TORMENTED: ANTIGAY BULLYING IN SCHOOLS

Ari Ezra Waldman[*]

This Article begins a theoretical and empirical discussion on bullying and cyberharassment of all students, but particularly gay and lesbian youth. Despite the recent spate of bullying-related suicides, I argue that antibullying proposals that include harsh criminal punishments for egregious cases of bullying and cyberbullying in schools lack validity as a matter of legal theory and practice. In fact, it is what makes criminalization so initially attractive—that is, the public's emotional and retributive need for punishments equal to bullying tragedies—that ultimately leaves the proposal devoid of reason. Criminalization proposals only satisfy retributive aims and are unlikely to solve the problem of bullying and cyberbullying in schools and unlikely to succeed as effective punishments.

If criminalization will not work for theoretical and practical reasons, I propose further study into affirmative "soft power" antibullying programs. In this context, I analyze the latest social science data about face-to-face and online bullying—their frequency, effects, and solutions—but also begin to fill the broad gap in empirical research on cyberharassment of gay and lesbian teenagers by studying one California high school and proposing specific avenues for further study. Those results will appear in a future paper. This study focuses on cyberbullying, the LGBT community, and unique school- and community-based solutions. My preliminary analysis suggests that school use of diversity inclusive curricula and teacher and peer support venues may create a more civil school climate that reduces the frequency and effects of bullying and cyberbullying, especially for gay and lesbian teens.

I. INTRODUCTION

A promising young man at an elite college jumps off a bridge because someone broadcasts the student's intimate encounter with another young man.[1] Another commits suicide after speakers at a town council meeting declare gays and lesbians like him

[*] Visiting Assistant Professor of Law, California Western School of Law; J.D., Harvard Law School; A.B., *magna cum laude*, Harvard College. This Article was delivered as part of a panel on "Perceptions and Effects of Technology Within the Law" at the 2011 Annual Meeting of the Law & Society Association in San Francisco, California. Special thanks to Brett Peterson, Director of High Tech High School in San Diego, California and the students and teachers at High Tech High for their participation in the Author's survey on bullying and cyberbullying. Special thanks to Danielle Keats Citron, Sheena Lewis, Maya Sen, and the California Western School of Law Faculty Development Committee for the helpful feedback. Amy Krieg provided essential assistance. All errors are, of course, my own.

1. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, at A1.

"diseased" and "pedophiles."[2] Still another hangs herself after being subject to endless bullying at school and online.[3] These increasingly common tragedies engender feelings of loss, anger, and heartache, and have us casting about for answers. In passing what is widely regarded as the nation's best antibullying law, Massachusetts found those answers partly in the criminal law, imposing tough penalties for severe cases of bullying and cyberbullying.[4] Many pundits and commentators sought even more draconian measures to respond to bullying-related suicides. It is only natural to look to the criminal law for satisfaction, but that does not mean it should respond.

This Article argues that although insidious, growing, and of particular harm to the gay and lesbian community, the problem of face-to-face bullying and cyberbullying in schools cannot be solved by recourse to the criminal law.[5] Criminalization neither makes sense as a matter of legal theory nor functions as a practically effective response to the problem. Admittedly, the option seems intuitively attractive. The often gruesome and callous behavior, in addition to overwhelming data on the pervasiveness of bullying and its causal link with suicidal ideation, lends credibility to a harsh response. Seeking monetary damages from school districts, the argument goes, either inadequately compensates for loss of life or misdirects culpability when bullying occurs over the Internet and away from school grounds. In addition, the theory that "the punishment should fit the crime," or the retributivist doctrine of proportionality, buttresses the argument for criminalization with intellectual heft. These factors have, at least in part, moved states like Massachusetts to criminalize egregious acts of bullying.[6]

This argument is wrong for three reasons. First, what makes criminalization attractive is not the knowledge that it will stop bullying in schools but rather a combination of two factors: (1) the inadequacy of other options and (2) the desire to satisfy the public's emotional and retributive reactions. Neither justifies criminalization: the former just suggests the need for some alternative and the latter is incapable of justifying criminalization on its own. So, although political leaders, pundits, and education experts have proposed a myriad of potential ways to reduce

2. John Wright, *Gay Oklahoma Teen Commits Suicide Following 'Toxic' City Debate Over GLBT History Month*, DALLAS VOICE, Oct. 10, 2010, http://www.dallasvoice.com/gay-oklahoma-teen-commits-suicide-toxic-city-debate-glbt-history-month-1047804.html.

3. Kevin Cullen, *Standing Up for Phoebe*, BOSTON GLOBE, Mar. 30, 2010, at 1.

4. MASS. GEN. LAWS ch. 265, § 43A(a) (West 2011).

5. I use the term "face-to-face bullying" to describe traditional bullying, or all bullying that does not fit within the cyberbullying definition. *See* Warren J. Blumenfeld & R.M. Cooper, *LGBT and Allied Youth Responses to Cyberbullying: Policy Implications*, 3 INT'L J. CRITICAL PEDAGOGY, no. 1, 2010 at 114, 118–19 (distinguishing cyberbullying, "the intentional and repeated harm of others through the use of computers, cell phones, and other electronic devices," from "face-to-face bullying" (also termed "real life" bullying)).

For a discussion of using traditional crimes such as stalking, invasion of privacy, and harassment to address face-to-face and cyberbullying, see generally Susan W. Brenner & Megan Rehberg, *"Kiddie Crime"? The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1 (2009). This Article addresses the unique situation of statutes that impose harsh punishments by virtue of the egregious nature and effects of bullying and cyberbullying, a topic not discussed by Professors Brenner and Rehberg or elsewhere.

6. *E.g.*, MASS. GEN. LAWS ch. 265, § 43A(a).

bullying and improve the quality of life of bullied adolescents, harsh criminal penalties that impose jail time for egregious acts of bullying are likely not the answer.[7]

Second, in addition to criminalization being theoretically lacking, there are impenetrable practical barriers. Without radical changes in the requirement that the state prove causation—the factual and proximate link between the defendant's conduct and the end result—convictions for common law crimes like manslaughter, for example, are simply unlikely. Not only are prosecutors unlikely to secure manslaughter convictions against aggressors who bully their victims to suicide, but legislators should also refrain from creating harsh new crimes to punish face-to-face bullies and cyberbullies for similar practical reasons. Prosecutions based on these bullying-specific criminal statutes will not only suffer the same problems of proof that plague proposed manslaughter trials, but the legislation is also tantamount to a symbolic legislative response to a problem politicians misunderstand.

Third, the latest social science evidence suggests that state imposition of harsh penalties for bullying-related suicides will neither reduce the frequency of bullying nor ameliorate its effects on victims.[8]

If criminalization of bullying and cyberbullying contradicts well-established legal theory and practice, educators and policymakers need other, more effective solutions. Unfortunately, research in this area, particularly with regard to online harassment, is just beginning, and there are no broad-based studies of similarly situated schools with different tools in their antibullying arsenals as compared to the nature and rate of bullying in those schools. This Article begins to fill this empirical gap with a small initial survey of one San Diego high school and proposes concrete steps to take in future studies, all of which will follow in my future scholarship. I hypothesize that affirmative school- and community-focused steps that create strong social support networks among peers, between students and teachers, and between students, teachers, and families will be more effective at solving a school's bullying and cyberbullying problems than criminal redress. This is something that High Tech High (HTH) School in San Diego, California has done quite well. Although we cannot make concrete causative or correlative conclusions based on a single study of one high school, the results of the HTH study lend initial credibility to the "soft power" approach and suggest specific avenues for future study.

Part II of this Article identifies the problem: the prevalence of cyberbullying, its frequency and effects on the uniquely vulnerable gay and lesbian student community, and the increasingly common suicides that are direct results of that bullying.[9] To do

7. Massachusetts's recently passed antibullying law includes a criminalization provision, a salient factor in that law receiving an "A++" grade from various bullying watchdog groups. *See The Commonwealth of Massachusetts*, BULLY POLICE USA, http://www.bullypolice.org/ma_law.html (last visited Feb. 29, 2012) (describing the Massachusetts statute as "a really good law, fair to all students" (emphasis omitted)).

8. See, for example, *infra* note 359 and surrounding text describing a study of the effectiveness of aggressive antibullying programs in schools that evidences how harsher penalties, like those related to criminalization, often present negligible deterrent effects.

9. I use the terms "LGBT" and "gay and lesbian" interchangeably, unless a particular study distinguished among lesbians, gay men, bisexuals, and transgendered individuals.

this, four recent cases of antigay bullying will be discussed.[10] Although bullying is not unique to members of the LGBT community, gays' and lesbians' particular susceptibility to student-on-student violence for being gay, online harassment, and recent news reports of a spate of LGBT bullying-related suicides merits this focus.[11] This Section not only collects the most recent social science data on bullying, but also provides new data based on my survey of high school students in San Diego.

Part III argues that in addition to the pervasiveness and tragic nature of antigay bullying, the practical and moral limitations of seeking monetary damages from schools makes recourse to the criminal law even more attractive. To this end, four different responses seeking monetary damages are discussed—namely, a § 1983 claim for deprivation of civil rights, a claim of sex discrimination under Title IX, a claim under state tort laws, and a wrongful death claim. All prove inadequate to address most cases of severe bullying and the unique problem of suicides caused by face-to-face bullying or cyberbullying not only because successful claims are rare, but because the retributivist theory of punishment suggests that they are morally inadequate.

Part IV turns to the potential criminal law response, arguing that although criminalization may seem intuitively compelling, theoretical and practical problems remain. I argue that in addition to being practically difficult to secure criminal convictions for bullying, the retributive theory cannot justify criminalization on its own. To make this case, the limits of criminalization are shown through two lenses: (1) bullying behavior as reckless homicide, or manslaughter, when it causes death and (2) new crimes specifically focused on egregious bullying and cyberbullying in schools based on a recent amendment to the Massachusetts criminal code. Like Massachusetts, I use the term "criminal bullying" to refer to the provision that criminalizes severe bullying. I depart from the Massachusetts amendments to consider a widely proposed but as yet unadopted statute that criminalizes bullying-related suicides.

Finally, Part V concludes with the initial results of an empirical survey of students at HTH. These results open the discussion on the most effective responses to antigay bullying and cyberbullying in schools and suggest that future research should focus on how schools can strengthen peer, teacher, and familial support for bullied adolescents and teenagers. I also consider objections to this analysis and propose specific avenues for a broad-based future study to address them. These further surveys will be reported in future scholarship.

10. See *infra* Part II.A for a discussion of the bullying that Jamie Nabozny, Dylan Theno, Ryan Halligan, and Tyler Clementi experienced. For details of these cases, see generally Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005); Frontline, *Interviews: John Halligan*, PBS (Oct. 19, 2007), http://www.pbs.org/wgbh/pages/frontline/kidsonline/interviews/halligan.html; Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to His Death*, ABC NEWS (Sept. 29, 2010), http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716.

11. *See, e.g.*, Foderaro, *supra* note 1 (reporting the suicide of Tyler Clementi); Peggy O'Hare, *Parents: Bullying Drove Cy-Fair 8th-grader to Suicide*, HOUSTON CHRONICLE, Sept. 27, 2010, http://www.chron.com/disp/story.mpl/metropolitan/7220896.html (reporting suicide of 13-year-old Asher Brown).

II. THE PROBLEM: ONLINE BULLYING THAT LEADS TO SUICIDE

Bullying is nothing new. The behavior's long history, some say, is reason enough to ignore the current zeitgeist and popular uproar over bullying in schools.[12] That argument is wrong for a variety of reasons. Evidence suggests that bullying is getting worse;[13] it is reaching into cyberspace where there is little to no supervision[14] and social scientists and education experts are only recently appreciating the causal connection between bullying and a host of negative short- and long-term consequences.[15] But, even if bullying were not a growing problem, that something has been around a long time is no justification for its continued existence. If anything, the pervasiveness of school bullying is a warning that eradication will be difficult. It is not an a priori barrier to amelioration.

Our first task, then, is to identify the problem. This Part defines bullying, summarizes the facts of a select few bullying cases to reach state courts or legislatures, and ultimately narrows those discussions to the topic of this Article—the imposition of criminal punishment for egregious cases of face-to-face and cyberbullying.

The *Journal of the American Medical Association* defines "bullying" as "a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one."[16] The asymmetry of power could be physical (i.e., an athletic student versus a less-physically developed

12. *See* Sen. Bob Casey, *Focus on the Family Stands Up for Bullying*, HUFFINGTON POST (Sept. 8, 2010, 5:25 PM), http://www.huffingtonpost.com/bob-casey/focus-on-the-family-stand_b_709651.html (discussing conservative opposition to addressing the problem of bullying in schools).

13. Comparing two Youth Internet Safety Surveys conducted in 2000 and 2006 suggests that cyberbullying is becoming more common. In 2006, nine percent of survey participants reported being harassed online with almost twenty-eight percent surveyed admitting to activities that fit the cyberbullying definition. JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 39, 53 (2006), *available at* http://www.unh.edu/ccrc/pdf/CV138.pdf. Those numbers are up from six percent and fourteen percent, respectively, from the 2000 study. *Id.* at 11, 53.

14. *See, e.g.*, Andrew V. Beale & Kimberly R. Hall, *Cyberbullying: What School Administrators (and Parents) Can Do*, 81 THE CLEARING HOUSE 8, 11 (2007) (stating that, for young people, the Internet is a "world away from adult knowledge and supervision"); Julia S. Chibbaro, *School Counselors and the Cyberbully: Interventions and Implications*, 11 PROF. SCH. COUNSELING 65, 66 (2007) (noting that parents may be unaware that their child is engaging in cyberbullying); Jaana Juvonen & Elisheva F. Gross, *Extending the School Grounds?—Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 497 (2008) (acknowledging the lack of adult supervision of young Internet users); *cf.* Blumenfeld & Cooper, *supra* note 5, at 124–25 (noting survey participant suggestions to increase outside monitoring of websites); WARREN J. BLUMENFELD, CYBERBULLYING: A NEW VARIATION ON AN OLD THEME (2005), http://www.agentabuse.org/blumenfeld.pdf (discussing the factors unique to human-computer interaction that tend to increase the frequency of abusive behavior).

15. *See, e.g.*, Paul D. Flaspohler et al., *Stand By Me: The Effects of Peer and Teacher Support in Mitigating the Impact of Bullying on Quality of Life*, 46 PSYCHOL. SCH. 636, 637–38 (2009) (collecting and summarizing a select few of the many studies establishing a link between bullying and various short and long term negative consequences, such as loneliness, social and emotional maladjustment, alcohol and drug abuse, poor academic achievement, antisocial or violent behavior, low self esteem, depression, anxiety, and suicide).

16. Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001).

victim) or psychological (i.e., high self-esteem versus low self-esteem).[17] The bullying can occur verbally (i.e., name calling, threats, taunts, "malicious teasing"), physically (i.e., hitting, kicking, taking personal belongings), or psychologically (i.e., spreading rumors, social exclusion).[18] The Department of Justice adds that "[b]ullying . . . involves a real or perceived imbalance of power, with the more powerful child or group attacking those who are less powerful."[19]

This broad definition—generally accepted in some form or another in the social science literature[20] and in most states' antibullying statutes[21]—has three notable characteristics important for any legal analysis. First, bullies must *intend* to do harm.[22] That is, a bully cannot negligently bully his victim; rather, he must know what he is doing and intend to harm his victim in some way.[23] There is, then, a mens rea to bullying, which could arguably include knowingly, purposefully, and recklessly inflicting harm.[24] Second, there appears to be significant, but not limitless breadth to the intended harm. Physical injury from assaults and emotional injury from direct insults and epithets may be the paradigmatic types of harm, but bullying is not limited to those injuries. As the definition makes clear, bullying can involve excluding someone from a group or clique or asking peers to vote on the relative "ugliness" or "wimpiness" of a student, for example.[25] This is called indirect bullying.[26] Notably, group exclusion could not occur to any effective degree without an imbalance of power.[27] For example, a pretty and popular young girl may exclude a less attractive peer, an athlete may deny a party invitation to a weaker peer, and male science club members may deny a female member full participation in its activities.

17. Blumenfeld & Cooper, *supra* note 5, at 115.

18. *Id.* (citing Nansel et al., *supra* note 16, at 2094).

19. NELS ERICSON, U.S. DEP'T OF JUSTICE, OJJDP FACT SHEET: ADDRESSING THE PROBLEM OF JUVENILE BULLYING (2001).

20. A number of studies have suggested additions or subtractions to the definition. For example, Smith and Sharp have suggested that bullying must be unprovoked by the victim. Peter K. Smith et al., *Working Directly with Pupils Involved in Bullying Situations*, *in* SCHOOL BULLYING: INSIGHTS AND PERSPECTIVES 193, 197 (Peter K. Smith & Sonia Sharp eds., 1994).

21. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 71, § 37*O* (West 2011) (defining bullying as "the repeated use by one or more students of a written, verbal or electronic 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").

22. Dan Olweus, *Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 3 J. CHILD PSYCHOL. & PSYCHIATRY 1171, 1173 (1994).

23. *Id.*

24. Different statutes can, of course, define their own required mens rea for bullying.

25. Blumenfeld & Cooper, *supra* note 5, at 119. Or, perhaps, the new "Ugly Meter" iPhone application, which uses facial recognition software to tell someone how ugly he or she is, can be fodder for such bullying. *See* Rosemary Black & Lindsay Goldwert, '*Ugly Meter' iPhone App May Be Hurtful to Kids and Fodder for Bullies*, N.Y. DAILY NEWS, Oct. 20, 2010, http://articles.nydailynews.com/2010-10-20/entertainment/27078743_1_app-new-iphone-facial-recognition.

26. Olweus, *supra* note 22, at 1173.

27. *Id.*

Pranks at the expense of a victim for the purposes of entertaining an aggressor's peers would also seem to fit the definition of bullying even though the bully thought what he was doing was funny. If the entertainment is based on the humiliation of another, for example, the prankster is deriving that entertainment based on harm he intentionally causes the victim. But, it is not clear the same could be said of a prankster who thought his victim would laugh off his humiliation. The distinction between the jovial and the malicious prank may be determined in context through the bully's statements or other behavior or through the second and third elements of bullying, namely, the frequency and asymmetry of power. In other words, a lighthearted prank becomes harassment or bullying when it is repeated and when the victim is weaker than the aggressor.[28]

Third, for behavior to reach the level of bullying, it must be *repeated*.[29] This definition appears to exclude occasional teasing and single-incident aggression, but the line between "occasional" and "repeated" is unclear. Furthermore, some studies have suggested that the most important difference between teasing and bullying is the asymmetrical relationship between the parties: a high status student—say, a popular athlete—can tease another high status student, whereas he is more likely to bully a low status student who has few friends.[30] The unequal status of the victim and the aggressor is, therefore, one of the essential components to bullying.[31] And weakness can be based on any number of asymmetries, with physical strength only representing the most noticeable paradigm. Minority status causes a significant asymmetry in power, especially where the particular minority is the subject of ridicule, bigotry, and hatred outside the school. It should come as no surprise then that young members of the gay and lesbian community are uniquely susceptible to bullying and its tragic consequences. They are bullied because they are perceived as deviating from the norm;[32] because they are, in the case of adolescent gay boys, perceived as less likely to be physically strong;[33] and because antigay bullying is, in some communities, either tacitly or explicitly condoned by antigay bigotry in society at large.

The cases of Jamie Nabozny—a Wisconsin public school student who, after being bullied relentlessly for six years for being gay, was forced to change schools—Dylan

28. *See id.* at 1173 (stating that in order to be considered bullying, the action must be repeated and there should be a power imbalance).

29. *Id.*

30. Ken Rigby & Phillip Slee, *Children's Attitudes Toward Victims*, *in* UNDERSTANDING AND MANAGING BULLYING 119 (1993); *see also* Marilyn Langevin, *Helping Children Deal with Teasing and Bullying: For Parents, Teachers, and Other Adults*, INT'L STUTTERING ASS'N., http://www.stutterisa.org/CDR omProject/teasing/tease_bully.html (stating that one key element of bullying is a power imbalance and that bullying can be a one-time event). For the argument that, in contrast to single incidents of aggression, repeated aggressive incidents should be subject to school discipline and merit little free speech protection, see Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. (forthcoming Fall 2012).

31. Olweus, *supra* note 22, at 1173.

32. *See, e.g.*, Anthony R. D'Augelli et al., *Childhood Gender Atypicality, Victimization, and PTSD Among Lesbian, Gay, and Bisexual Youth*, 21 J. INTERPERSONAL VIOLENCE 1462, 1467–69 (2006) (discussing results of a study evidencing that LGB youth, at an early age, felt they were "different from other youth" and were pointed out as being so by their peers).

33. *See id.* at 1472 (noting that males who were viewed as less masculine experienced significantly more verbal sexual orientation victimization than other males).

Theno—who was taunted for at least five years with antigay epithets and attacked in antigay assaults in school—Ryan Halligan—who committed suicide after spiraling into depression after, among other incidents, a boy at school started a rumor online that Ryan was gay—and Tyler Clementi—a Rutgers University freshman who jumped off the George Washington Bridge after his roommate surreptitiously videotaped Tyler in a sexual encounter with another boy and broadcast the video over Twitter—epitomize the situation in which many gay and lesbian students find themselves.[34] These cases are important for what they have in common and how they differ. All of these boys were harassed for being gay. Their cases have their families and the public looking to the law for answers, and their heartbreaking tragedies help make criminalization of bullying-related suicides intuitively attractive. Their stories differ in three respects as well. Two of these adolescents were harassed online, two committed suicide, and each culminated in a different response to the problem of antigay bullying in schools. They are, then, paradigmatic of the legal options available and, as I will argue, suggest both the attractiveness and the limits of criminal punishments for egregious bullying and bullying-related suicides.[35]

A. Antigay Bullying—Four Cases

While Jamie Nabozny was a student in Ashland, Wisconsin, he was repeatedly harassed and physically abused by his peers because he was gay.[36] He came out in the seventh grade, which is when the harassment began.[37] His classmates regularly referred to his as a "faggot," and physically assaulted him.[38] They hit him, spit on him, and two students even grabbed him, threw him on the floor, and performed a mock rape on him, with twenty other students looking on and laughing.[39] The harassment, and the principal's refusal to take any disciplinary action against the offending students, made Jamie "petrified" to attend school.[40] In eighth grade, he was assaulted in a boys' bathroom and, again, school officials took no action.[41] The bullying intensified to the point that a district attorney advised Jamie to take time off from school.[42] But, even after the ten days off, the harassment resumed, leading Jamie to attempt suicide.[43] After a stint in the hospital, Jamie finished the year at a Catholic school.[44] He returned to Ashland's public school system for high school, at which point the bullying resumed.[45]

34. See *supra* note 10 for citations providing background information on these cases.

35. See *infra* Part IV for a discussion of the issues concerning the criminalization of bullying.

36. Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).

37. *Nabozny*, 92 F.3d at 451.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id*.

43. *Id*. at 451–52.

44. *Id.* at 452. Notably, Catholic schools are not always options for bullied LGBT youths. Not only are there additional costs, but as long as Catholic doctrine considers homosexuality to be "an abomination," LGBT students may not feel safe or comfortable in this religious environment.

45. *Id.*

In ninth grade, he was struck from behind while using a urinal.[46] The impact caused him to fall, allowing another student to urinate on him.[47] Continued bullying resulted in another try at suicide, another hospital stay, and a runaway attempt.[48] When he returned to Ashland, "[s]tudents on the bus regularly [spouted] epithets, such as 'fag' and 'queer,'" at Jamie, and threw steel nuts and bolts at him.[49]

While waiting for the school library to open one morning, Jamie was attacked by eight students.[50] One student led the charge, kicking Jamie in the stomach for about five or ten minutes while the other students looked on in amusement.[51] Weeks later, Jamie collapsed from internal bleeding.[52] By the next year, Jamie left Ashland, enrolled in a school in Minneapolis, and was ultimately diagnosed with post-traumatic stress disorder resulting from years of being bullied.[53] Jamie's experiences track the definition of bullying closely. His bullies intended to cause him physical and emotional harm, they attacked him repeatedly, and they took advantage of his openly gay status to further his isolation from the school population.[54]

Dylan Theno had a similar middle school and high school experience. Starting in seventh grade, bullies verbally abused Dylan, calling him "faggot" and "flamer," screaming that "Dylan likes to suck cock," and telling the school that "Dylan masturbates with fish."[55] Some students performed mock fellatio as emblematic of Dylan's alleged sexual behavior.[56] Another student started a rumor that Dylan was caught masturbating in the school bathroom,[57] and that rumor followed him well into high school.[58] By ninth grade, students were writing on chalkboards that Dylan "likes men, is a fag, is a queer, and masturbates."[59] Other students would taunt Dylan with verbal epithets, trying to goad him into fights.[60] One fight resulted in school officials disciplining Dylan [61] and led to further verbal and physical harassment from friends of

46. *Id.*

47. *Id.* at 451.

48. *Id.*

49. *Id.* at 452.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id*.

54. *Id.* at 451–52. Perhaps the most tragic feature of Jamie's story is the inexplicable refusal of any school official to do anything about the harassment and their flagrant endorsement of the behavior. *See, e.g.*, *id*. (noting that after reporting the attack by the eight boys, the official in charge of discipline "laughed and told [Jamie] that [Jamie] deserved such treatment because he is gay"). Jamie's case suggests that holding school officials responsible for failure to stop bullying under 42 U.S.C. § 1983 (2006) is one possible legal recourse. That tactic is of limited use in many other bullying cases. See *infra* notes 138–50 and accompanying text for a discussion of Jamie's successful lawsuit against the school district.

55. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 954–57 (D. Kan. 2005).

56. *Id.* at 955, 957.

57. *Id*. at 955–56.

58. *Id*. at 958.

59. *Id*. at 957.

60. *Id.* at 960.

61. *Id.* A recent study showed that, in general, LGBT students tend to be disciplined more by school officials than their heterosexual peers. Katherine E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and*

Dylan's bullies.[62] Eventually, the principal prohibited the use of terms like "gay" or "fag," but that served only to increase the severity of Dylan's harassment.[63] The bullying was "unrelenting for years."[64] Dylan "begged his mother not to send him back to school."[65]

Ryan Halligan's and Tyler Clementi's victimization extended into cyberspace.[66] A young boy with developmental difficulties, Ryan was enrolled in special education classes during much of elementary school.[67] Verbal harassment started in fifth grade, when Ryan's fellow students noticed his poor motor skills and academic weaknesses, and it only got worse from there.[68] At one point, well into seventh grade, Ryan broke down in front of his parents and revealed the details of his torment—verbal and physical abuse from older and bigger students on an almost daily basis.[69] As a result, Ryan committed suicide on October 7, 2003.[70] It was only after that tragedy that the true extent of the abuse came to light. Ryan had spent many of his final months online, where a boy at school spread a rumor that Ryan was gay and where Ryan was goaded into thinking a girl at school liked him.[71] The virtual flirtations were canned, meant to entertain a few girls and boys who had been harassing Ryan since fifth grade.[72] Tyler was a freshman at Rutgers University when he jumped off the George Washington Bridge after his roommate, who had been uncomfortable with Tyler's perceived homosexuality since the beginning of the year, secretly filmed him during a sexual encounter with another young man and broadcast the video over Twitter.[73]

School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study, 127 PEDIATRICS 49 (2011), *available at* http://pediatrics.aappublications.org/cgi/reprint/peds.2009-2306v1.

62. *Theno*, 377 F. Supp. 2d at 960.

63. *Id*. at 961.

64. *Id*. at 968.

65. *Id*. at 961. Dylan brought a Title IX claim against the school for the deliberate indifference of school officials to his harassment at the hands of other students. *Id.* at 954. See *infra* notes 151–67 and accompanying text for a discussion of Dylan's successful lawsuit against the school district.

66. Friedman, *supra* note 10; Frontline, *supra* note 10.

67. *Ryan's Story: In Memory of Ryan Patrick Halligan 1989–2003*, RYAN'S STORY PRESENTATION, http://www.ryanpatrickhalligan.org (last visited Feb. 29, 2012).

68. *Id.*

69. *Id.*

70. *Id.*

71. Frontline, *supra* note 10.

72. *Id.*; *Ryan's Story*, *supra* note 67.

73. Friedman, *supra* note 10, at 1. And that was not the first time. Tyler had complained to university officials that his roommate was videotaping him, but nothing was done. Jonathan Lemire et al., *He Wanted Roomie Out: Rutgers Suicide Complained of Video Voyeur Before Fatal Fall*, N.Y. DAILY NEWS, Oct. 1, 2010, at 2.

B. Antigay Bullying—Data on Frequency and Effects

1. Bullying Frequency

Besides being tragedies, Jamie's, Dylan's, Ryan's, and Tyler's stories have one thing in common—each student was victimized, at least in part, because of real or perceived homosexuality. And although bullying clearly does not affect only gay and lesbian students,[74] overwhelming evidence suggests that gay, lesbian, and questioning[75] students are uniquely and pervasively victimized by face-to-face and online bullying. The Gay, Lesbian, and Straight Education Network's (GLSEN) 2009 National School Climate Survey revealed that 88.9% of students heard the word "gay" used in a negative way, 72.4% heard other homophobic remarks (e.g., "dyke" or "faggot") in school, and 84.6% were verbally harassed (e.g., called names or threatened with violence) at school because of their sexual orientation.[76] More than 40% were physically harassed (i.e., pushed, shoved, or otherwise physically attacked) at school in the past year because of their sexual orientation and 27.2% were harassed because of their gender expression.[77] Nearly 20% were physically assaulted (i.e., punched, kicked, attacked with a weapon) and nearly 53% were harassed or threatened via electronic media (i.e., text messages, emails, instant messages, or postings on Facebook).[78] As a result, more than 61% felt unsafe at school because of their sexual orientation and 39.9% felt unsafe at school because of how they expressed their gender.[79]

Other rigorous studies confirm GLSEN's findings. In a survey of gay, lesbian, and bisexual students in New York schools, 70% reported being harassed because of their sexual orientation or gender identity.[80] Another study reported that nearly 40% of gay, lesbian, and bisexual youth experienced physical harassment at least twice because of

74. The entire social science literature on the extent of bullying in school cannot be repeated here. The National Association of School Psychologists found that approximately one in seven kindergarten through twelfth grade students is either a person who bullies or a person who is bullied, and that bullying affects about five million elementary and junior high school students each year in the United States. *See Safeguarding Our Children: An Action Guide to Implementing Early Warning, Timely Response*, NAT'L ASS'N OF SCH. PSYCHOLOGISTS (2000), *available at* http://www2.ed.gov/admins/lead/safety/actguide/action_guide.pdf. Ten to fifteen percent of all young people report being bullied on a regular basis. *Id.* In one nationwide survey of sixth through tenth graders, 24.2% reported being bullied once or a few times and 8.4% reported being bullied at least on a weekly basis. Nansel et al., *supra* note 16, at 2096–97.

75. The word "questioning" refers to those youths who are questioning their sexual orientation at the time.

76. JOSEPH G. KOSCIW ET AL., GLSEN, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, at xvi (2010), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf.

77. *Id.*

78. *Id.*

79. *Id.* at xvi, 22.

80. ADVOCATES FOR CHILDREN OF N.Y., IN HARM'S WAY: A SURVEY OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS WHO SPEAK ABOUT HARASSMENT AND DISCRIMINATION IN NEW YORK CITY SCHOOLS 4 (2005), *available at* http://www.advocatesforchildren.org/pubs/lgbt_report.pdf.

their sexual orientation and 64.3% felt unsafe at school as a result.[81] And, the phenomenon of rampant homophobic bullying is nothing new. GLSEN has been publishing its Climate Survey since 1999 and studies from that time (and earlier) have found that gay and lesbian and questioning students experienced more bullying than their heterosexual peers.[82] The Human Rights Watch conducted a survey from October 1999 to October 2000, during which time 140 gay, lesbian, bisexual, and transgender students between the ages of twelve and twenty-one reported "persistent and severe homophobic bullying including taunts, property damage, social exclusion and physical attacks."[83] LGBT students are nearly three times as likely as heterosexual students to have been assaulted or involved in at least one physical fight at school, are three times as likely to have been threatened or injured with a weapon at school, and are nearly four times as likely to have skipped school because they felt unsafe.[84]

2. Cyberbullying

Much of this bullying now occurs online. What social scientists call cyberbullying is, like traditional or face-to-face bullying, the deliberate and repeated hostile behavior by a strong individual or group intended to harm a weaker individual or group.[85] The distinction is in the media of harm, such as Internet web sites, email, chat rooms, mobile phones, text messaging, and instant messaging. Warren Blumenfeld, a leading scholar on cyberbullying, provides the following paradigmatic examples: (1) people sending so-called "Flame Mail" to a group to humiliate a victim ("She's so ugly, so I sent out a flame mail to the entire school making fun of her acne"); (2) electronic hate mail based on a victim's actual or perceived race, ethnicity, religion, gender, sexual orientation, socioeconomic class, and so on; (3) taking a victim's screen name and sending an embarrassing message under that name; (4) anonymous derogatory posts on blogs or social networking sites; (5) online polling pages to rate victims as "ugliest," "biggest dyke," or "wimpiest faggot"; (6) posting private material about a victim, such as outing a person's sexual identity to classmates, parents, or employers; (7) taking pictures of a victim in a gym or locker room in a state of undress and posting the picture to a social networking site; (8) directly sending intimidating or threatening text messages or emails ("cyberstalking"); or (9) excluding victims from online communication with the group.[86]

81. Michelle Birkett et al., *LGB and Questioning Students in Schools: The Moderating Effects of Homophobic Bullying and School Climate on Negative Outcomes*, 38 J. YOUTH & ADOLESCENCE 989, 990 (2009).

82. *See* GLSEN, RESEARCH SUMMARY: 1999 NATIONAL SCHOOL CLIMATE SURVEY (1999), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/2-1.pdf.

83. Susan M. Swearer et al., *"You're So Gay!": Do Different Forms of Bullying Matter for Adolescent Males?*, 37 SCH. PSYCHOL. REV. 160, 161 (2008) (citing HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001), *available at* http://www.hrw.org/sites/default/files/reports/usalbg01.pdf).

84. *Id.*

85. *See* Nansel et al., *supra* note 16, at 2094.

86. Blumenfeld & Cooper, *supra* note 5, at 119.

High Internet use among young people[87] makes cyberbullying an insidious and growing problem.[88] According to a 2004 study conducted by i-SAFE America, an Internet safety education foundation, 57% of students reported receiving hurtful or angry messages online, with 13% saying it happens "quite often."[89] More than 20% of respondents received "mean" or "threatening" emails.[90] In contrast, 53% of respondents admitted to performing some act of cyberbullying, and 7% admitted saying mean or hurtful things online "quite often."[91] Nearly 35% have been threatened online, with 5% saying it happens "quite often."[92] Finally, 40% reported being bullied online, with 7% experiencing it "quite often."[93] In 2006, another survey found 9% of students reported being harassed online.[94] When students were asked if they experience cyberharassment at least twice over a two-month period, the positive responses increased to 25% of girls and 11% of boys.[95] In 2008, a study conducted by UCLA found that nearly one-fifth of respondents (19%) experienced frequent online bullying in the past year.[96] And those who use instant messaging, webcams, and video chat technologies, such as AIM,[97] iChat,[98] and Skype,[99] were about 1.5 to 2.8 times as likely to be repeatedly cyberbullied than those who did not use such communication tools.[100] Nearly 94% of adolescents, however, use those virtual communication technologies.[101] All these studies suggest that cyberbullying is becoming more common and will continue to do so as Internet use increases.

Like face-to-face bullying, cyberbullying is not limited to minorities. Gay and lesbian students, however, as well as those questioning their sexual orientation, are overrepresented in student populations that experience frequent online harassment from fellow students. Whereas the latest research suggests that that bullying of LGBT

87. A 2003 study conducted by UCLA found that in 2001 approximately ninety-one percent of twelve- to fifteen-year-olds and almost all teenagers sixteen to eighteen years old (ninety-nine percent) used the Internet on a regular basis. HARLAN LEBO, UCLA CTR. FOR COMMC'N POLICY, THE UCLA INTERNET REPORT: SURVEYING THE DIGITAL FUTURE YEAR THREE 21 (2003), *available at* http://www.digitalcenter.org/pdf/InternetReportYearThree.pdf. Much of that time was spent talking with their peers. *Id.*

88. *See* Jan Hoffman, *As Bullies Go Digital, Parents Play Catch-Up*, N.Y. TIMES, Dec. 4, 2010, at A1.

89. *National i-SAFE Survey Finds Over Half of Students Are Being Harassed Online*, i-SAFE AMERICA, at 1 (June 28, 2004), http://www.isafe.org/imgs/pdf/outreach_press/internet_bullying.pdf.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. WOLAK ET AL., *supra* note 13, at 10.

95. Beale & Hall, *supra* note 14, at 8 (citing R.M. Kowalski & S. Limber, *Cyberbullying Among Middle School Children* (2005) (unpublished manuscript)).

96. Juvonen & Gross, *supra* note 14, at 500.

97. AIM refers to AOL Instant Messenger. *See* AOL INSTANT MESSENGER, http://www.aim.com (last visited Feb. 29, 2012).

98. iChat refers to Apple's instant messaging service, available on all Mac devices. *OS X Lion: All Applications and Utilities*, APPLE, http://www.apple.com/macosx/apps/all.html#ichat (last visited Feb. 29, 2012).

99. Skype is a software application that allows users to make calls and videoconference over the Internet. *See* SKYPE, www.skype.com (last visited Feb. 29, 2012).

100. Juvonen & Gross, *supra* note 14, at 501.

101. *Id*. at 500.

students is at a much higher risk of going unnoticed and unremedied, the level at which bullying of non-heterosexual students occurs may be much higher than the reported figures imply.[102] In part to verify these statistics and begin to deepen a rather cursory understanding of antibullying in American schools, I surveyed 366 high school students at High Tech High School (HTH) in San Diego, California.[103] Just over 25% of the overall student population reported having been cyberbullied with some frequency; 21.5% of those identified as gay, lesbian, transgendered, or questioning their sexual orientation.[104] That means that although LGBT students constitute 14.8% of the student population at HTH, they are 37.3% of the cyberbullied population.[105] In addition, the HTH study suggests that LGBT students tend to be victims of more frequent cyberbullying than their heterosexual peers. Of those who reported a scattered few incidents of cyberbullying in the last month, 23.5% identified as LGBT, but of those who reported being cyberbullied "sometimes" or "often" in the last month, 55.6% and 75%, respectively, were LGBT students.[106] The percentage of LGBT students reporting bullying or cyberbullying in the last year similarly increased as the frequency of bullying increased. LGBT students constituted 15.8% of those rarely bullied in the last year, but were 44.4% of those who were bullied frequently in that same time period.[107]

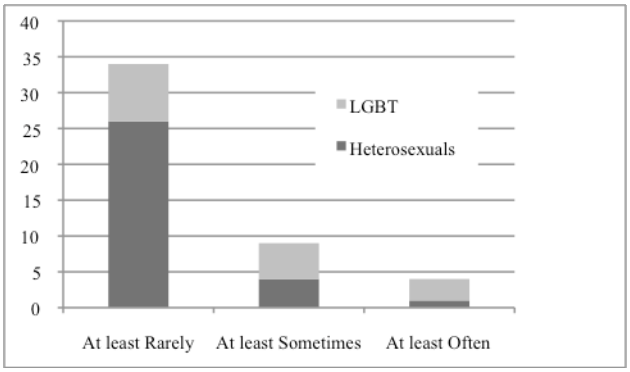
102. *See* Blumenfeld & Cooper, *supra* note 5, 122 (reporting that 37% of straight students would tell their parents if they were bullied online, whereas only 18% of gay or lesbian students would report the same to their parents).

103. Ari Ezra Waldman, Results from Survey of High Tech High School, San Diego, Cal. (Dec. 3, 2010) (on file with author). I reported this data, along with a summary of the findings of this Article, to an assembly of the faculties of the various High Tech High schools in San Diego, California on January 18, 2011. Participants (n = 366, 12th grade = 70, 11th grade = 92, 10th grade = 93, 9th grade = 109; 2 did not identify their grade) were high school students between the ages of 14 and 18. Overall, 54 identified as gay, lesbian, bisexual, transgender, or were questioning their sexuality. In addition, 180 identified as male (49.1%), 181 identified as female (49.5%), and 5 did not identify their gender.

104. *Id.*

105. *Id.*

106. *Id.* The following graph represents these findings:

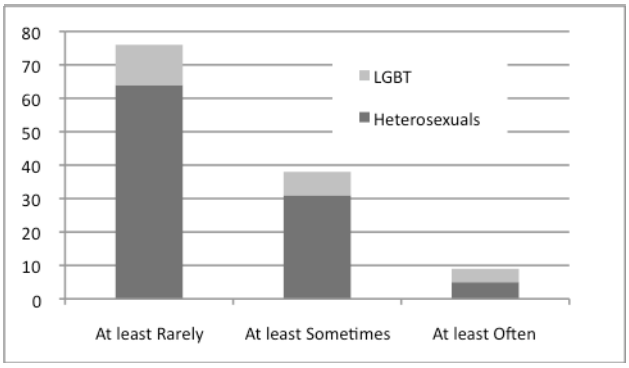


107. *Id.* The following graph represents these findings:

3. General Effects

Victims of bullies experience various negative outcomes, from withdrawal from school activities,[108] increased Internet use to the exclusion of face-to-face interaction with others,[109] and depression.[110] Even a single incident of bullying at school or a single incident of cyberbullying is associated with increased daily anxiety and depression at school.[111]

The evidence also suggests that bullying and cyberbullying have a more devastating effect on LGBT youths. In three studies between 2000 and 2004, Professor Ian Rivers found that bullying of LGBT students starts earlier than with others, at around ten or eleven years old, and usually continued for at least four to six years.[112] More than seventy percent of respondents reported feigning illness or skipping school to avoid face-to-face abuse, and those respondents were five times more likely to report having experienced suicidal ideation and make suicide attempts than those who reported no absenteeism.[113] Another study found that boys who reported being bullied because they were gay experienced negative emotional effects significantly more severe than those who were bullied for other reasons.[114] Gay male victims and boys



108. NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 47 (2007).

109. *See* Swearer et al., *supra* note 83, at 170 (discussing the negative impact of bullying on young homosexuals, particularly its spurring "constriction" of interpersonal connections).

110. WILLARD, *supra* note 108, at 47.

111. *See* Michele L. Ybarra et al., *Examining Characteristics and Associated Distress Related to Internet Harassment: Findings From the Second Youth Internet Survey*, 118 PEDIATRICS 1169, 1172 (2006) (reporting that thirty-eight percent of youth were distressed by a single incident of harassment); Adrienne Nishina & Jaana Juvonen, *Daily Reports of Witnessing and Experiencing Peer Harassment in Middle School*, 76 CHILD DEV. 435, 436 (2005) (measuring anxiety, humiliation, school dislike, and anger as negative effects of peer harassment); Michele L. Ybarra, *Linkages Between Depressive Symptomatology and Internet Harassment Among Regular Internet Users*, 7 CYBERPSYCHOLOGY BEHAV. 247, 252 (2004) (discussing depressive symptomatology as "significantly related to the report of online harassment").

112. Ian Rivers, *Recollections of Bullying at School and Their Long-Term Implications for Lesbians, Gay Men, and Bisexuals*, 25 CRISIS 169, 171 (2004).

113. Ian Rivers, *Social Exclusion, Absenteeism, and Sexual Minority Youth*, 15 SUPPORT FOR LEARNING 13, 15 (2000).

114. Swearer et al., *supra* note 83, at 170.

who are bullied because of perceived homosexuality have more negative views of school, experience higher levels of anxiety and depression into adulthood, perform significantly worse in school, generally restrict their expressions of emotion, and fail to develop interpersonal skills and connections.[115] Various scholars suggest that the greater harm to gay boys—real or perceived—is based on a social "gender straitjacket" that locks boys into the view that any expression of vulnerability is tantamount to femininity, which, in turn, is recast as evidence of being gay.[116] Consequently, a vicious cycle ensues—boys bully other boys, in part, to burnish their masculine bona fides, leaving heterosexual boys susceptible to antigay bullying and leaving real gay boys to "feel less than whole" not because of their sexual identity but because of a "damaging code" that reinforces their exclusion from the majority of their peers.[117]

These results make sense for three related reasons, and they show why cyberbullying is particularly devastating to gay teens. First, gay teens and those young men and women questioning their sexuality are more isolated from regular social groups and the self-esteem boosts those networks provide for personal and institutional reasons. They know everything from school dances to church social functions are not geared toward their social and romantic needs, and boys feel out of place when their peers ogle girls or speak of their sexual exploration and vice versa. They may live in places geographically isolated from the gay meccas of San Francisco, Los Angeles, and New York, and have no openly gay role models. Their sexual diversity may not exclude them from simply "playing the part" or even joining an accepting clique of friends, but it does create a barrier to full participation in a social world built around the maturation of a heterosexual teen. Therefore, the isolation and depression caused by being harassed for being gay compounds the isolation these teenagers already feel.

The negative effects of these emotional barriers to full membership in teen society are likely redoubled by a gay teenager's knowledge of the institutional discrimination gay people face and read about in the news. They are told that they cannot bring their same-sex partner to a school dance,[118] that the Catholic Church would rather deny homes to orphaned babies than find them a home with a committed gay couple,[119] that you can be fired from a job simply for being gay,[120] that they cannot marry,[121] and that

115. *Id.*

116. *Id.*

117. *Id.*

118. *E.g.*, Michael Patrick Nelson, *Long Island High School Bans Gay Prom Dates*, LONGISLANDPRESS.COM (May 12, 2011), http://www.longislandpress.com/2011/05/12/long-island-high-school-bans-gay-prom-dates.

119. *E.g.*, Aaron Wright, *Rockford Diocese Ending Foster Care, Adoption Programs*, 13WREX.COM (June 2, 2011), http://www.wrex.com/Global/story.asp?S=14734924.

120. Thirty-one states do not protect employees from being fired from their jobs because they are gay. *See* HUMAN RIGHTS CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS 2007–2008, at 3 (2009), *available at* http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf (showing that only twenty states and the District of Columbia have sexual orientation nondiscrimination laws).

121. Only Connecticut, Iowa, New Hampshire, Vermont, Massachusetts, and Washington, D.C. grant marriage licenses to same-sex couples. *See generally*, D.C. CODE § 46-401 (2010); CONN. GEN. STAT. ANN. § 46b-20 (West 2011); N.H. REV. STAT. ANN. § 457:1-a (2011); VT. STAT. ANN. tit. 15 § 1202 (West 2011);

conservative politicians have compared them to pedophiles, polygamists, and incestuous uncles,[122] and, among many other hateful names, the "end of civilization."[123] They may have also witnessed entire political campaigns focused on taking away their rights or affirming their sexual orientation as somehow less deserving of the rights that their friends enjoy. Awareness of such institutional discrimination can hardly make gay teenagers feel better about themselves and is likely to make an already damaged sense of self-worth drop even further. This makes theoretical sense even though there are no empirical studies to prove these effects of institutional discrimination and antigay political campaigns on the emotional well-being of gay youth. This is one question I am currently studying and will report in future scholarship.

Second, because gay teenagers are more vulnerable and isolated than their heterosexual peers, they rely more on online social networks to replace non-existent face-to-face communities. Facebook, MySpace, and other websites are essential tools for interaction among members of certain population enclaves that are forced underground due to social stigma, religious objection, or legal problems.[124] Douglas Heckathorn calls these groups "hidden populations,"[125] and gay, lesbian, and questioning adolescents are perfect examples of members of these groups.[126] Adolescents growing up in regions without a significant gay presence or students who choose, for various reasons, to remain closeted are presumably less likely to self-identify as gay, lesbian, or questioning in their physical, face-to-face community. Social networking technologies that allow roughly anonymous virtual interaction with like-minded individuals through chat rooms, dating sites, and blogs often are these adolescents' only source of camaraderie with the only people to whom they can relate. Therefore, these adolescents are not only frequent Internet users, but also completely reliant upon their Internet use and the virtual community they create for social support, information about their sexuality, and answers to any questions they have about being

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

122. *E.g.*, Steve Pep, *Missouri Republican Congresswoman Vicky Hartzler Compares Same-Sex Marriage to Polygamy, Incest, Pedophilia*, TOWLEROAD (June 4, 2011), http://www.towleroad.com/2011/06/hartzler.html.

123. *E.g.*, Andy Towle, *Huckabee to* GQ*: Gay Marriage Will End Civilization*, TOWLEROAD (Dec. 5, 2007), http://www.towleroad.com/2007/12/huckabee-to-gq.html (quoting Mike Huckabee as saying "[t]here's never been a civilization that has rewritten what marriage and family means and survived").

124. *See* Douglas D. Heckathorn, *Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations*, 49 SOC. PROBS. 11, 11 (2002) (stating that sampling of certain groups is "complicated by privacy concerns based on the stigma associated with membership in the population" and must therefore reach into other alternatives to gather data).

125. *Id.*

126. *See id.* (referencing injection drug users, homosexual men, and the homeless as examples of hidden populations). One type of hidden population member is one that cannot come forward and identify himself for fear of legal reprisal, like an intravenous drug user. As such, it is difficult for social scientists to reach this population for study. Professor Heckathorn has pioneered the use of online social networks to reach this type of population.

gay.[127] Empirical data bears this out. As early as 2001, more than eighty-five percent of gay, lesbian, and bisexual adolescents reported that the Internet had been the most "important resource for them to connect with LGB peers."[128] Destruction of or impingement upon that online social support network through cyberbullying is, therefore, particularly harmful. Cyberbullying turns what might have been a gay student's safe space into a danger zone. Gay and lesbian adolescents' dependence on online media makes them more susceptible to those who would use it as a sword against them.

Third, gay and lesbian students are less likely to tell their parents or other authority figures about face-to-face or cyberbullying, thus taking away the essential weapon of familial or adult support in combating harassment.[129] The two most notable reasons for secrecy is, first, the fear that their parents would restrict or take away their use of the Internet,[130] and second, the fear of being "outed."[131] Unlike their heterosexual peers who would never tell their parents,[132] fear of coming out as gay permeated gay students' reasons for both isolating themselves from their parents and using the Internet to excess.[133] As such, their membership in a so-called "hidden" population rejected by the community at large and, perhaps, their parents and peers causes gay and lesbian students to pull away from their parents and gravitate toward online social networks. This isolation makes gay and lesbian students uniquely susceptible and vulnerable to cyberbullying.

III. ALTERNATIVES TO CRIMINALIZATION—MONETARY DAMAGES

Jamie, Dylan, Ryan, and Tyler felt most, if not all, of the effects of face-to-face bullying and cyberbullying to some degree. What also links Jamie's, Dylan's, Ryan's,

127. *See* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003) (describing how the Internet has provided isolated gay men and lesbians in otherwise hostile environments "a virtual community that constitutes an emotional lifeline").

128. Vincent M.B. Silenzio et al., *Connecting the Invisible Dots: Reaching Lesbian, Gay, and Bisexual Adolescents and Young Adults at Risk for Suicide Through Online Social Networks*, 69 SOC. SCI. MED. 469, 469 (2009) (citing LYNNE HILLIER ET AL., AUSTL. RESEARCH CTR. IN SEX, HEALTH, AND SOC'Y, 'IT'S JUST EASIER': THE INTERNET AS A SAFETY-NET FOR SAME SEX ATTRACTED YOUNG PEOPLE (2001)).

129. Blumenfeld & Cooper, *supra* note 5, at 122. Studies have shown that social support from an adult and being comfortable confiding in parents or other authority figures reduces both the frequency of bullying and ameliorates its negative effects. *See* Flaspohler et al., *supra* note 15, at 645 (finding that students not engaged in bullying feel more support from teachers than students who bully or are bullied).

130. Blumenfeld & Cooper, *supra* note 5, at 122. To be sure, there were other reasons. By a seventeen percentage difference, more gay respondents would not tell their parents because "[t]hey couldn't do anything to stop it." *Id*. This reflects the pervasive feeling of hopelessness that bullied gay, lesbian, and questioning students feel when they lack adequate social resources in school, family, and the community.

131. *Id*. at 123.

132. Heterosexuals' most popular reasons for not telling their parents were their desire to "learn to deal [with it by] myself" (thirty-one percent), their fear of Internet restrictions (thirty-five percent), and their feeling that their parents could not solve the problem (thirty-eight percent). *Id*.

133. Open-ended student responses to the question about why they would not tell their parents included some form of the following: "My parents are homophobic."; "[M]y dad . . . hates the fact that I am a lesbian."; "They wouldn't love me if they knew I was a lesbian." *Id.* Other more benign explanations included some form of not wanting to worry their parents or simply being embarrassed about being bullied because of their sexuality. *Id*.

and Tyler's cases together is that each was bullied because of real or perceived homosexuality. But, their stories are distinct, most notably in the legal responses to each of their cases. Jamie's parents filed a claim against Jamie's school and its administrators under 42 U.S.C. § 1983 for failing to do anything about Jamie's abuse.[134] Dylan's parents filed a claim against their son's school for sex discrimination under Title IX.[135] Both won monetary damages.[136] But, such tactics might be inadequate to respond to egregious bullying and bullying-related suicides for three reasons: First, suing the school does not necessarily solve the problem; second, some argue that cyberbullying has a tenuous, at best, connection to the school, especially if perpetrated from home;[137] and, third, both claims ignore the unique tragedies of Ryan's and Tyler's cases—namely, the death of the bullied victim. It is this severity of the harm caused by bullying and cyberbullying that partly lends criminalization its retributive value.

In response to the bullying he experienced at school, Jamie brought a § 1983 action against the school officials based on their failure to protect him from his harassers.[138] The administrators' conduct was particularly egregious. Not only did many school officials turn deaf ears and blind eyes to Jamie's complaints, but some mocked Jamie's sexuality and his predicament as a target of antigay bullying.[139] In seventh grade, Jamie informed his principal of the abuse, but she "took no action."[140] Instead, she responded that Jamie should "expect" to be harassed if he was "going to be so openly gay," and dismissed the physical beatings, mock rapes, and verbal abuse as "boys will be boys."[141] She repeated this same dismissive attitude when Jamie's parents asked for help.[142] Despite promising to do something, the principal never took action.[143] In high school, the administrator in charge of discipline reacted to Jamie being beaten for "ten minutes while . . . other students looked on laughing" with a laugh of his own, stating that Jamie "deserved such treatment because he is gay."[144]

134. Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996). A § 1983 claim is the principal mechanism for seeking redress for an alleged deprivation of federal constitutional or statutory rights by state actors. *See generally* M. DAVID GELFAND, CONSTITUTIONAL LITIGATION UNDER SECTION 1983 (2d ed. 1996).

135. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 954 (D. Kan. 2005). This provision of the Education Amendments of 1972 bans discrimination on the basis of sex in any public or private school receiving federal funds. *See* 20 U.S.C. § 1681 (2006).

136. *See Theno*, 404 F. Supp. 2d at 1283 (awarding plaintiff $250,000 for damages as well as $268,793.51 in attorney fees and expenses); Shannon Tangonan, *Wis. District to Pay for Not Protecting Gay Student*, USA TODAY, Nov. 21, 1996, at 3A (reporting that school district agreed to pay Jamie's nearly $1 million to settle lawsuit).

137. I wholeheartedly disagree with this view, as I discuss more fully elsewhere. *See* Waldman, *supra* note 30 and Waldman, *We All Suffer: Identity-Based Aggression and the First Amendment*, MO. L. REV. (forthcoming 2013). I offer this view here to address the debate comprehensively.

138. *Nabozny*, 92 F.3d at 449. See *supra* notes 38–54 and accompanying text for a summary of the kind of antigay bullying Jamie suffered through during junior high and high school.

139. *Id.*

140. *Id.* at 451.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 452.

Jamie's § 1983 claim alleged that school administrators denied him equal protection of the law by failing to extend the same kind of antiharassment protection they extend to other students simply because of his gender and sexual orientation.[145] On appeal, the Seventh Circuit found that although the school stipulated that it "had a commendable record of enforcing" antiharassment policies, it clearly did not do so in Jamie's case.[146] And there was strong evidence suggesting that this disparate treatment was based on Jamie's sex. That Jamie's principal responded to a mock rape of Jamie by stating "boys will be boys"[147] suggests that she dismissed the incident, in part, because both victim and perpetrator were males. The court found "it impossible to believe that a female lodging a similar complaint would have received the same response."[148] As to Jamie's sexual orientation claim, the court found that the administrators' comments that Jamie should expect to be assaulted because he is gay or openly gay sufficiently proved that Jamie was treated differently because of his sexual orientation.[149] On remand, a jury found school officials liable for failing to stop the harassment, but, before damages could be imposed, the school offered to settle for $962,000.[150]

Dylan Theno was also successful in his claim for monetary damages against his Kansas school.[151] He argued that the administrators at his schools violated Title IX by being deliberately indifferent to his harassment by other students.[152] On a summary judgment motion from the school, the court found that Dylan offered sufficient evidence that he was harassed because of his behavioral nonconformity—namely, Dylan "failed to satisfy his peers' stereotyped expectations for his gender"—based on the fact that the harassment tended to disparage Dylan's masculinity.[153] The verbal taunts, crude behavior, and physical attacks would not have made sense had Dylan been female.[154]

The court also found deliberate indifference on the part of the administrators. In Dylan's case, school administrators punished Dylan when he was egged into fights by his harassers,[155] yet dealt with Dylan's bullies by issuing only a warning to never use antigay epithets again.[156] The school superintendant believed this response was consistent with school policies.[157] On other occasions, school officials forgot to address

145. *Id.* at 453. Wisconsin protects the students in its schools from discrimination, in relevant part, on the basis of sex and sexual orientation. WIS. STAT. ANN. § 118.13(1) (West 2011).

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

147. *Id.* at 451.

148. *Id.* at 454–55.

149. *Id.* at 457.

150. *See* Terry Wilson, *Gay-Bashing Victim Awarded $1 Million for School Incident*, CHI. TRIB., Nov. 21, 1996, at N12 (reporting that the school district offered a settlement of $900,000 in damages and $62,000 for medical bills before the jury could determine an amount).

151. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 404 F. Supp. 2d 1281, 1283 (D. Kan. 2005).

152. *Id.* at 954.

153. *Id.* at 965.

154. *See id.* (finding that the harassers' actions stemmed from the belief that Dylan "did not act as a man should act").

155. *Id.* at 955, 960.

156. *Id.* at 955.

157. *Id.*

Dylan's complaints,[158] or feigned ignorance to hide their "oblivious[ness],"[159] and typically did little to reprimand Dylan's bullies.[160] The court found this insufficient.[161] School administrators treated Dylan's harassment as "involv[ing] a few discrete incidents."[162] They treated each complaint individually, failing to recognize that the verbal and physical abuse was "severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped."[163] Furthermore, the court found that the school "rarely took any disciplinary measures above and beyond merely talking to and warning the harassers."[164] Granted, at least Dylan's school administrators seemed more proactive than Jamie's; at various times during Dylan's junior high and high school years, administrators disciplined Dylan's bullies with three-day suspensions, for example.[165] But, such responses were both rare and too little, too late.[166] In the end, the court ordered the school to pay Dylan $250,000 in damages.[167]

Despite Jamie's and Dylan's litigation successes, however, there are at least three reasons why pursuing monetary damages is an inadequate response to cases like Ryan Halligan's and Tyler Clementi's—that is, cyberbullying-related suicides caused by antigay harassment. First, the unique feature of these bullying cases is that the victims are harassed because of real or perceived sexual orientation. That has made success difficult under Title IX, almost impossible under § 1983, and problematic under state tort law. Second, by its very nature, cyberbullying extends beyond the school grounds and involves a student's off-campus digital speech. As such, courts are as yet unsure if liability for failing to stop it extends to the school or if such speech is protected under the First Amendment.[168] And third, seeking monetary damages ignores the fact that Ryan and Tyler died, an arguably qualitatively different result than what happened to Jamie or Dylan, meriting different treatment.

158. *Id.* at 957.

159. *See id.* at 959 (noting that the teacher claimed to have misunderstood the reason that Dylan was subject to certain teasing).

160. *See id.* at 965 (describing how school officials "mostly warn[ed]" the bullying students of consequences without taking more severe measures).

161. *Id.* at 965–66.

162. *Id.* at 966.

163. *Id.*

164. *Id.*

165. *Id.* at 956, 960.

166. *See id.* at 966 ("It was not until plaintiff's eleventh grade year that the school began taking measures that were arguably more aggressive. By that time, the harassment had been going on for a number of years without the school handing out any meaningful disciplinary measures to deter other students from perpetuating the cycle of harassment.").

167. *School Ordered to Pay $250,000 to Bullied Teen*, ABC NEWS (Aug. 12, 2005), http://abcnews.go.com/US/LegalCenter/story?id=1031901. The court also awarded Dylan attorneys' fees in excess of $268,000. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 404 F. Supp. 2d 1281, 1292 (D. Kan. 2005).

168. Although courts, like many in the academy, are currently wrestling with this issue, there are persuasive reasons why a school's disciplinary authority should not be cut off simply because the speech originated online and off-campus. *See* Waldman, *supra* note 30.

A. Practical Difficulties in Making Successful Title IX, § 1983, or State Tort Law Claims

In terms of likelihood of success, Title IX, § 1983, and state tort claims against schools and school officials are difficult when they involve allegations of on-campus bullying, let alone off-campus face-to-face bullying or cyberbullying. Successful lawsuits require plaintiffs to meet high burdens and prove sufficiently egregious conduct on the part of the school. And all require plaintiffs to overcome potential immunity claims. Although redress through these claims is not impossible—Jamie Nabozny and Dylan Theno are perfect examples of successful cases—the current landscape is much more pessimistic than those two cases suggest.

1. Title IX

Admittedly, Title IX may be the best hope for those students victimized by antigay bullying. In three cases other than Dylan's since 2003—*Schroeder v. Maumee Board of Education*,[169] *Martin v. Swartz Creek Community Schools*,[170] and *Patterson v. Hudson Area Schools*[171]—federal courts have permitted Title IX claims for students who were harassed because they were gay or perceived to be gay. But, the first hurdle is getting a foot in the door, as it is often difficult for plaintiffs to withstand summary judgment motions from defendant school districts. Initially, courts followed Title VII jurisprudence[172] to analyze Title IX cases[173] and found Title IX unavailable to gay students alleging discrimination on the basis of sexual orientation.[174] Despite *Oncale v.*

169. 296 F. Supp. 2d 869, 871, 879–81 (N.D. Ohio 2003) (finding that antigay bullying that included name-calling, physical assaults, threats of violence, and offensive gesturing satisfied the severity requirement of Title IX claims).

170. 419 F. Supp. 2d 967, 975 (E.D. Mich. 2006) (finding that beatings and being called names like "fag boy" are enough to merit a Title IX claim).

171. 551 F.3d 438, 439 (6th Cir. 2009) (finding genuine issue of material facts existed as to whether a school district was deliberately indifferent to extensive sexual harassment where the victim was called, among other insults, "faggot," and was sexually assaulted in the boys' locker room).

172. Title VII of the Civil Rights Act of 1964 makes workplace discrimination on the basis of sex unlawful. 42 U.S.C. § 2000e (2006). Federal courts universally agree that Title VII does not prohibit discrimination on the basis of sexual orientation. *E.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35–36 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989), *cert denied* 493 U.S. 1089 (1990); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979).

173. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)) (discussing Title VII's applicability to same-sex sexual harassment in a Title IX claim); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (extending Title VII ruling that "when a supervisor sexually harasses a subordinate because of a subordinate's sex, that supervisor discriminate[s] on the basis of sex" to the teacher-student context in a Title IX suit (internal quotation mark omitted)).

174. *See, e.g.*, Snelling v. Fall Mountain Reg'l Sch. Dist., No. CIV 99-448-JD, 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001) (finding that a Title IX action cannot be based on sexual orientation discrimination but can be based on other grounds); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090–93 (D. Minn. 2000) (finding that discrimination on the basis of sexual orientation is not actionable under Title IX based on Title VII precedent).

Sundowner Offshore Services,[175] a seminal Title VII case in which the Supreme Court found that sexual harassment was still actionable even if the aggressor and victim were of the same sex, discrimination based on sexual orientation is still often unavailable to Title IX plaintiffs. The Department of Education's Office of Civil Rights agreed when it stated that "Title IX does not prohibit discrimination on the basis of sexual orientation."[176] The bully's conduct would still have to be "of a sexual nature" and not simply comments or taunts based on the victim's sexual orientation.[177] So, if sexual orientation claims are unlikely under Title IX, victims of antigay bullying are left to prove discrimination on the basis of gender or sex.[178]

This is what the court found in Dylan's case. According to the court in *Theno*, Dylan failed to meet any of the requirements set forth in *Oncale* to prove same-sex gender harassment, but did offer sufficient evidence that he was harassed for gender nonconformity.[179] That is, Dylan was not bullied because he was gay, but rather because he failed to meet his tormenters' expectations of how a man should act, and, presumably, would not have been harassed if he were female.[180]

Even if they cross the Title IX summary judgment threshold like Dylan did, it is still not clear that plaintiffs like Matthew Schroeder, Jonathan Martin, and Dane Patterson—other bullied youths whose Title IX claims against schools and school officials were allowed to proceed[181]—would be entitled to damages pursuant to a successful Title IX lawsuit. Dylan may have won a significant settlement award, but the burden imposed on a Title IX plaintiff is high. He must show that (1) the school district had actual knowledge of the harassment, (2) the harassment was "severe,

175. 523 U.S. 75 (1998).

176. Dep't of Educ., Office of Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997) (citing *Williamson*, 876 F.2d at 69; *DeSantis*, 608 F.2d at 327; *Blum*, 597 F.2d at 936).

177. *Id.*

178. Despite a long history of gay and lesbian plaintiffs arguing that discrimination against them on the basis of their sexual orientation was indeed a form of sex discrimination, this theory has gained an exceedingly small following in federal and state courts. *See, e.g.*, DeSantis v. Pac. Tel. & Telegraph Co., 608 F.2d 327, 331 (9th Cir. 1978) ("We must again reject appellants' efforts to 'bootstrap' Title VII protection for homosexuals. While we do not express approval of an employment policy that differentiates according to sexual preference, we note that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes."). *But see* Baker v. State, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (concluding statutes that restrict same-sex marriage are "establish[ing] a classification based on sex"); Baehr v. Lewin, 852 P.2d 44, 63–68 (Haw. 1993) (plurality opinion) (holding that restrictions on same-sex marriage were based on sex and subject to strict scrutiny); *see also* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) (holding that discrimination based on gender stereotypes constitutes a recognizable Title VII discrimination claim); Centola v. Potter, 183 F. Supp. 2d 403, 409 (D. Mass. 2002) ("If an employer acts upon stereotypes about sexual roles . . . then the employer opens itself up to liability under Title VII's prohibition of discrimination on the basis of sex.").

179. Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 964–65 (D. Kan. 2005).

180. *See id.* at 973 ("Based on the origin and common theme of the harassment, which was a rumor that plaintiff was caught masturbating in the bathroom in seventh grade, a rational trier of fact could conclude that plaintiff was harassed because his harassers perceived that he did not act as they believed a man (or perhaps more accurately a teenage boy) should act.").

181. See *supra* notes 169–71 for a listing of Matthew's, Jonathan's, and Dane's cases.

pervasive, and objectively offensive," such that he was denied access to education, and (3) the district was "deliberately indifferent" to the harassment.[182] The third element is the sticking point. In some cases, courts have declined to find deliberate indifference if school officials take even some minor, not unreasonable action to end the harassment.[183] Nor do schools have to actually take successful steps to stop the harassment;[184] a school administrator's investigation of the alleged incident may be enough.[185]

2. § 1983

Successful § 1983 claims against school districts or school officials are even more rare, despite Jamie's success. Liability under § 1983 only arises when a "special relationship" with the school exists,[186] or when the school does something to actually increase the danger to the student.[187] But neither compulsory school attendance nor the principle that schools stand in place of parents (*in loco parentis*) during school hours create that relationship.[188] Courts are loathe to find either a special relationship or a school-created danger except in rare circumstances. In one case, a California appeals court ruled that a special relationship existed and a duty was owed if the harm to the student was reasonably foreseeable, as it was when a mentally challenged fifteen-year-old boy was sodomized on school grounds prior to the start of classes by a known, aggressive male bully.[189] And a New York appellate court upheld a decision that a school voluntarily assumed a special duty when a school's principal and security guard explicitly promised to protect a student from a neighborhood bully who eventually shot

182. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999). The school must also be a recipient of federal funds in order to be liable. *Id*. (citing 20 U.S.C. § 1681(a) (2006)); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) ("[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond. We think, moreover, that the response must amount to deliberate indifference to discrimination." (paragraph break omitted)).

183. *See Davis*, 526 U.S. at 648–49 (stating that the school "must merely respond to known peer harassment in a manner that is not clearly unreasonable").

184. *E.g.*, Yap *ex rel.* Yap v. Oceanside Union Free Sch. Dist., 303 F. Supp. 2d 284, 295–96 (E.D.N.Y. 2004) (finding an insufficient basis for § 1983 liability even where the school failed to successfully discipline the offending student).

185. *E.g.*, Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1121–22 (10th Cir. 2008) (finding it not unreasonable for a school principal to immediately turn over investigation of alleged sexual harassment to the police when principal could not be sure if the harassment occurred on or off school property).

186. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197–201 (1989) (holding that a state actor must affirmatively act to place an individual into custody and hold him against his will in order to establish a special relationship, which includes a duty to assume responsibility for the individual's basic "safety and general well-being," for purposes of § 1983 liability).

187. The state-created danger doctrine was implied in *DeShaney*, 489 U.S. at 201–02, but it has been recognized explicitly in subsequent case law. *E.g.*, Pena v. DePrisco, 432 F.3d 98, 107–10 (2d Cir. 2005); Bowman v. Williamson Cnty. Bd. of Educ., 488 F. Supp. 2d 679, 683–84 (M.D. Tenn. 2007).

188. D.R. *ex rel* L.R. v. Middle Bucks Area Vo. Tech. Sch., 972 F.2d 1364, 1369–73 (3d Cir. 1992).

189. M.W. v. Pan. Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673, 676–77, 679–81 (Ct. App. 2003).

and killed the student.[190] These are relatively extreme cases, and no sister court has followed these two outliers.[191] In most cases—especially when those cases involve cyberbullying that may take place outside school grounds—school districts escape liability for failing to address incessant bullying under § 1983.[192]

Holding school officials liable in their individual capacities is also possible, but difficult. A successful suit would likely have to overcome any claim of qualified immunity, but, at least here, suits involving victims of antigay bullying left unprotected by school officials because of sexual orientation discrimination should be successful in overcoming immunity claims.

Qualified immunity, although not explicitly recognized in § 1983, is recognized by the Supreme Court as providing government officials immunity from suit[193] "insofar as their conduct does not violate clearly established statutory or constitutional rights."[194] Therefore, in order to overcome a qualified immunity, a bullied plaintiff would have to show that the school official (1) deprived him of a constitutional right that was (2) clearly established at the time of the violations.[195] One workable option is to allege that students victimized by antigay bullying and left unprotected by antigay school administrators are deprived of their right to equal protection under the law when the school officials protect some students from harassment but not gay students. That is essentially what Jamie Nabozny argued and what the Seventh Circuit found. The principal's and other officials' comments that Jamie should "expect" to be attacked, harassed, and assaulted because he was "so openly gay," coupled with the officials' history of responding to non-gay harassment against heterosexual students, suggests that Jamie was treated differently because of his sexual orientation.[196] If this treatment was not a clear violation of the Equal Protection Clause pursuant to *DeShaney v. Winnebago County Social Services Department*,[197] where the Supreme Court laid out the standard for a § 1983 claim against state officials, it is certainly one now after *Romer v. Evans*.[198] In *DeShaney*, the Court stated that state officials, including anyone acting under the color of law (i.e., school officials), "may not . . . selectively deny its

190. Greene v. City of New York, 566 N.Y.S.2d 40, 40 (App. Div. 1991).

191. *See, e.g.*, McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 464 n.4 (6th Cir. 2006) (citing Soper v. Hoben, 195 F.3d 845, 853 (6th Cir. 1999), *cert denied*, 530 U.S. 1262 (2000)) ("[T]here is no 'special relationship' between a school and its students that gives rise to a constitutional duty.").

192. *See, e.g.*, Werth v. Bd. of Dirs. of the Pub. Schs. of Milwaukee, 472 F. Supp. 2d 1113, 1121–26 (E.D. Wis. 2007) (finding that the defendant school district "did not create or increase any risk of harm" to the bullied student and could not be held liable as a result of a substantive due process claim); Martin v. Swartz Creek Cmty. Schs., 419 F. Supp. 2d 967, 967, 975 (E.D. Mich. 2006) (granting summary judgment for defendant school district on § 1983 due process claim because a "failure to prevent peer-on-peer harassment is not a deprivation of a federal right"). *But see* Wolfe *ex rel.* W.W. v. Fayetteville, Ark. Sch. Dist., 600 F. Supp. 2d 1011, 1020–21 (W.D. Ark. 2009) (allowing § 1983 claim to go forward where plaintiff showed ample evidence of official knowledge of harassment and official misconduct so pervasive as to constitute a "custom or usage").

193. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

194. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

195. *See* Conn v. Gabbert, 526 U.S. 286, 290 (1999).

196. Nabozny v. Podlesny, 92 F.3d 446, 451, 454–58 (7th Cir. 1996).

197. 489 U.S. 189 (1989).

198. 517 U.S. 620 (1996).

protective services to certain disfavored minorities" without running afoul of the Equal Protection Clause.[199] *Romer* made this principle clear with respect to gays and lesbians, who had been selectively stripped of rights accessible to every other Coloradoan, when it repeated its holding that "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[200] Therefore, victims of antigay bullying asserting a deprivation of equal protection may succeed in overcoming a claim of qualified immunity from school officials.[201]

3. State Tort Law

As for recourse in state tort law, the prognosis is also dim. A bullied student would have to show gross negligence that rose to the level of deliberate indifference to a foreseeable injury. For example, where aggressors are well known and the school does nothing to stop them, a subsequent related injury may be foreseeable. That was the case in *Doe ex rel. Doe v. Omaha Public School District*,[202] where the school knew a male student had a history of physical altercations with and sexual assaults of female students, but did nothing to protect the plaintiff from a sexual assault at his hands.[203] Willful or reckless conduct may also suffice. A court also refused to grant immunity from liability to school officials where, for example, a guidance counselor had dismissed a boy's complaints about incessant bullying as the boy's inability to deal with things on his own.[204] Although both of these cases sound like Jamie's and Dylan's, these successes are rare. In most cases, tort suits are simply not available where states grant immunity to school districts,[205] or are otherwise not viable because of a cap on damage awards.[206]

199. *DeShaney*, 489 U.S. at 197 n.3 (citing Yick Wo v. Hopkins, 118 U.S. 356, 356 (1886)).

200. *Romer*, 517 U.S. at 634 (1996) (emphasis omitted) (omission in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

201. *See, e.g.*, C.N. v. Wolf, 410 F. Supp. 2d 894, 898–900 (C.D. Cal. 2005); *see also* Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 874–75 (N.D. Ohio 2003) (although no claim for qualified immunity was raised by the defendants, the court's analysis of Matthew Schroeder's equal protection claim suggests that the officials would not have been protected from suit where Schroeder alleged denial of equal protection due to sexual orientation discrimination).

202. 727 N.W.2d 447 (Neb. 2007).

203. *Doe*, 727 N.W.2d at 451, 454–58.

204. Wencho v. Lakewood Sch. Dist., 895 N.E.2d 193, 197–98 (Ohio Ct. App. 2008).

205. *E.g.*, Smith v. Sch. Dist. of Phila., 112 F. Supp. 2d 417, 424–25 (E.D. Pa. 2000); Doe v. Knox County Bd. of Educ., 918 F. Supp. 181, 183–84 (E.D. Ky. 1996); Carroll v. Hammett, 744 So. 2d 906, 910–12 (Ala. 1999). *But see* Panzarella v. Boyle, 406 F. Supp. 787, 798 (D.R.I. 1975) (finding that Rhode Island law only extends governmental tort immunity to "towns and cities of the State," not school districts); Warrington v. Tempe Elementary Sch. Dist. No. 3, 928 P.2d 673, 677 (Ariz. Ct. App. 1996) (interpreting Arizona law to provide sovereign immunity for school districts against claims related to planning or policy decisions but not claims related to day-to-day operational decisions).

206. Some states, like Wisconsin, for example, statutorily cap damage awards in tort cases against subdivisions of the state. *See* WIS. STAT. ANN. § 893.80(3) (West 2011) (imposing a $50,000 limit). *See generally* Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After* DeShaney, 90 COLUM. L. REV. 1940, 1961 (1990) (noting that, as compared to state tort remedies, even § 1983 provides more protection); William D. Valente, Commentary, *Liability for Teacher's Sexual Misconduct with Students—*

B. First Amendment Issues in Holding School Officials Responsible for Off-Campus Cyberbullying

As we have seen, if liability is to attach to school districts or school officials for failing to address any kind of peer-on-peer harassment, schools have to be in a position to discipline aggressors in the first place.[207] Cyberbullying presents unique problems in holding schools responsible for failing to act given the infinite reach of cyberspace, students' access to home and other off-campus computers, and the arguably greater free speech protections that students enjoy outside the classroom pursuant to *Tinker v. Des Moines Independent Community School District*.[208] Simply because the cyberexpression originates off campus does not insulate a student from potential discipline.[209] But the possibility of legal recourse appears to cause disputes among various courts. At a minimum, the disagreement among lower federal courts about the lawfulness of school discipline for derogatory or hurtful cyberexpression made off campus suggests that a successful claim against school officials for failure to address such cyberbullying is far from certain.

The Fourth Circuit's recent decision in *Kowalski v. Berkeley County Schools*,[210] however, suggests that we may be turning a corner. In that case, student had created a MySpace discussion group called "S.A.S.H.," which stood for "Students Against Shay's Herpes," referring to a fellow student, Shay N.[211] The cyberattacker may have "pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home" and would reach and disrupt the school.[212] The attacks came from students in her high school, were directed at a fellow student, and occurred through a group aptly named "*Students* Against Shay's

Closing and Opening Vistas, 74 EDUC. L. REP. 1021, 1022 n.4 (1992) (discussing various advantages to pursuing claims against schools under § 1983 as compared to state tort law).

207. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (holding that "[a] damages remedy will not lie under Title IX unless an official . . . at a minimum has authority to address the alleged discrimination and to institute corrective measures").

208. 393 U.S. 503, 510–11 (1969) (finding that a school may regulate a student's speech if such speech causes or is reasonably likely to cause a "material and substantial" disruption to school activities or to the work of the school). Elsewhere, I have argued that *Tinker* is not necessarily the appropriate lens through which courts should analyze First Amendment defenses to a school's authority to discipline cyberbullies. *See* Waldman, *supra* note 30. Because my goal here is to simply note that the First Amendment may be a barrier to a school's or a state's disciplinary authority over off-campus bullies, a more extensive discussion of the interaction between free speech and bullying is beyond the scope of this Article.

209. *See, e.g.*, Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale."); Sullivan v. Hous. Indep. Sch. Dist., 475 F.2d 1071, 1075–77 (5th Cir. 1973) (recognizing the right of a school to suspend a publisher of an underground newspaper distributed off campus in violation of the school's regulations). The unlimited reach of cyberspace, however, requires courts to rethink the breadth of that doctrine. *See* Waldman, *supra* note 30, (manuscript at 25–26) (noting that the on-campus/off-campus distinction in determining school's authority to discipline cyberbullying is "antiquated.").

210. 652 F. 3d 565 (4th Cir. 2011)

211. *Kowalski*, 652 F.3d at 577 ("[W]here such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the [bullying] problem.").

212. *Id* at 567.

Herpes,"[213] thus indicating a strong school connection. But, not every jurisdiction agrees with the *Kowalski* analysis.

This theory that cyberexpression can only be disciplined in extreme cases is supported by *J.C. ex rel. R.C. v. Beverly Hills Unified School District*.[214] Even though the court found that the off-campus nature of peer-to-peer cyberaggression was not an a priori barrier to possible school discipline, it found the particular behavior protected under the First Amendment because its apparent innocuousness was quite unlike the extreme depictions where courts permitted discipline in the past.[215] A student had created and posted a video clip on YouTube in which she and her friends ridiculed a thirteen-year-old classmate.[216] They used words like "slut," called the victim "spoiled," and used other profanity and derogatory comments.[217] The student also contacted at least five other students from school and told them to watch the video.[218] The victim was "very upset" when she found out, "was crying" when she told her guidance counselor, and said that "she did not want to go to class."[219] After a comprehensive analysis of the entirety of the case law, the court concluded that no reasonable juror could find that this video caused enough disruption to school to merit discipline.[220] After all, all the school had to deal with was "an upset parent and a student who temporarily refused to go to class."[221] Nor was the video violent or threatening and the victim simply "felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class. These concerns could not, without more, warrant school discipline."[222] The court also ultimately granted the students who posted the video over $100,000 in legal fees and costs.[223]

Undoubtedly, though, those who made the video in *J.C.* intended to hurt their victim through insults and derogatory comments and used their group to "gang up" on one student they did not like.[224] And yet, the school had no authority to discipline the offending students.[225] Given the state of the current case law, then, the First Amendment clouds our attempts to attach school liability to certain types of off-campus peer-to-peer cyberaggression, thus suggesting that this option may not have been available to the parents of Ryan Halligan and Tyler Clementi.

213. *Id.* at 573 (emphasis added).

214. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

215. *J.C. ex rel R.C.*, 711 F. Supp. 2d at 1117.

216. *Id.* at 1098.

217. *Id.*

218. *Id.*

219. *Id.* at 1098. Note the initial effects of the video track closely to the long-term effects of bullying, such as absenteeism, anxiety about school, and depression. See *supra* notes 113–17 and accompanying text for a discussion of such long-term effects.

220. *Id.* at 1117.

221. *Id.*

222. *Id.*

223. Joanne Jacobs, *Schools Try to Control Cyberbullying*, LINKING AND THINKING ON EDUCATION BY JOANNE JACOBS (June 28, 2010), http://www.joannejacobs.com/2010/06/schools-try-to-control-cyberbullying.

224. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1108.

225. *Id.* at 1123.

C. Loss of Life in Ryan's and Tyler's Cases—The Retributive Theory of Proportionality

It seems impractical to seek monetary damages from indifferent schools given the strict requirements of Title IX, § 1983, and state tort claims, coupled with the apparent First Amendment protection extended to some off-campus peer-to-peer cyberaggressors. There are other options for monetary damages, though. But seeking damages pursuant to a wrongful death statute is also impractical and unlikely to succeed. In addition, when bullying is so severe and when it results in the loss of life, as in the suicides of Ryan Halligan and Tyler Clementi, money damages may strike family members as inadequate for intuitive or intangible reasons.

Granted, the existence of wrongful death statutes belies the theory that money damages are somehow inadequate compensation for loss of life. Wrongful death statutes permit recovery for the death of an individual by a wrongful act, neglect, or default.[226] But traditionally, courts have refused to recognize suicide-related wrongful-death claims, finding that "the act of suicide is considered a deliberate, intentional and intervening act that precludes another's responsibility for the harm."[227] The theory is that suicide is not a foreseeable result of any injury.[228] And yet, some courts have shown a willingness to make an exception for wrongful death suits for student suicides if a "special relationship" between the school and the student makes the suicide foreseeable. In *Schieszler v. Ferrum College*,[229] for example, a federal district court refused to dismiss a wrongful death claim against the college where the college "had notice" that the student would commit suicide with "imminent probability."[230] In that case, the college became aware of the student's suicidal ideation after a suicide attempt that campus police interrupted.[231] The police notified the Dean, who required the student to sign a statement promising not to hurt himself in the future.[232] Later, the student told a friend to tell his girlfriend he loved her.[233] Assuming this was a final goodbye before another suicide attempt, the deceased's girlfriend went to the administration, but the Dean did nothing.[234] The court found that normally no liability would attach, except where "an affirmative duty to aid or protect" comes from some

226. *See, e.g.*, Olsen v. Farm Bureau Ins. Co. of Nebraska, 609 N.W.2d 664, 671 (Neb. 2000) (noting that wrongful death statutes create a cause of action that did not exist at common law).

227. Jain v. State, 617 N.W.2d 293, 300 (Iowa 2000) (citing McLaughlin v. Sullivan, 461 A.2d 123, 124 (N.H. 1983)) (the seminal case on wrongful death claims involving suicides); *see also* Edwards v. Tardif, 692 A.2d 1266 (Conn. 1997) (recognizing the traditional rule that suicide precludes another's liability); Washington Metro. Area Transit Auth. v. Johnson, 726 A.2d 172 (D.C. 1999) (holding that the last clear chance doctrine does not apply to suicides).

228. *See, e.g.*, Salsedo v. Palmer, 278 F. 92, 95–99 (2d Cir. 1921) (discussing the traditional view of suicide as an intervening independent act). This highlights the causation problem ignored by advocates of criminalization of bullying and cyberbullying that cause suicide. See *infra* Parts IV.A.3 and IV.B.2.b for a discussion of the problem of causation in the criminalization of bullying.

229. 236 F. Supp. 2d 602 (W.D. Va. 2002).

230. *Schieszler*, 236 F. Supp. 2d at 609.

231. *Id.* at 605.

232. *Id.*

233. *Id.*

234. *Id*. at 605–06.

"special relationship."[235] Here, the school asked the student to sign a form stating he would not harm himself, which suggested to the court that the defendants believed he was likely to try suicide again.[236] Based on these facts, the court, in denying the defendants' motion to dismiss, found that it was possible for a special relationship to have existed between the college and the student, and that the danger of another suicide attempt was foreseeable enough for an affirmative duty to have possibly attached.[237]

Only one court[238] has followed *Schieszler*'s reasoning. And, given that most jurisdictions have declined to find that a special relationship exists between a school and a student for the purposes of § 1983 claims,[239] except in extraordinary circumstances, it is unlikely that such a relationship will be found to substantiate wrongful death claims based on suicides caused by face-to-face bullying or cyberbullying. Nor is it clear that extending this line of cases is a good idea. By making liability incumbent on foreseeability and what the school knew, these cases would appear to punish schools that actually do a better job monitoring and identifying suicidal ideation in their students while absolving of responsibility those schools that do nothing in the first place. The maxim that "ignorance is bliss" should not be a governing legal principle to protect those schools that do nothing to care for their at-risk students.

In addition to the practical difficulty that suicide brings to successful wrongful death claims, the fact that the bullying victim died or was so severely psychologically harmed by post-traumatic stress disorder or deep depression, for example, may render money damages unseemly, unsatisfying, or both. What animates this feeling is the widely held, almost intuitive belief that the punishment should fit the crime. A student who is bullied so incessantly and so severely that he commits suicide, the argument goes, is more tragic than one who does not commit suicide, thus rendering his bully more criminally culpable and deserving of a more serious societal condemnation. This is the theory of proportionality, a corollary to a retributivist model of punishment,[240]

235. *Id.* at 606–07; *see also* RESTATEMENT (SECOND) OF TORTS § 314A (1965).

236. *Schieszler*, 236 F. Supp. 2d at 609.

237. *Id.* at 609–10.

238. *See* Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *13 (Mass. Super. Ct. June 27, 2005) (holding that because school administrators knew of plaintiff's self-destructive behavior, they had a duty to exercise reasonable care to protect plaintiff from self-harm).

239. See *supra* Part III.A.2 for a discussion of the rarity of successful § 1983 claims against school officials.

240. For the purposes of this Part, I argue only that it is a retributivist theory, and its corollary of proportionality, that animates the view that we should criminalize egregious face-to-face bullying and cyberbullying that cause suicides. A comprehensive analysis of the retributivist model of punishment, and its critiques and advantages, is beyond the scope of this Article. For an analysis of retribution, see generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 234–35 (1968); HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 33–34 (1976); John L. Mackie, *Retribution: A Test Case for Ethical Objectivity*, *in* PHILOSOPHY OF LAW 677 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991); Sidney Glendin, *A Plausible Theory of Retribution*, 5 J. VALUE INQUIRY 1 (1970); Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973); Lisa H. Perkins, *Suggestions for a Theory of Punishment*, 81 ETHICS 55 (1970). For a particularly insightful economic analysis of retribution, see generally Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71 (1980); Donald Wittman, *Punishment and Retribution*, 4 THEORY & DECISION 209 (1974).

and it is the philosophical animator of the desire to criminalize the most severe bullying cases and bullying-related suicides.

The retributive theory of punishment posits that "punishment is justified on the grounds that wrongdoing merits punishment";[241] that is, the criminal gets punished because a criminal deserves to get punished. There is no utilitarian or forward-looking benefit to punishment in this model because punishment is valued "without reference to the contingent benefits that the public might (or might not) enjoy. . . . The value . . . is internal to its practice and is not contingent upon the achievement of some future benefit."[242] Punishment, then, is Kantian—it is justified in and of itself,[243] independent of any benefit that may accrue to a society.

A necessary corollary to any retributive penal model is that if a criminal should be punished because he deserves it then he deserves to be punished in accordance with his desert, no more and no less. John Rawls recognized the correlation: "It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. . . . and the severity of the appropriate punishment depends on the depravity of his act."[244] This is the theory of proportionality, and it originated alongside the retributive model of punishment.[245] Both theories have ancient origins,[246] and they have their admirers in the criminal law[247] and elsewhere.[248] Proportionalists argue that the "[s]everity of

241. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4 (1955).

242. Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1176 & n.53 (2009).

243. IMMANUEL KANT, THE PHILOSOPHY OF LAW 45 (W. Hastie trans., 1887). For a complete analysis of Kantian views on retributive theory, see Donald Clark Hodges, *Punishment*, 18 PHIL. & PHENOMENOLOGICAL RESEARCH 209 (1957). *See also* Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 273 (1982) (arguing against Kantian retributivist theory).

244. Rawls, *supra* note 241, at 4–5.

245. Jeremy Bentham and others have tried to shoehorn proportionality into a utilitarian model. Bentham argued that "the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence," suggesting that making the punishment for murder harsher than the punishment for, say, robbery, incentivizes the would-be criminal to rob rather than kill. JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 399 (J. Bowring ed., 1843); *see also* Roozbeh B. Baker, *Proportionality in the Criminal Law: The Differing American Versus Canadian Approaches to Punishment*, 39 U. MIAMI INTER-AM. L. REV. 483, 493–94 (2008) (arguing that the American approach to punishment emphasizes greater punishment for more serious offenses). H.L.A. Hart finds some legitimacy in Bentham's utilitarian theory, but adds another forward-looking justification for punishments that do not "conflict with common estimates of [the crimes'] comparative wickedness. . . . it might either confuse moral judgments or bring the law into disrepute, or both." H.L.A. HART, LAW, LIBERTY AND MORALITY 36–37 (1969). Proportionality, however, cannot be based on any utilitarian theory. The former is backward looking, the latter is forward looking. Bentham's formulation of proportionality correlates punishment and a probable future offense rather than the particular crime that criminal committed. BENTHAM, *supra*, at 398.

246. English law incorporated a principle of proportionality in punishments from early in its history, tracing the origins of proportional punishments to the *lex talionis*—the Biblical law of "an eye for an eye, a tooth for a tooth." Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 844–47 (1969). When the Bill of Rights borrowed the phrase "cruel and unusual punishments," they quite possibly meant to adopt its history and interpretations. The Supreme Court in *Solem v. Helm*, 463 U.S. 277 (1983), seemed to think so when it suggested that the Eighth Amendment's use of language similar to that of the English Bill of Rights is evidence of such intent. *Id*. at 286–88.

247. Proportionality is manifested explicitly in the statements of purpose in various criminal codes. The Model Penal Code states that one of its purposes is "to differentiate on reasonable grounds between serious

punishment should be commensurate with the seriousness of the wrong" because, as Professor Andrew von Hirsch has argued, the purpose of punishment is to express a society's distaste for certain conduct and the amount of punishment reflects the magnitude of that distaste.[249] Any disparity between the punishment and society's view of how "bad" the criminal act was would be illogical.[250]

Some would say that this is why we generally punish murder more harshly than robbery and an unintentional death more harshly than an assault. But, just like proportionality instructs us to treat different crimes differently, the theory also tells us whether the sword of the criminal law should be used at all. After all, as Herbert Packer has noted, "[t]he combination of stigma and loss of liberty involved in a . . . sentence of imprisonment sets that sanction apart from anything else the law imposes."[251] In noting the exceptionalism of the criminal law and the consequences of conviction, Professor Packer was distinguishing minor indiscretions—traffic offenses, for example—from criminal behavior, the latter of which is the product of a more culpable state of mind and merits more severe punishment.

This is in part why the Supreme Court requires a higher standard of proof in criminal cases than in civil cases. In *In re Winship*,[252] the Supreme Court explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[253] Although it had various rationales for making the principle

and minor offenses," and "to safeguard offenders against excessive, disproportionate or arbitrary punishment." MODEL PENAL CODE § 1.02 (1985). The New York Penal Law hopes to "differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor." N.Y. PENAL LAW § 1.05 (McKinney 2009). And the California Penal Code states that punishment "is best served by terms proportionate to the seriousness of the offense." CAL. PENAL CODE § 1170 (West 2010).

248. The Supreme Court has found proportionality requirements in the imposition of fines based on the Eighth Amendment's express prohibition of fines that are "excessive," and in the area of forfeitures and punitive damages. In *United States v. Bajakajian*, 524 U.S. 321 (1998), for example, the defendant failed to report his attempt to sneak out of the country more than $357,000 in illegally obtained cash. *Id.* at 325. The applicable statute provided for forfeiture of the entire sum to the government, but the Court found that amount of forfeiture excessive. *Id*. at 324. As for scrutiny of punitive damages awards, the principle of proportionality is in play as well. Not only does the Court examine proportionality issues in punitive damages awards de novo, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001), but it is not shy about cutting those awards down to size. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), for example, the Court found that a damage award 145 times the plaintiff's actual damages was grossly excessive because "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives." *Id*. at 419–20.

249. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 66–67 (1976).

250. *See id.* at 66 (asserting that disproportionate punishment is clearly counterintuitive); Andrew von Hirsch & Lisa Maher, *Should Penal Rehabilitationism Be Revived?*, 11 CRIM. JUST. ETHICS 25, 28 (1992) (discussing the logical problems of disproportionate punishment).

251. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 150.

252. 397 U.S. 358 (1970).

253. *Winship*, 397 U.S. at 364. For a summary of the current status of the *Winship* doctrine and additional analysis of the three rationales animating the Court's decision in *Winship*, see generally Note, Winship *on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093 (1993). The Court has never had the occasion to weigh in on the scope of this foundational and well-established doctrine, but Justice Felix Frankfurter's dissent in *Leland v. Oregon*, 343 U.S. 790, 802 (1952) (Frankfurter, J., dissenting) came close. *Id. Leland* upheld a state law requiring defendants to prove an insanity defense beyond

explicit in *Winship*,[254] the Court found that the standard adequately reflected the gravamen of a criminal conviction.[255] Justice Harlan made this point explicit in his concurrence when he explained that society views an erroneous conviction far worse than it views an erroneous acquittal: it is far worse to convict an innocent man than acquit a guilty one because of the severity of the punishment laid down by the hand of criminal justice.[256] Justice Brennan noted that what is at stake in any criminal trial is the defendant's transcendent interest in his liberty.[257] Given the nature of that interest, the reasonable doubt standard ensures that his liberty is not taken away because of a mere mistake.[258] Since liberty is not at stake in civil cases, the lower preponderance of the evidence standard makes sense under a theory of proportionality.[259]

The exceptional and extraordinary impact of the criminal law suggests that only the worst conduct should be criminalized, and bullying that causes severe psychological distress and suicide may qualify as sufficiently criminal behavior. Adolescent bullying may be a constant feature of life in school, but incidents vary by degrees. Most students experience some form of bullying, fewer feel compelled to skip school, fewer still fall into deep depressions, and even fewer attempt suicide as a result. A proportionalist would say that bad conduct that is so severe and outside the norm of adolescent behavior that it pushes its victims into endless psychological despair and suicidal ideation deserves a harsh penalty that distinguishes it from the kind of behavior we expect of immature adolescents. Such "criminal harassment," to use

a reasonable doubt. *Id*. at 799. Justice Frankfurter believed that the reasonable doubt standard, which imposed an affirmative obligation on the state to prove guilt, was inconsistent with that approach. *Id*. at 802–03 ("[F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt.").

254. Note, *supra* note 253, at 1094–95. The Note points to three rationales: (1) bringing meaning to the presumption of innocence, (2) embodying the moral weight we give to erroneous convictions, and (3) leveling the playing field between a defendant and the government. *Id.* at 1094–95. There is a fourth rationale, highlighted in Justice Brennan's majority opinion. *See generally Winship*, 397 U.S. at 363–65 (discussing the danger of improper conviction as a justification for higher burden of proof in criminal cases). This rationale is similarly recognized in Justice Harlan's concurrence. *See id*. at 372 (Harlan, J., concurring) (discussing that proof beyond a reasonable doubt is justified on the basis of social consensus that wrongful conviction is worse than acquitting a guilty person).

255. *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

256. *Id.*

257. *Id.* at 364 (majority opinion).

258. *See id*. ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder . . . of his guilt beyond a reasonable doubt." (first omission in original) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958))).

259. This also explains why the kind of negligence necessary for tort liability is lower than that for criminal liability. A deviation from a reasonable standard of care would suffice for civil negligence, but criminal negligence requires a substantial and unjustifiable risk of which the defendant should be aware but fails to perceive and, as such, represents a gross deviation from the reasonable standard of care. *See* MODEL PENAL CODE § 2.02(2)(d) (1985) (stating that "the actor's failure to perceive [the risk], considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care").

Massachusetts's term,[260] may deserve punishment by the state, not simply by the school, as a statement of society's moral condemnation of the behavior. This may be why the deaths of Ryan Halligan, Tyler Clementi, and Phoebe Prince, a bullying victim who committed suicide on January 14, 2010,[261] caused such a popular uproar, whereas Jamie Nabozny's and Dylan Theno's cases only became a cause célèbre in the LGBT and education communities.[262] Ryan, Tyler, and Phoebe died; Jamie and Dylan did not.

The retributive doctrine of proportionality, then, animates the public's zeal for criminal penalties in severe bullying cases. As Professor Samuel Pillsbury has noted, both critics and admirers of the retributivist model agree that much of the moral weight behind the criminal law comes from our emotional reactions to wrongdoing.[263] Such emotion is "a fundamental trait of humanity" and can explain why we want criminal laws in the first place.[264] P.F. Strawson made this point clear when he argued that it was our so-called "reactive emotions—the emotions inspired by wrongful acts"—that inspired us to create criminal laws to deal with those wrongful acts.[265] Therefore, the emotional or intuitive desire to criminalize bullying or cyberbullying that causes suicide arguably reflects a foundational feature of the criminal law.

IV. CRIMINALIZATION DISSECTED

The retributive picture, however, is as yet incomplete. For retributivists, what merits more severe punishment is greater culpability, not simply a worse result alone. And yet, proposals to criminalize and punish egregious cases of bullying and cyberbullying focus solely on the effects—a suicide, for example—on the victim. Such proposals ignore the real possibility that any given victim may react to varying degrees of harassment in a myriad of ways.

It is not entirely accurate to say that the theory of proportionality requires punishing murder more seriously than robbery; rather, proportionality dictates that a society should punish *murderers* more severely than *robbers*. The theory posits a rationale for treating *actors*, not consequences of actions, differently. That is, there must be two strands to any retributivist and proportionality theory. We may indeed punish murder more severely than we punish robbery, but we also punish intentional conduct more severely than negligent conduct, even if the ultimate results are the same. That has much to do with the relative culpability of a premeditated actor compared to

260. MASS. GEN. LAWS ANN. ch. 265, § 43A(a) (West 2011).

261. Erik Eckholm & Katie Zezima, *9 Teenagers Are Charged After Suicide of Classmate*, N.Y. TIMES, Mar. 30, 2010, at A14.

262. A Google search for "Jamie Nabozny" yields about 30,400 results compared to about 2,390,000 results of a search for "Tyler Clementi." Tyler's and Phoebe's cases were also the main impetuses for the New Jersey and Massachusetts legislatures to revise and strengthen their antibullying statutes. *See, e.g.*, Emily Bazelon, *Bullies Beware*, SLATE (Apr. 30, 2010), http://www.slate.com/id/2252543 (noting that Massachusetts's strong antibullying law passed in response to Phoebe's suicide); Richard Pérez-Peña, *Christie Signs Tougher Law on Bullying in Schools*, N.Y. TIMES, Jan. 7, 2011, at A18 (reporting that Tyler's death and similar suicides gave New Jersey's antibullying bill "momentum" to get passed).

263. Samuel H. Pillsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143, 170 (2009).

264. *Id.* at 171.

265. *Id.* at 170–71 (citing P.F. Strawson, *Freedom and Resentment*, *in* FREE WILL 59–80 (Gary Watson ed., 1982)).

an indifferent one, and it suggests that proportionality applies not just to the end result of bad conduct (i.e., the death or the stolen money in a murder or bank robbery, respectively) but to the nature of the bad conduct itself. He who acts with premeditation receives a greater punishment than he who acts with depraved indifference or recklessness.[266] And, in some jurisdictions, those who commit robbery are charged with the same grade of offense—a second-degree felony—as those who commit manslaughter, even though no one dies in a robbery.[267] This second strand of proportionality—that punishment be commensurate with culpability, not simply with the result of the bad act—divorces the doctrine from its basic, ancient roots. "An eye for an eye and a tooth for a tooth" makes sense only as a rule of equality of consequences—a death is punished by a death. Retributivists do no treat all deaths the same, however, nor are property crimes necessarily punished less severely than homicide.

This begins to highlight the theoretical problems with criminalizing severe face-to-face bullying and cyberbullying and bullying that leads to suicide. As a preliminary matter, criminalization proposals often miss the culpable conduct. If all that matters is the result, then we ignore not only the gravity of the bullying behavior, but also the causative link between the behavior and the suicide. Jamie Nabozny was bullied incessantly for years, and his attackers physically assaulted him, verbally abused him, and destroyed his self-worth.[268] The same happened to Dylan Theno[269] and Ryan Halligan.[270] But all we know about Tyler Clementi is that his roommate turned on his laptop camera to spy on Tyler's private moment with another man.[271] Without minimizing the effect that breach of privacy and trust had on Tyler's emotional well-being, Jamie's bullies arguably engaged in exponentially worse behavior over time.[272] Proportionality might suggest treating Jamie's bullies more severely than Tyler's or, at least, Ryan's bullies more severely than all the others. If so, criminalizing any kind of bullying simply because it leads to a suicide ignores what could be more grave or culpable behavior.

This complication—directing a retributive impulse against the worst result rather than the more morally culpable conduct—is just one reason why criminalizing egregious bullying and bullying that leads to suicide is ill-advised. The others can be divided into practical and theoretical reasons. First, using common law crimes like

266. *Compare* N.Y. PENAL LAW § 125.25(1) (McKinney 2011) (intent to murder required for murder in the second degree), *with id.* § 125.15(1) (recklessness required for manslaughter).

267. *Compare* MODEL PENAL CODE § 222.1(2) (1985) (robbery is a felony in the second degree), *with id.* § 210.3(2) (manslaughter is a felony in the second degree).

268. See *supra* notes 36–54 and accompanying text for a discussion of the bullying of Jaime Nabozny.

269. See *supra* notes 55–65 and accompanying text for a discussion of the bullying of Dylan Theno.

270. See *supra* note 66–72 and accompanying text for a discussion of the bullying of Ryan Halligan and his subsequent suicide.

271. See *supra* note 73 and accompanying text for a discussion of the facts that led to Tyler Clementi's suicide.

272. See *supra* notes 28–29 and accompanying text for a discussion of how true bullying requires repeated conduct. Therefore, the single-incident aggression involved in Tyler Clementi's case is technically not bullying. This distinction is discussed in Waldman, *supra* note 30 (manuscript at 9–12). Because the merits of criminalization do not depend on whether the captured behavior is repeated, the distinction between single-incident aggression and repeated harassment is irrelevant.

manslaughter to capture this activity, as has been the call in Tyler's case, is likely to fail. Prosecutors would be unable to identify the proper defendant, let alone prove causation and awareness. And proving causation remains a problem even if legislatures create a new crime like aggravated criminal bullying to specifically address face-to-face bullying and cyberbullying that cause suicides. Second, there is no evidence that criminalization will solve the growing bullying and cyberbullying problem; in fact, there is substantial evidence that non-legal responses that strengthen social support networks among teenagers are society's best tools to prevent more bullying tragedies. Third, this suggests that although criminalization may have retributive value, it is not clear it offers anything else. It is backward looking, rather than aimed at solving a problem. It is, therefore, a symbolic legal response to a social problem and internally inconsistent as a matter of criminal law theory.

A. Manslaughter

Many called for manslaughter charges against Tyler Clementi's roommate.[273] Malcolm Lazin, executive director of the Equality Forum, a nonprofit organization dedicated to advancing gay and lesbian rights through education and outreach,[274] for example, somewhat confusingly called Tyler's roommate's conduct "willful and premeditated" and called on the Middlesex County, New Jersey prosecutor to file reckless manslaughter charges.[275] Such a proposal is riddled with practical difficulties.

1. Who is the proper defendant?

There are three problems of proof—of the proper defendant, of mens rea, and of causation. Determining the proper defendant in a bullying case is tricky because bullying, by definition, is repeated over time and may not be conducted by one perpetrator. In Jamie Nabozny's case, for example, the Seventh Circuit identified multiple students who physically bullied Jaime,[276] countless more that spouted antigay epithets and engaged in constant verbal harassment,[277] and two school officials who told him to "expect" harassment and assaults for being gay.[278] A prosecutor could choose the worst offender, which would be Stephen Huntley, who assaulted Jamie on numerous occasions culminating in a ten-minute beating.[279] Or, a prosecutor could choose Jason Welty and Roy Grande, two students who bullied Jamie since seventh

273. Marci Stone, *Thousands Demand Manslaughter Charges for Tyler Clementi's Death*, EXAMINER.COM (Oct. 1, 2010), http://www.examiner.com/us-headlines-in-national/thousands-demand-manslaughter-charges-for-tyler-clementi-s-death-video.

274. EQUALITY FORUM, http://www.equalityforum.com/page.cfm?id=14.

275. *Manslaughter Charges in Clementi Case?*, ADVOCATE.COM (Oct. 2, 2010), http://www.advocate.com/News/Daily_News/2010/10/02/Manslaughter_Charges_in_Clementi_Case.

276. Nabozny v. Podlesny, 92 F.3d 446, 451–52 (7th Cir. 1996). Jamie's five harassers included Jason Welty, Roy Grande, and Stephen Huntley. *Id*.

277. *Id*. at 451–52.

278. *See id*. (noting that the school principal told Nabozny he should "expect" harassing behavior from fellow students and school disciplinary officer said he "deserved such treatment").

279. *Id*. at 452.

grade and whose physical attacks caused Jamie to attempt to commit suicide.[280] Or, he could choose all three. It is not clear why, or if, one bully is more culpable than the other.

In fact, bullying can, though need not, be a collaborative effort, involving one or more primary aggressors, a series of secondary aggressors or "followers," and a litany of bystanders who provide tacit approval by laughing or doing nothing to stop the bullying.[281] It is the negative school climate or the repeated nature of bullying harassment that causes suicidal ideation. LGBT and questioning youth may be also victimized by a wider community that may bear animus toward gays and feel alienated by parents in whom they cannot confide. Whatever the specific factors contributing to suicide attempts in bullied LGBT youth, it is, at a minimum, difficult to identify the particular bullies who drove the victim to suicide.

2. Were the defendants aware their behavior created a substantial and unjustifiable risk of harm?

Assuming a prosecutor could identify one or a set of defendants who were responsible for bullying or cyberbullying a victim who committed suicide, a prosecutor's next step would be to prove that these defendants had the requisite mental state for conviction. Under the Model Penal Code, manslaughter is a homicide that is committed recklessly.[282] Since that is also true in New Jersey,[283] and would be applicable to any charges in Tyler Clementi's case, the recklessness standard is highly relevant.[284] Recklessness requires a "conscious[] disregard[]" of a "substantial and unjustifiable risk."[285] A reckless actor is aware that he creates risk by his actions, and he is aware that he is disregarding that risk when he acts.[286] In other words, a bully would have to know at least that his behavior makes it considerably more likely that his victim would commit suicide and then ignore that risk.

That is hard to prove anyway, but to suggest that a bully is aware that his conduct will very likely lead his victim to suicide involves two problems. First, it misunderstands bullying and the reasons why bullies behave the way they do. In other words, a bully cannot consciously disregard a risk if he fails to perceive the risk in the first place.[287] Second, even though there is substantial evidence that bullying and

280. *Id*. at 451–52.

281. Flaspohler et al., *supra* note 15, at 638.

282. MODEL PENAL CODE § 210.3(1)(a) (1985).

283. N.J. STAT. ANN. § 2C:11-4(b)(1) (West 2011).

284. Even if New Jersey had a negligent homicide statute, such a provision is usually reserved for crimes like vehicular manslaughter and would, in any event, result in minimal punishment.

285. N.J. STAT. ANN. § 2C:2-2(b)(3). There is some confusion and debate about the extent of the reckless actor's awareness. Must the actor be aware that there is a risk, that the risk is substantial *and* that the risk is unjustifiable? Or, must he simply be aware of some risk, which the jury determines from the facts is substantial and unjustifiable?

286. MODEL PENAL CODE AND COMMENTARIES, § 2.02 cmt. 3, at 238 (Official Draft and Revised Comments 1985).

287. Maybe the bully's crime is his failure to perceive the risk, assuming it exists. Such is negligence, which is not applicable to crimes of homicide in New Jersey. For a fascinating discussion of assigning culpability to actors who fail to perceive risks for morally different reasons, see Samuel H. Pillsbury, *Crimes*

cyberbullying cause suicidal ideation and make suicide attempts more likely, the causal link is attenuated and broken by the volitional act of taking one's own life. It would, therefore, be difficult to argue that a bully disregarded a "substantial and unjustifiable" risk of suicide if the risk of suicide is not substantial. This dilemma hints at the causation problem, as well.

A bully intends to harm, but he does so for reasons other than the effects his behavior has on his victim. He bullies to seem more powerful, to be funny,[288] to "get back at" others,[289] to show off for his friends or to hide his own insecurities,[290] to name just a few reasons, all of which are internal to the bully, not dependent upon a victim's reaction. However, a bully *could* be aware that his actions create a risk of suicide in his victims if he is told as much. A school's antibullying program that teaches students the tragic consequences of harassing others with emotional, verbal, and physical attacks may put bullies on notice that their harassing conduct is in reckless disregard of the known risks of bullying. But, bullying causes more than just suicidal ideation. Incessant harassment at school and online causes depression, isolation, academic underperformance, antisocial behavior, increased Internet use, and various other negative consequences.[291] Suicidal ideation and suicide attempts represent just one category of consequences, a category that is more rare than others. It seems, then, that a prosecutor would have the best chance of proving that the risk of suicide was "substantial" if suicide were the most frequent consequences of bullying. It is not.

3. Did the bullying cause the suicide?

The rarity of the suicidal response makes proving causation especially difficult. Any prosecutor seeking to establish a causal connection between antigay bullying and a victim's suicide would have to show that the bully's conduct was both the "but-for" cause and the proximate cause of the victim's death. The "but-for" cause refers to the requirement that the death would not have occurred in the absence of the defendant's bullying behavior. Proximate cause means that the bullying, in addition to being the but

of Indifference, 49 RUTGERS L. REV. 105, 151–153 (1997). If the criminal law focused on the defendant's reasons for disregarding risk and not on his consciousness of that risk, as Professor Pillsbury has argued, punishment for Tyler's death would be possible. *See id.* at 153 (arguing that a failure to perceive the risk does not excuse the harm). Consider two speeding cars, one of which carries a man rushing his dying wife to a hospital, the other carries teenage boys and a teenage driver trying to show off his machismo. They run red lights they fail to see, injuring pedestrians. If responsibility depends on the reasons for their failure to perceive risks, they are not equally culpable. The husband wanted to save his wife; the young man was trying to prove his masculinity. The former had a morally worthy concern to save his wife, but the latter valued his friends' approval more than the risks of speeding. It was the young man who manifested indifference toward life, whereas the husband was torn between two competing lives—the one he knew and loved in his car and the potential pedestrian he did not see. To treat the two drivers the same is to equate the value of saving a man's dying wife with the value of showing off for your friends.

288. Waldman, *supra* note 103.

289. *Id.*

290. *See, e.g.*, Nansel et al., *supra* note 16, at 2097 (reporting a positive relationship between bullying and the ability to make friends).

291. See *supra* Part II.B.3 and accompanying text for a discussion of the effects of bullying. *See also* KOSCIW ET AL., *supra* note 76, at 45–51 (describing the effects of a hostile school environment on bullied students).

for cause, must bear a sufficiently close relationship to the death of the victim. LeFave makes this distinction clear when he notes that criminal causation means that in addition to the defendant's conduct being the but-for cause of the death,

> the forbidden result which actually occurs must be enough similar to, and occur in a manner enough similar to . . . the result or manner which [the defendant's] reckless . . . conduct created a risk of happening (in the case of crimes of recklessness . . .) that the defendant may fairly be held responsible for the actual result even thought it does differ or happens in a different way from the intended or hazarded result.[292]

New Jersey's causation requirement is unique, departing from the Model Penal Code's foreseeability formulation. Under the Model Penal Code, a defendant would be liable for an actual result that defendant knew or should have known was "rendered substantially more probable by his conduct."[293] New Jersey gives more leeway to the jury to determine if the actual result is "within the risk of which the [defendants were] aware" when they acted or involves "the same kind of injury or harm as the probable result and [is not] too remote [or] accidental in its occurrence."[294] Causation, then, is not simply a matter of foreseeability. When the actual result is "of the same character" as either the intended or probable result, or when the actual injury is within the risk created and known by the defendant, causation is established. So, for example, the risk that the victim of a car accident would eventually take himself off a ventilator due to the injuries sustained during the accident is, quite remarkably, within the risk posed by the reckless driver.[295]

Although overwhelming evidence suggests a strong causal link between repeated bullying and suicide risk among LGBT youth, the suicidal reaction is neither foreseeable nor of the same character as the more common consequences of angst, depression, and isolation resulting from bullying. Still, the prosecutor has considerable

---

292. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(a), at 466 (2d ed. 2003). The quoted text also refers to "crimes of intent," but I assume, for the purposes of this discussion, that no bully specifically intends for his victim to die. That is why charging bullies with premeditated murder is not an option. Notably, there is some disagreement regarding the standard for causation that the state is required to meet. *See, e.g.*, State v. Jones, 882 A.2d 1277, 1282 (Conn. App. Ct. 2005) (citing State v. Browne 854 A.2d 13 (Conn. 2004)) (requiring the state "to demonstrate that the defendant's conduct was a proximate cause of the victim's death—i.e., that the defendant's conduct contributed substantially and materially, in a direct manner, to the victim's injuries and that the defendant's conduct was not superseded by an efficient intervening cause that produced the injuries"); Gibbs v. State, 677 N.E.2d 1106, 1109 (Ind. Ct. App. 1997) (noting that the state needs to only show that "the defendant's conduct contributed . . . immediately to the death of another person" (quoting Warner v. State, 577 N.E.2d 267, 270 (Ind. Ct. App. 1991))); Commonwealth v. Shoup, 620 A.2d 15, 18 (Pa. Super. Ct. 1993) (rejecting the use of "the tort concept of proximate cause" in a criminal homicide prosecution and requiring "a more direct causal relationship between the defendant's conduct and the victim's death"); State v. Yates, 824 P.2d 519, 523 (Wash. App. Ct. 1992) (ruling that the state was obligated to prove proximate cause).

293. MODEL PENAL CODE AND COMMENTARIES § 2.03 cmt. 3, at 261 n.17 (1985).

294. N.J. STAT. ANN. § 2C:2–3(a)(2)(c) (West 2011). Though not identical to the Model Penal Code, the New Jersey provisions have been interpreted by state courts as substantially consistent. State v. Martin, 573 A.2d 1359, 1364–66 (N.J. 1990).

295. *See, e.g.*, State v. Pelham, 824 A.2d 1082, 1098 (2003) (Albin, J., dissenting) (criticizing the majority's holding for extending the risk a defendant is aware of to include the risk that a victim will decline life-saving care).

social science evidence to support his prima facie case. Many psychologists, educators, and social scientists will agree that incessant harassment in school and online can cause suicide. The data bear out this connection, and, in fact, the data also suggest that LGBT individuals are already more likely to commit suicide than their heterosexual counterparts, thus making them more susceptible to the impact of online bullying and harassment.

It should come as no surprise that gay adolescents, especially young gay men,[296] attempt to commit suicide at alarmingly high rates. Various studies have shown that gay and lesbian youths are two to three times more likely than their heterosexual peers to attempt suicide.[297] With approximately 5,000 young Americans ages fifteen to twenty-four committing suicide each year, more than thirty percent of the completed suicides are of gay and lesbian youth.[298] More than twenty-one percent of gay male adolescents report making a suicide plan, and nearly twelve percent report making at least one suicide attempt.[299] Other studies suggest much higher rates.[300]

The connection between being gay and attempting suicide makes sense given the increased stresses that are associated with being gay. Studies suggest that gay adolescents who "come out" tend to experience family discord, disownment, and banishment.[301] They also face what some scholars have called a "double jeopardy" of disempowerment.[302] That is, in a society whose majority has, at best, a mixed view of gays and lesbians, these adolescents not only have to deal with the transitions of adolescence and young adulthood like their heterosexual peers but they also have to

296. Anthony R. D'Augelli et al., *Predicting the Suicide Attempts of Lesbian, Gay, and Bisexual Youth*, 35 SUICIDE AND LIFE-THREATENING BEHAVIOR 646, 647 (2005); Rivers, *supra* note 113, at 15.

297. Paul Gibson, *Gay Male and Lesbian Youth Suicide*, *in* 3 REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE: PREVENTION AND INTERVENTIONS IN YOUTH SUICIDE 3–110 (1989), *available at* http://www.ncmhjj.com/resource_kit/pdfs/Special%20Issues/References/GayMaleLesSuic.pdf.

298. Gary Remafedi et al., *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 PEDIATRICS 869, 869–71 (1991).

299. Jay P. Paul et al., *Suicide Attempts Among Gay and Bisexual Men: Lifetime Prevalence and Antecedents*, 92 AM. J. PUB. HEALTH 1338, 1342 (2002).

300. At least fifteen studies conducted between 1999 and 2001 suggest the suicide rates among LGBT adolescents are in the range of twenty to forty percent. *Id.*; *see also* Marvin R. Goldfried, *Integrating Gay, Lesbian, and Bisexual Issues Into Mainstream Psychology*, 56 AM. PSYCHOLOGIST 977, 982 (2001) (estimating that one in three LGB youths has attempted suicide); Steven A. Safran & Richard G. Heimberg, *Depression, Hopelessness, Suicidality, and Related Factors in Sexual Minority and Heterosexual Adolescents*, 67 J. CONSULTING & CLINICAL PSYCH. 859, 862 (1999) (finding that thirty percent of sexual minority youths attempted suicide in the past).

301. Robert Li Kitts, *Gay Adolescents and Suicide: Understanding the Association*, 40 ADOLESCENCE 621, 625–26 (2005).

302. Heidi S. Kulkin et al., *Suicide Among Gay and Lesbian Adolescents and Young Adults: A Review of the Literature*, 40 J. HOMOSEXUALITY 1, 3 (2000). Kulkin notes that young, white gay males face a "double jeopardy," whereas young, white lesbians face a "triple jeopardy." *Id.* This appears to suggest that the stresses that contribute to suicide ideation should increase with minority status. An African American lesbian, therefore, should experience "quadruple jeopardy." That the highest suicide rates are among young gay men, however, suggests that mere minority status is not a salient contributing factor to the probability of suicide. LGBT adolescents are uniquely at risk not only because of their minority status but also because of the continued social acceptability of discrimination and violence against their particular minority group in certain communities.

struggle to develop a positive self-identity/self-image as a homosexual person in an often homophobic society.[303] Doing so is difficult in a society where laws discriminate against gays and where gays experience bias-motivated violence. Psychologists are only recently understanding the impact of the antigay activities of the community at large—churches that praised the murder of Matthew Sheppard,[304] politicians who say gays are "destroying this nation,"[305] governments' refusals to protect gays from discrimination, for example—on gay adolescents' self-worth. And they have found that gay teenagers internalize these wider indignities and believe that they have no future in a society that hates them.[306] And that is what suicide is about—the narrowing of options and accumulation of stress to the point where the victim asks, "What's the point? Why go on?"[307] The single greatest contributor to that feeling of isolation and hopelessness is victimization,[308] and the face-to-face bullying and cyberbullying experienced by gay, lesbian, and questioning students both victimizes them and adds to their stresses.

That may be true, but in most studies, the percentage of LGBT and questioning youth that have attempted suicide as a result of bullying they experienced in school is universally and exponentially lower than those who say they experience depression, feign illness, or receive lower grades.[309] Suicide is simply not the most likely consequence of bullying or even the most likely consequence of depression caused by bullying. Even one case of a school bullying-related suicide is one too many, but the frequency of that tragedy pales in comparison to the millions of students who are victimized each day, internalize it, and react in any of a hundred different ways. So, although the data collected here may be useful to a prosecutor seeking criminal penalties for the death-by-suicide of a victim of bullying,[310] it is not sufficient for two reasons: (1) the relative rarity of suicide as a reaction to bullying, discussed above, and (2) the intervening human act of taking one's own life, traditionally regarded as breaking the causal chain at common law.

303. *See* Gibson, *supra* note 297, at 3-111–3-112.

304. Benjamin Ryan, *Free to Damn Matthew?*, THE ADVOCATE, Nov. 25, 2003, at 15.

305. *See, e.g.*, Scott Michels, *Politician's "Anti-Gay" Speech Sparks Outrage*, ABC NEWS (Mar. 14, 2008), http://abcnews.go.com/TheLaw/story?id=4444956&page=1.

306. *See* Kulkin et al., *supra* note 302, at 9–10 (describing the effect of pervasive homophobia in society); William P. McFarland, *Gay, Lesbian, and Bisexual Student Suicide*, 1 PROF. SCH. COUNSELING 26, 27 (1998) (recognizing oppression and stigma as risk factors for suicidal behavior); John A. Nelson, *Gay, Lesbian, and Bisexual Adolescents: Providing Esteem-Enhancing Care to a Battered Population*, 22 NURSE PRACTITIONER 94, 94 (1997) (identifying the impetus behind self-harm as "social isolation and heterosexist bias permeating our society").

307. *See* Kitts, *supra* note 301, at 622 (explaining that suicide victims universally have a narrow view of what options are available to help them resolve recurrent problems).

308. D'Augelli et al., *supra* note 296, at 651, 654, 657–58; Kitts, *supra* note 301, at 624–26.

309. *See, e.g.*, Birkett et al., *supra* note 81, at 990–91 (discussing the high rates of negative psychological and academic outcomes among LGBT and questioning youth resulting from bullying); KOSCIW ET AL., *supra* note 76, at xvi–xvii (discussing the problems of absenteeism, lower educational aspirations, and academic achievement, and poorer psychological well-being as they relate to LGBT students).

310. Elizabeth Scheibel, a Massachusetts district attorney, brought various criminal charges against nine students who were responsible for bullying Phoebe Prince, who committed suicide as a result. Eckholm & Zezima, *supra* note 261.

Although the kind of evidence needed to prove the link between antigay face-to-face bullying and cyberbullying would be arguably admissible under the *Daubert* standard,[311] proximate causation would be obviated by the suicide, traditionally seen as an independent intervening act.[312] In New Jersey, the causative chain would be broken by the volitional act of another, and would sufficiently remove the defendant's culpability as a matter of justice.[313] The only cases bearing some similarity to this scenario—a bully being charged with reckless homicide or manslaughter for the death-by-suicide of his victim—are those where one who assists in a suicide is charged with murder. But, here, the bully is not assisting or urging suicide and so long as the deceased was mentally responsible and was not under duress, deceived, or subject to pressure that made his actions involuntary, anyone who urges or assists in the suicide is not guilty of murder.[314] This makes sense. As Sanford Kadish has argued, we tend to think that human actions are products of free volitional choices, not inevitable results of a predetermined chain of events governed by physical laws.[315] The law of causation reflects that idea in that subsequent human actions, like committing suicide, are rarely treated like the physical events that directly follow from another's actions.[316]

There are, however, at least three scenarios in which a prosecutor could overcome the hurdle of an intervening act of suicide. First, a prosecutor could charge a bully whose victim committed suicide under a misdemeanor-manslaughter rule, assuming it is available in that jurisdiction. The rule states that if a person ends up dying because a misdemeanor is committed, the malicious intent that is required for that misdemeanor is applied to the death, subjecting the perpetrator to a charge of manslaughter.[317] The

311. Because such evidence would need to be provided through a psychological expert, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the prosecutor would have to show that the expert's testimony is relevant, scientifically reliable, and otherwise admissible. *Id.* at 589–95; *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 139 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). The Daubert Court explained that a trial court has a "gatekeeping" function and must determine if an expert's testimony is based on scientific knowledge and if his "reasoning or methodology" is "scientifically valid." *Daubert*, 509 U.S. at 592–93.

312. *See, e.g.*, People v. Campbell, 335 N.W.2d 27, 30 (Mich. Ct. App. 1983) ("The term suicide excludes by definition a homicide."). *But see* State v. Bier, 591 P.2d 1115, 1118 (Mont. 1979) (defendant convicted of negligent homicide for placing a loaded, cocked pistol within his wife's reach after she said she wanted to commit suicide).

313. State v. Pelham, 824 A.2d 1082, 1097 (N.J. 2003) (Alban, J., dissenting) (quoting MODEL PENAL CODE § 2.03 cmt. 3, at 261 n.6 (1985)).

314. The cases are innumerable. *See, e.g.*, People v. Kevorkian, 527 N.W.2d 714, 738–39 (Mich. 1994) (ruling that an actor who "merely" provides the means for suicide may be criminally liable for "assisted suicide," not murder); *Campbell*, 335 N.W.2d at 30–31 (holding that "[i]ncitement to suicide" was not criminal under state law); City of Akron v. Head, 657 N.E.2d 1389, 1391–92 (Ohio Mun. Ct. 1995) (deciding that a defendant who provided a gun to his girlfriend as a part of a suicide pact was not guilty of negligent homicide).

315. SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 140–41 (1987).

316. *Id.* at 140–45.

317. Misdemeanor-manslaughter statutes are increasingly on their way out of use and favor, but remain in quite a few jurisdictions. *See, e.g.*, CAL. PENAL CODE § 192(b) (West 2011) (defining involuntary manslaughter as killing while committing "an unlawful act, not amounting to felony" or "lawful act which might produce death . . . without due caution"); IDAHO CODE § 18-4006(2) (West 2011) (defining involuntary manslaughter as a killing "in the perpetration of or attempt to perpetrate any unlawful act," other than arson, rape, robbery, kidnapping, burglary, or mayhem); MINN. STAT. ANN. § 609.20(2) (West 2011) (defining involuntary manslaughter as a killing that "causes the death of another in committing or attempting to commit

transferred intent obviates the need to prove a conscious disregard of a risk—that is, it criminalizes a failure to perceive a real risk, not a knowledge of that risk. The rule, however, is no longer applicable in New Jersey.[318] Second, if there were evidence that a bully threatened his victim ("Go hang yourself, faggot, or you'll get another beating tomorrow"), then a prosecutor could argue that the victim was under duress, making his act of suicide involuntary. There is, however, no evidence of such egregious conduct in most cases of school bullying. Third, a prosecutor could offer evidence suggesting that the depression caused by incessant antigay face-to-face bullying and cyberbullying overcame or destroyed the victim's will to live.[319] There is ample evidence that depression can result in the loss of a will to live,[320] and there is ample evidence that incessant antigay bullying causes depression.[321] Establishing that the victim's depression rose to a sufficient level that it impaired his will to live would be a matter of fact for the jury, and it would require a prosecutor to equate bullying victims with torture victims[322] and terminally ill patients.[323] That is a tough comparison to make.

B. Criminal Bullying

Using a manslaughter statute seems like fitting a square peg into a round hole; the traditional conceptions of culpability and causation are simply not present in any suicide, let alone a bullying-related one. States were faced with a similar problem in the early 1990s, when Jack Kevorkian and others who assisted terminally ill patients end

a misdemeanor or gross misdemeanor offense with such force and violence that death of or great bodily harm to any person was reasonably foreseeable, and murder in the first or second degree was not committed thereby"). *But see* MODEL PENAL CODE § 201.3 cmt. 1, at 44 (Tent. Draft No. 9, 1959) (criticizing misdemeanor-manslaughter rule); State v. Pray, 378 A.2d 1322, 1324 (Me. 1977) (criticizing misdemeanor-manslaughter rule on the ground that it imposes liability "even though [a] person's conduct does not create a perceptible risk of death").

318. New Jersey does not have a misdemeanor-manslaughter rule. Invasion of privacy, the crime with which the Middlesex County prosecutor is likely to charge Tyler Clementi's roommate, is a third-degree crime in New Jersey. *See* N.J. STAT. ANN. 2C:14-9 (West 2011).

319. This would be similar to the argument prosecutors attempted in the 1993 case of Jose Alonso Garcia, a nineteen-year-old who raped an elderly woman who died of congestive heart failure a month after the attack. Rene Lynch, *Murder Added to Charge of Rape*, L.A. TIMES, Feb. 7, 1993, at 3. Shortly after the initial rape, the woman had told a therapist that she could not go on living after being so violently attacked. *Id.* Prosecutors added a murder charge to the original rape indictment. *Id.* The murder argument, however, failed. E.J. Gong, Jr., *Woman's Rape, Death Not Tied, O.C. Jury Finds*, L.A. TIMES, Mar. 16, 1994, at 1.

320. *See, e.g.*, Harvey M. Chochinov & Leonard Schwartz, *Depression and the Will to Live in the Psychological Landscape of Terminally Ill Patients*, *in* THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE 261–77 (Kathleen Foley & Herbert Hendin eds., 2002) (discussing the correlation between depression and the desire for death).

321. See *supra* notes 108–15 and accompanying text for a discussion of the link between bullying and depression.

322. *See, e.g.*, Motion to Dismiss for Outrageous Government Conduct at 2, United States v. Padilla, No. 04-60001 (S.D. Fla. Oct. 5, 2006) ("In an effort to gain Mr. Padilla's 'dependency and trust,' he was tortured for nearly the entire three years and eight months of his unlawful detention. The torture took myriad forms, each designed to cause pain, anguish, depression, and, ultimately, the loss of will to live."); *see also* Dan Eggen, *Padilla Case Raises Questions About Anti-Terror Tactics*, WASH. POST, Nov. 19, 2006, at A03 (discussing various torture tactics used against Padilla, which led to his depression).

323. *See* Chochinov & Schwartz, *supra* note 320, at 264–77 (discussing depression and the will to live in terminally ill patients).

their lives escaped murder convictions.[324] In response, most states enacted specific assisted suicide statutes that criminalized activities like Mr. Kevorkian's in their own right.[325] A unique severe bullying and bullying-related suicide statute would arguably fulfill the same void, criminalizing a phenomenon that escapes the traditional criminal law. As discussed earlier, criminalization may be attractive to a population affected by and searching for a response to severe bullying and suicides caused by face-to-face bullying and cyberbullying, and given the difficulties associated with successfully proving that bullies commit manslaughter when their victims take their own lives, a new crime may be the only criminal law solution remaining.

1. Criminalization Proposal and Advantages

For the purposes of this discussion, consider the following proposed language, based on an antibullying statute enacted by the Commonwealth of Massachusetts:

> (a) Whoever willfully engages in a pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal bullying and shall be punished by imprisonment in a house of correction for not more than two and one-half years.
>
> (b) Whoever willfully engages in a pattern of conduct or series of acts over a period of time directed at a specific person that is known to be particularly vulnerable to the psychological effects of such conduct, which so seriously alarms and physically or emotionally injures that person and, under the circumstances created by that willful conduct, causes that person to commit suicide, shall be guilty of the crime of aggravated criminal bullying and shall be punished by imprisonment in a house of correction for not more than seven years.
>
> (c) Such conduct or acts described in these paragraphs shall include, but not be limited to, conduct or acts conducted in person, by mail or by use of a telephonic or any telecommunication device including, but not limited to, electronic mail, internet communications or facsimile communications.[326]

Paragraphs (a) and (c) are taken almost directly from Massachusetts's recently passed antibullying law.[327] A provision similar to the second paragraph has been proposed, but never adopted.[328]

324. *E.g.*, People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).

325. ALASKA STAT. ANN. § 11.41.120 (2011); ARIZ. REV. STAT. ANN. § 13-1103 (2011); CAL. PENAL CODE § 401 (West 2011); FLA. STAT. ANN. § 782.08 (West 2011); IOWA CODE ANN. § 707A.2 (West 2011); LA. REV. STAT. ANN. § 32.12 (2011); ME. REV. STAT. ANN. tit. 17-A, § 204-1 (West 2011); MICH. COMP. LAWS ANN. § 750.329a (West 2011); MINN. STAT. ANN. § 609.215 (West 2011); MISS. CODE ANN. § 97-3-49 (West 2011); MO. REV. STAT. ANN. § 565.023 (West 2011); NEB. REV. STAT. § 28-307 (2011); N.M. STAT. ANN. § 30-2-4 (West 2011); N.D. CENT. CODE § 12.1-16-04 (2011); OKLA. STAT. ANN. tit. 21, § 813 (West 2011); 18 PA. CONS. STAT. § 2505 (West 2011); S.D. CODIFIED LAWS § 22-16-37 (2011); WIS. STAT. ANN. § 940.12 (West 2011).

326. MASS. GEN. LAWS ANN. ch. 265, § 43A(a)–(c) (West 2010). A few changes were made for the purposes of clarity and simplicity.

327. MASS. GEN. LAWS ANN. ch. 265, § 43A(a), (c). A few changes were made for the purposes of clarity and simplicity.

To summarize what a prosecutor's case-in-chief would be like in a trial for aggravated criminal bullying, consider facts similar to those in *Nabozny v. Podlesny*.[329] First, the prosecutor would have to show that the defendant's harassing behavior was repeated and carried out over time against a particular victim. The conduct of Stephen Huntley, who verbally and physically assaulted Jamie for years, and even beat and kicked him to the point Jamie required hospitalization,[330] would fit this element of the crime. Next, the prosecutor would have to show that Stephen willfully harassed Jamie. Here, proof of Stephen's purposeful conduct against Jamie would suffice to prove knowledge. Third, Stephen would have to know that Jamie was a vulnerable victim, susceptible to the psychological effects of the harassment. It is not clear from the facts in *Nabozny* what Stephen knew; after all, the case was about what the school and school officials knew. Arguably, though, knowledge of Jamie's vulnerability could be established with proof that school officials reprimanded Stephen, disciplined him, and warned him that he should never bully Jamie again because of what Stephen's conduct was doing to Jamie. Proof that Stephen attended a mandatory assembly or discussion on the effects of bullying and harassment would also be helpful to the prosecutor. Fourth, the prosecutor would offer evidence of the severe psychological, academic, and physical effects that Jamie experienced as a result of Stephen's conduct. At this point, expert testimony should be offered on the connection between Stephen's behavior and Jamie's deep depression and suicidal ideation. Finally, the prosecutor would have to show that it was Stephen's bullying that created the circumstances necessary for Jamie's suicide, or, in other words, that but for Stephen's repeated harassment, Jamie would have had no reason to experience severe depression and execute a suicide.

This statute has a number of advantages. First, for "criminal bullying," it adapts the common law rule against stalking and harassment to the bullying and cyberbullying contexts, avoiding problems of proof that have plagued previous attempts to capture modern bullying behavior in old crimes.[331] Paragraph (b) aims to do the same for bullying that leads to suicide. Compared to charging the behavior under a manslaughter statute, the proposed crime both addresses a unique and growing problem and obviates the need to prove the kind of awareness necessary for a manslaughter conviction. Plus, it accurately reflects the egregious bully's behavior by recognizing that he knowingly harasses his victim and, in doing so, creates the necessary conditions that push his

328. Senior members of the education think tank Education Development Center, Inc. (EDC) have proposed treating bullying as a crime in cases like Phoebe Prince's. *Bullying Prevention: Beyond Crime and Punishment*, EDC (May 10, 2010), http://www.edc.org/newsroom/articles/bullying_prevention_beyond_crime_and_punishment. The proposal was raised in NEWSWEEK. Jessica Bennett, *From Lockers to Lockup*, NEWSWEEK, Oct. 11, 2010, at 38. And, commentators in most major newspapers have recommended some form of criminalization of bullying when it leads to suicide. *See, e.g.*, Rochelle Riley, *Social Homicide Should Be a Crime*, DETROIT FREE PRESS, Nov. 16, 2010, http://www.freep.com/article/20101116/COL10/11160332/Social-homicide-should-be-a-crime (arguing that if a person is bullied to death, assaulters should be charged with a crime).

329. 92 F.3d 446 (7th Cir. 1996). Even though Jamie did not successfully commit suicide, he attempted suicide on two occasions. *Nabozny*, 92 F.3d at 451–52. Furthermore, the abundant and detailed facts of Jamie's case make this discussion concrete.

330. *Id.* at 452.

331. *See* Brenner & Rehberg, *supra* note 5, at 15–45 (discussing the use of traditional crimes such as stalking, invasion of privacy, and harassment to address face-to-face bullying and cyberbullying).

victim to suicide as the only means of escape. Paragraph (b) also limits criminalization to those acts of bullying directed at individuals known to be particularly and uniquely vulnerable to harassment and its effects. This ensures that a bully is not held culpable simply because his victim was weak, but rather because the bully took advantage of that known weakness and exploited it.

Second, Paragraph (a) is also sufficiently narrow in that it only captures conduct that "seriously alarms" and that would cause a "reasonable person" to feel distress.[332] Paragraph (b) is sufficiently narrow, as well, limiting itself to particularly egregious conduct that, under the circumstances, causes suicide. This narrow tailoring avoids the concern that antibullying statutes captures protected speech and behavior, much of which reflects the ordinary back-and-forth of the schoolyard, intrasex relationships, and adolescence.[333]

Third, Paragraph (b) reflects a strong popular desire for a criminal law response to the deaths of Tyler Clementi and Phoebe Prince. This proposal, then, has value under the retributive model of punishment. It assigns greater punishment for conduct more evil based on the theory that anyone who bullies his victim to death is more deserving of punishment than one who bullies his victim into emotional distress.

Fourth, it accepts the possibility that someone can indeed *cause* another to commit suicide. This kind of "causing suicide" statute is a firm part of the penal codes in eight states,[334] included in the Model Penal Code,[335] and distinguished as a separate crime that amounts to manslaughter in Hawaii.[336] According to at least one state to adopt the Model Penal Code's causing suicide formulation, this kind of statute addresses those that cause their victims to commit suicide "by aggressive or devious means and for

332. MASS. GEN. LAWS ANN. ch. 265, § 43A(a) (West 2011).

333. Broad antibullying statutes are subject to the same First Amendment objections brought in cases where victims try to hold schools responsible for off-campus cyberbullying. See *supra* Part III.B and accompanying text for a discussion of the potential barrier imposed by the First Amendment to a school's disciplinary authority over off-campus bullies. It also strikes me that broader language could be subject to the same objection that was leveled against Title VII in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80–81 (1998). Respondents and their amici suggested that allowing individuals who had been the victim of same-sex harassment in the workplace to bring Title VII claims for sex discrimination would turn Title VII "into a general civility code for the American workplace." *Id*. at 80. Justice Scalia rejected this suggestion, noting that previous Title VII precedent clearly stated that the statute "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Id.* at 81. That requirement allows juries to permit "ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation"—while prohibiting discriminatory conditions of employment. *Id*. at 81. A certain amount of male-on-male horseplay, to use Justice Scalia's words, and female-on-female competition will always occur in the schoolyard. By narrowing the criminalization provisions of antibullying statutes to that conduct that alarms and would case emotional distress, legislative drafters are avoiding this objection.

334. ARK. CODE ANN. § 5-10-104 (West 2011); COLO. REV. STAT. ANN. § 18-3-104 (West 2011); CONN. GEN. STAT. ANN. § 53a-56 (West 2011); DEL. CODE ANN. tit. 11, § 645 (West 2011); N.Y. PENAL LAW § 125.15 (McKinney 2011); OR. REV. STAT. ANN. § 163.125 (West 2011); WASH. REV. CODE ANN. § 9A.36.060 (West 2011); 18 PA. CONS. STAT. ANN. § 2505 (West 2011).

335. MODEL PENAL CODE § 210.5 (1985).

336. HAW. REV. STAT. § 707-702(1)(b) (West 2011).

purely selfish motives."[337] It captures morally culpable conduct, not the arguably palliative conduct inherent in assisting in the suicide of a terminally ill patient. And finally, it puts face-to-face bullying on an equal footing with cyberbullying, which, as we have seen, may be the more significant problem in the future.

2. Why Criminalization Is a Bad Idea

For all these advantages, however, this proposal suffers from both practical and theoretical difficulties that make it unnecessary and a bad idea. First, it fails to recognize that bullying is a collaborative effort that may involve a group of perpetrators. Second, for all the drafters' efforts to avoid having to prove what the bully knew, the causation problem still plagues the aggravated criminal bullying provision. Third, the proposal only has retributive value. There is no evidence that criminalization of bullying-related suicides will actually solve the problem, making the entire effort an exercise in futility.

a. The Proposal Is Underinclusive

As a weapon in the fight against bullying, the proposal is underinclusive because it fails to capture egregious bullying that is doled out by more than one perpetrator. Jamie Nabozny, Dylan Theno, and Ryan Halligan all suffered at the hands of multiple bullies, and Tyler Clementi's depression may have been the result of years of harassment at the hand of many bullies. As such, it is not clear if *each* bully's conduct would rise to the level of "alarming" harassment or if *together* their behavior would either make a reasonable person significantly distressed or create the circumstances necessary for depression and suicidal ideation. Of course, if a prosecutor chose to indict all a victim's bullies, or even just the most egregious harassers, the prosecutor would have to prove that each defendant's behavior satisfied the elements of the crime beyond a reasonable doubt. If the victim's distress was caused by the culture of harassment caused by bullies acting independently, it would be difficult to prove that each bully so harassed his victim into emotional distress or suicide.

b. Proof of Causation Is Elusive

Aggravated criminal bullying still requires proof of causing suicide, which will place the same burdens on prosecutors as would a manslaughter conviction. In order to be found guilty under any causing suicide statute, the defendant's actions have to be found to have somehow caused the death of the victim. The salient problem in establishing proof of causation is the absence of any objective factors or observable evidence to keep the causal chain intact despite the otherwise volitional act of committing suicide. In *Commonwealth v. Bowen*,[338] a Massachusetts causing suicide case from 1816, for example, George Bowen was indicted for the "self-murder" of the man imprisoned in the prison cell next to him.[339] The victim had been sentenced to

337. Blick v. Office of Div. of Criminal Justice, No. CV095033392, 2010 WL 2817256, at *3 (Conn. Super. Ct. June 2, 2010).

338. 13 Mass. (1 Tyng) 356 (1816).

339. *Id.* at 356.

death for murder and Bowen "repeatedly and frequently advised and urged" the victim to kill himself so that he may die on his own terms rather than satisfy the blood lust of the people.[340] The prosecutor argued that Bowen was guilty of murder because the victim hanged himself at Bowen's provocation.[341] The defense countered that even if Bowen suggested it, the state had to prove that the advice was "the procuring cause of the death," or the more direct cause-in-fact of the hanging.[342] The jury refused to convict, finding no evidence directly connecting the advice to the suicide in order to sufficiently overcome the victim's volitional act of hanging himself.[343]

In these old cases, the only evidence sufficient to prove causation was if the defendant was present when the victim committed suicide or if the two had signed a suicide pact. In *Blackburn v. State*,[344] for example, the defendant was tried for murder for having administered poison to the victim.[345] The Ohio Supreme Court held that Blackburn's presence at the time and place the victim took the poison "was his act of *administering* it."[346] In fact, the defendant's presence would have been sufficient evidence to sustain a conviction even if he had not actually supplied the poison in the first place.[347] And, in *Burnett v. People*,[348] the Illinois Supreme Court held that the defendant would be guilty of causing suicide if the pact he and the victim signed to take their own lives induced the suicide.[349] Professor Sue Brenner has argued that these factors—presence at a suicide, a suicide pact, among others—were stand-ins or heuristics for establishing that the defendant overcame the victim's free will.[350] Both presence and a pact suggested that the defendant exerted more power over the victim than an ordinary individual. The presence factor assumes that someone is more likely to exert undue influence when physically present at a suicide, and the suicide pact extends that logic—it combines presence with an assurance of co-participation.[351] But these factors are imperfect stand-ins for truly overcoming the free will of the suicide victim. Presence alone cannot create culpability, for example, and the mere existence of a suicide pact says nothing about a defendant's attempt to back out and encourage his partner to do the same, perhaps even with physical force. More importantly, they are antiquated stand-ins. Modern prosecutors have psychological experts who can testify as to the mental state of the victim, the mental state of the defendant, and the psychological effects of the defendant's actions on that victim. Therefore, any causing suicide prosecution becomes "an exercise in psychology,"[352] or, more practically, a

340. *Id.*

341. *Id.* at 357.

342. *Id.* at 359.

343. *Id.* at 360–61.

344. 23 Ohio St. 146 (1872).

345. *Bowen*, 23 Ohio St. at 147.

346. *Id.* at 163.

347. *Id.*

348. 204 Ill. 208 (1903).

349. *Burnett*, 204 Ill. at 218.

350. Sue Woolf Brenner, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of "Causing Suicide"*, 47 ALB. L. REV. 62, 86–87 (1982).

351. *Id.* at 87.

352. *Id.* at 63.

battle between psychologists. This presents the prosecutor with precisely the same causation problem as in a trial for manslaughter. In both cases, the prosecutor must prove that the defendant's actions overcame the victim's will to live and although the evidence linking bullying to depression and suicide is ample, it is unlikely sufficient to overcome centuries of precedent on causing suicide and the jury members' own intuition on free will.

There are no modern causing suicide cases in which prosecutors successfully used expert testimony to prove that the defendant exerted an undue influence over the victim and thus caused the victim to commit suicide. What is more, by restricting guilt in its causing suicide statute to only those defendants that use force, duress, or deceit to push their victims to take their own lives,[353] the Model Penal Code makes clear that undue influences other than force, duress, or deceit would be insufficient indicia of culpability.

c. Retribution Fails to Justify Criminalization

It seems, then, that we are faced with a problem without a solution. Although homophobic bullying—both face-to-face and online—is pervasive, there is no clear path of response. Tort remedies are sometimes difficult to reach or off limits entirely; criminal remedies are, at best, impractical, and, at worst, bad ideas. The problem has been getting worse, which may explain why recent bullying-related suicides have caused a sensational national response, from education advocates, state legislators, and lawyers. Some of that response is healthy, welcome, and overdue. In response to a striking spate of teen suicides caused by homophobic bullying,[354] a host of public figures have responded. Seattle columnist Dan Savage established the "It Gets Better" campaign on YouTube to remind gay teenagers that suicide is not the way out and directed donations to The Trevor Project, a national twenty-four hour, toll free confidential suicide hotline for gay and questioning youth.[355] Television stars,[356] athletes,[357] and political leaders[358] have made stopping antigay bullying a cause célèbre.

353. MODEL PENAL CODE § 210.5 (1985).

354. *See, e.g.*, *Bullying May Have Pushed 15-Year-Old to Suicide*, WTHR.COM EYEWITNESS NEWS (Sept. 13, 2010), http://www.wthr.com/story/13147899/bullying-may-have-pushed-15-year-old-to-suicide?redirected=true (recounting the circumstances surrounding the suicide of Billy Lucas); Tricia Pursell, *Friends: Bullying Led to Tragedy*, THE DAILY ITEM (Nov. 6, 2010), http://dailyitem.com/0100_news/x603547374/Bullied-student-kills-self (discussing the suicide of gay high school freshman Brandon Bitner); Peggy O'Hare, *Parents Say Bullies Drove Their Son to Take His Life*, HOUS. CHRON., Sept. 28, 2010, at B1 (reporting the suicide of thirteen year-old Asher Brown).

355. IT GETS BETTER PROJECT, http://www.youtube.com/user/itgetsbetterproject.

356. *See, e.g.*, *Ellen DeGeneres Speaks Out on Anti-Gay Bullying*, WTHR.COM ENTERTAINMENT (Oct. 8, 2010), http://www.wthr.com/story/13254188/ellen-degeneres-speaks-out-on-gay-bullying; Sheila Marikar, *Anderson Cooper Joins Slew of Stars Sticking Up for Gay Teens*, ABC NEWS (Oct. 8, 2010), http://abcnews.go.com/Entertainment/anderson-cooper-joins-slew-stars-sticking-gay-teens/story?id=11834366.

357. MLB.com, *Phillies and ItGetsBetter.org*, YOUTUBE (Aug. 27, 2011), http://www.youtube.com/watch?v=rTYc0C1VpC0.

358. *Elizabeth Warren: It Gets Better*, ELIZABETH WARREN FOR MASS., http://elizabethwarren.com/itgetsbetter (last visited Feb. 28, 2012).

These responses highlight the third reason why criminalization of severe bullying and bullying that causes suicide is a bad idea and shed light on a more effective alternative. It is inaccurate to say there is no response to bullying in schools. There may be no *legal* response, but the law, and especially the criminal law, is not our only option. There is no indication that criminalizing bullying-related suicides will do anything to deter bullying or ameliorate its effects. Professor J. David Smith analyzed research studies on the effectiveness of whole school antibullying programs that included required assemblies and harsh disciplinary responses to incidents of bullying and reported that eighty-six percent of "victimization outcomes"—that is, reports by victims of program benefits—were "negligible or negative" and the remaining fourteen percent of reported effects were "positive (albeit small)."[359] We are thus left with a criminal law that, at worst, only has retributive value, and, at best, is a symbolic response to a very real problem.

Statutes that criminalize bullying sound like good ideas. They fulfill an emotional need and address tragedies that not only affect the LGBT community, but pull on the heartstrings of every parent with a child in school. They also step in where tort remedies inadequately compensate for egregious conduct and loss of life. However, although they may satisfy the public's retributive impulses, there is no indication that they will solve the problem. In fact, antibullying criminal laws seem to lack all indicia of good criminal laws other than their provision of retributive value.

As I have argued, criminalization of severe bullying and bullying-related suicides reflects the proportionalist's and retributivist's view of punishment. The behavior these proposals would capture is so egregious and the results are so tragic that the bully deserves punishment, and punishment at a level in accordance with his desert. That is, bullying that causes severe emotional distress—Criminal Bullying in the Massachusetts example—merits two-and-one-half years in jail, whereas Aggravated Criminal Bullying—the hypothetical criminal statute that captures those cases of bullying that cause their victims to commit suicide—merits seven years. And yet there appears to be no utilitarian benefit to either of these proposals.

Among the three remaining traditional theories of punishment—incapacitation, deterrence, and rehabilitation—none is present here. All utilitarian theories of punishment are forward looking, aimed at preventing the next crime, altering an individual's future behavior and maximizing society's benefit as a result. The retributive theory of punishment is backward looking, as it makes a punishment dependent on the gravity of an offense already committed.

Rehabilitation is a non-starter; prison terms for bullies cannot conceivably reform the bully into a good student. Incapacitation also fails the smell test; school principals have been "incapacitating" bullies for decades with detentions, suspensions, and scheduling changes to keep them away from their targets. Nothing has worked. Theoretically, harsher punishments could deter future bullying where school-imposed punishments could not. But principals have long hoped that discipline for bullying would have deterrent effects only to see the problem continue or get worse. There is

359. J. David Smith et al., *The Effectiveness of Whole-School Antibullying Programs: A Synthesis of Evaluation Research*, 33 SCH. PSYCHOL. REV. 547, 554 (2004).

simply no evidence of a connection between increasing the severity of punishment and a reduction in bullying frequency.

Thus, the criminalization of bullying is distinctly, and solely, retributive. But, even some retributivist scholars admit that retributive theory alone fails as a legitimate justification for punishment. The retributive concept of punishment is meant to be distinguished from revenge or retaliation based on its point of view—namely, retribution focuses on society's assessment of the defendant's wrong, whereas vengeance depends upon the impulse of the victim, or his kin, supporters, or friends, to strike back.[360] In the bullying context, a retributive impulse is the state's response with tough criminal laws, whereas revenge occurs when the bullied victim and his friends fight and bully or assault their harassers. Offering his defense of retributivism, Professor Douglas Husak admits that retributivists commit a logical jump from a criminal's desert to state-imposed punishment. According to Professor Husak, retributivists can argue that culpable wrongdoers deserve suffering, which can—but need not—be imposed by the state.[361] It is punishment's attendant suffering that satisfies our intuitive and emotional responses to criminal conduct, not the fact that such suffering is imposed by the state.[362] After all, "devices other than state punishment can satisfy the demands of retributive justice."[363] A victim's kin can exact their own retribution, just like a bullying victim can respond to harassment by physically assaulting his tormenter. Although retributivists like Professor Husak believe in state monopolies on punishment and universal denial of a personal right to revenge, those beliefs cannot stem from retributive theory alone.[364] There is, then, no principle internal to retributive theory that distinguishes between vengeance and state-imposed punishment. Therefore, if proposals to criminalize egregious bullying are justified solely by their retributive value, such proposals are no more justified than a law that allows bullying victims to attack their tormenters with abandon.

This argument about retributivism's justification for the imposition of suffering, but not necessarily state-imposed punishment, is borne out in the debate over the criminalization of egregious bullying. If the debate over Massachusetts's antibullying legislation is any indication, legislators were moved not by a belief to punish offenders in accordance with their desert, but by a desire to lash out and find an outlet for their emotional responses to recent reports of bullying-related suicides. One legislator was "haunted" by the suicides and wanted to make sure no bully had an "excuse to get off the hook."[365] Another spent his allotted time reading "letters from students who said they witnessed bullying, and one who said he'd considered suicide because of

360. Posner, *supra* note 240, at 72.

361. Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 972–73 (2000).

362. *Id.*

363. *Id.* at 973.

364. *See id.* (asserting retributive theory alone is satisfied by suffering other than punishment); Pearl, *supra* note 243, at 288–89 (arguing that a retributive theory shows justification for punishment, not that the state is morally obligated to provide it).

365. Massachusetts House Session, *The Bills in Third Reading Committee Released S 2323 Relative to Bullying in Schools* (Mar. 18, 2010) [hereinafter Mass. House Session] (statement of Rep. Martha Walz) (on file with author).

bullying."[366] One senator reported on "sad" stories that "particular[ly] . . . struck" him.[367] These stories are akin to victim impact statements, suggesting that Massachusetts legislators felt that harsh punishments were, at least in part, meant to provide some recompense, closure, or satisfaction to the victims of egregious bullying and bullying-related suicides. As many commentators have argued, it is not clear that this is a legitimate function of criminal punishment.[368]

If antibullying criminal laws have any value other than fulfilling society's retributive desires, it is purely symbolic. They are prime examples of symbolic legislation, or legislation not enacted to alleviate an underlying social problem, but rather to satisfy symbolically the claims and demands of a particular interest group.[369] All legislation bears some symbolic weight,[370] but, like hate crime laws, laws that criminalize severe bullying and bullying-related suicides do not appear to fill a criminal justice need but have great significance to minority advocates.[371] As discussed earlier, antibullying laws are a cause célèbre of gay rights activists, and, due to recent tragedies involving the suicides of bullied LGBT adolescents, the desire to take action against egregious bullying behavior is more pronounced. But, it seems that the animating factor behind criminalization and other draconian punishments is to send a message, not to stop bullying.

Professor James Jacobs has argued that the debate over including sexual orientation as a sentencing enhancer in hate crime laws typifies this "send a message" mentality.[372] To Professor Jacobs, "history and logic" require that homophobia be included as a prejudice that turns an ordinary crime into a hate crime.[373] Some conservatives oppose this because they either believe they have a religious right to

366. Massachusetts Senate Session, *School Bullying: Question Came on Engrossing S 2313 Relative to Bullying in Schools* (Mar. 11, 2010) [hereinafter Mass. Senate Session] (reading by Sen. James B. Eldridge) (on file with author).

367. *Id.* (statement by Sen. Mark Montigny).

368. *See, e.g.*, George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 55 (1999) (adhering to strict retributionary theory and thereby rejecting a revenge theory of punishment); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999) (arguing retributive theory must ignore victims completely in criminal prosecution); Jeffrie Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209, 220 (1990) (discussing controversy of revenge as the purpose of punishment). *But see* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (upholding the constitutionality of victim impact statements in capital cases).

369. *See* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 98 (1963) (arguing that the force behind Prohibition in the United States was not so much the policy of reducing the alcohol consumption as it was the need for a dying rural class of land-holders to create a symbol of its power).

370. *See* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 2 (1964) (examining "politics as a symbolic form . . . by looking at man and politics as reflections of each other").

371. *See* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1250 (2000) (suggesting that politically unpopular groups use symbolic legislation as a form of protest); James B. Jacobs, *Implementing Hate Crime Legislation: Symbolism and Crime Control*, 1992 ANN. SURV. AM. L. 541 (1993) (discussing how hate crime laws are examples of symbolic legislation).

372. Jacobs, *supra* note 371, at 542.

373. *Id.* at 544.

express and act on their homophobia[374] or believe that bias against homosexuality, which they may see as abhorrent to God or a lifestyle choice, is not on par with other "socially-rejected biases," like anti-Semitism and racism.[375] This, however, is precisely the objective gay rights activists hope to achieve through hate crime legislation—that is, sending a message that gay bashing is no different than lynching an African American man simply because he is black.[376]

The desire to send a message that bullying is egregious behavior similarly animated the debate in the Massachusetts legislature. In the House debate, for example, Representative Martha Walz talked about how reports of bullying and suicides "has haunted" her and that, if anything, the proposed legislation "sends a message that things must change."[377] Representative Robert Hargraves, who offered an amendment that would leave more power to individual principals to regulate bullying, characterized the House debate as "feel good, we voted for anti-bullying."[378] And in the Senate, Senator Steven Panagiotakos felt that the involvement of the criminal justice system "sets the right process in place [and] sends the right message."[379] For Senator Robert O'Leary, it "point[s] the finger and say[s] it's unacceptable."[380] Senator Gale Candaras agreed, noting that the purpose of the bill was to "send[] a clear message that [bullies] are going to be held accountable."[381] Although all legislators who commented on the record wanted to solve the bullying problem, it is not clear from the transcripts that the legislators thought that harsh penalties would achieve anything other than highlighting the problem by using the bully pulpit of the state.

To the extent that criminalization of egregious bullying and bullying that lead to suicide in particular and antibullying statutes in general reflect the retributive model of punishment, it is irrelevant that criminalization will do little, if anything, to solve the problem of bullying and cyberbullying. Retributive theory is not meant to be forward looking, but rather simply assigns deserved punishment ex post for acts already done. But, a law that has only retributive value and will not address the underlying problem going forward is, at best, unnecessary, and, at worst, harmful. Antibullying efforts should be dedicated elsewhere: to improving school climate, to strengthening peer-to-peer and student-to-teacher social support, to making schools safe havens from homophobia in the wider community, and to providing alternative support structures to LGBT youths isolated by antigay bigotry at home, to name just a few goals. How to achieve these goals is up to educators, psychologists, and counselors, not lawyers.

374. *See, e.g.*, Bullying Prevention Act of 2012, H.R. 3788, 107th Gen. Assemb., 2d Sess. (Tenn. 2012), http://www.capitol.tn.gov/Bills/107/Bill/HB3788.pdf (stating that the policy underlying Tennessee's pending antibullying act "shall not be construed or interpreted to infringe upon the first amendment rights of students and shall not prohibit their expression of beliefs protected by the first amendment").

375. Jacobs, *supra* note 371, at 544.

376. *Id.* at 545; *see also* Beale, *supra* note 371, at 1254 (providing examples of statements by Senators endorsing the enactment of federal hate crimes to "send a message").

377. Mass. House Session, *supra* note 365 (statement of Rep. Martha Walz).

378. *Id.* (statement of Rep. Robert Hargraves).

379. Mass. Senate Session, *supra* note 366 (statement by Sen. Steven Panagiotakos).

380. *Id.* (statement of Sen. Robert A. O'Leary).

381. *Id.* (statement of Sen. Gale Candaras).

V. CONCLUSION—STRENGTHENING SOCIAL SUPPORT NETWORKS TO REDUCE BULLYING AND AMELIORATE ITS EFFECTS

Though one recent study suggested that forty-eight percent of respondents say that state and federal governments should do more to stop cyberbullying,[382] cyberbullying may not be a problem for the criminal law. Bullying is a social problem that requires an extra-legal response. And yet, educators lack the necessary empirical data to determine what policies would be most effective in reducing bullying and cyberharassment in schools. There are also too few studies that quantify school responses to the unique and growing problem of antigay harassment in schools and online. I would like to start to fill that wide gap with this initial study and offer specific proposals for future research.

Educators already know that one of the most influential factors in stopping general bullying in schools is the presence of peers who are willing to stand up to and defend against bullying.[383] Peers who stand up to harassment "create[] an atmosphere that does not accept bullying,"[384] suggesting that it may be up to student support to ameliorate the bullying problem. But, these studies are neither geared toward the gay and lesbian community nor do they ask whether standing up to bullies is likely when the victims are members of such a discriminated minority. Furthermore, it is not enough to say that students need to stand up to bullies; as a practical matter, the imbalance of power between bullying victims and their attackers means that victims cannot stand up to harassers in any real sense.

Warren Blumenfeld is one social scientist focusing on cyberharassment of gay youth, but there is much to study.[385] I hypothesize that policies that integrate gays into the school community and provide them with social support are the most effective policies to counteract pervasive and destructive antigay harassment in schools and online. This "soft power" response, which would include gay-inclusive curricula, gay-straight alliances, small advising groups that stay together from ninth to twelfth grades, inclusion of sexual orientation in health education, and other ex ante programs that improve tolerance and acceptance of gays, should make antigay bullying antiquated and provide gay students with the necessary self-esteem to stand up to harassment and integrate themselves into school society.

A. Preliminary Study – High Tech High School

To begin this discussion, I surveyed 366 students at High Tech High School (HTH) in San Diego, California.[386] This is not the kind of broad-based study that would fill the quantitative gaps in our understanding of harassment of gay teenagers; rather, this survey was conducted with limited resources and meant to spark further questions for future research. That research is ongoing and will be presented in future papers. To that end, this Section will present this preliminary data, consider objections, and offer specific proposals to address those objections in future research.

382. Blumenfeld & Cooper, *supra* note 5, at 123–24.

383. Flaspohler et al., *supra* note 15, at 638.

384. *Id.*

385. *See generally* Blumenfeld & Cooper, *supra* note 5, at 123.

386. Waldman, *supra* note 103.

Bullying exists at HTH, but it is relatively rare compared to the bullying epidemic at the average American high school. Of 366 respondents, only 34 (9.3%) reported experiencing a few incidents of bullying in the last month. And, only 4 (1.1%) reported being bullied with any frequency. Even expanding the scope of bullying and cyberbullying experiences to the previous year, only 9 students (2.3%) felt harassed with any frequency.[387] More than 40% of HTH students reported that they did not know even one person who had been bullied or cyberbullied, and the most common explanation was either that their friends "do not tolerate" bullying or they "look out for one another."[388]

Self-identified gay, lesbian, bisexual, transgender, or questioning students noted that they experience more frequent bullying and cyberharassment than the general population, but the rates are lower than in the GLSEN study. Students were asked if they had been bullied or cyberbullied "more than twice," "three or four times," or "more frequently." The percentage of gay students increased from one reported category to the next. And yet, the overall numbers—the fraction of the gay population bullied at any given frequency—is far lower than the mean of American schools as reported by GLSEN.

This initial data suggest that there is something different about HTH. Bullying may not be absent from HTH, but it is less common than in other schools. The school has accomplished this without resorting to draconian in-school discipline, and, unlike Massachusetts, California has not imposed harsh criminal penalties for severe cases of bullying or cyberbullying. There are, therefore, other factors at play in HTH's success. Notably, HTH provides the kind of necessary social support to students through small advisory groups in which one faculty member nurtures the same group of fifteen to seventeen students through each year of high school.[389] These groups not only offer students the opportunity to learn in supportive environments but also provide them with emotional, motivational, and informational support about any problems they might be experiencing at school or at home.[390] Indeed, students who felt they had strong peer and teacher support reported the lowest levels of school bullying, the lowest levels of negative effects of any bullying they did experience, and the highest levels of quality of life.[391] HTH also has an active gay-straight alliance, openly gay teachers, openly gay parents, and gay-inclusive curricula, among other school policies, that integrate gay people into the school community.[392]

This kind of informal in-school support, when combined with official support in the form of school district policies that clearly define bullying, creates a sense of

387. *Id.* Seventy-six students (20.7%) experienced some bullying in the last year, which, although far below the national average, still suggests a bullying presence at HTH.

388. *Id.*; *see also* Henry Gruenbaum, *Stopping the Bully on the School Campus*, SAN DIEGO UNION-TRIB., Dec. 12, 2010, (Opinion) (stating that an HTH student had seen someone get bullied "perhaps only once" and that there are strong relationships amongst classmates).

389. Interview with Brett Peterson, Director, High Tech High (Dec. 13, 2010).

390. *Id.*

391. Flaspohler et al., *supra* note 15, at 639, 646–47 (discussing existing literature and the results of a study showing that those students who experienced high levels of teacher and peer social support indicated fewer problems with bullying and a higher quality of life in school).

392. Interview with Brett Peterson, *supra* note 389.

protection among bullied victims that someone is looking out for their interests.[393] School counselors can create this protective bubble when they educate faculty, staff, students, and parents, with the latter perhaps being the most important constituency. Often parents are unaware that their children are being bullied in school or online until it is too late. Educating parents on the nature of bullying and cyberbullying and how to stop it are effective means of extending social support into the home.[394]

Gay, lesbian, and questioning youth are uniquely susceptible to gaps in this social support network and, as such, have the most to gain by filling those gaps. GLSEN has found that gay-straight alliances and school and community groups that include both LGBT and their straight allies create safe spaces and affirm for bullied LGBT youth that they have people to talk to and outlets to express their individuality.[395] Students in schools with gay-straight alliances heard fewer homophobic remarks, were more likely to report that school officials intervened in bullying cases, and experienced less victimization than students at schools without such groups.[396] Similarly, students in schools that taught LGBT-inclusive curricula, such as teaching positive representations of LGBT people, history, and events, and had LGBT teachers on staff, reported a higher quality of life and reported fewer incidents of bullying than students in other schools.[397]

B. Objections and Plans for Future Research

Although I do not offer the data from HTH as definitive proof of causation or correlation between "soft power" and a lower rate of antigay bullying and cyberharassment—the data set is too small, HTH is too unique, and there are a multitude of factors for which to control—these preliminary results lend some credibility to the hypothesis and, more importantly, highlight specific areas for future research.

Surveying 366 students at one school insufficiently captures the teenage demographic, especially since HTH is a unique charter school with a known progressive educational philosophy. HTH is based on the principle that students and teachers are engaged in a "common intellectual mission."[398] It eschews conventional educational norms by integrating students into the teaching process, allowing students to learn from and grow with each other.[399] The school attracts a diverse student body, from a diverse group of parents who see the benefits of a more collegial school environment with small classes, nurturing teachers, and alternative methods.[400]

393. *See* Chibbaro, *supra* note 14, at 66 (noting school policies, awareness campaigns, and school counseling interventions are important parts of bully prevention and intervention).

394. *Id.* at 67.

395. KOSCIW ET AL., *supra* note 76, at 54.

396. *Id.* at 64.

397. *Id.* at 66.

398. *HTH Design Principles*, HIGH TECH HIGH, http://www.hightechhigh.org/about/design-principles.php (last visited Feb. 29, 2012).

399. *About High Tech High*, HIGH TECH HIGH, http://www.hightechhigh.org/about (last visited Feb. 29, 2012).

400. Interview with Brett Peterson, *supra* note 410.

Therefore, that bullying and cyberbullying incidents occur less frequently in a school like HTH may have to do with a number of factors, including progressive family values that have little to do with the "soft power" dynamic of the school. To address this valid critique, the sampling of schools should be broadened and diversified to include large and small schools, urban and suburban schools, and public and charter or parochial schools. I am currently expanding the scope of my survey to create a broad-based sample. As of this writing, I am researching individual school candidates.

Even if the sample expanded to include a large number of students in many schools, in order to prove that lower rates of antigay bullying and cyberbullying are correlated with a school's "soft power," we have to control for a host of other factors. This will be difficult, but not quantitatively impossible. The ideal sample would be a series of schools with identical demographics but different policies to deal with antigay harassment. I am currently researching public schools in California for just those types of candidates.

However, there may be factors that cannot be controlled in the analysis. Public perceptions of minority rights and gay rights, in particular, are changing rapidly, and given how fast and how far support for gay rights has come in the last few years, it may be hard to differentiate between changing social norms and school policies as correlative factors. For example, a March 2011 telephone survey of 1,005 adults by ABC News and the Washington Post found that, for the first time, the majority of Americans favor same-sex marriage by a 53 to 44% margin.[401] And yet, not two years earlier, a USA Today/Gallup Poll conducted on May 7–10, 2009, found support for marriage equality at only 40%, lower than it was in 2003, with 57% opposed.[402] According to the 2009 poll, 48% of Americans felt that society would change for the worse if same-sex marriage were legalized.[403] This rapid change in attitude could be partly responsible for any reduction in antigay bullying and surveys of students and analyses of school policies would not account for these social pressures.

I am not persuaded by this critique. The data suggest that antigay bullying has been getting worse as tolerance for gays increases, not better. Gay and questioning students are committing suicide in tragically high numbers even as portions of the general public become more tolerant. Furthermore, increases in social tolerance can contribute to a doubling-down of hate and intolerance when traditionalists feel that their values are under siege. What is more, tolerance is a far cry from social integration, and bullying, cyberharassment, and discrimination erect barriers to integration into so-called "normal" society.

To establish a correlative or causative relationship between a school's gay-inclusive "soft power" policies and a reduction in antigay bullying, we need not only a broad based study of various high schools, but the research must be long term. The only way to determine the effect of the policies while controlling for other factors is to consider antigay bullying rates before a school implemented a given policy and antigay

401. *ABC News/Washington Post Poll: Gay Marriage*, ABC NEWS (Mar. 18, 2011), http://abcnews.go.com/images/Politics/1121a6%20Gay%20Marriage.pdf.

402. Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP (May 27, 2009), http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx.

403. *Id.*

bullying rates in the years following the policy's introduction. This long-term study of antigay bullying and cyberbullying at various schools is the next step in my research.