

# **A Child's Right to Human Dignity: Reforming Anti-bullying Laws in the U.S. and other Nations**

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Nearly 4,000 years ago, in one of the earliest known codes of law, the Babylonian King Hammurabi recognized that the purpose of the law was "to bring about the rule of righteousness in the land . . . so that the strong should not harm the weak."<sup>1</sup> Time has not changed fundamental human nature, nor has it altered the fundamental purpose of the law. Wisely crafted and applied laws can serve as effective tools for protecting the most vulnerable among us from those that might otherwise abuse them.

Children necessarily rely on the protection of adults both at home and school.<sup>2</sup> It is therefore the responsibility of adults to ensure that homes and schools provide a safe haven for children. Educators must protect the safety and well-being of students in schools so that the students may focus their full attention on learning and growing into well-adjusted, responsible, productive

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<sup>1</sup> THE CODE OF HAMMURABI (c. 1780 BCE) (translated by L.W. King in 1910 and edited by Richard Hooker), <http://www.wsu.edu/~dee/MESO/CODE.HTM>

<sup>2</sup> See Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 23-24 (2004) ("The Declaration sets out a positive right to protection for children. Thus, in the Preamble, it explains that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection,' linking needs and rights. Principle 2 goes on to assert, 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.' Principle 9 refers specifically to abuse, stating, '[T]he child shall be protected against all forms of neglect, cruelty and exploitation.' In the Declaration, children's rights are rooted in the inherent 'dignity and worth of the human person.' By virtue of their humanity, children are entitled to the protections necessary for them to live with dignity").

citizens through their studies and healthy social interactions in schools.<sup>3</sup> In the absence of these protections schools can become places where intimidation, humiliation, fear, and violence threaten the mental and physical well-being of our children.<sup>4</sup>

Bullying<sup>5</sup> is the most common form of violence in schools, causing serious harm to far too many children.<sup>6</sup> Bullying is not just some quaint right of passage that all must endure: “The consensus among physicians and social scientists, educators and youth development organizations, civil rights advocates, and law enforcement is that bullying is neither inevitable nor normal, and that it seriously impairs the health and achievement of victims.”<sup>7</sup> There has been “growing recognition since the 1970s of ‘the threat posed by bullying in schools to children’s well-being.’”<sup>8</sup> Incidents of bullying are wide-spread but preventable acts of psychological and physical violence aimed at the most vulnerable among us resulting in

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<sup>3</sup> John Dayton & Carl Glickman, *American Constitutional Democracy: Implications for Public School Curriculum Development*, 69 PEABODY J. EDUC. 62 (1994).

<sup>4</sup> See generally, Pamela Orpinas & Arthur M. Horne, *CREATING A POSITIVE SCHOOL CLIMATE AND DEVELOPING SOCIAL COMPETENCE* (2006).

<sup>5</sup> Bullying is distinguished from other forms of conflict and aggression by three factors: 1) It is intended to inflict suffering; 2) the infliction of suffering is repeated and persistent; and 3) there is an imbalance of power between the perpetrator and the victim. See Sheri Bauman & Cindy Hurley, *Teachers' Attitudes and Beliefs About Bullying: Two Exploratory Studies*, 4 J. SCHOOL VIOLENCE 49, 50 (2005).

<sup>6</sup> See Kathleen Hart, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1115 (2005) (describing the scope and impact of bullying).

<sup>7</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 147-148 (2009).

<sup>8</sup> Ursula Kilkelly, *CHILDREN’S RIGHTS IN IRELAND: LAW, POLICY AND PRACTICE* 514-515 (2008), citing the *U.N. Study on Violence Against Children* (2008).

consequences ranging from painful humiliation to death.<sup>9</sup>

Bullying causes untold human suffering that can reverberate from the actual victims to the entire community. The harms caused by bullying may include increased disruptions to learning, absenteeism, dropouts, mental and physical illness, higher health care costs,<sup>10</sup> substance abuse, weapons in schools, violence, crime, and even suicide or Columbine-type tragedies when psychologically fragile persons are pushed beyond their limits to tolerate bullying and abuse.<sup>11</sup>

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<sup>9</sup> U.S. DEPT. OF EDUC., NAT'L CENTER FOR EDUC. STAT., INDICATORS ON SCHOOL CRIME AND SAFETY: 2006, INDICATOR 11: BULLYING AT SCHOOL (2007), at [http://nces.ed.gov/programs/crimeindicators/ind\\_11.asp](http://nces.ed.gov/programs/crimeindicators/ind_11.asp) ("In 2005, about 28 percent of students reported having been bullied at school during the last 6 months. Nineteen percent of students said that they had experienced bullying that consisted of being made fun of; 15 percent reported being the subject of rumors; and 9 percent said that they were pushed, shoved, tripped, or spit on. Of those students who had been bullied, 79 percent said that they were bullied inside the school, and 28 percent said that they were bullied outside on school grounds. Of the students in 2005 who reported being bullied during the previous 6 months, 53 percent said that they had been bullied once or twice during that period, 25 percent had experienced bullying once or twice a month, 11 percent reported being bullied once or twice a week, and 8 percent said that they had been bullied almost daily"). See also Carmel Sileo, *Who is to Blame When Bullying Ends in Death?*, 40 TRIAL 79 (2004).

<sup>10</sup> Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 239, 265 (Harassment of both children and adults is damaging and costly to Americans. "Ongoing research attempts to precisely measure the economic costs of harassment - including the costs from psychological and physical illness, absenteeism, turnover - and, inter alia, lost productivity through organizational disunity, reduced morale, and acts of sabotage. In addition, indirect costs must account for intertwined pathologies, like alcoholism and mental illness, which reportedly cost U.S. industry in the tens of billions of dollars annually. The U.S. Bureau of National Affairs found in a 1990 study 'that between \$5 billion and \$6 billion was lost each year to businesses as a result of the decreased productivity caused by real or perceived abuse of employees'").

<sup>11</sup> Andrew Brownstein, *The Bully Pulpit: Post-Columbine, Harassment Victims Take Schools to Court*, 38 JTLA Trial 12, 13 (2002) ("What emerged in the aftermath [of Columbine] was a brutal image of students ostracized by the 'popular kids' and taunted on a daily basis. Two-thirds of teenagers involved in deadly school shootings say they were seriously bullied, and many suicides have been linked to peer harassment . . . The 1950s image of the bully as the big kid who extorted lunch money began to fade. Studies revealed bullying to be a pervasive part of school culture worldwide, with devastating long-term effects for both victims and bullies").

Allowing bullying to continue without doing all that can reasonably be done to prevent it is in no one's best interests. Further, tolerance of such malicious, injurious conduct is not an acceptable adult reaction to behaviors that threaten the safety, health, and well-being of children. All children have the right to learn in a safe, respectful environment.<sup>12</sup>

Given the pervasive scope of the problem, and the extent of human suffering and harm resulting from bullying, it is astounding that this issue has received such limited attention by law makers. This article addresses international laws recognizing children's rights to protection, and discusses efforts to reform bullying laws in U.S. schools. Based on the U.S. experience in attempting to improve anti-bullying laws, this article makes general recommendations for improving anti-bullying legislation in the U.S. and in other nations in order to better protect children in schools.

#### *International Recognition of Children's Rights to Protection*

The General Assembly of the United Nations adopted the *Universal Declaration of Human Rights* (UDHR) in 1948.<sup>13</sup> The Preamble to the UDHR recognized "the inherent dignity and . . . the equal and inalienable rights of all members of the human family" and that "human rights

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<sup>12</sup> Ursula Kilkelly, CHILDREN'S RIGHTS IN IRELAND: LAW, POLICY AND PRACTICE 459 (2008) ("The right to education is an internationally recognised human right and the subject of significant constitutional and legislative provision nationally and internationally. It is well established that children have the right to education . . . and to benefit from it in a way that recognizes that education enables the fulfilment of the child's potential. This requires that education meets the child's needs, is child-centred and also aims to equip the child with the life and social skills to respond appropriately to life's challenges . . . children have the right to be protected from harm").

<sup>13</sup> General Assembly of the United Nations, *Universal Declaration of Human Rights* (1948), at <http://www.un.org/Overview/rights.html> (the *Universal Declaration of Human Rights* is part of the United Nations *International Bill of Human Rights*, which acquired the status of international law after a sufficient number of nations ratified the document in 1976).

should be protected by the rule of law.”<sup>14</sup> These rights include the right to the “security of person”<sup>15</sup> the right to not be subjected “to cruel, inhuman or degrading treatment”<sup>16</sup> or “to attacks upon . . . honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>17</sup>

The UDHR was in significant part a reaction to the atrocities of the Nazis in World War II, and an attempt to recognize a common ground for all of humanity in the protection of fundamental human rights.<sup>18</sup> Like the *U.S. Declaration of Independence*,<sup>19</sup> the UDHR recognized that fundamental human rights exist even when those rights are not respected under the laws of a corrupted and abusive government. As Dr. Martin Luther King Jr. said: "We must never forget that everything that Hitler did in Germany was 'legal.'"<sup>20</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at Art. 3.

<sup>16</sup> *Id.*, at Art. 5.

<sup>17</sup> *Id.*, at Art. 12.

<sup>18</sup> Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, 26 HUM. RTS. 27, 27 (1999) (“The UDHR adopted by the U.N. General Assembly in 1948, was a direct response to the human rights atrocities perpetrated during World War II”).

<sup>19</sup> The Declaration of Independence (U.S. 1776), available at <http://www.constitution.org/usdeclar.htm> (“*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed*”).

<sup>20</sup> Dr. Martin Luther King, Jr., *Letter from Birmingham Jail* (April 16, 1963), available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf> See also, Henry T. King, Jr., *The Limitations of Sovereignty from Nuremberg to Sarajevo*, 20 CAN.-U.S. L.J. 167, 176 (“We, and future generations, should never be permitted to forget that Adolf Hitler's massive aggressions carried out for the purpose of extending the sovereignty of the German state finally resulted in the near obliteration of Germany from the face of the earth, and that the post war

The UDHR recognized that human rights were not dependent on the ever-shifting opinions of political leaders, political majorities, or current expediencies, but were instead the inalienable birthrights of all persons. It should be noted, however, that: “The UDHR is not a legally binding instrument. Rather, it is an expression of aspiration--a set of goals that the people of all countries should strive to reach. There is no enforcement mechanism in the UDHR; no international committee has been set up to monitor whether countries are actually abiding by its principles.”<sup>21</sup>

Instead, two other treaties were created to give substance to the UDHR, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights*, together creating an “International Bill of Rights” which included UN mechanisms for monitoring and enforcement.<sup>22</sup> Subsequent human rights declarations included the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>23</sup> the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>24</sup> the *Convention on the Elimination of All Forms of Racial Discrimination*,<sup>25</sup> the *Convention on the*

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agreements made by Germany to limit its sovereignty to make the European Community a workable reality have brought peace, prosperity and security to the German people to a degree never achieved before. This is a lesson of history which should always be with us”).

<sup>21</sup> Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, 26 HUM. RTS. 27, 27 (1999).

<sup>22</sup> *Id.*

<sup>23</sup> Available at [http://www.unhchr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhchr.ch/html/menu3/b/p_genoci.htm)

<sup>24</sup> Available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm)

<sup>25</sup> Available at [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm)

*Elimination of All Forms of Discrimination Against Women*,<sup>26</sup> and the *Convention on the Rights of the Child*.<sup>27</sup>

### *Convention on the Rights of the Child*

The *Convention on the Rights of the Child*<sup>28</sup> (CRC) has become a leading force in issues related to children's rights:

Adopted by the United Nations General Assembly on November 20, 1989, the Convention on the Rights of the Child . . . has received precedent-setting global support. On the day that it was opened for signature, more nations participated in the signing ceremony than any previous U.N. human rights treaty. It went into force more quickly and received more ratifying votes than any other U.N. human rights treaty. In addition, the Convention, more than any other treaty, nearly replicates the wide range of rights envisioned in the 1948 Universal Declaration of Human Rights. It is indisputable that the United States played a pivotal role in the drafting of the Convention and, thus, in changing the world for children.<sup>29</sup>

The U.S. role in the process of drafting the CRC was substantial:

The United States was the most active in the expansion process, proposing more articles than any other nation in the Working Group. In total, the United States initiated seven articles, including Article 10 (family reunification), Article 19 (protection from abuse), and Article 25 (review of placement). In addition, the United States influenced the textual editing of almost every article. Only five other States proposed entirely new

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<sup>26</sup> Available at <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>

<sup>27</sup> Available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

<sup>28</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 (1989), at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

<sup>29</sup> Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 185. *Id.*, at 188 (“The United States remains one of only two nations in the world that have not ratified the Convention; Somalia, which currently does not have a functioning government, is the other. Even the U.S. trust territories of the Marshall Islands and Solomon Islands are States Parties to the Convention. Yet, despite the United States' failure to ratify the convention, any strong proponent of individual rights is likely to agree that U.S. participation in the drafting of the Convention radically improved the status of children”).

articles for the Convention: Denmark (Article 5, parental guidance), India (Article 6, survival and development), Argentina (Article 8, identity), Norway (Article 29, recovery and reintegration), and China (Article 33, narcotics). U.S. influence was so strong that some people referred to the Convention as the ‘U.S. child rights treaty.’”<sup>30</sup>

To date, however, although the U.S. signed the CRC in 1995, the U.S. has not ratified the CRC.<sup>31</sup>

Several sections of the CRC are generally applicable and some language is directly applicable to the need for adequate legal safeguards for children and protections from bullying in schools.

For example, Article 3(2) of the CRC declares:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.<sup>32</sup>

Not only does this suggest a general duty to provide children with the protection necessary to the well-being of the child, but also that there is a duty to implement appropriate laws and policies necessary to protecting children. Article 3(3) further declares: “States Parties shall ensure that

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<sup>30</sup> *Id.*, at 190.

<sup>31</sup> See Richard G. Wilkins, Adam Becker, Jeremy Harris & Donlu Thayer, *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 412 (2003) (“we believe the CRC's newly minted autonomy rights are neither beneficial to children nor harmonious with traditional notions of salutary family life . . . Second, we have concluded that the CRC's sweeping reconstruction of family life lies beyond Congress' reach”). *But see* Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 195 (2006) (“Critics seemingly fail to understand that the Convention, like every U.N. human rights treaty, encompasses three principles: (1) it is entered into voluntarily by sovereign nations who seek to comply with standards they hold to be desirable; (2) the Committee's role is to assist nations in meeting their goals; and (3) nations in no way surrender any piece of their sovereignty by ratifying the treaty. States Parties are free to interpret the Convention as they deem appropriate, and, upon ratification, they may designate those parts of the treaty with which they do not choose to comply by making a ‘reservation’ to that provision”).

<sup>32</sup> Available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision” and Article 4 declares that: “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”<sup>33</sup>

The CRC’s provisions articulate a broad duty of protection that includes protections for the physical well-being of the child and also protections against intrusions on privacy, attacks on personal honor and reputation, and other forms of psychological harassment and abuse occurring both in schools and extending beyond schools including the realm of cyber-bullying.<sup>34</sup> Article 16 states: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation” and “[t]he child has the right to the protection of the law against such interference or attacks.”<sup>35</sup> Article 19 declares:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child . . . Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.<sup>36</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> Shira Auerbach, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641 (2009).

<sup>35</sup> Convention on the Rights of the Child, at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>

<sup>36</sup> *Id.*

Article 37 requires: “States Parties shall ensure that . . . No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”<sup>37</sup> and Article 39 concludes:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.<sup>38</sup>

Directly addressing the rights of children to be protected from bullying in schools, General Comment No. 1 to the CRC states:

Children do not lose their human rights by virtue of passing through the school gates. Thus, for example, education must be provided in a way that respects the inherent dignity of the child . . . the school environment itself must thus reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29 (1) (b) and (d). A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of article 29 (1).<sup>39</sup>

### *Bullying Laws in U.S. Schools*

As in other nations, bullying is a distressing persistent epidemic in U.S. schools: “The National Education Association estimates that 160,000 students avoid school every day for fear of being physically or emotionally abused by their peers under the not-so-watchful eyes of school staff.”<sup>40</sup> Further, bullying occurs not just within the walls of the school, but can occur

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Committee on the Rights of the Child, General Comment No 1, para 8 (2001), at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument)

<sup>40</sup> Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L. J. 105, 108 (2007).

anywhere would-be bullies have access to their intended victims. With the wide-spread use of modern communications technologies, for example, bullies are now marauding in the cyber-world as well, and inventing disturbing new ways to intimidate, harass, and harm their victims anywhere, anytime, virtually without limits.<sup>41</sup> And when children are being harassed by today's high-tech enabled bullies, they no longer have even the sanctuary of their own homes as a temporary escape from the torment of school bullies. "Cyber bullying reaches beyond the schoolyard as technology affords the bully a veil of anonymity with instantaneous 24/7 access to the victim before an unlimited Internet based audience of bystanders and supporters. The victim cannot escape the electronic message delivered by the tormentor."<sup>42</sup>

Although not specifically intended to address bullying, several current U.S. laws may be applicable in incidents of bullying based on race,<sup>43</sup> gender,<sup>44</sup> or disability.<sup>45</sup> Further, physical

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<sup>41</sup> See, Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773 (2008).

<sup>42</sup> Jill Joline Myers & Gayle Tronvig Carper, *Cyber Bullying: The Legal Challenge for Educators*, 238 EDUC. L. REP. 1, 1 (2008).

<sup>43</sup> See Title VI, 42 U.S.C. § 2000d (2009) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). See also William Y. Chin, *School Violence and Race: The Problem of Peer Racial Harassment Against Asian Pacific American Students in Schools*, 10 SCHOLAR 333 (2008).

<sup>44</sup> 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"). See also Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53 (2005).

<sup>45</sup> See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1093 (2002) ("There are several sources of law under which claims for disability harassment in the public schools can be analyzed: Section 504 of the Rehabilitation Act and title II of the ADA; the Individuals with Disabilities Education Act (IDEA); the common law; and the

assaults, sexual assaults, stalking, and disorderly conduct violate criminal laws,<sup>46</sup> and an assault, defamation, or invasion of privacy may also be the basis of a tort suit.<sup>47</sup> Nonetheless:

Federal and state laws neither deter bullying nor provide most victims a remedy for psychological or physical injuries. Generally, federal law, whether civil rights statutes or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, offers remedies for victims who are bullied on the basis of federally protected criteria: race, nationality, sex, or disability. The vast majority of victims, however, are bullied for reasons that do not fall under this civil rights umbrella. For example, in a survey of Ohio students aged thirteen to eighteen, the majority cite *physical appearance* as the most common reason students are bullied and harassed (49%), followed by sexual orientation (18%), and gender expression (9%). Moreover, even when victims do fall into protected categories, courts have set a high bar for recovery, with plaintiffs often prevailing in only the most horrific cases.<sup>48</sup>

There is a growing awareness, however, that adequate laws are needed to protect everyone from the consequences of bullying in schools:

Increasing incidents of school violence rooted in bullying behavior, including school shootings such as Columbine High School (1999) in Littleton, Colorado and teen and pre-teen suicides . . . have raised public and political awareness that has generated [state] anti-bullying legislation . . . There are even groups calling for federal anti-bullying laws linked to the fulfillment of the No Child Left Behind Act.<sup>49</sup>

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United States Constitution”).

<sup>46</sup> See, e.g., *Svedberg v. Stamness*, 525 N.W.2d 678 (N.D. 1994) (upholding a charge of disorderly conduct against a student who had repeatedly harassed and threatened another student, and rejecting a first amendment defense on the grounds that the harassing speech constituted “fighting words”).

<sup>47</sup> Brady Coleman, *Pragmatism’s Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPLOYEE RTS. & EMP. POL’Y J. 239, 247 (“Several tort actions - assault, defamation, invasion of the right to privacy - are theoretically applicable to the many variants of harassment”).

<sup>48</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 149 (2009) (emphasis added).

<sup>49</sup> Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L. J. 105, 105 (2007).

Further, there is a growing recognition that current U.S. laws do not adequately address harassment and bullying<sup>50</sup> as well as increasing calls to provide proactive prevention policies and adequate remedies for injuries that occur.<sup>51</sup> Perhaps most important is the realization that it is necessary to recast the rationale for anti-bullying laws from protection based on limited categories of discrimination to a broader protection of fundamental human dignity. Under this new model harassment would be recognized “as an issue primarily of dignity rather than discrimination.”<sup>52</sup>

### *Improving Anti-bullying Laws*

Adults have a responsibility to protect children from serious threats to their safety and well-being, and bullying is most certainly a serious threat.<sup>57</sup> There is considerable evidence that current laws and policies do not adequately protect children. Under current law in the U.S., for example:

Even if a victim obtains a legal remedy under state or federal law, such remedy comes long after the harm has been done--after the student has changed schools, dropped out, or

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<sup>50</sup> See, e.g., Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 239.

<sup>51</sup> Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut's Anti-Bullying Statute*, 7 CONN. PUB. INT. L. J. 105, 108 (2007) (“There is, or ought to be, an expectation that students should be able to attend school without fearing for their personal safety. The law must provide a cause of action when schools fail to meet their obligation to provide a safe (and respectful) learning environment”).

<sup>52</sup> Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 239, 259.

<sup>57</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 642 (2004) (“Nearly two decades of educational research has repeatedly demonstrated that one of the most damaging and pervasive problems in our schools today is bullying. That research has shown that bullying leaves its victims with serious and often life-long emotional problems”).

is well past eighteen. As a practical matter, kids need their schools to adopt and enforce effective anti-bullying policies that will protect them while they are in school. Clearly, policies offering students the greatest protection are those that prevent bullying from happening in the first place, not those merely imposing consequences after incidents arise. Thus, model anti-bullying policies are those that deter bullying by improving overall school climate.<sup>58</sup>

There are positive, proactive measures that adults can take to help transform schools into safer, more respectful places for children.<sup>59</sup> Legislative improvements in anti-bullying policies can be an important part of this process, bringing greater public attention, resources, and formal authority to bear on this serious problem, and thereby helping to positively change culture, schools, and children's lives.

A 2009 review of bullying related litigation in the U.S. concluded “the cases illustrate that, employed piecemeal, punitive tactics such as progressive discipline, mediation, conflict resolution, and so-called ‘zero tolerance’ policies, if unsupported by the entire school community, do not reduce bullying.”<sup>60</sup> More comprehensive law and policy remedies, however, if wisely crafted and administered, can help to support the broader institutional and cultural changes necessary to better protect children in schools.

To remedy bullying in schools it is necessary to have well prepared professional educators motivated and empowered to work with children to address the root causes and effects of bullying in schools. Statutes, regulations, and policies can play a central role in establishing and

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<sup>58</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 150-151 (2009).

<sup>59</sup> See, e.g., Arthur M. Horne, Christi L. Bartolomucci & Dawn Newman-Carlson, *BULLY BUSTERS: A TEACHER'S MANUAL FOR HELPING BULLIES, VICTIMS, AND BYSTANDERS* (2003).

<sup>60</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 152 (2009).

supporting effective anti-bullying efforts. Bullies rely on an imbalance in power between the bully and the victim. Laws and institutional policies have the ability to shift the balance of power against would-be bullies, by systematically rallying the authority of the law, the resources of the government, and the opinions of the community, against the malicious practice of bullying and in support of greater safety and civility in schools.

Lawmakers in different cultures and contexts will likely hold divergent views about what particular elements to emphasize in anti-bullying legislation, and reasonable persons may disagree about what methods or legal tools may prove most effective under varying circumstances. Nonetheless, the recommendations below provide a useful guide for improving the efficacy of legislation and school policies in protecting children from bullying:<sup>61</sup>

1) *Laws must communicate a strong commitment to stopping bullying in schools*: There is powerful evidence to support legislative findings that bullying and harassment present a grave threat to the health and well-being of children, an unreasonable interference with the educational process, and that it is in society's best interests to assertively address this problem.<sup>62</sup> To serve as

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<sup>61</sup> John Dayton & Anne Dupre, *From the Common Bully to the Cyber Bully: Finding Effective Law and Policy Remedies*, July 2007 lecture at the University of Maine School of Law (manuscript on file with authors) (in 2007 Dayton & Dupre conducted a comprehensive study of anti-bullying legislation in the U.S. Based on a thorough analysis of state anti-bullying laws, this study suggested policy recommendations for improving anti-bullying laws. This article presents an updated and revised version of these recommendations based on further analysis of U.S., Irish, and international laws).

<sup>62</sup> See, e.g., Arthur M. Horne & Jon Carlson, *BULLYING PREVENTION* (2005); Corinna Young, *BULLYING BEHAVIOR: CURRENT ISSUES, RESEARCH, AND INTERVENTION* (2002); Dan Olweus, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* (1993); National Conference of State Legislatures, *School Bullying, available at* <http://www.ncsl.org/programs/educ/SchBullying.htm> (“research indicates that this type of adolescent victimization occurs frequently, particularly in middle school grades, and can result in serious consequences for both bully and victim”); NATIONAL CENTER FOR EDUCATION STATISTICS, *STUDENT REPORTS OF BULLYING RESULTS FROM THE 2001 SCHOOL CRIME*

an effective foundation for needed reform, laws must clearly evidence a deep and unwavering commitment to stopping bullying in schools.<sup>63</sup>

2) *Definitions of “bullying” must be broad enough to address current realities in schools:*

Narrow definitions of bullying that only include, for example, physical assault or serious threat of assault<sup>64</sup> and fail to include other non-violent but highly harmful forms of bullying such as harassment, social bullying, cyber-bullying,<sup>65</sup> etc., will fail to protect the mental and physical health of children in schools adequately.<sup>66</sup> To address current realities in schools, legislation and

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SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY, U.S. DEPARTMENT OF EDUCATION STATISTICAL ANALYSIS REPORT (2005).

<sup>63</sup> Even the format and placement of these provisions can send powerful messages about law makers’ genuine commitments to reform. Accordingly, these provisions should not be buried in tangential or unrelated statutes, seemingly included as an afterthought amendment, or scattered among many different statutes, making it unnecessarily difficult for those who need these provisions to access them, and sending a negative message about law makers’ seriousness and commitment to these laws. *See generally* David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437 (1996). Unless the policies send an unambiguous message of serious commitment by law makers, they may be perceived as little more than symbolic gestures to placate parties who pushed for anti-bullying legislation, doing little more than symbolically declaring the problem addressed and therefore resolved without substantively changing any realities for children in schools. *See, e.g.*, MISS. CODE ANN. § 37-11-54 (2007) (allocating no additional resources, setting very limited and likely meaningless goals, and establishing an arbitrary sunset clause for repeal).

<sup>64</sup> GA. CODE ANN. § 20-2-751.4 (2007).

<sup>65</sup> *See* Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51 (2005).

<sup>66</sup> Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L. J. 105, 108-109 (2007) (“The overt acts typical of younger children and adolescent/teenage boys, including physical and verbal abuse, harassment, and humiliation, are far more easily identified than their covert cousins. Covert acts could arguably be considered more pernicious forms of emotional and psychological torment and perhaps even more damaging to the victims. This covert or ‘relational aggression’ infects the lives of adolescent and teenage girls (and to a lesser extent boys) and their classmates in middle schools and high schools across the country. State anti-bullying laws, and school district anti-bullying policies, most often do not address relational

policy must be the product of a clear understanding of current problems and a thorough knowledge of available remedies for addressing these problems.<sup>67</sup> Related scope and definition problems include language that sets the bench-mark for actionable bullying too high,<sup>68</sup> and policies that arbitrarily limit the protection of the statute based on grade-level, leaving many children unnecessarily vulnerable.<sup>69</sup>

3) *Definitions of "bullying" cannot be so over-broad that they intrude on protected speech:*

Bullying policies that intrude on protected speech are unlawful.<sup>70</sup> Further, policies that do not fairly respect the legitimate free speech rights of all persons in the community are unlikely to

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aggression or even recognize it as a form of bullying. Its existence and the adverse impact it has on the educational environment are simply ignored and denied by school administrators and school policy makers”).

<sup>67</sup> Policies must address current problems threatening children and be updated as necessary. For example, the failure to include cyber-bullying or other current and clearly emerging threats within the statutory definition of actionable bullying can leave children unnecessarily vulnerable to these dangers. *See* Jill Joline Myers & Gayle Tronvig Carper, *Cyber Bullying: The Legal Challenge for Educators*, 238 EDUC. L. REP. 1, 7 (2008) (describing Internet-based resources for addressing Internet-based harassment).

<sup>68</sup> A child in the custody and protection of school officials should not have to wait to be intentionally injured more than once before the child can expect appropriate action and protection from school officials under state law. *But see* GA. CODE ANN. § 20-2-751.4 (2007); LA. REV. CODE § 416.13 (2007).

<sup>69</sup> Because bullying occurs at all grade levels, legal remedies should extend to all grade levels in age appropriate ways. *But see* GA. CODE ANN. § 20-2-751.4 (2007) (limiting protections to grades 6-12 only).

<sup>70</sup> U.S. Const. art. I (“Congress shall make no law . . . abridging the freedom of speech”); Const. of Ireland § 40.6.1 (“The State guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of the citizens to express freely their convictions and opinions”). *See also* *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001) (defining speech as "harassing" does not exclude that speech from First Amendment protection, and holding that anti-harassment policy was unconstitutionally overbroad); Martha McCarthy, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52 (2002).

gain the broad community support necessary for effective implementation of the policy. While taking a firm stand against all bullying and harassment, policies must also recognize and respect the rights of all persons to peaceably disagree with any and all points of view.<sup>71</sup> So long as individuals express themselves in a manner appropriate to civil discourse in a public school, every person's right to communicate their opinions must be protected, whether their views are popular or not.<sup>72</sup>

4) *Policies must protect the safety and human dignity of all children*: It is essential that policies protect persons that fall into categories that have received protected status under law because of a demonstrated history of discrimination, such as discrimination based on "race, creed, color, national origin, marital status, sex, sexual orientation, or disability."<sup>73</sup> These are not, however, the only persons subjected to acts of bullying. To the contrary, bullying is often not motivated by any race, gender, etc., animus,<sup>74</sup> but instead occurs within a relatively homogenous group. When statutory protections are limited exclusively to particular characteristics,<sup>75</sup> it leaves millions of children unprotected from abuse. Put simply, anti-bullying policies must protect the

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<sup>71</sup> VT. STAT. ANN. 16 § 11(A)(26) (2007) (Department of Education policy implementing Vermont Act 91). Far, efficient, and effective laws strike a proper balance between legitimate competing interests. Anti-bullying laws and policies must strike a proper balance, for example, between protecting individuals from harassment, and respecting individual rights to expression; between protecting individuals from abuse, and assuring a fair hearing for the accused.

<sup>72</sup> NEV. REV. STAT. § 388.125 (2007).

<sup>73</sup> VT. STAT. ANN. 16 § 11(A)(26) (2007).

<sup>74</sup> Nansel T.R., et al., *Bullying Behaviors Among U.S. Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094 (2001).

<sup>75</sup> *But see* WASH. REV. CODE § 28A.300.285 (2007) ("Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the harassment, intimidation, or bullying").

safety and human dignity of all children.

5) *State-wide policy mandates must be strong enough to assure adequate protection for children throughout the state, yet flexible enough to allow for reasonable local variations and innovations:* State-wide policies should assure that all children are protected by the essential elements of anti-bullying laws, but policies should also allow for reasonable variations based on special circumstances and local needs, and encourage continuing local innovations aimed at finding better solutions to local problems.<sup>76</sup>

6) *School officials must be assigned an enforceable duty to implement anti-bullying laws:* Unless anti-bullying laws are implemented by local school officials, they will not change bullying behavior. There should be an unambiguous, enforceable duty for all school officials to implement anti-bullying laws, assuring a safe and respectful learning environment free of bullying, harassment, and intimidation.<sup>77</sup> Further, there should be clear and certain consequences for school officials when there is convincing evidence of a willful failure to comply with laws establishing protections for children in their care.<sup>78</sup>

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<sup>76</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 702 (2004) (“There should be enough flexibility in the requirements to allow adaptability of approaches to local school settings, and enough specificity to prevent pro forma development of policies that will never themselves create the fundamental changes in school climate that are at the heart of effective bullying intervention”).

<sup>77</sup> NEV. REV. STAT. § 388.125 (2007).

<sup>78</sup> Less ethical and responsible school officials who most need the push of legal mandates to address bullying in their schools seriously are also most likely to ignore anti-bullying laws that remain optional. See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 700 (2004) 658-659 (“bullying and violence flourish in particular kinds of school climates, and those climates are largely within the control of school officials. School officials, then, should be forced to take control of the climates in their schools and to reduce the prevalence of bullying

7) *There must be clear lines of accountability concerning who is responsible for implementing all aspects of the policy, from reports through remedies, with reasonable and well defined time-lines:* Policies should clearly designate who is responsibility for all reports and include a requirement for prompt investigations and timely remedial actions as appropriate.<sup>79</sup>

8) *School officials are granted necessary jurisdiction and authority to protect students:*

Protections expressly extend beyond the physical limits of the school and school activities if the off-campus bullying is disrupting the educational process, denying equal educational opportunity, or threatening student safety.<sup>80</sup>

9) *All school employees have an affirmative duty to model appropriate conduct:* Policies

establish that all school employees, teachers, administrators, child services professionals, food services workers, custodial staff, and transportation personnel, etc., have an affirmative duty to demonstrate appropriate behavior on the premises of any public school by treating students, colleagues, and all persons they encounter while on duty with appropriate civility and respect, and by refusing to tolerate harassment, abuse, or intimidation.<sup>81</sup> This includes serving as consistent roles models of nonviolent behaviors that do not present or condone sexual, racial, or

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and related peer-on-peer violence. No one expects schools to eliminate all bullying; but educators no longer have any excuse for turning a blind eye to the problem and ignoring the research in their own field”).

<sup>79</sup> Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even With Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1, 5 (2005) (noting that New Hampshire requires a “48-hour notification window for every principal or designee to notify parents or guardians of all students involved in a bullying occurrence”).

<sup>80</sup> CONN. GEN. STAT. § 10-222(D) (2007).

<sup>81</sup> NEV. REV. STAT. § 388.125 (2007).

other harassment, or allow student hazing.<sup>82</sup> School personnel are expressly prohibited from engaging in any form of harassment, and the policy makes harassment by certified employees a basis of suspension or revocation of a certificate, and mandates a report to state certification officials.<sup>83</sup>

10) *Mandatory reporting requirements apply to all school personnel and students:* Bullying often occurs with the knowledge of many persons, including school officials, other school personnel, and students. By creating an affirmative duty for all persons to report incidents of bullying, and broadly notifying all persons of this duty, it becomes much more difficult for those that know about incidents of bullying to ignore this behavior without risking personal consequences.<sup>84</sup>

11) *All persons who make good faith reports are protected with good faith immunity:* To encourage necessary reporting, and to protect those that report in good faith, there should be good faith immunity for all reports made in good faith.<sup>85</sup>

12) *Establish a system for anonymous reporting:* Some children, and even some school

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<sup>82</sup> MINN. STAT. § 120(B).22 (2007).

<sup>83</sup> VT. STAT. ANN. 16 § 11(A)(26) (2007) (Department of Education policy implementing Vermont Act 91).

<sup>84</sup> Altruism is a most admirable quality, but for some it may be a less reliable motivator than personal consequences in assuring that all children are protected from bullying and abuse in schools. Further, a mandated reporting system may provide persons that might otherwise be reluctant to report bullying, because of fear of being accused of "tattling" on others, etc., a useful "fig leaf" when reporting is a legal requirement and not a choice. *But see* Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statute be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53, 65 (2005) ("Only a few states actually require a school employee who witnesses an act of bullying to report it to a principal or other designated school official"). *See. e.g.*, N.J. STAT. ANN. § 18A:37-13 (2007).

<sup>85</sup> NEV. REV. STAT. § 388.125 (2007).

personnel, may fear retaliation if they openly make a report. Anonymous reporting procedures are likely to both increase the chances that bullying activities will be reported and put would-be bullies on notice that they are likely to be reported by someone if they engage in prohibited bullying conduct.<sup>86</sup>

13) *Policies include anti-retaliation prohibitions*: There should be clear, strong, and effective prohibitions against any retaliation towards persons who make good faith reports.<sup>87</sup>

14) *There are appropriate sanctions for malicious false reports*: Policies provide for appropriate disciplinary action for any person who knowingly and maliciously makes a false report.<sup>88</sup>

15) *Securing a safe environment for all children is made part of the primary mission of the school*: The policy aimed at protecting children is rooted in the school's fundamental mission of educating children rather than just tacked onto policies addressing general disciplinary measures. The policies should recognize that securing a safe, supportive environment for all children is a necessary prerequisite to maximizing learning.<sup>89</sup>

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<sup>86</sup> Due process of law proscribes the use of anonymous reports as evidence in disciplinary hearings. *See generally* Goss v. Lopez, 419 U.S. 565 (1975). That is not, however, the purpose of this information. These anonymous reports should be used solely to alert school officials to a situation that may be endangering the health and safety of a child so that they can investigate and assure that all children in their school are safe. If, however, the follow-up investigation by school officials independently reveals evidence of misconduct, this subsequent evidence may be used in a disciplinary proceeding.

<sup>87</sup> *See* Doe v. Brimfield Grade School, 552 F. Supp. 816, 820 (C.D. Ill, 2008) (a severely bullied student's mother "a teacher at the school, was retaliated against for voicing objections, through false accusations of unprofessional conduct and challenges to her competence as a teacher").

<sup>88</sup> N.J. STAT. ANN. § 18A:37-13 (2007).

<sup>89</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 658-659 (2004) ("Current legal theories and approaches to bullying suffer from a common flaw: they view bullying from an incident-based perspective rather than from a school culture perspective. They

16) *Policies mandate a curriculum that promotes constructive actions and prevention:* To the extent possible, the curriculum and policies should go beyond mere negative prohibitions and punishments after the fact.<sup>90</sup> They should incorporate positive and constructive approaches to preventing bullying, such as instruction on ethics, morality, building a culture of civility, and preventing and treating the causes of bullying. Students should be positively instructed what to do to improve their school culture and the quality of life for all students and not just negatively warned what not to do. Students and all school personnel should be provided with conflict resolution skills, and age appropriate civility and anti-bullying lessons should be thoroughly integrated into the curriculum and school culture at all grade levels.<sup>91</sup>

17) *Policies appropriately balance discipline and counseling for children that engage in bullying:* Bullying is not normal, healthy behavior, and bullies likely have problems that require attention. Intervention programs should include discipline and counseling aimed at ethical and moral growth. In many cases, discipline alone is insufficient to effectively deal with bullying behavior and its consequences, and effective counseling programs are necessary.<sup>92</sup>

18) *Anti-bullying training is provided to all persons in schools:* There should be no safe-harbor for bullying, and all persons should be part of the anti-bullying effort. Students should be

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focus on what school officials knew about a specific bullying incident rather than addressing what school officials have done to ensure a culture where bullying is unacceptable to everyone in the school”).

<sup>90</sup> OKLA. STAT. § 24-100.1 (2007).

<sup>91</sup> MINN. STAT. § 120(B).22 (2007).

<sup>92</sup> CONN. GEN. STAT. § 10-222(D) (2007).

provided with age appropriate training,<sup>93</sup> and all school personnel, including teachers, administrators, and all support personnel should be provided with high quality anti-bullying training programs with proven efficacy.<sup>94</sup>

19) *Children are provided with age-appropriate and situation appropriate self-help skills:*

Children are taught how to avoid potentially dangerous situations, walk away from pointless conflicts, and as necessary, taught essential age-appropriate self-protection skills.<sup>95</sup>

20) *Policies should send a clear message that public humiliation, violence, and other coercive*

*conduct are not acceptable means of conflict resolution in schools:* Laws and policies that, for example, allow school officials to use acts of humiliation, violence, and extreme restraint procedures against children,<sup>96</sup> and policies that prohibit children from striking one another but

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<sup>93</sup> VT. STAT. ANN. 16 § 11(A)(26) (2007) (Vermont DOE Policy implementing Act 91 requires student notification of policy in age appropriate language with examples of harassment; requires age appropriate training with students and staff).

<sup>94</sup> See Arthur M. Horne, Christi L. Bartolomucci & Dawn Newman-Carlson, BULLY BUSTERS: A TEACHER'S MANUAL FOR HELPING BULLIES, VICTIMS, AND BYSTANDERS (2003). See also, *Bully Busters Training*, at, *Stop Bullying Now* (BULLY BUSTERS is a research-driven bullying prevention curriculum for elementary, middle and junior high schools. Upon completion of the training, teachers, administrators, and staff will be able to put the program in place immediately to begin reducing bullying and positively affect school climate), at <http://www.stopbullyingnow.net/bullybusterstraining.htm>

<sup>95</sup> MINN. STAT. § 120(B).22 (2007).

<sup>96</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, Before the House Committee on Education and Labor, 111<sup>th</sup> Cong.*, 4, 7 (2009), at <http://www.gao.gov/new.items/d09719t.pdf> (Statement of Gregory D. Kutz, Managing Director Forensic Audits and Special Investigations) (seclusion and restraints against students, some as young as 5 years old, have resulted in broken bones and other severe injuries, deaths from suffocation while pinned down, and suicides while confined or restrained. There are no federal laws restricting the use of restraints and seclusions and "state laws and regulations in this area vary widely . . . nineteen states have no laws or regulations . . . seven states place some restrictions of the use of restraints, but do not regulate seclusions. Seventeen states require that

retain the right of school officials to strike children,<sup>97</sup> are likely to send mixed and confusing messages to children about the fundamental right to human dignity and the acceptability of acts of humiliation, violence, and coercion in conflict resolution.

21) *Policies require reasonable parental responsibility and involvement*: Parents are required to take appropriate parental responsibility for the behavior of their minor children, and are required to participate, as necessary, with school officials in reasonable remedial efforts. Continued willful refusal by parents to participate in reasonable efforts to address serious behaviors that threaten harm to the child or others may be deemed actionable neglect under state child protection laws.<sup>98</sup>

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selected staff receive training before being permitted to restrain children. Thirteen states require schools to obtain consent prior to using foreseeable or non-emergency physical restraints, while nineteen require parents to be notified after restraints have been used. Two states [Texas and California] require annual reporting on the use of restraints . . . Texas public school officials stated they restrained 4,202 students 18,741 times during the September 2007 through June 2008 academic year. During the same time period, California officials reported 14,354 instances . . . children with disabilities were sometimes restrained and secluded even when they did not appear to be physically aggressive and their parents did not give consent").

<sup>97</sup> What message, for example, does the use of corporal punishment by school officials send to children about resolving disputes, bullying and the exercise of power over others? *See* OKLA. STAT. § 24-100.1 (2007) (statute addressing bullying, but also expressly protecting local schools right to exercise corporal punishment).

<sup>98</sup> *See generally* Eric W. Johnson, *Educational Neglect as a Proper Harm to Warrant a Child Neglect Finding*, 76 IOWA L. REV. 167 (1990). *See also* Howard Davidson, *No Consequences- Re-Examining Parental Responsibility Laws* 7 STAN. L. & POL'Y REV. 23, 23 (1995-1996) ("parents whose actions or indifference contribute to their children's violent and destructive behavior must be held to a legally appropriate standard of responsibility, with civil and criminal sanctions imposed where warranted"); Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 857 (2006) ("In an effort to hold parents accountable for the behavior of their children, policymakers now require parents to participate in every aspect of the juvenile justice system . . . and are increasingly required to attend court hearings under the threat of contempt . . . Parents are also increasingly required to participate in treatment . . . to participate in family counseling, parenting skills classes, individual therapy, or community service").

22) *Criminal acts are dealt with as criminal acts*: School policies should treat serious criminal acts such as assault, sexual assault, terroristic threats, stalking, and malicious harassment as what they are: criminal acts, and not just common misbehavior in school.<sup>99</sup> An act that constitutes a crime off-campus is still a crime when it occurs on-campus. When children are victims of criminal acts, school officials should notify law enforcement officials and treat criminal acts as criminal acts, holding the perpetrators of on-campus crimes equally accountable for the commission of crimes regardless of location. For perpetrators of crimes against children, being on school property should not convey any special immunity from accountability under the law.

23) *Anti-bullying efforts must be community-wide and broadly communicated*: Parents, community leaders, and all members of the community are invited to participate in anti-bullying efforts, to send a unified message throughout the community that bullying of children will not be tolerated anywhere or by anyone in the community.<sup>100</sup> There should be comprehensive publication of the policy, with the policy disseminated in multiple forums, forms, and languages where appropriate, to communicate a broad and clear message throughout the community that bullying is unacceptable, harmful to all, and will not be tolerated in the school or anywhere in the community.<sup>101</sup>

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<sup>99</sup> See WASH. REV. CODE § 28A.300.285 (2007) (defining "Malicious harassment"). See also Jonathan W. Blodgett, *Bullying and the Violence it Causes*, 40 Prosecutor 34, 34 (2006) ("bullying behavior can result in crimes such as assault and battery, making threats, criminal harassment, stalking, and violation of a person's civil rights . . . Bullying prevention is crime prevention. Bullying is not child's play. It is not 'just part of growing up.' Bullying, and the violence it causes, has become an increasingly serious problem in our communities").

<sup>100</sup> MINN. STAT. § 120(B).22 (2007).

<sup>101</sup> N.J. STAT. ANN. § 18A:37-13 (2007). See also WASH. REV. CODE § 28A.300.285 (2007) ("Training materials shall be disseminated in a variety of ways").

24) *Equal protection and treatment are guaranteed to all persons regardless of their social, economic, or political status:* School officials should be expressly prohibited from inappropriately interfering with the process of reporting, investigating, or administering remedies related to acts of bullying and harassment.<sup>102</sup> The perpetrators of incidents of bullying and harassment may be relatively high social status students, or from high social status families, targeting more vulnerable lower social status victims. School officials may have a social or political incentive to ignore misconduct perpetrated by socially or politically powerful individuals unless that incentive is counter-balanced by prohibitions against any improper interference with the accountability process, and requirements for a full and objective investigation in all cases regardless of the social or political status of the alleged victim or perpetrator.

25) *Students are guaranteed a fair and objective review of disputes:* When school official bias in the implementation of policies is alleged, there should be a reasonable opportunity for an independent review by qualified neutral parties outside the school system.<sup>103</sup> Providing an opportunity for an external independent review protects both the rights of individual students and the public integrity of the school.

26) *Policies must be focused on protecting children and not on limiting school district liability:* Ethical, responsible educators understand that it is their duty as an adult to protect the safety and well-being of children in their care. Ethical, responsible laws are aimed at supporting educators in this task, not at absolving individuals and institutions that neglect their duties to children and

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<sup>102</sup> NEV. REV. STAT. § 388.125 (2007).

<sup>103</sup> VT. STAT. ANN. 16 § 11(A)(26) (2007).

allow them to be abused in their schools.<sup>104</sup>

27) *Anti-bullying programs must be adequately funded to achieve long-term success: An effective program requires adequate funding and a long-term commitment of support.*<sup>105</sup>

28) *Policies support continued research and improvement in legislation, local policy, treatment methods, and prevention: The policy supports ongoing efforts to find and use best practices and research in preventing bullying in schools, and policies are periodically reviewed to assure that they effectively address current problems in schools.*

### Conclusion

Legislation can communicate just and powerful ideas to the community it serves. In a single generation U.S. civil rights laws opened doors of opportunity that had previously been closed,

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<sup>104</sup> When school officials knowingly refuse to protect children from abuse the law should protect children and not the adults and institutions that failed to protect the children. *See, e.g., Doe v. Brimfield Grade School*, 552 F. Supp. 2d 816, 819-823(C.D. Ill, 2008) (in *Doe* the court rejected school officials' motion to dismiss plaintiff's complaint. The plaintiff alleged that "harassment was both verbal and physical, with the physical 'sexual misconduct consist[ing] predominantly of grabbing, twisting, and hitting' John's testicles repeatedly beginning in November 2004 and continuing to November 2005. The school's principal was 'aware of the ongoing practice of male students hitting each other in the testicles', also known as 'sac stabbing.'" The plaintiff further alleged that the student's injuries required surgery, but parent's complaints to school officials continued to be ignored. "On his return to school after the surgery, John was teased about his surgery, and, intentionally struck in the testicles again. His stitches popped and his surgical incision broke open. The school's principal still did nothing to correct the situation. Instead, John was reprimanded by his coach for complaining, advising John that he needed to 'stick up for himself' . . . to 'toughen up and stop acting like a little girl'").

<sup>105</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 678 (2004) ("Unless the funds are guaranteed and the level of instruction is required to be research-based, rigorous, and ongoing, the schools' attempts to mount serious and sustained efforts against bullying will probably be doomed at the outset, despite everyone's best intentions").

transforming American culture including the workplace and schools into more open, inclusive, and just institutions.<sup>106</sup> Effective anti-bullying legislation can also transform the culture of educational institutions and improve the daily lives and learning opportunities of all children by rallying the authority of the law, the resources of the common government, and the support of the community. It is long past time to convert schools from forums for abuse into institutions where all children can learn and grow in safety and dignity.

Legislative improvement is a never-ending task. The Preamble to the U.S. Constitution states its purpose as the formation of a "more perfect union" recognizing the ongoing challenge of advancing justice and the general welfare.<sup>107</sup> At all levels of government, revising laws and policies towards these ends remains a perpetual work in progress to more perfectly achieve the purposes of the people and their common government. To address the plague of bullying in schools, at least twenty-one U.S. states have enacted anti-bullying legislation.<sup>108</sup> Law makers in other nations are also making progress in protecting children from bullying in schools.<sup>109</sup>

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<sup>106</sup> See, e.g., Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005).

<sup>107</sup> U.S. CONST. pmb. (1787).

<sup>108</sup> Alaska Statutes § 14.33.200 (2008); Arizona Revised Statutes § 15-341 (2008); Arkansas Code § 6-18-514 (2008); California Code § 32261 (2008); Colorado Code § 22-32-109.1; Connecticut General Statutes § 10-222d (2008); 14 Delaware Code § 4112D (2008); Georgia Code § 20-2-751.4 (2008); 2008 Illinois Laws § 10-0.14; Louisiana Revised Statutes § 416.13 (2008); Minnesota Laws 120B.22 (2008); Mississippi Code § 37-1-54 (2008); Nevada Revised Statutes § 388.125 (2008); New Hampshire Revised Statutes 193-F:3 (2008); New Jersey Revised Statutes 18A:37-13 (2008); Oklahoma Statutes § 24-100.1 (2008); Oregon Revised Statutes § 339.351 (2008); Rhode Island General Laws § 16-21-26 (2008); 16 Vermont Statutes § 11(a)(32) (2008); Washington Revised Code § 28A.300.285 (2008); West Virginia Code § 18-2C-1 (2008).

<sup>109</sup> See, e.g., Ursula Kilkelly, CHILDREN'S RIGHTS IN IRELAND: LAW, POLICY AND PRACTICE 518 (2008).

Anti-bullying laws can serve as powerful tools for moving the shameful practice of bullying, and the equally shameful practice of tolerating bullying, out of the shadows and into the full light of public view. As Justice Brandeis said: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>110</sup> Anti-bullying legislation provides a critically important tool for focusing public attention on this problem, and publicly affirming a commitment to establishing an effective system for protecting the safety, well-being, and dignity of all children.

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<sup>110</sup> Louis Brandeis, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed. 1933).