough" on bullies.[3] Books and articles about the dangers of bullying have proliferated in the popular press, decrying

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[1] The most widely reported "bullycides" include Tyler Clementi, Phoebe Prince, and Megan Meier. *See* Emily Bazelon, *What Really Happened to Phoebe Prince?*, SLATE, July 20, 2010, http://img.slate.com/media/31/100721_Bull-E_final_3.pdf; Lauren Collins, *Friend Game: Behind the online hoax that led to a girl's suicide*, THE NEW YORKER, Jan. 21, 2008, http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_collins; Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, http://www.nytimes.com/2010/09/30/nyregion/30suicide.html.

[2] *See, e.g.*, IT GETS BETTER PROJECT, http://www.itgetsbetterproject.com (last visited Mar. 18, 2011) (provides an internet website and YouTube channel featuring videos of adult gay men and lesbians encouraging teens who feel bullied because of their sexual orientation); *see also* U.S. Department of Health & Human Services, *StopBullying.gov*, STOP BULLYING NOW, http://www.stopbullyingnow.hrsa.gov/kids/ (last visited Mar. 21, 2011) (a website aimed at helping kids understand what is bullying and how to address bullying).

[3] *See, e.g.*, Matt Friedman, *N.J. Assembly, Senate pass 'Anti-Bullying Bill of Rights' in wake of Tyler Clementi's death*, NJ.COM, Nov. 22, 2010, http://www.nj.com/news/index.ssf/2010/11/nj_assembly_passes_anti-bullyi.html.

behavior that used to be considered simply part of growing up.[4] A survey of high school students released in October 2010 suggests that nearly half have been "bullied, teased, or taunted in a way that seriously upset them" in the last twelve months.[5] And a popular television show has even crafted an entire storyline around a character's experience with gay bullying.[6] Bullying has fully entered the national consciousness.

Regardless of whether this increased focus on bullying represents a real increase or simply a growing awareness of the negative consequences of bullying, lawmakers have responded aggressively to the problem: forty-four states and the District of Columbia have enacted some kind of anti-bullying statute, incorporated either in their criminal code, their education code, or both,[7] and several states have modified existing laws to include a broader set of bullying behaviors and/or to specifically take cyberbullying into account.[8]

But "getting tough" on bullies today is not as simple as sending the offenders to the principal's office. Laws addressing bullying must first grapple with several foundational issues. First, bullying itself must be defined. Attempts to regulate bullying have been complicated

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[4] *See, e.g.*, Brenda High, *Bullycide in America: Moms Speak Out*, BULLYCIDE.ORG, http://www.bullycide.org/ (last visited Mar. 21, 2011) (a website focused on the "bullying/suicide connection"); *see also* SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING (2009).

[5] Josephson Institute, *Installment 1: Bullying and Violence: The Ethics of American Youth: 2010*, CHARACTER COUNTS!, http://charactercounts.org/programs/reportcard/2010/installment01_report-card_bullying-youth-violence.html (last visited Mar. 18, 2011).

[6] *See* Dave Itzkoff, *Teenage Dreams and Nightmares: Talking 'Never Been Kissed' With Ryan Murphy of 'Glee'*, N.Y. TIMES ARTS BEAT BLOG (Nov. 10, 2010, 7:00 AM), http://artsbeat.blogs.nytimes.com/2010/11/10/page/2/ (follow "Teenage Dreams and Nightmares" hyperlink).

[7] Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws*, CYBERBULLYING RESEARCH CENTER, http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf (last updated Mar. 2011).

[8] For example, Massachusetts's S.B. 2323 not only gives schools more tools to prevent, recognize, and punish bullying, but also broadens Massachusetts' criminal stalking and harassment laws to include more forms of communications (such as instant messaging) frequently used by bullies. *See infra* notes 169-74 and accompanying text.

by confusion and disagreement over what exactly constitutes bullying behavior. Does bullying include a "single significant incident," or must the behavior be "repeated?"[9] Must the bully make a credible threat to the safety of the victim, or is it enough that the victim feels "tormented" or "intimidated?"[10] Bullying bears a remarkable resemblance to Justice Potter Stewart's famous description of obscenity in *Jacobellis v. Ohio*: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . . But I know it when I see it . . . ."[11] Certainly, the pervasiveness of social electronic media usage among students[12] means that today's bullying behavior is no longer limited to old-fashioned playground taunts, but parents, educators and law enforcement officials may disagree as to when a student has crossed the line between unacceptable but unavoidable unfriendliness and truly destructive behavior that must be punished.[13]

Second, punishment for bullying must respect the free speech rights of students while effectively regulating the most offensive, inappropriate, and potentially dangerous behavior. Even though students' free speech rights are not absolute, students are entitled to limited, and in many cases substantial, freedoms of speech.[14] Bullying that involves no physical contact or threats and occurs off campus (for example, a student who creates a YouTube video that insults another student but is filmed off school grounds and is not disruptive to school activities) may be out of the reach of either educational remedies or criminal punishments.[15]

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[9] *See* N.H. REV. STAT. ANN. § 193-F:3 (2010).

[10] *See* LA. REV. STAT. ANN. § 14:40.7 (2010)

[11] 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[12] *See* AMANDA LENHART, KRISTEN PURCELL, AARON SMITH & KATHRYN ZICKUHR, PEW RESEARCH CENTER, SOCIAL MEDIA AND MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS (2010), http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx. *See* discussion *infra* note 36 and accompanying text.

[13] *See, e.g.*, Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 27, 2010, http://www.nytimes.com/2010/06/28/style/28bully.html (A girl was suspended for posting a YouTube video that insulted a classmate, but while her father described the video as "relentlessly juvenile," he did not consider it cyberbullying, "which he said he did not condone.").

[14] *See infra* notes 181-200 and accompanying text.

[15] *See, e.g.*, J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (discussed *infra* notes 189-200 and accompanying text).

Finally, the combination of an almost unlimited range of possible misbehaviors and a population of victims and perpetrators who are predominantly minors implicates a patchwork of criminal, civil, educational, and parental authorities. Parents and guardians are often the first line of defense against bullies, and therefore are best able to both recognize when their own children are being bullied and set appropriate standards of conduct for children who may be tempted to bully others.[16] Schools have the ability to regulate conduct within their halls and to create categories of offenses which may be punishable by suspension or expulsion. The criminal code, with punishments that include probation, fines, or incarceration, is designed for serious offenses—but exactly when bullying between students becomes a "serious offense" is a matter that is open to debate. This confusion means that even as frustrated parents and lawmakers advocate for and implement specific criminal laws against bullying, the resulting statutes are susceptible to both overlap with existing criminal law and ambiguity as to when bullying crosses the line into criminal conduct.

For California, the outcome of this conversation is not academic. California has already seen its share of tragic bullying incidents, including the widely publicized suicide of Megan Meier. Meier had been befriended, entranced, and subsequently "dumped" on MySpace by "Josh Evans," a fictional alias created by Lori Drew, the mother of a classmate and former friend of Megan's.[17] Most recently, Seth Walsh, a thirteen-year-old Tehachapi boy, committed suicide in September 2010 after enduring a long period of bullying for his sexual orientation.[18] Unlike the laws of a growing number of other states, California's criminal laws that punish behavior adjacent to or inclusive of bullying—including stalking, criminal threats, and harassment—are relatively narrow.[19] To date, any anti-bullying prevention and

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[16] *See, e.g.*, Brenda High, *Suggestions for Parents When Dealing with Bullying*, BULLY POLICE USA, http://www.bullypolice.org/help_for_parents.html (last visited Mar. 21, 2000).

[17] *See* United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009) (Following their breakup, "Josh" wrote to Megan, "[T]he world would be a better place without [you] in it." She hanged herself shortly thereafter.).

[18] Yobie Benjamin, *Bullied Tehachapi gay teen Seth Walsh dies after suicide attempt*, SF GATE, Sept. 29, 2010, http://www.sfgate.com/cgi-bin/blogs/ybenjamin/detail?entry_id=73326.

[19] California's stalking law is narrower in that it requires the perpetrator to threaten the victim's safety. *Compare* Michigan's stalking law, MICH. COMP. LAWS § 750.411h(1)(d) (2010) ("'Stalking' means a willful course of conduct involving

18

punishment measures that California has implemented have been incorporated within its Education Code.[20]

This article addresses the issue of how California could best use criminal remedies to combat student bullying. To answer this question, the article focuses on the challenges and advantages of dedicated anti-bullying laws when compared to the current range of criminal, civil, and educational remedies for student bullying. Part I describes the problem of school bullying, discusses how bullying behaviors are defined, and examines the statistics on the prevalence of bullying among students. Part II reviews existing statutes in the criminal and civil law that can be used to punish bullies and discusses the effectiveness of these non-specific laws when applied to bullying situations. Part III looks at new criminal anti-bullying statutes and analyzes how they differ from existing remedies for bullying. Finally, Part IV looks specifically at California's situation: How effectively do California's traditional criminal laws protect students against bullying, and what changes would a criminal anti-bullying statute create?

I conclude that a specific criminal anti-bullying statute does not make sense for California because of both the difficulties in defining a distinct crime of bullying and the relative effectiveness of existing laws that could be applied to bullying behaviors, with some reforms. Additionally, reliance on criminal anti-bullying statutes misses the opportunity to resolve some bullying situations through the educational system or through civil actions and risks impinging on protected student speech. Instead of criminal anti-bullying statutes, I recommend that California strengthen its related criminal statutes—including laws against stalking, making criminal threats, and the use of

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repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."), *with* California's similar law, CAL. PENAL CODE § 646.9(a) (West 2010) ("Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking.").

[20] *See, e.g.*, A.B. 86, 2008 Assem. Comm., Reg. Sess. (Cal. 2008) (amends specific sections of California's Education Code to further define bullying and strengthen school penalties for bullying).

electronic communications to instill fear or harass—to enable these laws to be applied more broadly to bullying behaviors.[21]

PART I: THE PROBLEM OF STUDENT BULLYING

Crafting appropriate remedies for bullying first requires an understanding of the problem itself. Successful laws that address bullying behaviors—whether educational, civil, or criminal—must set specific goals, address the right population, and target the behaviors that are most harmful to students and society. This section provides an overview of the problem of student bullying: how it is defined, how often it occurs, and the negative outcomes it creates.

"Bullying" defined

"Bullying" is a catch-all term for an ill-defined set of behaviors. Bullying can encompass both several traditional crimes, such as assault and stalking, and a broad spectrum of more subtle, psychologically-focused behaviors that range from schoolyard teasing and taunting to the systematic spreading of misinformation about another student. As the California Department of Education defines it, bullying "involve[s] a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful."[22] Once the power dynamic has been established, the means of torment can be varied: "Bullying may be *physical* (hitting, kicking, spitting, pushing), *verbal* (taunting, malicious teasing, name calling, threatening), or *psychological* (spreading rumors, manipulating social relationships, or promoting social exclusion, extortion, or intimidation)."[23]

Statutory definitions of prohibited student bullying generally combine the environment (the school setting) with the behavior (bullying, however it is defined by the statute), and its effect on its victims (emotional distress, fear, inability to learn).[24] Within this

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[21] *See* CAL. PENAL CODE § 646.9 (West 2010) (stalking), § 422 (criminal threats), § 528.5 (West 2010) (impersonation by electronic means), and § 653.2 (West 2010) (use of electronic communications to instill fear or harass).

[22] *Bullying at School*, CAL. DEPT. OF EDUC., http://www.cde.ca.gov/ls/ss/se/documents/bullyingatschool.pdf (last visited Mar. 21, 2011).

[23] *Id.*

[24] *See, e.g.*, MASS. ANN. LAWS ch. 71, § 37O (LexisNexis 2010) (one of the Massachusetts laws changed in the wake of the Phoebe Prince suicide) ("'Bullying' [is] the repeated use by one or more students of a written, verbal or electronic

general framework, specific definitions of bullying vary somewhat by state. New Hampshire's newly enacted anti-bullying law, for example, defines bullying as inclusive of both a "single significant incident" and "a pattern of incidents," while Massachusetts' relevant law requires "repeated" behaviors.[25] And state laws can encompass an extremely broad set of behavior that, at one end of the spectrum, "physically harms a pupil or damages the pupil's property," and at the other, simply "interferes with a pupil's educational opportunities" or "creates a hostile environment at school for the victim."[26]

Additionally, many states, perhaps driven by public outcry or high profile cases within their jurisdictions, have defined "cyberbullying" as a distinct subset of bullying.[27] Because technology changes have outstripped lawmakers' ability to specify which electronic devices are included within the law, state cyberbullying laws tend to be broad and inclusive of any possible means or mode of bullying. For example, Louisiana's cyberbullying statute defines the crime as "transmission of any electronic textual, visual, written, or oral communication" that is communicated "with the intent to coerce, abuse, torment, intimidate, harass, embarrass, or cause emotional distress to a person under the age of seventeen."[28]

Some states, including California, further define bullying as behavior that is directed toward members of a protected class. In California's Educational Code, bullying is defined as including "hate violence" against protected groups, and includes "one or more acts by a pupil or a group of pupils directed against another pupil that constitutes sexual harassment, hate violence, or severe or pervasive intentional harassment, threats, or intimidation."[29] This victim-focused definition of bullying can be problematic, as it may limit the

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expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.").

[25] *Compare* § 370 *with* N.H. REV. STAT. ANN. § 193-F:3 (2010).

[26] N.H. REV. STAT. ANN. § 193-F:3 (Bullying also includes behavior that "causes emotional distress to a pupil" or "substantially disrupts the orderly operation of the school.").

[27] *See, e.g.*, LA. REV. STAT. ANN. § 14:40.7 (2010).

[28] § 14:40.7(A).

[29] A.B. 86, 2008 Assem. Comm., Reg. Sess. (Cal. 2008) (amended CAL. EDUC. CODE §§ 32261, 32265, 32270, and 48900 (West 2010)).

definition of who can be bullied to someone who has specific physical characteristics. Advocacy organizations such as BullyPolice.org stress that this emphasis on victims both creates problems for lawmakers in defining who is "eligible" to be victimized and ignores the reality that any child can be bullied.[30]

Even with these multiple attempts to define specific bullying behaviors by state, the definition of bullying retains much of its intuitive, "I know it when I see it," character. This creates a dilemma for school administrators: while most school principals would promptly involve the police in a gang-related assault on school grounds, they would likely hesitate before using law enforcement to arrest teenage girls who are repeatedly taunting and teasing a classmate through text messages and Facebook. However, as incidents such as Phoebe Prince's suicide demonstrate,[31] this teasing and taunting can have deadly consequences, and the sense of urgency created by these tragedies has led lawmakers to push ahead with anti-bullying laws, even in the absence of a consistent definition of the limits of the term "bullying."

Incidence of bullying

The recent and widely publicized cluster of "bullycides" has raised awareness of bullying to unprecedented levels through exposure in the popular press.[32] However, studies have reached divergent conclusions about the prevalence of bullying. At the high end, the Josephson Institute survey of self-reported bullying suggests that nearly 50% of high school students had been bullied over a 12-month period, with a similar share of students reporting that they themselves

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[30] *The MORE Perfect Anti Bullying Law*, BULLY POLICE USA, http://www.bullypolice.org/ThePerfectLaw2006.pdf (last updated Feb. 2006).

[31] Prince, a fifteen-year-old Massachusetts high school student, committed suicide after being bullied, allegedly in retaliation for her relationship with a popular boy. *See* Bazelon, *supra* note 1.

[32] For example, People Magazine, one of the most widely read magazines in the United States and a barometer of popular culture that usually focuses on celebrities, featured "bullycides" on its cover twice in 2010. *See* Liz McNeil, *Suicide in South Hadley Bullied to Death?*, PEOPLE MAG., Feb. 22, 2010, http://www.people.com/people/archive/article/0,,20350702,00.html (reporting on Phoebe Prince's suicide); *see also* Alex Tresniowski, *Tormented to Death*, PEOPLE MAG., Oct. 18, 2010, http://www.people.com/people/archive/article/0,,20432972,00.html (focusing on Tyler Clementi and other "bullycides" among gay students).

had bullied another student.[33] These figures have not changed significantly since 2008, and in some categories have actually declined.[34] On the lower end, a 2001 National Institute of Child Health and Human Development survey found that 17% of the respondents had been bullied "sometimes" or "weekly," 19% had bullied others with the same frequency, and 6% had been both victims and perpetrators.[35] Comparisons are difficult, however, as one study measured the incidence of bullying over the course of a year and the other looked at those who have been bullied on a weekly basis.

Cyberbullying is a particular concern among parents, who fear that increased bullying goes hand in hand with the proliferation of technologies now available to students. Teenagers have in fact moved into social networking *en masse*: 73% of American teens with internet access now use social networking websites.[36] While this usage has created many opportunities for bullying, rates of cyberbullying do not appear to be increasing: the Cyberbullying Research Center reports a cyberbullying rate that has fluctuated between 20% and 40% over the past seven years, with no systematic increases over time.[37]

Girls, in particular, may be affected by cyberbullying.[38] Unlike offline bullying, cyberbullying does not require a bully to be physically threatening, and the anonymous, yet public, nature of cyberbullying may mesh particularly well with the clique-filled environment populated by middle- and high-school girls.[39] Typical cyberbullying behaviors directed at girls include name-calling, threats, "behaviors involving duplicity," and the revelation of "confidential or

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[33] Josephson Institute, *supra* note 5.
[34] *Id.*
[35] Nels Ericson, *OJJDP Fact Sheet: Addressing the Problem of Juvenile Bullying*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY, http://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf (last visited Mar. 21, 2011).
[36] Lenhart, Purcell, Smith & Zickuhr, *supra* note 12.
[37] Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf (last visited Mar. 21, 2011).
[38] Sameer Hinduja & Justin W. Patchin, *Cyberbullying by Gender*, CYBERBULLYING RESEARCH CENTER, http://www.cyberbullying.us/2010_charts/cyberbullying_gender_2010.jpg (last updated 2010) (survey suggests higher lifetime rates of cyberbullying among girls).
[39] Lori O. Favela, *Female Cyberbullying: Causes and Prevention Strategies*, STUDENT PULSE (Nov. 12, 2010), http://www.studentpulse.com/articles/322/female-cyberbullying-causes-and-prevention-strategies.

sensitive information" online.[40] Unfortunately, many of the comments are public, and they can last forever: "the audience is not merely the playground inhabitants, but is impossibly huge, spanning states, countries, cultures, and even time."[41] Without disciplinary action by a school or an injunction against a social networking site, an "I hate Jane Doe" Facebook page can become part of Jane Doe's "permanent record" on the internet.

Impact of bullying

Suicide is the most serious consequence of student bullying, and much of the recent national attention given to bullying has been driven by a widely publicized series of suicides among bullied teens. Two cases in particular have inspired outrage and calls for stricter penalties: Phoebe Prince, a South Hadley, MA, fifteen-year-old, committed suicide in January 2010 after briefly dating a popular boy and angering his former girlfriend, who responded by mercilessly taunting Phoebe with sexual insults.[42] Tyler Clementi, a nineteen-year-old Rutgers University freshman, jumped from the George Washington Bridge in October 2010 after his roommate posted a video of Tyler's sexual encounter with another man on the internet.[43] In both cases, the alleged bullies are being prosecuted under the criminal law: six South Hadley students have been charged with crimes relating to Phoebe's suicide,[44] and two Rutgers students have been charged with invasion of privacy for filming and broadcasting Tyler without his knowledge.[45]

Beyond these sensational and anecdotal reports of teen "bullycides," there is some statistical evidence that links bullying to suicide ideation and attempts, as well as other mental health problems.

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[40] Amanda Burgess-Proctor, Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Victimization of adolescent girls*, CYBERBULLYING RESEARCH CENTER, http://www.cyberbullying.us/cyberbullying_girls_victimization.pdf (last visited Mar. 21, 2011).

[41] Favela, *supra* note 39.

[42] *See* Bazelon, *supra* note 1.

[43] For background on Tyler Clementi's case, *see* Foderaro, *supra* note 1.

[44] Bazelon, supra note 1. On May 4, 2011, Sean Mulveyhill pleaded guilty to misdemeanor harassment charges, and Kayla Narey "admitted to sufficient facts" for a harassment charge. Each received one year's probation and 100 hours of community service. See Erik Eckholm, Two Students Plead Guilty in Bullying of Teenager, N.Y. TIMES, June 27, 2010, http://www.nytimes.com/2011/05/05/us/05bully.html.

[45] Foderaro, *supra* note 1.

In a 2010 study of almost 2,000 high school students, both victims and perpetrators of bullying were more likely to have attempted suicide than those who neither bullied nor were bullied.[46] The study also noted that bullying seemed to correlate with other mental health challenges, concluding that "[bullying] tends to exacerbate instability and hopelessness in the minds of adolescents already struggling with stressful life circumstances."[47]

In addition to suicide, bullying is linked to increased rates of mental illness and distress for both bullies and their targets. A study of approximately 2,000 middle school students found that those who had experienced cyberbullying—either as victims or offenders—had lower self-esteem than those who had no experience with cyberbullying.[48] A study conducted by the National Institute of Child Health and Human Development also found that victims of bullying reported having trouble making friends and suffering from humiliation and loneliness, and were at greater risk of developing depression and other mental health problems as adults.[49]

Finally, the impact of bullying reaches beyond its effects on victims and perpetrators and extends to larger negative societal consequences. Teens who experienced cyberbullying were more likely to engage in "problem behaviors" offline, including using drugs and alcohol, cheating on tests, or skipping school without permission.[50] Furthermore, teenage bullying has been correlated with criminal activity later in life: one study found that 60% of boys who bullied others in middle-school were convicted of at least one crime as

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[46] Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCHIVES OF SUICIDE RES. 206 (2010), *available at* http://www.cyberbullying.us/publications.php (follow "download PDF" hyperlink under "Bullying, Cyberbullying, and Suicide"; then follow "download PDF" hyperlink).

[47] *Id.*

[48] Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbulling and Self-Esteem*, CYBERBULLYING RESEARCH CENTER, http://www.cyberbullying.us/cyberbullying_and_self_esteem_research_fact_sheet.pdf (last visited Mar. 21, 2011).

[49] *See* Ericson, *supra* note 35.

[50] Sameer Hinduja & Justin W. Patchin, *Offline Consequences of Online Victimization*, 6 JOURNAL OF SCH. VIOLENCE 89 (2007), *available at* http://www.informaworld.com/smpp/content~db=all?content=10.1300/J202v06n03_06.

adults, compared with 23% of boys who did not bully.[51] In short, bullying not only affects the bullies, the bullied, and their families, but also creates costs which must be borne by taxpayers and the state. This in turn forms an incentive for states to seek responses to bullying that go beyond family- or even school-imposed punishments, and into the realm of criminal law.

PART II: POTENTIAL REMEDIES FOR BULLYING WITHIN THE EXISTING CRIMINAL AND CIVIL CODES

Criminal statutes that can be applied to bullying

With four exceptions, the majority of states do not have criminal statutes designed to specifically address bullying.[52] However, when bullying is broken down into the components most traditionally associated with it—an imbalance of power, physical threats or assaults, and verbal attacks perpetrated either in person or by means of an electronic device[53]—it becomes clear that these components can be associated with several crimes that are already part of the criminal code, even in states that do not have specific anti-bullying statutes. Current criminal laws that can be used to punish bullying generally focus on some combination of the individual bullying *behaviors* themselves, the *means or tools* used to perpetrate the behaviors, or the *status of the victim* as a member of a protected class.

"Behavior-based" laws

Most states have laws that criminalize behaviors that are intrusive or disturbing but fall short of physical violence or assault. Since California's first anti-stalking law in 1990,[54] every state has passed a similar law or laws under the general headings of "stalking," "harassment," or "criminal threats."[55] In a process that echoes the attention being given to school bullying today, these laws were

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[51] *See Bullying at School*, *supra* note 22.

[52] Idaho, Louisiana, Nevada, and North Carolina have specific criminal anti-bullying statutes. In addition, legislatures in Colorado, Hawaii, and North Dakota are considering proposals for criminal bullying sanctions; these laws are discussed *infra* Part III.

[53] *Bullying at School*, *supra* note 22.

[54] Heather M. Stearns, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027, 1028 (1995).

[55] *Fact Sheet 14: Are You Being Stalked?*, PRIVACY RIGHTS CLEARINGHOUSE (June 14, 1994), http://www.privacyrights.org/fs/fs14-stk.htm#4.

enacted on the heels of several well-publicized cases where stalkers who were known to their victims—and often to police—later went on to murder their targets,[56] and the laws were conceived primarily to protect women from men whose view of a romantic pursuit is obsessive enough to include threats, harassment, fear, and potential violence.[57]

However, when viewed outside the context of a romantic relationship or infatuation, the stalking and harassment laws of most states could apply equally well to many bullying behaviors that occur among students. In many ways, stalking and harassment laws define "bullying for adults."[58] A typical stalking law, for example, defines stalking as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[59] This definition could just as easily apply to a teenager plagued by derisive text messages from a group of peers as it could to an adult woman being followed by her ex-boyfriend. In fact, when the Justice Department surveyed stalking victims about the type and nature of the tactics used by their stalkers, these individuals identified the top three actions as "unwanted phone calls and messages," "unwanted letters and email," and "spreading rumors"—behaviors that could as easily relate to school bullying as to criminal stalking.[60]

Furthermore, many states have created two categories of "intrusive conduct" laws, often differentiated as "stalking" for more serious offenses and "harassment" for less serious ones. In states that have both, the less serious harassment laws may be even more

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[56] Rhonda Saunders, *Stalking: Legal Aspects of Stalking*, STALKING ALERT, http://www.stalkingalert.com/articlesofinterest.htm (last updated Aug. 20, 2005).

[57] Stearns, *supra* note 54 ("[A stalker] equates love with possession, and he enjoys the thrill of the chase in realizing his fantasy. In a very real sense of the word, the stalker is a relentless hunter. The victim is his prey.").

[58] *Compare* IDAHO CODE ANN. § 18-917A(2)(a) (2010) (defining "harassment, intimidation, or bullying") *with* IDAHO CODE ANN. § 18-7906(1) (2005) (defining "stalking in the second degree"), discussed *infra* at notes 152-55. The laws are virtually identical, except that the former is aimed at a minor student population.

[59] MICH. COMP. LAWS § 750.411h(1)(d) (2010).

[60] Katrina Baum, Shannan M. Catalano, Michael R. Rand & Kristina Rose, *Stalking Victimization in The United States*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, Jan. 2009, at 2, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1211.

applicable to non-romantic, peer-to-peer bullying, because the key difference between the more serious and less serious offense is typically the presence of a specific threat of injury or death to the victim.[61]

For example, Massachusetts has both a stalking law[62] and a criminal harassment law.[63] The texts of these laws are nearly identical, beginning with: "[w]hoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress . . . ."[64] While the criminal harassment law continues with: "shall be guilty of the crime of criminal harassment," the stalking law adds: "and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking . . . ."[65] Similarly, Michigan differentiates between "stalking," a misdemeanor, and "aggravated stalking," a felony, by including "the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim" within the definition of aggravated stalking, but not stalking.[66]

In spite of what appears to be a good fit between the behaviors defined in stalking and/or harassment laws and the behaviors most commonly associated with bullying, these laws have not been extensively applied to school bullies.[67] Very few cases have removed stalking laws from the context of adult romantic relationships, and the few cases that have applied these laws in the context of bullying have wrestled with even the idea of using the term "stalking" in the context of student-to-student interactions.

The Nebraska appeals court case of *Nebraska v. Jeffrey K.*[68] provides an example of both the potential applicability of stalking laws

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[61] *See Criminal Stalking Laws*, STALKING RES. CTR., http://www.ncvc.org/src/main.aspx?dbID=DB_State-byState_Statutes117 (last visited Mar. 21, 2011) (providing an overview of state-by-state stalking, harassment, and related laws).

[62] MASS. ANN. LAWS ch. 265, § 43 (LexisNexis 2010).

[63] MASS. ANN. LAWS ch. 265, § 43A (LexisNexis 2010).

[64] §§ 43 and 43A.

[65] *Id.*

[66] MICH. COMP. LAWS § 750.411i(2)(c) (2010).

[67] A LexisNexis search on November 1, 2010, found no reported cases other than those discussed *infra*.

[68] 717 N.W.2d 499 (Neb. Ct. App. 2006), *rev'd*, 728 N.W.2d 606 (Neb. 2007).

28

to bullying and the difficulty courts may have in applying these laws outside of the "traditional" adult romantic context of stalking. Jeffrey, a high school student, was charged as a juvenile under Nebraska's stalking law, which defines stalking as "willfully harassing another person with the intent to injure, terrify, threaten, or intimidate,"[69] and further defines "harass" as "engaging in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose."[70]

The charges stemmed from Jeffrey's treatment of a female classmate.[71] As described by his victim, Jeffrey's behavior was classic schoolyard bullying: "Jeffrey and his friends called the victim and her friends various names, including 'fat ass[es],' 'fat penguins,' 'whores,' and 'fat bitch[es].' . . . [T]he name calling became a daily occurrence."[72] The victim's testimony also illustrates the power dynamics at work: "The victim specifically testified that Jeffrey's tone of voice was 'mean but not really—like a threatening voice' and that it 'was more kind of for his joy . . . his pleasure.'"[73] The bullying also included a physical component, which apparently aimed to humiliate the victim: "on three or four occasions, Jeffrey and his friends threw food, such as candy, potato chips, or French fries, at the victim and her friends."[74]

This case illustrates the difficulties that courts may have in applying stalking laws to bullying behavior. The trial court convicted Jeffrey of stalking, holding that he "engaged in a course of conduct, a pattern and practice calculated to intimidate [the victim] herein, [including] daily, verbal put-downs, [and] denigrating statements to her, *causing himself amusement*," which served "no legitimate purpose" except to intimidate the victim.[75] However, the appeals court reversed the conviction, noting that "[t]here is no evidence in the record which would support a finding that Jeffrey intended to injure, terrify, or threaten the victim."[76] Instead, the appeals court found that

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[69] 717 N.W.2d at 502; *see also* NEB. REV. STAT. § 28-311.03 (Cum. Supp. 2004).
[70] § 28-311.02.
[71] *Jeffrey K.*, 717 N.W.2d at 502.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 506.
[76] *Id.*

Jeffrey undertook these actions "for his own juvenile amusement."[77] The appeals court opinion emphasizes that this "amusement" or "pleasure" in victimizing a peer does not "demonstrat[e] a criminal intent to intimidate the victim."[78]

In short, the appeals court associated the crime of stalking with a seriousness of purpose that schoolyard bullying doesn't seem to merit: a "real" stalker acts to instill fear or terror in his victim, while the bully is simply out to have a bit of fun.[79] Judge Carlson's dissent argues that this distinction is irrelevant, noting "[t]he fact that Jeffrey found his behavior amusing does not justify the conclusion that Jeffrey did not intend to intimidate the victim."[80]

The Nebraska Supreme Court agreed with Judge Carlson, reinstating Jeffrey's conviction on appeal by the State.[81] Unlike the appeals court, the Supreme Court held that by an objective or reasonable person standard, "it is readily apparent that a reasonable person would be seriously intimidated by Jeffrey's conduct."[82] The court went on to note that in a three-month period, "Jeffrey yelled at his victim close to 200 times, in front of her friends and other students at school. Moreover, he threw food at her and shoved a chair directly in the victim's path, causing the chair to hit her. A reasonable person could be expected to alter his or her course to avoid such intimidation."[83]

The fundamental difference between the appeals court and the Supreme Court in *Jeffrey K.* turns on the distinction between the perpetrator's perspective (whether Jeffrey bullied to instill fear in his victim or rather "for his own juvenile pleasure") and the victim's perspective (whether a "reasonable victim" would have felt intimidated by Jeffrey's actions). This distinction is critical to any

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[77] *Id.*

[78] *Id.*

[79] *See also* Ramsey v. Harman, 661 S.E.2d 924, (N.C. Ct. App. 2008) (civil case finding that adult defendant's use of a personal website to publish negative statements about plaintiff and her daughter did not rise to the level of "harassment" or "stalking" as defined by sections 50C-1(6) and (7) of North Carolina's General Statutes, and invalidating a civil no-contact order that had been issued on those grounds. The opinion noted that "the statute does not allow parties to implicate and interject our courts into juvenile hurls of gossip and innuendo between feuding parties.").

[80] *Jeffrey K.*, 717 N.W.2d at 506 (Carlson, J., dissenting).

[81] *Jeffrey K.*, 728 N.W.2d at 606.

[82] *Id.* at 612.

[83] *Id.*

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attempt to apply stalking and harassment laws to bullying situations. Most bullies would not likely describe their own intentions as fear or intimidation, and bullying truly is a "victim-specific" crime—the means used to bully a thirteen-year-old African-American middle school girl might be entirely different from the means used to bully a gay sixteen-year-old high school boy. Applying these traditional laws successfully to bullying behaviors would require that courts focus on the impact on the victim, rather than on the intent of the perpetrator.

Laws that regulate the "tools" used by bullies

A second set of laws that could apply to bullying behaviors are "tools-based" laws—for example, statutes that punish based on the misuse of a tool, system, or device. These laws could be a good fit for bullying for two reasons. First, the pervasiveness of personal technology and social media nearly guarantees that most kids have the "tools" (smart phones, computers, etc.) covered by these laws.[84] Second, these "tools-based" laws are often extremely broad in scope, potentially capturing a range of behaviors not covered by other statutes.[85]

The most well-known of these laws is the federal Computer Fraud and Abuse Act (CFAA). The CFAA was originally enacted to prosecute criminal hackers and others who use computers for illegal means, but it is written broadly enough to punish anyone who "intentionally accesses a computer without authorization or exceeds authorized access" and obtains "information from any protected computer."[86] "Unauthorized access" could range from bank fraud to corporate espionage to identity theft, and while it was not the original intent of the law,[87] unauthorized access could include potential bullying behaviors such as hacking into another person's Twitter account or creating a false social network profile in someone else's name to send embarrassing messages attributable to them.

As evidence of its potentially broad scope, the CFAA has already been applied to cyberbullying in the case of Lori Drew, an

[84] *See supra* note 41 for discussion on social media usage among teens.
[85] *See infra* notes 90-101 and accompanying text.
[86] 18 U.S.C. § 1030(a)(2)(C) (2006).
[87] *See* United States v. Drew, 259 F.R.D. 449, 451 n.2 (C.D. Cal. 2009) ("The federal computer fraud and abuse statute, 18 U.S.C. 1030, protects computers in which there is a federal interest—federal computers, bank computers, and computers used in interstate and foreign commerce. It shields them from trespassing, threats, damage, espionage, and from being corruptly used as instruments of fraud.").

adult charged with a felony violation of the CFAA for using an unauthorized computer to commit the tort of intentional infliction of emotional distress on thirteen-year-old Megan Meier.[88] Drew created a fictional MySpace page in the alias of "Josh Evans," a teenage boy, and used "Josh" to befriend, flirt with, and finally harass her daughter Sarah's off-again, on-again friend Meier.[89] Initially, Drew allegedly intended to use the alias to determine whether Megan was insulting Sarah behind her back.[90] However, "Josh" and Megan conducted a month-long, flirtatious correspondence over MySpace, facilitated not only by Drew, but also by a teenaged employee of Drew and a friend of Sarah Drew.[91] When "Josh" suddenly turned hostile on the afternoon of October 17, 2006, and instigated an "insult war" among Megan and her friends, Megan fled to her room and hung herself.[92]

The case gained national attention, driven both by concerns over the unsupervised, free-for-all atmosphere on social networking sites and by public perception of Drew as a "helicopter parent" and immature perpetrator of bullying behavior.[93] When the local District Attorney declined to press charges against Drew, saying that "there are undisputed facts and disputed facts, and even if you believe all of them they still don't give you a criminal fact pattern in the state of Missouri,"[94] the U.S. Attorney's office brought federal charges under the CFAA.[95] Ultimately, however, there was no conviction for cyberbullying in this case; Drew was convicted of a misdemeanor for violating MySpace's terms of service but was acquitted of the felony violation of using an unauthorized computer to commit a tort.[96] Furthermore, in its opinion granting Drew's motion for a judgment of acquittal in the misdemeanor conviction on the grounds that a breach of a website's terms of service agreement is not in itself enough to constitute a violation of the CFAA, the federal district court noted that "[w]hile this case has been characterized as a prosecution based upon

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[88] *Id*; *see also* 18 U.S.C. § 1030(c)(2)(B)(ii) (stating that the unauthorized access is a felony if the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State).
[89] *Drew*, 259 F.R.D. at 452.
[90] Collins, *supra* note 1.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES, Nov. 26, 2008, http://www.nytimes.com/2008/11/27/us/27myspace.html?ref=us.
[96] United States v. Drew, 259 F.R.D. 449, 449 (C.D. Cal. 2009).

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purported 'cyberbullying,' there is nothing in the legislative history of the CFAA which suggests that Congress ever envisioned such an application of the statute."[97] The holding in *Drew* appears to narrow the scope of the CFAA, making it more difficult for it to be used to prosecute cyberbullying.

In addition to the CFAA, the federal government and some states have prohibited the use of the phone or computers for the transmission of criminal threats, obscene language, or harassment.[98] These laws are similar to offline stalking and harassment laws, but they focus on the means of conveying the threats or harassment. Similar to other stalking and harassment laws, these statutes tend to focus on a perpetrator's behavior as well as on the impact on a victim, but with the added feature of means of communication.[99] As such, prosecutors could potentially use these laws to pursue bullying behavior, as long as the bullying includes the specific actions covered by the law (e.g., threats, obscene language, etc.), combined with the tools the law prohibits using (e.g., the phone or "other communications device"), and the impact on the victim (e.g., the victim feels threatened, intimidated, or harassed).

Laws that focus on the status of the victim

The characteristics of the victims of bullying—particularly victims who are members of a protected class—have received a great deal of public attention following the suicide of gay Rutgers student Tyler Clementi and three other suicides by gay teens in September 2010.[100] Many members of minority groups, including racial, ethnic,

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[97] *Id.* at 451 n.2.

[98] *See, e.g.*, 18 U.S.C. § 875(c) (2006) ("Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."); 47 U.S.C. § 223(a)(1)(C) (2006) (prohibits making a telephone call or utilizing a telecommunications device, whether or not conversation or communication ensues, without disclosing one's identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications); VA. CODE ANN. § 18.2-152.7:1 (2010) ("If any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act, he shall be guilty of a Class 1 misdemeanor.").

[99] *See, e.g.*, *supra* note 98.

[100] Mary Elizabeth Williams, *Why are so many gay teens dying?* SALON.COM, Sept. 30, 2010,

and religious minorities, along with the disabled and those perceived to be gay, are disproportionately the targets of crime and bullying.[101] Most states have enacted laws that create specific "hate crimes" for those who target members of these groups and/or hate crime "enhancements" to the standard punishment an offender could expect to receive for a crime if the victim was a member of a protected group.[102] Texas, for example, takes the "enhancement" approach, holding that if the court finds that a crime was motivated by bias, "the punishment for the offense is increased to the punishment prescribed for the next highest category of offense."[103] New York, by contrast, created a specific crime that is committed when a person "[s]trikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct."[104]

The challenge with using hate crime regulations to punish bullying behavior is that often the bullying victim is not chosen because of his or her group status, but rather for no obvious reason. Phoebe Prince was bullied because she had a romantic relationship with a popular boy.[105] Megan Meier was bullied because she had a stormy friendship with a neighbor's daughter.[106] Children can be selected as victims based on their appearance, their personality quirks,

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http://www.salon.com/life/feature/2010/09/30/gay_teen_suicide_cyberbullying/index.html.

[101] In the data collected for the Josephson Institute's survey, discussed *supra* note 5, 23% of respondents said they were "prejudiced against certain groups," 21% of students said they had "[m]istreated someone because he or she belonged to a different group," and 42% said they had "used racial slurs or insults" in the last twelve months.

[102] Forty-five states have some criminal penalty for "bias-motivated violence or intimidation," with the protected groups varying by state. *See State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (last visited Mar. 11, 2011). Seventeen states have statutory or education code regulations designed to address discrimination, harassment, or bullying of students based on their sexual orientation. *See Statewide School Laws and Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/documents/school_laws.pdf (last updated June 24, 2010).

[103] TEX. PENAL CODE ANN. § 12.47 (West 2010).

[104] N.Y. PENAL LAW § 240.30(3) (McKinney 2010).

[105] *See supra* note 42 and accompanying text.

[106] *See supra* notes 90–94 and accompanying text.

or simply because they caught a bully's eye at the wrong time.[107] In fact, the advocacy group Bullypolice.org, which created a "grading" system to assess state anti-bullying laws based on their specificity, penalties, and other factors, emphasizes that the laws that receive the highest "grades" do not include any limitation on who can be a victim: "Any child can be victimized by a bully . . . . The way a bully's target or victim acts or physically looks is not the victim's problem but the bully's own psychological problem . . . . Defining victims will slow the process of lawmaking, dividing political parties who will argue over which victims get special rights over other victims."[108]

Perhaps because of the difficulty of defining a protected class of victims, very few bullying incidents have sparked hate crime prosecutions.[109] One notable and highly publicized exception to this is the prosecution of Dharun Ravi and Molly Wei, who have been charged under New Jersey's invasion of privacy statute[110] for allegedly using a webcam to broadcast Tyler Clementi's sexual encounter with another man in his dorm room.[111] According to news reports, local prosecutors had started to consider bias-related charges immediately following Clementi's suicide, and on April 21, 2011, a New Jersey grand jury indicted Ravi on fifteen counts, including "bias intimidation," a hate crime charge.[112]

Civil remedies for bullying behavior

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[107] Victims of bullying may fall into psychological, rather than physical, categories: "passive targets," who are "generally characterized as anxious, insecure, and unassertive," and "provocative targets," who are "characterized by both anxious and aggressive behavior." D.J. Boyle, *Youth Bullying: Incidence, Impact, and Interventions*, 55 J. OF THE N.J. PSYCHOL. ASS'N 22 (2005).

[108] *The MORE Perfect Anti Bullying Law*, *supra* note 30.

[109] A LexisNexis search on November 1, 2010, found no reported cases in which bullies were prosecuted under hate crime statutes or enhancements.

[110] N.J. STAT. ANN. § 2C:14-9(b) (West 2010) ("An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.").

[111] *See supra* note 43 and accompanying text.

[112] *Rutgers student Tyler Clementi suicide case poses test for N.J. privacy law*, NJ.COM, Nov. 4, 2010, http://www.nj.com/news/index.ssf/2010/11/rutgers_student_tyler_clementi_5.html; Beth Falco, *Former Student Charged in Rutgers Suicide Case*, MSNBC.COM, April 20, 2011, http://www.msnbc.msn.com/id/42681625/ns/us_news-crime_and_courts/.

A final category of existing remedies for bullying behaviors is a civil suit by the victim against the perpetrator or against the school that enabled the bullying or failed to respond to the victim's complaints. While civil actions are not a direct substitute for criminal laws and do not carry the same statutory penalties, civil suits may fill the gaps where a behavior is not covered by a criminal statute.

As with criminal bullying prosecutions under traditional stalking and harassment laws, there have been few civil suits for conduct related to bullying.[113] Three examples of unsuccessful civil suits against bullies serve to illustrate the difficulty in finding tortious conduct in bullying behaviors. First, in the New York case of *Finkel v. Dauber*,[114] student Denise Finkel sued four classmates and their parents, alleging that postings made on a private Facebook group amounted to defamation.[115] The posts, on the "Ninety Cents Short of a Dollar" Facebook page, stated that Finkel had contracted AIDS from a male prostitute or by having sex with animals, and that after having become infected with various sexually transmitted diseases, she had "morphed into the devil."[116]

The court found that the posts did not meet the standard for defamation, which in New York requires a statement of fact that a "reasonable reader" would believe was conveying a fact about the plaintiff.[117] Accordingly, the court dismissed Finkel's suit, holding that "[t]aken together, the statements can only be read as puerile attempts by adolescents to outdo each other. While the posts display an utter lack of taste and propriety, they do not constitute statements of fact."[118] The court also specifically addressed the cyberbullying nature of the posts in its opinion: "Insofar as the Plaintiff's counsel['s] suggestion that the posts constitute cyber bullying, the Courts of New York do not recognize cyber or internet bullying as a cognizable tort action. A review of the case law in this jurisdiction has disclosed no

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[113] Aside from *Ramsey* discussed *supra* in note 79, three cases discussed *infra* notes 113-33 and *J.C. v. Beverly Hills Unified School District* infra notes 191-201, a November 10, 2010, LexisNexis searching revealed very few civil cases related to broadly defined "bullying" behaviors. *See, e.g.*, Antalik v. Thomaston Bd. of Ed., No. LLICV075001762S, 2008 Conn. Super. LEXIS 2082 (Aug. 13, 2008).

[114] 906 N.Y.S.2d 697 (Sup. Ct. 2010).

[115] *Id.* at 326.

[116] *Id.* at 330.

[117] *Id.* at 329.

[118] *Id.* at 330.

case precedent which recognized cyber bullying as a cognizable tort action."[119]

Similarly, in the Minnesota case of *Jasperson v. Anoka-Hennepin Independent School District No. 11*,[120] a trustee of the estate of J.S., a teenager who had committed suicide, filed a wrongful death action against J.S's school district, alleging that the school district had failed to protect J.S. from foreseeable harm caused by bullies who had approached and threatened J.S. after school.[121] J.S's mother had reported the bullying to school officials, who counseled J.S. but took no further action against the bullies.[122] J.S. had also had problems with one of his teachers and was doing poorly in several classes.[123] Approximately two weeks after J.S. reported the bullying, and a day after receiving a report card with mostly failing grades, J.S. shot himself with his parent's gun.[124]

In affirming the dismissal of Jasperson's suit, the appeals court held that the school could not have protected J.S. from harm because although the school knew about the bullying, "the threat that J.S would harm himself was not foreseeable to the school district's personnel."[125] Additionally, the court found that the school officials' actions did not cause J.S.'s suicide, because there was no indication "that J.S. was in 'terror' after he reported [the bullying]. The record does not suggest any change in J.S.'s demeanor or behavior indicating that he was experiencing terror or distress."[126] In short, there was not a sufficiently direct link between the bullying and the suicide to render school officials liable for J.S.'s death.[127]

Finally, in *Doe v. Bristol Board of Education*,[128] a Connecticut minor sued both his local board of education and a classmate, who allegedly bullied and sexually harassed him over a five-month

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[119] *Id.*

[120] No. A06-1904, 2007 WL 3153456 (Minn. Ct. App. Oct. 30, 2007). Of note, because of the limited number of relevant reported cases that apply to bullying, I have used unpublished cases in several instances. These are not meant to establish legal precedent but rather to show how courts have interpreted criminal laws in bullying cases.

[121] *Id.*

[122] *Id.* at *4-5.

[123] *Id.* at *5-6.

[124] *Id.* at *5-7.

[125] *Id.* at *12.

[126] *Id.* at *13-14.

[127] *Id.* at *14.

[128] No. CV065002257, 2007 WL 1053836 (Conn. Super. Ct. Mar. 23, 2007).

period.[129] The suit further alleged negligent supervision, negligent failure to implement and enforce policies to prevent sexual harassment, negligent infliction of emotional distress against the school, and intentional infliction of emotional distress and assault and battery against the student.[130] The plaintiff alleged that his classmate had on multiple occasions "bothered him," "shoved him against his locker and flicked his ears on repeated occasions," "sexually harassed the plaintiff by holding his school binder at groin level and rubbing against the plaintiff in a sexual manner," and had "'humped' the plaintiff."[131] The plaintiff and his mother reported these incidents to school officials on multiple occasions, but the school allegedly took no corrective action, and the plaintiff ultimately withdrew from the school.[132]

The superior court struck the claims against the school from the suit on the grounds that, under Connecticut law, the allegations did not merit an exception from governmental immunity because there was no indication that the bully's action would cause "imminent harm" to the plaintiff.[133] Under the plaintiff's alleged facts, "it was foreseeable, at best, that if the students were together in an unsupervised location within the school, the plaintiff might be the object of harassment. Something more than mere foreseeability, however, must be alleged in the complaint to establish the degree of imminence that is required . . . ."[134]

In each of these cases, the deciding court found that the bullying behaviors did not rise to the standard of tortious conduct, even though in all of the cases, the bullies' actions had been reported and well-documented, and the bullying had caused their victims great emotional distress. These examples suggest that courts are disinclined to promote civil legal remedies for bullying and would prefer to give schools discretion to deal with bullying as they see fit. When this disinclination is combined with a similar reluctance to apply traditional criminal laws to bullying situations, the result is a status quo in which few bullies receive anything more than a reprimand from

[129] *Id.* at *1.
[130] *Id.* at *4-5.
[131] *Id.* at *2-3.
[132] *Id.* at *3-4.
[133] *Id.* at *12 ("'Imminent' harm must be "something about to materialize of a dangerous nature. Imminent harm excludes risks which might occur, if at all, at some unspecified time in the future.").
[134] *Id.* at *14.

school officials, leaving the field open for the development of new anti-bullying statutes.

PART III: STATUTORY APPROACHES SPECIFICALLY AIMED AT PREVENTING AND PUNISHING BULLYING

Types of anti-bullying approaches

States have taken three general approaches to preventing and punishing bullying. First, the majority of states have created anti-bullying provisions within their education codes mandating that local school districts develop and enforce anti-bullying policies and procedures.[135] Second, four states—Idaho, Louisiana, Nevada, and North Carolina—have enacted standalone criminal anti-bullying statutes.[136] These states have defined bullying or cyberbullying as a crime (generally a misdemeanor), with a definition of the offense and specific penalties.[137] Finally, several other states have taken an approach which leverages existing statutes and combines a strong anti-bullying policy in the education code with harassment, stalking, or related laws that have been broadened to include generally agreed upon bullying behaviors.[138]

Bullying policies within the educational code

Of the forty-four states and the District of Columbia that have some kind of anti-bullying provision, only four actually use the words "bullying" or "cyberbullying" in their criminal code; the rest locate punishment for bullying within the educational system.[139] Typically, these education code provisions require school authorities to "adopt a policy declaring harassment and bullying in schools, on school property, and at any school function, or school-sponsored activity

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[135] Hinduja & Patchin, *supra* note 7 (provides information on both offline and online bullying laws). Note that Hinduja and Patchin's overview lists several states as having "criminal penalties for bullying" when in fact they take an approach, discussed *infra*, that does not criminalize "bullying" *per se* but rather combines broad "harassment" or "stalking" laws with strong anti-bullying provisions in education codes.

[136] *See* IDAHO CODE ANN. § 18-917A (2010); LA. REV. STAT. ANN. § 14:40.7 (2010); NEV. REV. STAT. ANN. § 392.915 (LexisNexis 2010); N.C. GEN. STAT. § 14-458.1 (2010).

[137] *See* IDAHO CODE ANN. § 18-917A (2010) (Idaho classifies bullying as an "infraction").

[138] *See, e.g.*, S.B. 2323, 2010 Leg., 186th Gen. Ct. (Ma. 2010).

[139] Hinduja & Patchin, *supra* note 7.

regardless of its location, in a manner consistent with this section, as against state and school policy,"[140] and specify that the anti-bullying policy include components such as a definition of the prohibited behavior, a reporting mechanism, and appropriate punishments, which are limited to suspension, expulsion, or other sanctions that can be administered by the school system.[141]

These codes vary in their detail and rigor. Some states merely require that "[e]ach school board shall adopt a written policy prohibiting intimidation and bullying of any student. The policy shall address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use,"[142] with no specificity on what the policies must include, how they should be enforced, or the date by which the policies must be in place.[143] Others provide much more guidance to school districts, defining specific terms such as "harassment" or "bullying," specifying a minimum set of requirements for the policy, and providing a date by which such policies must be in place.[144]

The challenge and limitation of these educational statutes is that the range of punishments is constrained by what a school or school district has the authority to do on its own. Even a detailed, actionable education code provision such as Delaware's, which Bullypolice.org gives its highest grade of "A++" for its specificity in defining terms and setting policy requirements for local school districts,[145] can only mandate that each school district create and implement "an appropriate range of consequences for bullying"[146] which, without a criminal component, is limited to school-based

[140] IOWA CODE § 280.28 (2010).
[141] *Id.*
[142] MINN. STAT. § 121A.0695 (2010).
[143] *Id.* Because of Minnesota's lack of specifics in its anti-bullying laws, the anti-bullying advocacy group Bully Police USA has given Minnesota's law a "C-". *See Minnesota*, BULLY POLICE USA, http://www.bullypolice.org/mn_law.html (last visited Mar. 11, 2011).
[144] *See, e.g.*, IOWA CODE § 280.28 (2010). In contrast to Minnesota, Bully Police USA gives Iowa's law an "A-" for its specific details and requirements. *See also Iowa*, BULLY POLICE USA, http://www.bullypolice.org/ia_law.html (last visited Mar. 11, 2011).
[145] *See The MORE Perfect Anti Bullying Law*, *supra* note 30, for discussion of how state laws are "graded."
[146] DEL. CODE ANN. tit. 14, § 4112D(b)(2)(h) (2007).

sanctions, such as expulsion or suspension from school activities.[147] These school-based punishments may be appropriate in many cases, but they may not create an effective deterrent for students who are not invested enough in their education to care about suspension or expulsion, nor do they speak to the public's desire for harsher punishments in cases, like Meier's, Prince's, and Clementi's, where the consequences of bullying are more severe.

Stand-alone anti-bullying statutes

Louisiana, Idaho, Nevada, and North Carolina have put teeth into their anti-bullying prohibitions by enacting specific criminal anti-bullying statutes, even though each of their education codes contains anti-bullying provisions similar to those described above.[148] In these states, bullying and cyberbullying are actual crimes, with their own definitions that are distinct from either the education code or related crimes like stalking or harassment.[149] All four laws took effect in 2010, and two include criminal penalties only for cyberbullying,[150] suggesting that these laws were created in response to high-profile "bullycides" and growing concerns about the dangers of children's ever-increasing access to technology.[151]

While these newly created anti-bullying laws are distinct from their states' stalking or harassment laws in that they are focused on the school environment or are aimed specifically at students or people

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[147] *See* § 4112D(g) ("An incident may meet the definition of bullying and also the definition of a particular crime under state or federal law. Nothing in this section or in the policies promulgated as a result thereof shall prevent school officials from . . . reporting probable crimes that occur on school property or at a school function . . ."); *see also* CAL. EDUC. CODE § 48900 (West 2009) (enumerating the grounds for expulsion or suspension from California public schools).

[148] *See* IDAHO CODE ANN. § 33-205 (2010); LA. REV. STAT. ANN. § 17:416.13 (2010); NEV. REV. STAT. ANN. § 388.135 (LexisNexis 2010); *see also* N.C. GEN. STAT. § 115C-407.16 (2010).

[149] *See* IDAHO CODE ANN. § 18-917A (2010); LA. REV. STAT. ANN. § 14:40.7 (2010); NEV. REV. STAT. ANN. § 392.915 (LexisNexis 2010); *see also* N.C. GEN. STAT. § 14-458.1 (2010).

[150] *See supra* note 149. Idaho's and Nevada's laws include penalties for all types of bullying, whereas in Louisiana and North Carolina, criminal penalties are limited to cyberbullying.

[151] For example, the Idaho anti-bullying law is called "Jared's Law," after Jared High, a thirteen-year-old who committed suicide after extended bullying that included a severe beating. *See Idaho*, BULLY POLICE USA, http://www.bullypolice.org/id_law.html (last visited Mar. 11, 2011).

under eighteen years of age,[152] they have a close, and in some cases overlapping, relationship with the related criminal laws in their respective states. A side by side comparison suggests that stalking and bullying are in fact the adult and juvenile versions of the same basic behaviors. For example, Idaho's anti-bullying law prohibits any student from committing "an act of harassment, intimidation or bullying against another student"[153] and defines "harassment, intimidation, or bullying" as inclusive of anything that a "reasonable person under the circumstances" should know would place a student "in reasonable fear of harm to his or her person," "in reasonable fear of damage to his or her property," or "[i]s sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student."[154] In comparison, Idaho's stalking law defines stalking as engaging in a course of conduct that "seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress," or "would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member."[155] In both the stalking and the anti-bullying statutes, the crime is defined by both the perpetrator's actions and the actions' impact on the victim, and there seems to be little distinction between the standards of the two laws, save for the anti-bullying law's inclusion of fear of "damage to his or her property" and the specification that the victim is a "student."[156]

In contrast, Louisiana's new cyberbullying law appears to be more complementary to the state's related cyberstalking law. Louisiana defines cyberbullying as "the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen," and it is punishable with a $500 fine or

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[152] *See, e.g.*, NEV. REV. STAT. ANN. § 392.915(1) (LexisNexis 2010) ("A person shall not, through the use of any means of oral, written or electronic communication, including, without limitation, through the use of cyber-bullying, knowingly threaten to cause bodily harm or death to a pupil or employee of a school district or charter school . . . ."); N.C. GEN. STAT. § 14-458.1 (2010) ("[I]t shall be unlawful for any person to use a computer or computer network to do any of the following (1) With the intent to intimidate or torment a minor . . . .").

[153] IDAHO CODE ANN. § 18-917A(1).

[154] § 18-917A(2)(a)(iii), (b).

[155] § 18-7906(1)(a)-(b).

[156] *Compare* § 18-917A(2)(a) (defining "harassment, intimidation, or bullying") *with* § 18-7906(1) (defining "stalking in the second degree").

imprisonment for up to six months.[157] Cyberstalking is also a crime in Louisiana and includes the use of "electronic communications" to threaten "to inflict bodily harm to any person or to such person's child, sibling, spouse, or dependent, or physical injury to the property of any person," or "to communicate to another repeatedly, whether or not conversation ensues, for the purpose of threatening, terrifying, or harassing any person,"[158] and is punishable by a fine of up to $2000 or imprisonment for up to one year.[159] In this case, the cyberbullying law is both broader and less retributive than the cyberstalking law. The cyberbullying law includes "any" communication, not just "repeated" communications, and contains more lenient penalties, perhaps in recognition of being directed at a student population. Even with these differences, however, there is a significant overlap in what is prohibited by the two laws: any "repeated" electronic communication to a person under the age of 18 that "harasses," "threatens," or "terrifies" its recipient is likely covered by both the cyberstalking and cyberbullying laws.[160]

These specific laws against bullying have both advantages and challenges. On the positive side, anti-bullying laws are responsive to public outrage over bullying, and they effectively shine a light on some of the worst behavior that occurs among students. Furthermore, language in the new bullying laws that mirrors language in traditional stalking and harassment laws raises the obvious conclusion that "stalking" or "harassment" is essentially bullying among adults—and this behavior should not be tolerated no matter who engages in it.

On the other hand, these laws risk over-defining certain behaviors as "bullying" that could be addressed equally well in neutral stalking or harassment statutes that apply to both adults and minors. Defining a separate "bullying" law for minors, even if it mirrors a "stalking" law that applies to adults, risks sending a signal that similar behaviors (harassment, intimidation, etc.) are somehow less serious if committed by one student against another than among adults. Additionally, these laws may enact harsh penalties on students who might be better served by school-based sanctions such as suspension, or alternative programs such as counseling. Because they are so new, these laws have yet to be tested; there are no cases in which an appeals

[157] LA. REV. STAT. ANN. § 14:40.7(A), (D)(1)-(2) (2010).
[158] § 14:40.3 (B)(1)-(2).
[159] § 14:40.3 (C)(1).
[160] §§ 14:40.3, 14:40.7.

court has considered a case under any of the anti-bullying statutes discussed above, nor has any court addressed a challenge to the laws themselves.[161] It therefore remains to be seen whether, as intended, the laws can effectively punish behavior that would be out of the reach of their states' existing criminal laws against stalking, harassment, or related crimes, or whether the laws instead fill a gap that does not actually exist between the state educational codes and the rest of the criminal code.

Approaches that expand traditional criminal penalties with a focus on bullying behaviors

Rather than enact specific anti-bullying laws, several states have taken the approach of strengthening or adding specificity to their education code anti-bullying policies in conjunction with including common bullying behaviors in their stalking and/or harassment laws.[162]

Massachusetts provides the best example. In the wake of the publicity following Phoebe Prince's suicide, six students were charged with a variety of crimes, including statutory rape (for the two eighteen-year-old seniors who allegedly dated and had sex with Phoebe), stalking, criminal harassment, violation of civil rights with bodily injury resulting,[163] and disrupting a school assembly.[164] Amid the debate over whether the charges were appropriate given the circumstances,[165] Massachusetts passed S.B. 2323 in 2010, which

[161] As of November 11, 2010.

[162] *See, e.g.*, S.B. 2323, 2010 Leg., 186th Gen. Ct. (Ma. 2010); H.B. 91, 2008 Gen. Assem., Reg. Sess. (Ky. 2008); *see also* S.B. 818, 94th Gen. Assem., 2nd Reg. Sess. (Mo. 2008).

[163] MASS. ANN. LAWS ch. 265, § 37 (LexisNexis 2010) ("No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States."). The students were charged under this law for allegedly denigrating Phoebe's national origin by calling her an "Irish slut" and interfering with her right to an education. *See* Bazelon, *supra* note 1.

[164] *Attorney Elizabeth Scheibel's statement on Prince death*, SCRIBD (Mar. 29, 2010, 4:48 PM), http://www.scribd.com/doc/29114833/Attorney-Elizabeth-Scheibel-s-statement-on-Prince-death.

[165] *See* Jessica Barnett, *From Lockers to Lockup*, NEWSWEEK, Oct. 4, 2010, http://www.newsweek.com/2010/10/04/phoebe-prince-should-bullying-be-a-crime.html.

modifies both the educational and criminal codes in the state.[166] First, it strengthens the schools' ability to deal with bullying by defining bullying, prohibiting both cyberbullying and bullying on school grounds, and mandating that schools develop bullying prevention plans.[167] Second, the bill revises the state's existing stalking and harassment laws to include more forms of communications devices by which stalking or harassment can be conducted, including "any device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications."[168] Finally, the bill makes a similar change to Massachusetts' law against "Use of the Telephone to Make Annoying Phone Calls," by adding "contact[ing] another person by electronic communication" to the existing law.[169]

Massachusetts' new law has been called the "country's best anti-bullying law" for the comprehensive approach it takes to bullying,[170] even though it includes no new criminal laws or specific criminal statutes against bullying *per se*, as defined distinctly from stalking, harassment, and other related crimes.[171] Interestingly, the six students charged following Phoebe Prince's suicide would likely not face different or additional criminal charges under the new law; based on publicly available facts about the case, the new additions to the stalking, harassment, and misuse of the telephone laws—which primarily focus on the expansion of the modes of communication that

[166] S.B. 2323, 2010 Leg., 186th Gen. Ct. (Ma. 2010).

[167] *Id.* School districts are charged with developing their own plans, but plans must contain ten components, including for example, "descriptions of and statements prohibiting bullying, cyberbullying and retaliation," "clear procedures for students, staff, parents, guardians, and others to report bullying or retaliation," a "range of disciplinary actions that may be taken against a perpetrator for bullying or retaliation," "procedures consistent with state and federal law for promptly notifying the parents or guardians of a victim and a perpetrator," and "a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students."

[168] *Id.* § 5A-B.

[169] *Id.* § 5C.

[170] Emily Bazelon, *Bullies Beware*, SLATE, Apr. 30, 2010, http://www.slate.com/id/2252543/.

[171] S.B. 2323, 2010 Leg., 186th Gen. Ct. (Ma. 2010).

can be used for stalking or harassment—would be only tangentially applicable in Prince's case.[172]

Along with Massachusetts, Missouri and Kentucky have taken a similar approach by passing bills that both strengthen the state's education code approach to bullying and expand the definitions of stalking and harassment.[173] In both cases, the relevant stalking and harassment laws were broadened to include conduct that resembles bullying behaviors, prohibiting "[c]reat[ing] a hostile environment by means of any gestures, written communications, oral statements, or physical acts"[174] or "[e]ngag[ing] in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, [or to] cause such person to be frightened, intimidated, or emotionally distressed."[175] And while neither bill specifically uses the word "bullying" within its state's harassment law, both include references to students or young people. Kentucky applies the broad prohibition against "creating a hostile environment" *only* to those "enrolled as a student in a local school district,"[176] and Missouri creates a specific category of harassment for someone who "knowingly communicates with another person who is or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates or causes emotional distress to such other person."[177]

This expansion of existing criminal statutes, usually in conjunction with changes to the education code, has two primary advantages over dedicated anti-bullying statutes. First, by modifying educational policy in conjunction with the criminal code, the laws recognize that bullying is a problem unique to the educational setting and place at least part of the onus of reducing bullying behaviors on schools, rather than courts. Second, by avoiding the use of terms like "bully" or "bullying" in the criminal law itself, these approaches

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[172] Bazelon, *supra* note 1. There appeared to be only one incident of the alleged bullying that included a substantial online component; one of the girls (Kayla Narey) posted a comment on her Facebook page about how she hated "Irish sluts," which was apparently meant to refer to Phoebe Prince, but the comment was not made directly to Phoebe, and it was only seen by Phoebe because a boy she was dating showed it to her.

[173] *See* H.B. 91, 2008 Gen. Assem., Reg. Sess. (Ky. 2008); S.B. 818, 94th Gen. Assem., 2nd Reg. Sess. (Mo. 2008).

[174] H.B. 91 § (4)(1)(f), 2008 Gen. Assem., Reg. Sess. (Ky. 2008)

[175] S.B. 818 § 565.090 1(4), 94th Gen. Assem., 2nd Reg. Sess. (Mo. 2008)

[176] *See supra* note 17.

[177] *See supra* note 175.

recognize that what we colloquially call "bullying" between kids can include behaviors that are adult, criminal acts and should be punished as such.[178] However, avoidance of the word "bully" has a downside as well: it may allow for a collective belief that kids shouldn't be prosecuted as criminals for activities that are "just part of growing up." It remains to be seen whether these laws will actually be used to prosecute bullies, or whether as in states with "traditional" stalking and harassment laws, prosecutors and courts will resist deploying these "adult" harassment laws against student bullies.[179]

Concerns and challenges inherent in the expansion of criminal anti-bullying laws

Dedicated anti-bullying statutes and expansion of existing criminal laws have advantages when compared to each other; additionally, any change or expansion in the current criminal code involves challenges when compared to the status quo. There are two primary arguments against any expansion of criminal behavior, whether through new anti-bullying statutes or the expansion of current laws. The first is that creating new crimes or expanding the scope of existing crimes leads to a slippery slope that criminalizes behavior that other means, such as the education code, can more effectively regulate. The second is that by criminalizing what is often primarily speech (e.g., teasing, taunting, threats, etc.), these expanded laws will run up against individual students' First Amendment rights.

The case that all but the most egregious bullying (e.g., behavior that would already be covered by existing stalking or harassment laws) should be regulated by the education code rests on the belief that bullying between students is best handled by school authorities who interact with students on a day-to-day basis. This argument contends that if bullying is handled at the school, without the involvement of the criminal justice system, students can be allowed to make youthful mistakes that have meaningful, but limited, consequences and can learn appropriate behavior in an environment that is both corrective and compassionate. Suspension and expulsion are serious punishments, but they can be overcome—whereas an arrest record is a

[178] Conversely, avoiding the word "bullying" also ensures that *adults* who engage in stalking or harassing behaviors do not fall outside of the scope of the law, the way in which they might under a dedicated anti-bullying statute that specifically applied to students

[179] As of November 11, 2010, there were no relevant reported cases under the newly amended laws of either state.

consequence that affects a student for life.[180] With children entering the juvenile justice system at ages as young as ten in California,[181] this argument is part of a larger debate over the increasing criminalization of all kinds of behaviors, particularly among juveniles.

The second argument—that more expansive anti-bullying laws could be held unconstitutional because they impinge upon students' free speech rights—has been debated by multiple commentators in the wake of increased interest in tougher punishments for bullying.[182] While students' free speech rights are not unlimited, a student's rights cannot be completely circumscribed simply by virtue of that student's attendance at a public school; in the words of the Supreme Court, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[183]

As the first of four significant United States Supreme Court cases that together define the limits of student free speech,[184] *Tinker v. Des Moines* created the test that applies to much of the speech that would be prohibited by the newly proposed anti-bullying statutes. In *Tinker*, three students were suspended for wearing black armbands to

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[180] *See, e.g.*, Barnett, *supra* note 165 ("There is longstanding research to show that law is not a deterrent to kids who respond emotionally to their surroundings; ultimately, labeling a group of raucous teens as 'criminals' will only make it harder for them to engage with society when they return.").

[181] *California's Criminal Justice System: A Primer*, LEGISLATIVE ANALYST'S OFFICE (Jan. 31, 2007) http://www.lao.ca.gov/2007/cj_primer/cj_primer_013107.aspx#chapter%207.

[182] *See, e.g.*, Jessica Moy, *Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After Morse v. Frederick*, 37 HASTINGS CONST. L.Q. 565 (2010); Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 339-45 (2008); Kathleen Hart, *Note: Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109 (2005).

[183] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[184] *See also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986) (holding that students have no First Amendment protection for lewd, vulgar or "patently offensive" speech that occurs in school); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[E]ducators do not offend the First Amendment by exercising editorial content over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."); Morse v. Frederick, 551 U.S. 393, 403 (2007) (holding that a school may restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use).

school in protest of the Vietnam War.[185] The Court overturned the suspension, holding that a school may regulate a student's speech or expression only if such speech causes or is reasonably likely to cause a "substantial disruption of or material interference with school activities" or to the work of the school.[186]

Three subsequent cases have since refined *Tinker*'s holding, further limiting "lewd" speech that occurs at school,[187] speech that occurs within a "school-sponsored" activity,[188] and speech that occurs at a "school event"[189] and appears to "promote illegal drug use."[190] However, the core *Tinker* holding remains and, as the case of *J.C. v. Beverly Hills Unified School District*[191] illustrates, would likely apply to anti-bullying statutes that attempt to regulate bullying that consists entirely of non-threatening, non-harassing speech, particularly if that speech does not occur on school grounds.

As one of the few examples of federal courts' responses to a constitutional challenge related to bullying, *J.C.* demonstrates the limits of schools' ability to punish non-threatening bullying behaviors.[192] Plaintiff J.C., a student at Beverly Vista High, filmed a four-minute video of several of her friends insulting C.C., another student.[193] The video was filmed after school in a local restaurant.[194] J.C. later posted the video on YouTube and alerted "5 or 10" friends from school that they should look at the video; she also called C.C. and told her to look at it.[195] The next day, C.C. and her mother came to the school to complain about the video, and after an investigation, J.C. was suspended for two days.[196] J.C. sued the school, the school district, and specific school officials for violation of her First Amendment free speech rights.[197]

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[185] *Tinker*, 393 U.S. at 504.
[186] *Id.* at 514.
[187] *Bethel*, 478 U.S. at 684-85.
[188] *Hazelwood*, 484 U.S. at 273.
[189] *Morse*, 551 U.S. at 401.
[190] *Id.* at 403.
[191] 711 F. Supp. 2d 1094 (C.D. Cal. 2010).
[192] *See also* Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (finding that a student's off-campus creation of a Facebook page that disparaged a teacher was protected under *Tinker*).
[193] 711 F. Supp. 2d at 1098.
[194] *Id.*
[195] *Id.*
[196] *Id.* at 1098-99.
[197] *Id.* at 1100.

In finding that J.C.'s free speech rights had been violated, the court applied the *Tinker* standard and held that J.C.'s behavior did not rise to the level of a "material and substantial disruption" that would allow the school to regulate her speech: "[the] disruption is entirely too *de minimis* as a matter of law to constitute a substantial disruption . . . at most, the record shows that the School had to address the concerns of an upset parent and a student who temporarily refused to go to class, and that five students missed some undetermined portion of their classes on May 28, 2008."[198]

In holding that J.C. could not be suspended for the video, the court also provided some guidance as to the type of bullying that would likely rise to the level of a "substantial disruption." It noted,

> J.C.'s video was not violent or threatening. There was no reason for the School to believe that C.C.'s safety was in jeopardy or that any student would try to harm C.C. as a result of the video. Certainly, C.C. never testified that she feared any type of physical attack as a result of the video. Instead, C.C. felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class. These concerns cannot, without more, warrant school discipline. . . . [T]o allow the School to cast this wide a net and suspend a student simply because another student takes offense to her speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul of *Tinker*.[199]

The court's description in *J.C.* of the type of speech that could be regulated by the school bears a close resemblance to speech already prohibited in most states under even the most narrowly defined stalking or harassment laws; that is, speech that contains a "threat of bodily injury"[200] or places another person "in reasonable fear for his or her safety."[201] At the same time, the language the court uses to describe C.C.'s reaction to J.C.'s bullying accurately, if perhaps inadvertently, describes how most students actually feel after being

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[198] *Id.* at 1117.
[199] *Id.*
[200] *See, e.g.*, CAL. PENAL CODE § 422 (West 2010).
[201] *See, e.g.*, PENAL § 646.9.

bullied: C.C. was not endangered, but she "felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class."[202]

This conundrum—that one student's constitutionally protected speech can be another student's humiliation—lies at the heart of the debate over how expansive the criminal regulation of bullying should become. With each step toward greater protection of victims, the law risks further encroachment upon the free speech rights of others. Conversely, by limiting legal remedies for the bullied in favor of the protected speech of the bullies, the law risks creating a continued stream of Phoebe Princes and Tyler Clementis and Megan Meiers—fragile students who, in the face of what they perceive as relentless, never-ending harassment, choose to take their own lives rather than continue to endure. The court in *J.C.* takes an approach that clearly favors speech over protecting victims, holding that unless the speech contains a threat or places its target's safety "in jeopardy," it cannot be punished by the school, let alone criminalized.[203] While it remains to be seen whether other courts will apply *Tinker* as broadly to their states' new anti-bullying laws, a broad application of the principles underlying the holding in *J.C.* would restrict both criminal and education code provisions against bullying.

PART IV: HOW SHOULD CALIFORNIA APPROACH BULLYING?

California has several options for strengthening its anti-bullying efforts. Like most states, California has two of the building blocks that can be used to address bullying: mandates for bullying prevention and punishment within its education code, and criminal laws that could apply to bullying behaviors. However, many of these laws and policies are narrower and more specific than other states' comparable statutes, and would allow many bullying incidents to go unpunished. Despite the challenges described above, California should consider strengthening its anti-bullying policies through both changes in the criminal and the education codes.

Provisions in the California Education Code

The California Education Code contains a number of provisions designed to protect students and maintain a safe school environment. In particular, the Interagency School Safety Demonstration Act of 1985 proclaims that "all pupils enrolled in the state public schools have the inalienable right to attend classes on

[202] *J.C.*, 711 F. Supp. 2d at 1117.
[203] *Id.*

school campuses that are safe, secure, and peaceful,"[204] and establishes a goal of improving overall school safety, including the prevention and reduction of bullying behaviors.[205] The Act includes several provisions related to bullying: it mandates that schools establish "comprehensive school safety plans;"[206] creates a statewide "school safety cadre" composed of "up to 100 professionals from educational agencies, community-based organizations, allied agencies, and law enforcement;"[207] and tasks this cadre with improving overall school safety, including reducing bullying, "teen relationship violence, [] discrimination, and harassment."[208] However, the Act does not describe any detailed anti-bullying programs or policies, nor does it establish any specific penalties for bullying.

Other sections of the California Education Code describe specific violations that can result in suspension or expulsion, and several forms of bullying are included among those offenses. Under section 48900, a pupil may be suspended or expelled for engaging "in an act of bullying, including, but not limited to, bullying committed by means of an electronic act . . . directed specifically toward a pupil or school personnel."[209] "Bullying" is defined in the Code as including "sexual harassment,"[210] "hate violence,"[211] and any other incident in which school officials have determined that the student has committed "harassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment."[212]

While the bullying provisions in the California Education Code are more detailed and systematic than education codes in other

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[204] CAL. EDUC. CODE § 32261(a) (West 2009).
[205] *See* EDUC. § 32261.
[206] EDUC. § 32282(b).
[207] EDUC. § 32270.
[208] *Id.*
[209] EDUC. § 48900(r).
[210] EDUC. § 212.5 ("Sexual harassment" means "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting . . . .").
[211] EDUC. § 233(e) ("Hate violence" is "any act punishable under Section 422.6, 422.7, or 422.75 of the Penal Code."). *See* sources cited *infra* note 218-26.
[212] EDUC. § 48900.4.

states,[213] the Code lacks both the specificity and the compliance mechanisms that, for example, Massachusetts had adopted recently for its own education code.[214] In particular, the new Massachusetts law not only mandates that schools develop bullying prevention programs, but also creates a number of content, dissemination, and reporting requirements to ensure that the programs are being implemented and managed on an ongoing basis.[215] The distinction between the California and the Massachusetts prevention statutes can best be described as the difference between "guidelines" as adopted by California, and "plans" as created by Massachusetts—California's laws suggest a direction for a local school district to head toward, but Massachusetts' new law comes significantly closer to ensuring that a district will actually get to the desired destination.

At a minimum, California could improve its education-based approach to bullying by strengthening its education code to include more specificity in its requirements of local schools and accountability for successfully developing and implementing bullying prevention and punishment plans.[216] However, as discussed in Part III, even the toughest education code-based responses can only go to the limits of what a school system can do: suspend, expel, or otherwise punish a student through academics or extracurricular activities. If the state wants to apply the same standards to school bullying that it would apply to the equivalent behaviors in adults, it must use the criminal justice system to address the more serious forms of bullying and consider remedies that criminalize bullying behaviors.

Current criminal laws that address bullying behaviors in California

While California does not have a specific anti-bullying law, it does have a portfolio of stalking, harassment, and unwanted contact laws that, like similar laws in other states, could be used to address bullying behavior.[217] These laws include:

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[213] *See, e.g.*, MINN. STAT. § 121A.0695 (2010) (providing no specifics on the definition of bullying or what types of policies must be implemented).

[214] *See* S.B. 2323, 2010 Leg., 186th Gen. Ct. (Ma. 2010).

[215] *Id.* § 4.

[216] *See, e.g.*, DEL. CODE ANN. tit. 14, § 4112D(b)(2)(h) (2007) (Delaware's anti-bullying provision contains thirteen specific components that local school districts' anti-bullying programs must address, including definitions, consequences, and reporting procedures.).

[217] The following California laws described in this section are misdemeanors, punishable by imprisonment of not more than one year and/or a fine of not more than $1000, unless otherwise noted.

- **Stalking**: Holds that "[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking."[218]
- **Criminal threats**: Punishes "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat . . . and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety."[219]
- **Hate crime laws**: Create both a separate "hate crime" that prohibits interference with "the free exercise or enjoyment of any right or privilege secured . . . by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim,"[220] as defined by California Penal Code section 422.55,[221] as well as a hate crime enhancement under Penal Code section 422.7, which holds that the minimum penalty for a crime committed under certain circumstances and motivated by bias is imprisonment for up to one year and/or a fine of up to $10,000.[222]
- **Obscene, threatening, harassing phone calls**: Prohibits both "obscene" communications made "with intent to annoy" and

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[218] CAL. PENAL CODE § 646.9(a) (West 2010). Section 646.9(e) further defines "harass" to mean "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose."

[219] PENAL § 422.

[220] PENAL § 422.6.

[221] PENAL § 422.55 (Hate crimes covered by this section include disability, gender, nationality, race or ethnicity, religion, sexual orientation, association with a person or group with one or more of these actual or perceived characteristics.).

[222] PENAL § 422.7. The conditions that could trigger the hate crime enhancement under this section include "the present ability to commit a violent injury or causes actual physical injury," "[property] damage in excess of nine hundred fifty ($950)," or a previous conviction for committing or conspiring to commit the previous two conditions.

communications that include "any threat to inflict injury to the person or property of the person addressed or any member of his or her family," transmitted by phone or "electronic communication device."[223] This law also addresses "repeated contact" by means of phone or electronic communication device, "whether or not conversation ensues."[224]

- **Use of electronic communications to instill fear or harass**: Punishes "[e]very person who, with intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family," disseminates personal information about another person via an electronic communication device to cause "unwanted physical contact, injury, or harassment, by a third party," to the person whose information was disseminated.[225]
- **Impersonation by electronic means**: Prohibits impersonation of "another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person," as long as "another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated."[226]

Bullying prosecutions under current California laws

Taken together, California's relevant criminal laws cover several types of bullying behavior, but they leave some meaningful gaps. For example, California's stalking and criminal threats laws focus on threats to the physical safety of the victim, requiring that the perpetrator make a "credible threat with the intent to place that person in reasonable fear for his or her safety"[227] or threaten "to commit a

[223] PENAL § 653m.
[224] *Id.*
[225] PENAL § 653.2.
[226] PENAL § 528.5(a)-(b). A related law is Penal Code section 529, which addresses performance of certain acts in false character and punishes a person who "falsely personates another in either his private or official capacity" and uses the false identity in actions that might make the person who is being impersonated liable for bail, surety, a suit, or a crime. Prosecutions of juveniles under section 529 are typically incidents in which the juvenile lies about his age or other identifying characteristics during an encounter with the law. *See, e.g.*, People v. Ivan J., 105 Cal. Rptr. 2d 382 (Ct. App. 2001) (A seventeen-year-old lied about his age to a police officer in an attempt to avoid a citation for underage tobacco smoking.).
[227] PENAL § 646.9(a).

crime which will result in death or great bodily injury to another person."[228] This relatively narrow scope would limit application of these laws to only the most egregious bullying, where a bully makes an actual threat to the life or safety of his or her victim. In contrast, some states define stalking more broadly, requiring only that the victim feel "terrorized, frightened, intimidated, threatened, harassed, or molested,"[229] even if no specific threat was made to the victim's health or safety.[230] Alternatively, many states with similarly narrow stalking laws that require a physical threat nevertheless punish other less serious, unwanted contact using laws that prohibit "harassment."[231] The combination of California's specific focus on physical safety within its stalking and threats laws and its lack of a broader criminal harassment law would allow a bully who followed, taunted, and intimidated his victim, but never made a threat to her life or health,[232] to go unprosecuted.

The small number of bullying-related prosecutions in California confirms that it is difficult to shoehorn many bullying behaviors into California's current penal code.[233] In fact, very few of the laws discussed above have been used to prosecute bullying.[234] The most well-known of these laws, Penal Code section 646.9 (stalking), is used almost exclusively to prosecute "romantic" or "relationship-focused" offenders; no stalking cases involving bullying have been

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[228] PENAL § 422.

[229] MICH. COMP. LAWS § 750.411h(1)(d) (2010).

[230] *See, e.g.*, NEB. REV. STAT. § 28-311.03 (Supp. 2004).

[231] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 265, § 43A (West 2010) (prohibiting "a knowing pattern of conduct or series of acts" that "seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress").

[232] *See, e.g.*, Nebraska v. Jeffrey K., 717 N.W.2d 499, 502 (Neb. Ct. App. 2006).

[233] Excluded from this discussion are cases in which a "bullying" incident (e.g., intimidation or harassment using words, texts, emails, etc.) is accompanied by another clearly recognized crime such as assault, robbery, use of a firearm, etc., and that *other crime* is prosecuted. *See, e.g.*, In re K.B., No. A121424, 2009 WL 449648, at *1 (Cal. Ct. App. Feb. 24, 2009) (defendant engaged in threats and name-calling that escalated into assault); In re D.L., No. H031081, 2007 WL 4139204, at *1 (Cal. Ct. App. Nov. 21, 2007) (defendant taunted victim, then robbed him of his hat, sunglasses, and shirt); In re GE M., 277 Cal. Rptr. 554 (Ct. App. 1991) (defendant made racially motivated threats against victim, and then brandished a firearm at him).

[234] As of November 11, 2010, no exclusively "bullying-focused" cases have been reported under PENAL §§ 653.2, 628.5, or 646.9, or the hate crimes laws of §§ 422.55, 422.6, and 422.7.

examined by California appeals courts.[235] The typical stalking case is one more similar to *People v. Halgren*,[236] in which the stalker met his victim at a grocery store and became almost instantly obsessed with her, repeatedly calling her at home and at work and threatening her when she refused his advances.[237]

Some bullying behaviors have, however, been prosecuted under Penal Code section 422 (criminal threats), with mixed results. In the case of *In re Breana W.*,[238] a fourteen-year-old eighth grader was convicted as a juvenile of making a criminal threat when she wrote a threatening note to another student and asked a friend to deliver it to her.[239] The note read in part,

> [T]rust me Bitch, if you continue to talk shit about me and Megahn [*sic*], we will find out, and I will disrespect you and whoop your ass at your own house! I dare you to show this to your faggot ass principal. Read that part to him, and say Breana sed [*sic*] and meant it![240]

The appeals court upheld Breana's conviction, finding that Breana's note was specific enough to meet the requirements of section 422: it had "intended to convey a threat of 'significant or substantial physical injury' warranting great bodily injury within the meaning of *section 422*,"[241] and "[a] reasonable person would have been fearful of Breana's imminent criminal threats."[242]

By comparison, in the case of *In re Steven R.*,[243] a sixteen-year-old's juvenile conviction for making a criminal threat was overturned on the grounds that the behavior was not "the sort of serious criminal activity which section 422 proscribes."[244] Steven R., apparently angry that twelve-year-old Marcelo R. had reported Steven's friend to the police for assault, approached Marcelo in a middle school cafeteria

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[235] This is accurate as of November 11, 2010.
[236] 52 Cal. App. 4th 1223 (Ct. App. 1996).
[237] *Id.* at 1226-28.
[238] No. F047972, 2006 WL 14491, at *1 (Cal. Ct. App. Jan. 4, 2006).
[239] *Id.* at *3.
[240] *Id.*
[241] *Id.* at *7 (emphasis added).
[242] *Id.* at *9.
[243] No. B157087, 2003 WL 1439615, at *1 (Cal. Ct. App. Mar. 21, 2003).
[244] *Id.* at *8.

and asked him, "Why are you talking crap about my homey like that? You are lucky I don't beat your ass."[245] While Marcelo testified that he was "placed in fear" and "was wondering if he was going to kick my ass like he said,"[246] the court found that "[t]his was at most an angry schoolyard outburst by a young man who was upset over accusations leveled at a friend, not a serious threat of death or great bodily harm."[247]

The difference between the outcomes in *Breana W.* and *Steven R.* appears to hinge on the specificity of the threat to the victim's physical safety and the perpetrator's apparent ability and willingness to make good on the threat. While the court in *Breana W.* found the threats to be "imminent" and "warranting great bodily injury,"[248] the court in *Steven R.* held the threats to be "schoolyard taunts, equivocal and conditional in nature. The statements express anger with Marcelo's actions and suggest that his actions deserve a physical response, but they do not suggest that a physical response is forthcoming."[249] This distinction suggests that most bullies would fail to meet the test under California Penal Code section 422, because even prolonged taunting, teasing, or harassment, without a specific threat of injury or harm, would not constitute the making of a criminal threat.

In contrast to California's stalking and threats laws, the California law against obscene, threatening, or harassing phone calls might be more broadly applicable to bullying behavior, because it contains no absolute requirement that the victim feel physically threatened.[250] Instead, under Penal Code section 653m, the communications must be intended to "annoy or harass," and *either* must include "obscene language" *or* "threat to inflict injury," *or* must be "repeated contact[s]," "whether or not conversation ensues."[251] However, despite this relatively broad scope, there are almost no examples of juvenile prosecutions for bullying under section 653m. The only available reported example[252] illustrates again how reluctant courts are to recognize bullying behaviors as crimes.

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[245] *Id.* at *2-3.
[246] *Id.* at *3.
[247] *Id.* at *8.
[248] *In re Breana W.*, No. F047972, 2006 WL 14491, at *2, *3 (Cal. Ct. App. Jan. 4, 2006).
[249] *Steven R.*, 2003 WL 1439615, at *2.
[250] *See* CAL. PENAL CODE § 653m (West 2010).
[251] *Id.*
[252] As of November 11, 2010.

In the case of *In re C.C.*,[253] sixteen-year-old C.C. was convicted as a juvenile of violating section 653m by sending several "obscene" texts to S., his ex-girlfriend, after she broke up with him.[254] While the texts contained multiple sexually-based insults and slurs,[255] the appeals court overturned C.C.'s delinquency on the grounds that the texts were not "obscene" as defined by the legally accepted use of the term, meaning "offensive to one's feelings, or to prevailing notions of modesty or decency; lewd."[256]

In deciding that C.C.'s texts were not "obscene," the court first held that "we need not consider whether the texts were objectively of the kind that would offend someone's feelings sufficiently for criminal liability, because S. testified without contradiction that she was not subjectively offended."[257] The court then determined that the texts were not "lewd," because of the context in which the vulgar terms were used:

> Although the second text used vulgarities derived from sexually related terms such as "fuck" and "cunt," those words were not used lewdly. They were expletives used as verbs and adjectives to emphasize the depth of [C.C.'s] feelings, and in a couple of places as insults to describe how he felt about S. as a result of her conduct.[258]

Finally, the court held that, in the specific context of a dialogue among high school students, "[n]either text was offensive to prevailing notions of modesty or decency . . . . [E]ach [word] has acquired secondary meanings through modern usage. In particular, the evidence was uncontradicted that these words are in common use at the high school, the venue in which the relationship existed . . . ."[259]

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[253] 100 Cal. Rptr. 3d 746 (Ct. App. 2009).
[254] *Id.*
[255] *Id.* at 748 (Sample texts include "fuck u u stupid fuckin girl! fuck u!! god u stupid little fuckin cunt! u pushed me to cheat on u u would constantly tease me and fuck with me and put me thru things those were all bitch moves and i took them i cheated on u because of that u find a fuckin guy that will stay with u when u tease but dont put out and i waited all that time u will probably fuck [B.] right after he wins the [football game].").
[256] *Id.* at 750 (quoting People v. Hernandez, 283 Cal. Rptr. 81, 85 (Ct. App. 1991)).
[257] *Id.*
[258] *Id.*
[259] *Id.*

59

Throughout its opinion, the court in *C.C.* gives significant weight to both the social and emotional context in which the texts were sent. The court appears sympathetic to C.C.'s emotional state as a lover spurned, emphasizing that "the words were used by an agitated, frustrated high school boy to his former high school girlfriend,"[260] and excuses C.C.'s foul language by concluding that "both parties to the communication attended a high school where such language is in common parlance."[261] The court also minimizes the impact of the texts by noting that "the messages concern intimate matters between the parties, and were not spoken aloud in a group, but texted privately *inter sese*."[262]

While all of these statements may be true, neither the emotional state of the perpetrator nor the "public vs. private" nature of an "obscene" communication are elements of a criminal threat under California law,[263] and the court's generous interpretation of C.C.'s texts may suggest that the court simply finds it difficult to conclude, in good conscience, that a few nasty words between a teenager and his ex-girlfriend could constitute a criminal offense. In this respect, *In re C.C.* once again illustrates the difficulties courts may have in finding that criminal laws meant to regulate adult behavior are applicable to bullying between teenagers.

Even if California's current portfolio of laws was applied more aggressively than in *Steven R.* or *C.C.*, it would still fail to apply to many of the behaviors most associated with bullying today. For example, had Phoebe Prince's suicide occurred in California, the six teens currently being prosecuted in Massachusetts for bullying would likely be ineligible for prosecution under any of California's relevant statutes.[264] The classmates who bullied Phoebe Prince never threatened her life or safety, as would be required under either section 646.9 or section 422. They did not contact her repeatedly with any obscene language or threats, as would be necessary under section 653m. Nor did they impersonate her or disseminate her personal

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[260] *Id.* at 751.
[261] *Id.*
[262] *Id.*
[263] *See* CAL. PENAL CODE § 653m (West 2010).
[264] Two eighteen-year-olds were also charged with statutory rape; those charges are excluded from this discussion because statutory rape is not a bullying-related charge. *Attorney Elizabeth Scheibel's statement on Prince death*, SCRIBD (Mar. 29, 2010, 4:48 PM), http://www.scribd.com/doc/29114833/Attorney-Elizabeth-Scheibel-s-statement-on-Prince-death.

information online with the intent to harass her, either of which would qualify for charges under sections 528.5 or 653.2, respectively. In fact, the only law Phoebe Prince's bullies might have broken in California is Penal Code section 422.6, the hate crime law, which prohibits interference with the constitutional rights of another based on "one or more of the actual or perceived characteristics of the victim."[265] Phoebe Prince was referred to several times as an "Irish slut" or an "Irish whore,"[266] and if it could be alleged that the bullying was both ethnically motivated and interfered with Phoebe's right to an education, the bullies could be charged under that law.[267]

Even though the options for criminal prosecution in California would be limited, the teens responsible for bullying Phoebe Prince, as well as those who are the subjects of *C.C.*, *Breana W.*, and *Steven R.*, could likely have been disciplined by their individual schools under California's bullying policies as mandated by the Interagency School Safety Demonstration Act of 1985.[268] However, since specific anti-bullying policies are determined at a local level, each teen's punishment would depend on the policies implemented by his or her particular school district. Furthermore, even if school policies against bullying work as they are designed to, suspension and expulsion are the most severe punishments available to school officials,[269] and in some cases, these non-criminal remedies may not be considered harsh enough to deter bullying behavior or punish the offenders.

Options for strengthening California's anti-bullying approach

Taken together, the limits of California's criminal and education codes suggest that many bullying incidents may slip through the cracks and that California has significant room to strengthen its approach to preventing and prohibiting bullying behavior. As discussed above,[270] while strengthening the relevant sections of

[265] PENAL CODE § 422.6. This statute is similar to chapter 265, section 37 of the Annotated Laws of Massachusetts (LexisNexis 2010) (civil rights violation with bodily injury resulting, under which five of the teens in Phoebe Prince's case are charged in Massachusetts).

[266] Bazelon, *supra* note 1.

[267] *See also* CAL. CONST., art. 1, § 31 ("The State shall not discriminate against . . . any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

[268] *See* CAL. EDUC. CODE § 32261(a) (West 2009).

[269] *See* EDUC. § 48900.

[270] *See supra* notes 203-14 and accompanying text for a discussion of California Education Code.

California's Education Code[271] could force local school districts to become more accountable for bullying prevention and punishment, and increase the frequency with which students are disciplined at school for bullying, these changes would not affect the criminal law. Therefore, as described in Part III, if California wishes to further criminalize bullying behavior, the legislature has two basic options for increasing criminal penalties for bullying: a standalone anti-bullying law, similar to those in North Carolina or Idaho,[272] or an expansion of the behaviors covered by existing relevant laws, including stalking, criminal threats, and harassing communications. Putting aside the relative legislative and political difficulties inherent in implementing either approach, each option has benefits and drawbacks.

A dedicated anti-bullying law has several advantages. First, it would reinforce the idea that bullying should not be tolerated as simply "kids being kids," and that some of the outrages that teenagers perpetrate against each other actually rise to the level of criminal behavior. Second, an anti-bullying law may serve as a more effective deterrent to bullies than laws not specific to student behavior. Most teens intuitively understand what bullying looks like,[273] and teens might pay more attention to their schools' anti-bullying program if it came with an explicit threat of criminal penalties. Third, a law that specifically criminalizes bullying behaviors may find a more receptive audience among lawmakers and the public, who, based on the number of articles, reports, and online efforts dedicated to ending bullying, are outraged over the current bullying "epidemic" and determined that something should be done to stop it.[274]

Finally and most importantly, a dedicated anti-bullying law—especially one that is written with bullying-specific punishments

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[271] *See* A.B. 1156, 2011 Leg., Reg. Sess. (Cal. 2011), *available at* http://info.sen.ca.gov/pub/11-12/bill/asm/ab_1151-1200/ab_1156_bill_20110218_introduced.html (Feb. 2011) (California State Assembly Member Mike Eng introduced this bill to amend the California Education Code to broaden the definition of bullying, provide training for school personnel and make it easier for victims to transfer to other schools).

[272] *See supra* notes 148-62 and accompanying text.

[273] *See, e.g.*, Pamela Paul, *The Playground Gets Even Tougher*, N.Y. TIMES, Oct. 8, 2010, http://www.nytimes.com/2010/10/10/fashion/10Cultural.html (suggesting that children as young as seven or eight are capable of understanding and perpetrating bullying).

[274] *See, e.g.*, IT GETS BETTER PROJECT, *supra* note 2 (aiming to stop bullying against LGBT teens). For a sample of public reaction to bullying and calls for criminal penalties, *see also* Foderaro, *supra* note 1.

62

appropriate for juveniles—may facilitate criminal punishment more easily than neutral, non-bullying-specific laws. Judges and juries might find it significantly more palatable to convict juveniles of "bullying" rather than the more serious-sounding "stalking" or "criminal threats." As discussed, this hesitation in using the blunt instrument of criminal law against high school bullying behaviors appeared to play a role in the court's decisions in both *In re C.C.* and *In re Jeffrey K.* The appeals court in *C.C.* appeared reluctant to label C.C.'s texts as "obscene" under section 653m at least in part because of the high school milieu in which the texts were sent.[275] Similarly, the Nebraska appeals court in *Jeffrey K.* could not reconcile a "stalking" conviction with a situation where a boy taunted a girl simply for his own "juvenile amusement."[276] In this respect, the very small number of bullying convictions under stalking and harassment laws appears similar to the backlash against charging teenagers under child pornography laws for "sexting" or distributing nude pictures of themselves to their boyfriends or girlfriends.[277] Labeling a behavior as bullying, rather than stalking or harassment, may therefore enable more bullying behaviors to be prosecuted.

The alternative to an anti-bullying statute would be to expand the existing California laws that cover bullying behaviors. To cover both offline and online bullying, this approach would primarily focus on two relevant statutes: Penal Code section 646.9 (stalking) and section 653.2 (use of electronic communications to instill fear or to harass). To include more bullying behaviors within these laws, section 646.9 could be amended to expand the definition of stalking beyond the requirement that stalking include a "credible threat with the intent to place that person in reasonable fear for his or her safety."[278] Instead, stalking could be defined, as it is in many other states, as inclusive of all behavior that "would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[279] If the legislature decides that behavior which *does* include a threat to the victim's safety should be more severely punished, that behavior could be defined as "aggravated stalking," as

[275] *C.C.*, 100 Cal. Rptr. 3d at 750.
[276] *See Jeffrey K.*, 717 N.W.2d at 506.
[277] *See, e.g.*, Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010) (finding that a District Attorney could not threaten to charge minors under child pornography laws for sending semi-nude cell phone pictures of themselves to friends).
[278] CAL. PENAL CODE § 646.9(a) (West 2010).
[279] *See, e.g.*, MICH. COMP. LAWS § 750.411h(1)(d) (2010).

in Michigan,[280] or section 646.9 could be kept as is, and the less severe crime could be labeled "harassment," as in Massachusetts.[281] Similarly, the misuse of electronic communications law could be expanded to remove the requirement that the perpetrator have the "intent to place another person in reasonable fear for his or her safety, or the safety of the other person's immediate family,"[282] and instead simply require that the perpetrator have the intent to seriously alarm, annoy, torment, or terrorize the person with no legitimate purpose.[283]

These two statutory changes would encompass a broader array of bullying behaviors, without limiting the law's application the way a specific anti-bullying statute might. This approach also has several other advantages. Removing the "bullying" label and prosecuting a bully for "stalking" sends the message that criminal behavior is criminal behavior no matter where it occurs, and that the rules are the same for students in school as they are for everyone else. Perpetrators cannot hide behind the still-common belief that bullying is a rite of passage, or that "everybody does it" when they are facing charges for a serious crime. Additionally, an expansion in these laws could have other positive consequences beyond the context of student bullying, as adults whose conduct today does not rise to the level of criminal stalking—for example, a "romantic" stalker who obsessively follows his target without making a specific threat to her life or safety—would also fall within its scope.

CONCLUSION

A conservative approach to further criminalization of bullying in California

This discussion has focused primarily on how to further criminalize bullying in California: whether it is best done through dedicated statutes or through the expansion of existing criminal laws. In answering this question, the full range of bullying behaviors must be taken into account. As this article has discussed, what we call bullying is actually an intuitively but imperfectly defined collection of speech and conduct. Bullying can be comprised of dozens of anonymous taunts and insults directed at a student through social

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[280] *See* § 750.411i(2)(c).

[281] *See* MASS. ANN. LAWS ch. 265, § 43A (LexisNexis 2010).

[282] PENAL § 653.2.

[283] This suggested language is paraphrased from the definition of "harassment" under Penal Code section 653.2(c)(1).

64

media tools such as Facebook and Twitter, or it can take the form of physical threats and intimidation perpetrated in person by one student against another. Bullying can happen on school grounds—on the playground, in the classroom, or in the locker room—or it can occur in the homes of individual students as they sit at their computers communicating with individual peers or broadcasting their opinions to the world at large. And victimization by bullies can cause a student to commit suicide—or it can become just another unpleasant memory of adolescence.

It is precisely because bullying is so varied, so ever-changing, and so unpredictable that a specific "crime of bullying" misses the mark, for several reasons. First, creating a separate crime of bullying, but defining that crime as including the same actions that many states classify as stalking or harassment, does a disservice to victims: it trivializes their victimizers' behaviors by labeling them as "bullying," when in another (adult) context these actions would be considered serious offenses. A victim of stalking is a victim of stalking, whether their stalker is a thwarted Romeo or a malicious classmate.

Second, if the goal of creating a student-specific crime of bullying is to apply differentiated punishment to students versus adults, perpetrators are also poorly served by criminal anti-bullying statutes. Students convicted of bullying would still become part of the criminal justice system and face the risks that entry into the system entails, even if their crimes are considered less serious than they would be if perpetrated by an adult. If a perpetrator's behavior does not rise to the level of a generally-agreed upon adult crime, such as stalking or harassment, a student might be better served by tougher school-based remedies instead of a watered-down "crime of bullying" that nevertheless contains real criminal penalties.

Finally, creating a crime of bullying implies that any behavior that induces an extreme reaction in a victim will be punished, when in fact this is impossible. As discussed above, many bullying behaviors that lead to horrible outcomes could not be considered crimes under even the toughest anti-bullying laws. Lori Drew, for example, was acquitted of all charges under the CFAA. The students who bullied Phoebe Prince have been charged with multiple crimes, but none of the charges are related to Massachusetts' new anti-bullying law. Even under the toughest anti-bullying law a state could create, student speech would continue to enjoy at least limited First Amendment protection, and there is no criminal remedy for a family whose child commits suicide over a Facebook page.

Instead, a better solution for California would be to strengthen the state's existing criminal laws against stalking and harassment. As discussed above, California's laws are some of the country's narrowest, and they constrain law enforcement not only when attempting to prosecute student bullies, but also in holding adults who harass or threaten others accountable for their actions. Stalkers and harassers are, in many ways, simply "adult bullies," and limiting application of stalking and harassment laws to romantic relationships fails to consider the range of situations in which adults can behave criminally by stalking or harassing each other. Broadening California's definitions of stalking and harassment under Penal Code section 646.9 and section 653.2 to include situations that do not encompass a specific threat of bodily harm, particularly in conjunction with more transparency and accountability within the education code to ensure that other bullying behaviors are addressed within each school district, would avoid lumping serious criminal behavior under the category of "bullying" while creating a better standard for what constitutes stalking or harassment—among romantic partners, students, or anyone else.

The question this discussion does not fully answer is *how much* to criminalize bullying—for example, exactly where to draw the line between criminal and merely distasteful behavior. While this is at some level a philosophical question, expanding existing laws, rather than creating new ones, is a relatively conservative answer. Where specific anti-bullying statutes would create new crimes that are limited to the student or school environment,[284] the expansion of existing laws would not criminalize any behavior in a student that would not also be considered illegal when applied to an adult. Additionally, the expansion of existing laws is a narrower solution to the free speech problem discussed above.[285] By aligning juvenile and adult punishments for stalking and harassing behaviors, this approach would avoid restricting student speech any more than it restricts adult speech and avoids the problem of being subject to *Tinker* or other student-specific tests of free speech.

No law can bring back Phoebe Prince, or Tyler Clementi, or Megan Meier, or Jared High, or Seth Walsh, or any of the other

[284] *See supra* notes 148-61 and accompanying text for discussion of school- or student-specific anti-bullying statutes.

[285] *See supra* notes 182-203 and accompanying text for discussion of free speech issues.

students who chose to take their own lives rather than continue to endure the fear and embarrassment of bullying. And no law can fully eliminate the pain of bullying for all of the future Phoebes and Tylers who continue to suffer. The best that the law can do is to punish those whose behavior crosses the line and to draw that "line" at a place that strikes a balance between the protection of individual rights and the protection of victims. In expanding its current laws, this is the path that California should pursue.

Bullying : A Report from the Huntington Beach Human Relations Task Force

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May 2012

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Table of Contents

Executive Summary

At the request of the Huntington Beach City Council, the Human Relations Task Force conducted a study on bullying in Huntington Beach. The objective was to evaluate the findings and make a recommendation to the Council as to whether an ordinance was needed to address the issue specifically. The limitations of this study include a lack of reliable and valid local data, the use of unstructured, informal interviews and small sample sizes. This study focused only on children, primarily traditional middle and high school students, and does not address issues concerning adults (i.e. work-place bullying).

Summary of Findings. There are many definitions of bullying, however it is generally accepted that there are three components to bullying: repetition, intent to harm, and an imbalance of power. In California "bullying" is defined by statute in the California Education Code and includes both physical and verbal acts as well as those by electronic means. Research has shown that victims of bullying are disproportionately from already vulnerable populations including the disabled and sexual minority youth. Based on reviews of empirical research, interviews with law enforcement personnel, school administrators, students and members of the community there is no evidence to suggest that the incidence of bullying in Huntington Beach differs from other communities – it is likely that 28% to 30% of Huntington Beach children are involved in some form of bullying as either a victim or as a bully.

In California there are three laws which specifically address "bullying" as well as "cyber-bullying" in schools in addition to those which address school safety and criminal acts defined in the penal code which addresses bullying-related behaviors. There is limited or no current law protecting individuals from those acts of bullying which do not meet the level of a penal code violation which occur away from the school grounds.

Each of the three school districts in Huntington Beach recognizes that bullying is a serious problem and is attempting to address the issue as directed by recent state legislation. In fact, all three local districts have taken steps beyond their legislative mandates. Many of the programs currently in place are focused on student, parent and staff education. Unfortunately, there is no reliable empirical evidence to support the effectiveness of this approach. Recent legislation including AB 9 (Seth's Law) has not been fully implemented but will be in place beginning with the 2012 – 2013 school year.

The Huntington Beach Police Department opposes a new ordinance addressing bullying. Currently, there are only two officers assigned as school resource officers (SRO) for Huntington Beach's 44 schools. The SRO's currently have flexibility and are able to use their extensive experience and judgment to intervene in acts of bullying responding to the circumstances. An ordinance could make the SRO's less effective and place unreasonable expectations on their limited resources and time. Without an understanding of what constitutes bullying by the public, the HBPD believes a new ordinance would create an expectation by the public for the department to investigate acts which would be more appropriately handled through the schools.

Conclusion and Final Recommendations. Bullying is a serious problem with long-term consequences which potentially threatens the safety and well-being of Huntington Beach children and young adults. After careful consideration of all of the factors involved, the HRTF has concluded that a specific anti-bullying ordinance is not needed in Huntington Beach. However, the task force has identified a number of interventions related to bullying and makes the following recommendations:

- Adoption of a "Declaration Against Bullying"
- Sponsorship of a series of events aimed at raising awareness within the community
- Commission of an annual bullying survey
- Promotion of a city-wide reporting system
- Implementation of a periodic review of issues affecting those victims from vulnerable populations

Acknowledgements

The Huntington Beach Human Relations Task Force would like to acknowledge the following persons and organizations for their contributions of time, resources and expertise that were used in preparing this report:

Huntington Beach City School District

Ocean View School District

Huntington Beach Union High School District

Huntington Beach Police Department

School Resource Officers Derek Young and Vickie Schroyer

Orange Coast Memorial Medical Center Emergency Nursing Staff

Orange County Human Relations Commission

Orange County Sheriff's Department

Deputy Sheriff Quyen Young

David De Haas, M.D. & CEP America

Introduction

Purpose. The purpose of this report is to provide the results of a study on the issue of "bullying" in Huntington Beach and to make a recommendation to the Huntington Beach City Council as to whether there is a need for a city ordinance to address the behaviors associated with bullying.

> **Submitted by Councilmember Joe Carchio – Direct the Human Relations Task Force to conduct a study of the issue of "bullying" in Huntington Beach and report findings to City Council**
>
> **Recommended Action:**
> *Direct the Human Relations Task Force to conduct a study of the issue of "bullying" in Huntington Beach and prepare a report of their findings for the City Council. The report shall include a recommendation concerning whether there is a need to adopt a local ordinance to address this type of behavior. Staff in the police department shall assist the Human Relations Task Force in the preparation of this report.*

Methodology. An *ad hoc* committee of the Human Relations Task Force ("bullying committee") was created to study the issue of bullying in Huntington Beach. The bullying committee began with an extensive review of the current literature related to the terms "bullying," "bullying related behaviors," and "cyber-bullying." Members of the bullying committee met with representatives of the Huntington Beach Police Department (HBPD) on two occasions, attended an educational conference on bullying and cyber-bullying presented by the Orange County Sheriff's Department and Community Services Program, Inc. (CSP), interviewed representatives of the local school districts, and sought input informally from students, parents and community residents, healthcare providers and other potential stakeholders. The bullying committee met several times over the course of conducting this study and reported monthly to the Human Relations Task Force.

Bullying Overview

Definition. "Bullying" is defined in the California Education Code Section 48900 as "any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act..." The conduct or behavior must have, or be reasonably predicted to have, at least one of the following effects on the victim:

- Fear of harm to person or property
- Detrimental physical or mental health
- Substantial interference with academic performance

- Substantial interference with ability to participate in or benefit from the services, activities, or privileges provided by a school

While there are many definitions available, there are common components that qualify a behavior or act as bullying. With bullying there is a real or perceived imbalance of power between the bully and the victim. Victims may be unable or have a hard time defending themselves. The actions of the bully toward the victim have the intention of causing harm. With bullying there is repetition – the actions or behaviors toward the victim happen over and over. Bullying can take many forms including direct verbal or physical acts; indirect social attacks; and in the form of cyber-bullying (U.S. Department of Health and Human Services website, 2012).

Types of Bullying

- *Verbal*: name-calling, teasing
- *Social*: spreading rumors, leaving out on purpose, breaking up friendships
- *Physical*: hitting, punching, shoving
- *Cyber-bullying*: using the internet, mobile phones and other technology to harm others

Components of Bullying Behavior

- Imbalance of power
- Intent to cause harm
- Repetition

Cyber-bullying

The proliferation of computers and mobile phones with internet access has led to a dangerous form of bullying known as *cyber-bullying*. Examples of cyber-bullying include

- Sending hurtful, rude or mean text messages to others
- Spreading rumors or lies about others by e-mail or on social networks
- Creating websites, videos or social media profiles that embarrass, humiliate, or make fun of others

Cyber-bullying is very different from face-to-face bullying because messages and images can be sent instantly 24 hours a day, 7 days a week and shared to a very wide audience in a short time anonymously. Monitoring, preventing and addressing incidents of cyber-bullying pose new challenges to parents, educators and law enforcement due to unfamiliarity with the technology used, lack of resources and jurisdictional questions (Vuong, 2012).

Facts About Cyber-bullying

- 1 in 4 teens in a relationship (25%) say they have been called names, harassed, or put down by their partner through cell phones and texting
- Only 20% of girls who were bullied online knew who was bullying them. 27% of girls who were bullied decided to retaliate by bullying the person who bullied them.
- Only 20% of victims informed a parent or another adult.
- 43% of youth report that they have experienced some form of cyber bullying in the last year.
- The incidence of cyber-bullying is most prevalent among 15- and 16-year-olds, particularly among girls
- Teen cyber bullying victims are twice as likely to talk to a friend about a bullying incident as to talk with their parents or another adult.

Source: Orange County Human Relations Commission

Prevalence and Incidence

Bullying is a widespread problem and "perhaps the most underreported safety problem on American school campuses" (U.S. Department of Justice, Office of Community Oriented Policing Services, 2002, p. 1). A study by the National Education Association estimated that 160,000 children miss school daily due to fear of attack or intimidation by other students and more than 30% of school age children are affected by bullying on a monthly basis (Bradshaw, Waasdorp, O'Brennan, & Gulemetova, 2011). Federally collected data indicates that, nationwide, 20% of students in grades 9-12 experience bullying (Centers for Disease Control and Prevention, 2010) and 28% of students in grades 6-12 experience bullying (National Center for Education Statistics and Bureau of Justice Statistics, 2011). Additional statistics compiled by Orange County Human Relations are presented as an Appendix.

Victimization and Impact of Bullying

The impact of bullying has been documented through empirical studies and through coverage of some high-profile cases by the news media. Bullying has been shown to have long-lasting consequences for victims, bullies and for those who witness incidents of bullying. Victims of bullying tend to be "more insecure than most children and react passively and anxiously to situations...they tend to be physically smaller and weaker and are often cautious, sensitive and quiet" (Weir, 2001, p. 1249). Victims are more likely to exhibit poor academic performance and to experience long-term negative health impacts including anxiety, depression and physical ailments including headaches, unexplained abdominal pain and fatigue (Monahan, 2011).

People Who Bully Others

- Have a higher risk of abusing alcohol and other drugs in adolescence and as adults
- Are more likely to get into fights, vandalize property, and drop out of school
- Are more likely to engage in early sexual activity
- Are more likely to have criminal convictions as adults. In one study, 60% of boys who bullied others in middle school had a criminal conviction by age 24
- Are more likely to be abusive toward their romantic partners and children as adults

People Who Witness Bullying

- Have increased use of tobacco, alcohol or other drugs
- Have increased mental health problems, including depression and anxiety
- Are more likely to miss or skip school

Suicide and Suicidal Ideations.

The most serious consequence of bullying is youth suicide. The Centers for Disease Control and Prevention (2007) reported that suicide has become the third leading cause of death in teens. While overall youth suicide rates have decreased, "upward trends were identified in the 10- to 19-year-old age group" (Hinduja & Patchin, 2010, p. 206). Hinduja & Patchin (2010) attribute this increase to the evolving nature of adolescent peer aggression resulting from the proliferation of information technology. The phenomenon of suicide associated with cyber-bullying is now referred to as ***cyberbullicide***.

Suicide is among the leading causes of death of children under 14 and suicide rates among 10 to 14 year olds have increased 50 percent over the last 3 decades.

Special Risk Populations

Both traditional forms of bullying and cyber-bullying tend to victimize specific populations at a significantly higher rate and include obese, chronically ill, disabled, gifted and sexual minority youth (National Center for Education Statistics and Bureau of Justice Statistics, 2011).

Sexual Minority Youth. "Gay, lesbian, bisexual, transgender, questioning and intersex (GLBTQI) youth, and those perceived to be GLBTQI, face extensive verbal and physical bullying in schools" (Varjas et al., 2008, p. 59). Many interventions addressing bullying may not always apply to this population and they require special protections as they are less likely to report bullying and in many cases, for safety reasons, are unable to inform a parent or other adult when they are subjected to bullying. A summary of additional findings as published by The Trevor Project (2012) is provided in Table 1.

Table 1. Facts about Lesbian, Gay, Bisexual and Transgender Youth

- Nine out of 10 LGBT students (86.2%) experienced harassment at school; three-fifths (60.8%) felt unsafe at school because of their sexual orientation; and about one-third (32.7%) skipped a day of school in the past month because of feeling unsafe (GLSEN National School Climate Survey 2009).
- LGBT students are three times as likely as non-LGBT students to say that they do not feel safe at school (22% vs. 7%) and 90% of LGBT students (vs. 62% of non-LGBT teens) have been harassed or assaulted during the past year. (GLSEN From Teasing to Torment 2006)
- Sexual minority youth, or teens that identify themselves as gay, lesbian or bisexual, are bullied two to three times more than heterosexuals. (Nationwide Children's Hospital, Columbus, OH 2010)
- Lesbian, gay, and bisexual adolescents are 190 percent more likely to use drugs and alcohol than are heterosexual teens (Marshal MP, Friedman MS, et al – *Addiction* 2008).
- It is estimated that between 20 and 40 percent of all homeless youth identify as lesbian, gay, bisexual, and/or transgender (2006 National Gay & Lesbian Task Force: An Epidemic of Homelessness). 62% of homeless LGB youth will attempt suicide at least once—more than two times as many as their heterosexual peers (Van Leeuwen JMm et al – *Child Welfare* 2005)

Current Laws Addressing Bullying

Federal and State Level. There is no Federal law that directly addresses bullying. The State of California has several laws addressing bullying in schools (Table 2.). While the State has provided for a definition of bullying and recognizes cyber-bullying as a form of bullying, none of the current legislation provides for any criminal sanctions nor does it address bullying that occurs outside of school unless the acts meet the definition of a penal code violation (Appendix).

County and City Level. As of the date of this report, no city in Orange County has adopted any ordinance addressing the issue of bullying (Huntington Beach Police Department). In the present environment, before any act of bullying is addressed by law enforcement it must rise to the level of a penal code violation. Nationwide, there is a trend for cities to adopt ordinances addressing the issue bullying. There is no available data at this time to determine the effectiveness of these efforts however.

- **Ridgefield, NJ** - Called for the formation of a committee which will receive bullying complaints and will be tasked to investigate them and to recommend remedial action.
- **Detroit, MI** - Made bullying of any person younger than 18 on public grounds a misdemeanor
- **Asheville, NC** - Enacted an anti-bullying ordinance for all city institutions and grounds
- **Milton, WI** - Enacted ordinance to allow the police department to fine students who bully and harass others. The ordinance covers physical, verbal and cyber-bullying

Table 2. California Legislation Addressing Bullying and Bullying Related Behaviors

AB 9 "Seth's Law" (2011).

- Requires school policy and investigation processes.
- Named after 13 year old Seth Walsh who committed suicide after being harassed about sexual orientation and identity

AB 1156 (2011).

- Expanded the definition of bullying and connected it to academic performance.
- Notes that bullying causes a substantial disruption and detrimental effect on students.
- Encourages training for school officials.
- Creates provisions to remove victim from the "unhealthy setting."

AB 746 (2011).

- Language of the law includes student behaviors on social networking web sites.
- Adds bullying by electronic means as ground for suspension from school.

SB 719 (Bullying Prevention for School Safety and Crime Reduction Act of 2003)

- Constitutional right to be safe and secure in their persons at school (by amendment to Educ. Code)
- Requires school districts in cooperation with law enforcement to develop comprehensive school safety plans

AB 79 (2001).

- Requires the Department of Education to develop model policies on the prevention of bullying and on conflict resolution
- Makes the model policies available to school districts and authorizes school districts to adopt one or both policies for incorporation into the school safety plan.

AB 86 (2008) Pupil safety.

- Gives school officials grounds to suspend a pupil or recommend a pupil for expulsion for bullying, including, but not limited to, bullying by electronic act.

S.B. 257 (2001)

- Specifies that, for school and law enforcement partnership purposes, school crime includes hate crimes and requires the comprehensive school safety plan to include development of a discrimination and harassment policy, as specified, and development of hate crime reporting procedures.

A.B. 499 (1998)

- Charges the State Board of Education to develop guidelines, adopt policies, and fund programs to create a school environment free from discriminatory attitudes and hate violence.

Huntington Beach Police Department

Input from the Huntington Beach Police Department (HBPD) was sought throughout the process of preparing this study. Task Force members met with both School Resource Officers, SRO's Shroyer and Young, as well as the HBPD liaison to the HRTF, Sgt. Dierking. All three officers recognize that bullying is a problem, however, they also expressed opposition to any new ordinance specifically addressing "bullying" for the following reasons:

- The term "bullying" is being overused in the public and being misapplied to many behaviors which do not fall under the definition of bullying
- Students for various reasons do not report being bullied to the SROs or to others
- The majority of bullying cases which are reported are effectively handled by the schools and rarely result in referral to the SROs
- Huntington Beach has only two officers serving 44 schools
- There are currently laws in place to prosecute individuals when their actions reach a level requiring interventions beyond that for which the schools are authorized

The primary concern of the HBPD is that a new ordinance would generate calls to the police department from the public to report bullying. This would place a burden on the department's resources to conduct investigations of these incidents when the majority would either not meet the definition of bullying or would have been more appropriately handled through the schools or more informal interventions.

Huntington Beach School Districts' Anti-Bullying Programs

Special Acknowledgements
Dr. Gregg Haulk, Huntington Beach City School District
Dr. William Loose, Ocean View School District
Dr. Greg Plutko, Huntington Beach Union High School District

Each of the three Huntington Beach School Districts is strongly committed to addressing the issue of bullying, as stated by each superintendent during personal interviews. All three have initiated interventions beyond that of their legislative mandates and welcomed additional community support including the following:

- Provide guest speakers to the high schools' annual assembly
- Provide anti-bullying signage
- Support community efforts to enhance parent education

Huntington Beach City School District

Superintendent Gregg Haulk, cited an extensive program in his district including the following measures (G. Haulk, personal communication, March, 2012):

- Training for teachers with a strong focus by the board of education
- A goal to increase parent education
- An emphasis on addressing the growing threat of cyber-bullying.

Ocean View School District

The district is implementing a district-wide anti-bullying program. The district is utilizing the California School Boards Association Model and definition for bullying. The district has utilized a comprehensive program for all schools in the district entitled, "Developing School-Wide Positive Behavioral Intervention Systems Model." The district has already implemented the program *Positive Social Behaviors and Anti-Bullying Interventions* (W. Loose, personal communication, March, 2012).

Huntington Beach Union High School District

Superintendent Plutko reported extensive measures to address the problem of bullying. A plan for each school and a district-wide program addressing bullying has been developed and continues to evolve. Peer mediation has been initiated for students involved in behavioral issues including bullying. A tip line has also been implemented in response to bullying (G. Plutko, personal communication, March, 2012).

Conclusion and Recommendations

The Human Relations Task Force recognizes that bullying is a serious problem which potentially threatens the safety and well-being of Huntington Beach children, adolescents and young adults. After careful consideration of the findings of this study, the potential impact on city resources and the effect any action or lack thereof could have on current victims of bullying the following is recommended by the HRTF:

1. The Council adopt a "Declaration Against Bullying" acknowledging that bullying is a serious problem and stating that it will not be tolerated in any form on public grounds.
2. The City of Huntington Beach, in coordination with local school districts and other organizations, sponsor a series of events aimed at raising awareness and directed toward students, parents and the public at-large. Suggested events include
    a. Sponsoring speakers and discussions at local schools
    b. Holding a city-wide anti-bullying art contest
    c. Sponsoring a movie series at the Central Library
3. The Council commission a voluntary annual standardized, validated survey such as the *Olweus Bullying Questionnaire* to be administered to Huntington Beach middle

and high school students in order to provide local data and to monitor the effectiveness of anti-bullying interventions[1].

4. The City of Huntington Beach, in coordination with the local school districts and Huntington Beach Police Department's School Resource Officers, develop and promote a city-wide reporting system for victims, parents and witnesses of bullying to report bullying related behaviors and to obtain information on how to access support resources if needed.
5. The Huntington Beach Human Relations Task Force periodically reviews the issue of bullying and assesses the need for further interventions, especially the needs of those victims identified in this report as being from an already vulnerable population.

While there is no quick fix to the issue of bullying, the HRTF believes that these suggestions will benefit those affected by bullying and greater Huntington Beach community. Combined with other efforts described herein, these interventions will raise the level of public awareness and potentially serve as a catalyst for further dialogue while making a strong statement in support of the parents and victims of bullying-related behaviors.

[1] The Olweus Bullying Questionarre (OWB) is available for online administration through the Hazelden Foundation at a cost of 0.95 cents per student. Additional information and a sample report can be found at http://www.featraining.org/documents/bullying/Olweus_Sample_Standard_School_Report.pdf

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Appendix A. California Penal Code (C.P.C.) Violations Applied to Bullying

C.P.C. 240 – Assault (Misdemeanor). An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

C.P.C. 242 - Battery (Misdemeanor). A battery is any willful and unlawful use of force or violence.

C.P.C. 273 a(b) – Child Cruelty (Felony). Willfully cause or permit a child to suffer, or inflict on child, unjustifiable physical pain or mental suffering.

C.P.C. 415 – Disturbing the Peace (Misdemeanor). Any person who: 1) unlawfully fights in a public place 2) challenges another person in a public place to a fight, or 3.) uses offensive words to promote an immediate violent reaction

C.P.C. 528.5 (a) – Identity Theft (Misdemeanor). Knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person.

C.P.C. 646.9 – Stalking (Misdemeanor or Felony). Willfully, maliciously, and repeatedly harass, make a credible threat, with intent to place that person in reasonable fear for their safety.

C.P.C. 422 – Criminal Threats (Felony). Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device.

C.P.C 653 (m) – Annoying/Threatening Communication (Misdemeanor). Every person who, with intent to annoy, telephones or makes contact by means of electronic communication device any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person.