

U.S. APPROACHES TO COUNTER CHILDHOOD BULLYING

David W. Collier and Sherri B. Lantinga†*

INTRODUCTION

The particular expressions of interpersonal cruelty vary across times, cultures, genders, and age groups; but bullying has undoubtedly been part of all human communities. Now, with the widespread use of hand-held communication technologies, adults and children have available an even broader range of ways to torment others. Although families and schools have long tried to deter and punish childhood bullying, the rapid onset of “cyberbullying” has outpaced the effectiveness of such measures. Further, the pervasiveness and public nature of cyberbullying may increase the risk of serious and violent responses such as suicide or school shootings.¹ In this paper we review how the American family and schools have attempted to prevent or punish traditional bullying. We next examine how the legal systems can be used to respond to serious consequences of traditional bullying. We also discuss the prevalence of cyberbullying in the U.S. and focus on how legal systems can be effectively used to deter cyberbullying.

I. WHAT IS BULLYING IN THE UNITED STATES?

The first step in any discussion on bullying is to define terms. For the purposes of this paper we refer to traditional bullying as “unwanted, aggressive behavior among school-aged children involving a real or perceived power imbalance.”² In addition, the behavior is “repeated, or has the potential to be repeated, over time.”³ Bullying has typically taken three main forms, though they can overlap. First, verbal bullying entails name-calling, inappropriate sexual comments, and verbal threats.⁴ Second, social bullying includes spreading damaging rumors, excluding

* Professor of Law, Handong International Law School; J.D., Regent University School of Law. Professor Collier has served as an Assistant Commonwealth’s Attorney for Buchanan County, Virginia, where he prosecuted misdemeanor and felony criminal cases.

† Classroom consultant and editor, Handong International Law School; M.A., Ph.D. Social/Academic Psychology from the University of Illinois-Chicago. Sherrie Lantinga has served as a Professor of Psychology at Dordt College, Iowa and as the Dean for Curriculum and Instruction.

¹ Alana Vivolo-Kantor et al., *Bullying and Suicide: What’s the Connection?*, STOP BULLYING (Dec. 30, 2013), <http://www.stopbullying.gov/blog/2013/12/30/bullying-and-suicide-whats-the-connection>.

² *Id.*

³ *Id.*

⁴ *Id.*

someone from a group, and publicly embarrassing someone.⁵ Third, physical bullying refers to hitting, kicking, pushing, tripping, and taking or breaking someone's things.⁶ All three types occur frequently in the United States.⁷ A U.S. government-funded survey indicates that, nationwide, 73% of students in grades 6–12 experienced bullying in the last school year.⁸ Admittedly, bullying statistics are difficult to assess, as researchers use different age groups, methodologies, timespans, and differently worded questions; as a result, 20% to 90% of students report being victims of bullying in the United States.⁹

Advances in communication technology have given rise to new and widely accessible ways of harming others. The popularity of and easy access to mobile phones and social media sites have led to a new form of bullying, so-called “cyberbullying.” Cyberbullying is “the intentional and repeated mistreatment of others through the use of technology, such as computers, cell phones and other electronic devices.”¹⁰ In addition to the range of devices, cyberbullying also encompasses an array of forums. Cyberbullying has quickly become a common form of bullying in the U.S.¹¹ A national survey found that nearly one in six high school students (grades 9–12) were electronically bullied in the previous year.¹²

The basic appeal of cyberbullying may be similar to traditional bullying (e.g., sense of control, social status) but the constraints are significantly decreased, which may mean far more bullies and victims. Both parties may experience serious mental and physical health

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Jill Fleury DeVoe & Lynn Bauer, *Student Victimization in U.S. Schools: Results from the 2009 School Crime Supplement to the National Crime Victimization Survey*, NAT'L CENTER FOR EDUC. STAT. (Nov. 2011), <http://nces.ed.gov/pubs2012/2012314.pdf>.

⁹ Sandra G. Boodman, *Gifted and Tormented*, WASH. POST (May 16, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/15/AR2006051501103.html>; *Bullying Statistics 2010*, BULLYING STAT., <http://www.bullyingstatistics.org/content/bullying-statistics-2010.html> (last visited July 10, 2014); Danice K. Eaton et al., *Youth Risk Behavior Surveillance - United States, 2011*, 61 MORBIDITY AND MORTALITY WKLY. REP., no. 4 (June 8, 2012), <http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf>.

¹⁰ *Definitions Related to Name-Calling, Bullying and Bias*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/education-outreach/bullying-cyberbullying/c/definitions-bullying-and-bias.html#U46qTnK1aRY> (last visited July 11, 2014).

¹¹ *Cyber Bullying Statistics*, BULLYING STAT., <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html> (last visited July 11, 2014).

¹² Eaton, *supra* note 9.

outcomes,¹³ making bullying a significant concern for families, schools, and the government.

II. INDIVIDUAL AND FAMILY STRATEGIES FOR DETERRENCE OF TRADITIONAL BULLYING IN THE U.S.

Traditionally, American fathers (and other males in multi-generational, extended family households) have encouraged children (especially sons) to stand up for themselves and their families, which included fighting back against bullies. Thus, men taught children how to physically defend themselves. It was believed that hitting a bully who has been sufficiently warned was an effective deterrent to future confrontations.¹⁴ In addition, the ability to defend oneself was thought to strengthen a child's self-confidence, elevate respect from peers, and protect him from bullying. These values and skills were reinforced by local community stories and in radio and television programming.¹⁵

Many Americans now consider such teachings to be ignorant, old-fashioned, or even brutal.¹⁶ Indeed, American support for even occasional spanking by parents has significantly declined in recent decades, particularly among women.¹⁷ Interestingly, this trend coincides with significant changes in family structure in the U.S.: the number of children under age 18 living in single-parent (no father) homes jumped from 23% to 36% between 1980 and 2012.¹⁸ Rather than physical defense tactics taught at home, today's promoted strategies to deter bullying focus primarily on parental and school-based development of a child's social-emotional skills.¹⁹ For example, Project SEATBELT (Safe Environments Achieved Through Bullying prevention, Engagement, Leadership, and Teaching respect) aims to help children "become resilient, respectful, and responsible and prevent their involvement in bullying, either as the child

¹³ *Effects of Bullying*, STOP BULLYING, <http://www.stopbullying.gov/at-risk/effects> (last visited July 11, 2014).

¹⁴ Justin Case, *Bullying Prevention: The Old Fashioned Way*, MONT. PIONEER, <http://www.mtpioneer.com/2011-April-bullying-prevention.html> (last visited July 10, 2014).

¹⁵ *E.g.*, *Little House on the Prairie: The Bully Boys* (Paramount Studios, NBC television broadcast Dec. 6, 1976).

¹⁶ Sue Edgerley, *Teaching Kids to Protect Themselves*, 5 KEYS PARENTING (Sept. 24, 2010), <http://5keysparenting.com/blog/2010/09/teaching-kids-to-protect-themselves>.

¹⁷ *Attitudes Toward Spanking*, CHILD TRENDS, http://www.childtrends.org/wp-content/uploads/2012/10/51_Attitudes_Toward_Spanking.pdf (last updated Apr. 2013).

¹⁸ *Family Structure and Children's Living Arrangements*, FED. INTERAGENCY F. ON CHILD AND FAM. STAT., <http://www.childstats.gov/americaschildren/famsoc1.asp> (last visited July 11, 2014).

¹⁹ *E.g.*, Laura Markham, *10 Ways to Bully-Proof Your Child*, AHA! PARENTING, http://www.ahaparenting.com/parenting-tools/raise-great-kids/socially-intelligent-child/Helping_Bullied_Child (last visited July 11, 2014).

who bullies or the child who is bullied, or both.”²⁰ Other programs focus on making systematic or cultural changes within children’s social groups to prevent bullying²¹ rather than training one child at a time.

Some critics believe these newer, “soft” psychological approaches to bullying address victims’ feelings, but fail to address the root of the bullying problem. In other words, social-emotional approaches teach children to be “good victims” instead of deterring bullies.²² Thus, in an interesting adaptation of the older family-based coping strategies, some private organizations are attempting to prevent bullying by enhancing potential victims’ ability to physically protect themselves. For example, the Gracie Bullyproof system, run by a family of long-standing *jiu-jitsu* masters, trains children to understand appropriate rules of engagement and to use non-violent techniques to neutralize opponents who have physically assaulted them.²³ The Gracies believe “there are only three solutions to bullying: bullyproof the victims, bullyproof the bullies, and bullyproof the schools.”²⁴ A featured story describes a bullied 12-year-old who completed a one-week Gracie Bullyproof program, then returned to school and put his training into practice once he was bullied again: “He went through the entire cycle of standing up for himself verbally first, then physically, but not violently. He kept it humble, and allowed the bully to save face. No punches. No kicks. He just held him with Gracie *jiu-jitsu*. It’s the gentle way.”²⁵

Although less publically visible and therefore more difficult to measure than organizational training, parents may still punish their children for engaging in bullying. Creative or unusual punishments sometimes garner news attention, as in a widely publicized U.S. incident in 2013, when parents learned their 10-year-old daughter was bullying

²⁰ *What is Seatbelt?*, RFK CENTER, <http://bullying.rfkcenter.org/what-is-seatbelt> (last visited July 12, 2014).

²¹ *E.g., About the Bully Project*, THE BULLY PROJECT, http://www.thebullyproject.com/about_the_bully_project (last visited July 9, 2014); NO BULLY, <http://nobully.com> (last visited July 11, 2014); *PACER’s National Bullying Prevention Center*, PACER CENTER, <http://www.pacer.org/bullying/about> (last visited July 11, 2014).

²² Elisabeth Wilkins, *School Bullies: How the Parents of One Child are Fighting back*, EMPOWERING PARENTS, <http://www.empoweringparents.com/blog/bullying/school-bullies-how-the-parents-of-one-child-are-fighting-back/> (last visited July 12, 2014).

²³ GRACIE BULLYPROOF, <https://www.graciekids.com> (last visited July 10, 2014).

²⁴ *Id.*; see also *Gracie Bullyproof*, GRACIE JIU-JITSU ACAD., http://www.gracieacademy.com/bully_proof.asp (last visited July 11, 2014); Steve Henson, *Bullying Victims Fight back with Help from Brazilian Jiu-Jitsu Royalty*, THE POST GAME (Aug. 24, 2011, 1:17 AM), <http://www.thepostgame.com/features/201108/real-it-gets-victims-schoolyard-bullying-can-fight-back-help-ufc-royalty>.

²⁵ Henson, *supra* note 24.

another child because of her unstylish clothing.²⁶ The parents then forced their daughter to wear unattractive, second-hand clothing to school; within two days, she demonstrated remorse for bullying and showed empathy for the other girl.²⁷

III. U.S. SCHOOL PRACTICES AS A DETERRENT TO TRADITIONAL BULLYING

Bullying can occur nearly anywhere that people interact, but among children it occurs most frequently in school,²⁸ especially in poorly supervised areas such as washrooms, hallways, buses, and locker rooms.²⁹ Schools that lack structured adult supervision, where teachers and students are indifferent to bullying, or where few rules exist to deter bullying are particularly likely to foster bullying behavior.³⁰

Earlier in U.S. history and in other countries, corporal punishment was a common consequence for bullying and other misbehavior, both at the family and state public school levels.³¹ As suggested above, this practice has been falling out of favor.³² Further, in the case of bullying, the decline in corporal punishment by parents appears to coincide with cultural changes in understanding the state's increased authority in cases of delinquency.³³ Although corporal punishment is still legal from a federal perspective,³⁴ thirty-one states have banned corporal punishment in public schools³⁵ and two states have banned it in private schools.³⁶ In

²⁶ Brittany Green-Miner & Caroline Connolly, *Thrift Shop Clothes Punishment for Bullying Tween Gets Mixed Reviews*, FOX 13 NEWS (May 21, 2013), <http://fox13now.com/2013/05/21/ugly-clothes-punishment-for-bullying-tween-gets-mixed-reviews/>.

²⁷ *Id.*

²⁸ *Cyber / Bullying Statistics*, STAT. BRAIN, <http://www.statisticbrain.com/cyber-bullying-statistics> (last visited July 11, 2014).

²⁹ *Facts About Bullying*, BULLYING PREVENTION PROGRAM, <http://bullyfree.com/free-resources/facts-about-bullying> (last visited July 11, 2014).

³⁰ *Id.* (citing ALLAN L. BEANE, *PROTECT YOUR CHILD FROM BULLYING: EXPERT ADVICE TO HELP YOU RECOGNIZE, PREVENT, AND STOP BULLYING BEFORE YOUR CHILD GETS HURT* (Jossey-Bass 2008)).

³¹ *E.g.*, Allan L. Patenaude, *History of the Treatment of and Attitudes Towards Children*, in *HANDBOOK OF JUVENILE JUSTICE: THEORY AND PRACTICE* 3, 3–30 (Barbara A. Sims & Pamela Preston eds., CRC Press 2006), available at http://www.academia.edu/1004684/History_of_the_Treatment_of_and_Attitudes_toward_Children.

³² *E.g.*, Child Trends, *supra* note 17.

³³ Patenaude, *supra* note 31.

³⁴ C. Farrell, *Corporal Punishment in U.S. Schools*, WORLD CORPORAL PUNISHMENT RES., <http://www.corpun.com/counuss.htm> (last visited July 11, 2014).

³⁵ *U.S.: Corporal Punishment and Paddling Statistics by State and Race*, CENTER FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com/index.php?page=statesbanning> (last visited July 12, 2014).

³⁶ C. Farrell, *Country Files - Index*, WORLD CORPORAL PUNISHMENT RES., <http://www.corpun.com/rules2.htm> (last visited July 11, 2014).

states where corporal punishment is not banned, it is usually carried out by an administrator or athletics team coach via a wooden paddle applied two or three times to the clothed buttocks.³⁷

U.S. schools without legal recourse to corporal punishment have tried other strategies to deter increasing rates of bullying. Some schools, especially in crime-ridden urban areas, initially reacted by installing security systems or guards to monitor hallways.³⁸ As these kinds of measures proved insufficient, many schools have taken pro-active steps to deter bullying. These include adopting clear anti-bullying policies to formally communicate that bullying is not tolerated; the most effective policies include clear definitions of bullying, a code of conduct, and a bullying reporting system.³⁹ Schools may also focus on the creation of a safe, inclusive school climate; enhanced communication among stakeholders (faculty, parents, etc.); the integration of anti-bullying materials into the school's curriculum; and the development of activities that enhance appropriate intervention skills.⁴⁰ In addition, teachers are trained to (re-)establish themselves as visible authority figures who actively promote positive behaviors, intervene immediately when bullying is observed, and communicate with parents about bullying behaviors.⁴¹ Schools may also offer confidential counseling for bullies and victims; provide teacher and staff training to enhance sensitivity to students' emotional needs; and install closed-circuit security cameras to enhance adult supervision of school grounds.

In some areas of the U.S., school districts may be fined or receive other civil law penalties if they allow specific kinds of bullying.⁴² As a result, some schools have promoted "zero tolerance" policies in which pre-determined and often serious consequences (e.g., suspension, expulsion) attend to specific rule violations.⁴³ These policies are intended to deter

³⁷ *Id.*

³⁸ Andrea Cohn & Andrea Canter, *Bullying: Facts for Schools and Parents*, NASP RESOURCES (Oct. 7, 2003), http://www.nasponline.org/resources/factsheets/bullying_fs.aspx.

³⁹ Rana Sampson, *Bullying in Schools*, U.S. DEPT OF JUSTICE PROBLEM-ORIENTED GUIDES FOR POLICE SER. NO. 12 (Mar. 22, 2002), available at <http://www.cops.usdoj.gov/pdf/e12011405.pdf>.

⁴⁰ *Prevention at School*, STOP BULLYING, <http://www.stopbullying.gov/prevention/at-school/index.html> (last visited July 11, 2014).

⁴¹ *Tips for Teachers and Staff to Address Bullying*, VIOLENCE PREVENTION WORKS, http://www.violencepreventionworks.org/public/bullying_tips_for_teachers.page (last visited July 12, 2014).

⁴² Thomson Reuters, *Bullying*, FIND LAW, <http://education.findlaw.com/student-conduct-and-discipline/bullying.html> (last visited July 10, 2014).

⁴³ Christopher Boccanfuso & Megan Kuhfeld, *Multiple Responses, Promising Results: Evidence-Based, Non-Punitive Alternatives to Zero Tolerance*, CHILD TRENDS (Mar. 2011), http://www.childtrends.org/wp-content/uploads/2011/03/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf; *Frequently Asked Questions*, NO BULLY, <http://nobully.com/about-bullying/frequently-asked-questions> (last visited July 11, 2014).

bullying and other rule violations through fear of clear consequences. However, critics point to research showing that zero tolerance policies have little effect on deterring bullying and may instead just deter peer reporting of bullying.⁴⁴ A significant problem with zero-tolerance policies is that every involved student (whether bully or victim) may be equally punished because of the difficulty in determining responsibility.⁴⁵ In addition, punishments for bullying are exclusionary; they focus on removing the bully from school activities or school grounds for a specified period of time⁴⁶ rather than teaching more appropriate behavior toward peers.

Thus, in an effort to be more sensitive to situation-specific factors, some schools have enacted punishments that “fit the crime.” Rather than just relying on suspension of privileges or school activities for rule violators, punishments may now include relevant community service. Mandatory counseling is another possibility for bullies, which is intended to help bullies take responsibility for their actions, make amends with the victims, and develop empathy toward others.⁴⁷

Despite all these efforts, research suggests that students at schools with anti-bullying programs may experience *more* bullying than those in schools without such programs.⁴⁸ Further frustrating the efforts of schools, child bullying often happens outside of a school’s direct jurisdiction (*e.g.*, bus stops, parks), and some bullying behaviors appear to overlap with violations of civil or criminal laws. Because schools cannot be held responsible for preventing and punishing every incident of child bullying, the legal system must sometimes become involved.

IV. U.S. LEGAL ACTION AGAINST TRADITIONAL BULLYING

On January 14, 2010, fifteen-year-old Phoebe Prince of Massachusetts committed suicide after months of bullying by several classmates.⁴⁹ On March 29, 2010, the local prosecutor brought multiple felony and misdemeanor criminal charges against five of the involved teenagers, who were charged as adults.⁵⁰ The specific charges included

⁴⁴ Boccanfuso, *supra* note 43; Reuters, *supra* note 42; Cohn, *supra* note 38.

⁴⁵ Henson, *supra* note 24.

⁴⁶ Reuters, *supra* note 42; Cohn, *supra* note 38.

⁴⁷ Evelyn Beck, *If Your Child is the Bully*, SCH. FAM., <http://www.schoolfamily.com/school-family-articles/article/819-if-your-child-is-the-bully> (last visited July 9, 2014).

⁴⁸ Christopher J. Ferguson, *Anti-Bullying Programs Could be a Waste of Time*, TIME (Oct. 10, 2013), <http://ideas.time.com/2013/10/10/anti-bullying-programs-could-be-a-waste-of-time>.

⁴⁹ Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate’s Suicide*, N.Y. TIMES (Mar. 29, 2010), <http://www.nytimes.com/2010/03/30/us/30bully.html?pagewanted=all&r=0>.

⁵⁰ *Id.*

statutory rape, assault, violation of civil rights resulting in injury, criminal harassment, disturbance of a school assembly, and stalking.⁵¹ Phoebe's case also acted as an impetus for statewide anti-bullying legislation that was enacted on May 3, 2010.⁵² Rather than criminalizing bullying, the Massachusetts statute focused on school anti-bullying policy implementation.⁵³

The Phoebe Prince case exemplifies what often happens in serious bullying situations. After months of torment and abuse, a young person commits suicide and then authorities act by criminally prosecuting the perpetrators. This is often followed by calls for and enactment of legislation to prevent future tragedies.⁵⁴

A. U.S. Criminal Legal Action

Due to the potentially grave consequences of bullying, as seen in Phoebe Prince's case, police and prosecutors are sometimes called upon to criminally prosecute the perpetrators. A number of criminal charges may be appropriate, such as battery, assault, or stalking. Criminal battery is generally defined as the "intentional, unprivileged, unjustified touching of another with such violence that bodily harm is likely to result."⁵⁵ For example, a criminal battery charge may be appropriate when an alleged bully punches, pushes, or otherwise makes physical contact with a victim. Similarly, criminal assault refers to an attempted battery or putting another in fear of an immediately threatened battery.⁵⁶ An example of criminal assault would be a bully throwing a rock or other object at a victim and missing the victim, or a bully raising his hand against a victim and threatening to punch the victim in the face. Stalking is slightly different from assault and battery: there does not have to be any physical contact with the victim or putting a victim in fear of physical contact, and any threats of harm would not have to be immediate. A typical stalking criminal charge can be found in the State of Massachusetts, which criminalizes the actions of a person who:

⁵¹ *Id.*

⁵² *Id.*

⁵³ Noah Bierman, *Grieving Family by His Side, Governor Signs Legislation*, BOSTON GLOBE (May 4, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/05/04/grieving_family_by_his_side_governor_signs_legislation; Editorial, *Criminal Charges Mark a New Seriousness About Bullying*, BOSTON GLOBE (March 30, 2010), http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/03/30/criminal_charges_mark_a_new_seriousness_about_bullying.

⁵⁴ Bierman, *supra* note 53; *Criminal Charges*, *supra* note 53.

⁵⁵ Commonwealth v. Dixon, 614 N.E.2d 1027 (Mass. App. 1993).

⁵⁶ Commonwealth v. Gorassi, 733 N.E.2d 106 (Mass. 2000).

(1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury.⁵⁷

An example of stalking would be a bully or group of bullies following a victim home from school every day for a week while threatening to harm the victim sometime in the future.

If criminal charges are proven beyond a reasonable doubt and the perpetrator is convicted, he or she can face consequences such as incarceration, probation, community service, court-ordered counseling, or some combination of these.⁵⁸

Besides criminal charges, another option for bullying victims and their parents is obtaining a protective/restraining order from the courts. An order can be very broad, restricting any contact between the victim and the perpetrator, or more narrowly tailored to the particular situation. Although the issuance of such an order is a civil action, the violation of such an order carries potential criminal sanctions for contempt of court and therefore may deter future bullying behavior.⁵⁹

B. U.S. Civil Legal Action

In addition to criminal sanctions that an alleged bully might face, he or she may also be civilly liable to the victim under the doctrines of civil battery, civil assault, or intentional infliction of emotional distress (IIED). These legal actions are collectively referred to as torts, which are wrongful actions that harm others.⁶⁰ The differences between civil and criminal actions may make torts more appealing to victims. One major difference between criminal and civil actions is the parties who are involved in the case. In a criminal action, the matter is prosecuted by the State against the alleged perpetrator, who becomes the criminal defendant. The State prosecutor has wide latitude in determining whether, when, and how to proceed against the criminal defendant. The State prosecutor represents the State against the defendant; and the victim's role is that of a witness for the prosecution and not as a party.

⁵⁷ MASS. ANN. LAWS ch. 265, § 43 (LexisNexis 2014).

⁵⁸ Thomson Reuters, *Beyond a Reasonable Doubt*, FIND LAW, <http://dictionary.findlaw.com/definition/beyond-a-reasonable-doubt.html> (last visited July 9, 2014); *Criminal Punishment*, USLAW.COM, http://www.uslaw.com/us_law_article.php?a=249 (last visited July 13, 2014).

⁵⁹ See MASS. ANN. LAWS ch. 258E, § 3 (LexisNexis 2014).

⁶⁰ *Tort*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/tort> (last visited July 11, 2014).

In contrast, in a civil action, the plaintiff/victim is a party to the case and brings a civil lawsuit against the perpetrator (civil defendant(s)).⁶¹ Moreover, in a civil action the plaintiff/victim decides whether, when, and how to proceed against the defendant. An additional difference between criminal and civil actions is the lower burden of proof for the latter. For civil actions, the burden of proof is a “preponderance of the evidence” standard. Roughly speaking, this means that in order for the plaintiff to prevail, she must convince the trier of fact (judge or jury) that at least 51% of the evidence weighs in her favor.⁶² In contrast, in a criminal action, the burden of proof used is a “beyond a reasonable doubt” standard. This concept is usually not described in percentages, but it roughly means that a State prosecutor must convince the trier of fact that approximately 90% of the evidence weighs in her favor.

A third major difference is that a civil tort defendant, if found civilly liable, is typically ordered by the court to pay monetary damages to the plaintiff/victim rather than facing criminal sanctions.⁶³ In short, civil suits provide the victim complete control in whether, when, and how to proceed; the likelihood of prevailing in a civil suit is greater due to the lower burden of proof; and any penalties the court may order are in the form of monetary compensation to the victim. However, as discussed below, there are some other significant drawbacks to civil actions.

The individual States vary in their formulations of the civil battery, civil assault and IIED causes of actions, but the Restatement (Second) of Torts provides a helpful summary of these rules.⁶⁴ The focus of civil battery, like criminal battery, is an intentional harmful contact with another:

An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.⁶⁵

With regard to civil assault, similarly to criminal assault:

an actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the

⁶¹ Thomson Reuters, *Civil Case*, FIND LAW, <http://dictionary.findlaw.com/definition/civil-case.html> (last visited Mar. 16, 2015).

⁶² *Preponderance of the Evidence*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited July 11, 2014).

⁶³ *Damages*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/damages> (last visited July 11, 2014).

⁶⁴ *Zimmerman's Research Guide*, LEXISNEXIS, <http://law.lexisnexis.com/infopro/zimmermans/dispatch.aspx?z=1896> (last visited July 12, 2014); see RESTATEMENT (SECOND) OF TORTS (1965).

⁶⁵ RESTATEMENT (SECOND) OF TORTS § 13 (1965).

other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.⁶⁶

Lastly, IIED refers to the infliction of severe emotional distress. More specifically, a IIED case may be brought against “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”⁶⁷ Here is an example. Alice (A) is invited to a swimming party at the home of her classmate. Bart (B) gives A a bathing suit which he knows will dissolve in water. The bathing suit does dissolve while A is swimming, leaving her naked in the presence of her classmates. A suffers extreme embarrassment, shame, and humiliation and B is subject to liability to A for her emotional distress.⁶⁸

One of the main difficulties with holding alleged bullies civilly liable is that although they may meet the requirements of the specific cause of action (i.e., battery, assault or IIED), they may be unable to pay monetary damages to the victim. These so-called “judgment proof defendants” are legally liable but have little or no resources to pay the civil court judgment.⁶⁹

In addition, it is costly and time-consuming for victims to pursue civil legal actions. There are, however, narrow circumstances in which the parents of the alleged bullies (or the schools where the bullying occurred) may be held liable for the alleged bully’s actions. Under the Restatement (Second) of Torts the general rule is, “there is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another.”⁷⁰ However, parents may be held liable for failure to exercise control over their children under the following provision:

a parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.⁷¹

This rule makes parents responsible for the conduct of their children in so far as they have the ability to control their behavior and the opportunity and knowledge of the necessity of doing so. For example,

⁶⁶ *Id.* § 21.

⁶⁷ *Id.* § 46.

⁶⁸ *Id.*

⁶⁹ *Judgment-Proof*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/judgment-proof> (last visited July 11, 2014).

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 315 (1965).

⁷¹ *Id.* § 316.

Albert (A) is informed that his twelve-year-old child, Charlie (C), is shooting at a target in the street with a .22 caliber rifle, in a manner, which endangers the safety of those using the street. A fails to take the rifle away from C or take any other action. The child unintentionally shoots Bernice (B), a pedestrian, in the leg. A is therefore subject to liability to B.⁷²

Similarly, under the limited circumstances described in the Restatement (Second) of Torts, section 320, schools may be held liable for failure to control the actions of alleged bullies against their victims.⁷³ The main idea of this provision is that when teachers and school administrators take custody of children in a school setting, they deprive those children of the normal protection of their parents. As a result, the teachers and administrators are required to “exercise reasonable care” to protect that child from other children in the school in so far as they have the ability to control their behavior and “the opportunity and knowledge of the necessity of doing so.”⁷⁴

V. CYBERBULLYING IN THE U.S.

For almost one year, a group of middle-school girls tormented Rebecca Sedgewick, a twelve-year old Florida girl. A fourteen-year-old girl allegedly viewed Rebecca as a competitor for a particular boy’s attention, so she began verbally and physically threatening Rebecca; she also instigated an online harassment campaign against Rebecca that involved as many as fifteen other middle-school girls. They repeatedly sent Rebecca online messages such as, “You should die” and “Why don’t you go kill yourself.” Rebecca left school, changed one of her online screen names to “That Dead Girl,” and sent the message, “I’m jumping” to her friend in North Carolina. Later that day she jumped to her death from a nearby tower.⁷⁵ The county sheriff arrested the fourteen-year old and another twelve-year-old girl involved in the incident and charged them with felony aggravated stalking. However, the prosecutor later dropped the charges

⁷² *Id.*

⁷³ *See id.* § 320 (“One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.”).

⁷⁴ *Id.*

⁷⁵ Lizette Alvarez, *Girl’s Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES (Sept. 13, 2013), <http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html>.

due to “insufficient evidence.”⁷⁶ Rebecca’s mother, Tricia Norman, and her attorney, Matt Morgan, have filed a wrongful death civil law suit against everyone involved in the incident. In addition, they are lobbying for tougher anti-bullying legislation at both the state and federal level. The proposed state law would require repeat bullies to serve time in a juvenile detention facility. They are also supporting a federal law that would require schools that receive public financing to implement specific procedures to combat bullying.⁷⁷ Rebecca’s case is just one of many tragedies related to the so-called cyberbullying phenomenon in the United States.

The popularity of and easy access to mobile phones, computers, other electronic devices, and social media sites have led to a significant increase in cyberbullying. In addition to the range of devices used in cyberbullying, it also encompasses an array of forums (e.g., e-mail, texts, chats, social media sites) and forms: circulating rumors by e-mail or posts on social media sites; sending cruel e-mails or text messages; posting fake personal profiles and disseminating embarrassing pictures and videos of the victim. What accounts for the appeal of cyberbullying? Children who may not have bullied in face-to-face interactions no longer have the traditional constraints of location, time of day or week, or fear of nearby authorities⁷⁸ if they have unsupervised access to communication technology. Cyberbullies can taunt, shame and threaten from a distance, with far less physical risk than in traditional bullying. It also allows abusive text and images to be seen by a much greater number of people who are widely distributed both geographically and temporally; insults and cruel comments may be seen days, months, or even years after their original posting and by people around the globe.⁷⁹ Phones and the internet enable viewers to easily re-post or share information with others inside or outside the community of the bully or the victim, thus repeating the offense to the victim and magnifying its negative effects.⁸⁰ Indeed, some now believe cyberbullying is a contributing factor in many U.S. school shootings and

⁷⁶ Elliott Rodriguez, *Mother of Bullied Fla. Girl Pushes for Tougher Laws*, CBS MIAMI (Nov. 25, 2013, 5:28 PM), <http://miami.cbslocal.com/2013/11/25/mother-of-bullied-fla-girl-pushes-for-tougher-laws>.

⁷⁷ *Id.*; *Wrongful Death Suits Planned Against Bullies of Florida Girl*, FDBR, <http://www.miamipersonalinjuryattorneyfl.com/2013/12/wrongful-death-suits-planned-against-bullies-of-florida-girl.shtml> (last visited July 12, 2014).

⁷⁸ Susan Swearer, *Bullying: What Parents, Teachers Can Do to Stop It*, AM. PSYCHOL. ASS’N (Apr. 2, 2010), <https://www.apa.org/news/press/releases/2010/04/bullying.aspx>.

⁷⁹ Austl. Human Rights Comm’n, *Children and Young People, VIOLENCE, HARASSMENT AND BULLYING*, <https://bullying.humanrights.gov.au/children-section1> (last visited July 9, 2014).

⁸⁰ Robert Slonje et al., *The Nature of Cyberbullying, and Strategies for Prevention*, 29(1) COMPUTERS IN HUM. BEHAV. 26, 26–32 (2013), available at <http://www.west-info.eu/swedish-initiative-addresses-cyber-bullying/slonje-cyberbullying>.

teenage suicides.⁸¹ The term “bullycide” has been coined to describe suicide that results from being bullied.⁸²

A. U.S. Legal System Response to Cyberbullying

As a response to high-profile bullying cases (like Rebecca and Phoebe’s, above), forty-nine out of fifty U.S. states have enacted anti-bullying legislation; all of these require schools to enact anti-bullying policies. Eighteen of these states have statutory provisions specifically dealing with cyberbullying, and forty-two states have legislative provisions that somehow address electronic harassment or cyberbullying. Twelve of these states provide for criminal sanctions for cyberbullying or electronic harassment. Additionally, school-administered sanctions against bullies are provided for in the laws of forty-four states.⁸³ In short, cyberbullying is seeing increased attention by the legal system.

1. U.S. Criminal Cyberbullying Laws

A recent example of a state criminal law that specifically targets cyberbullying can be found in Louisiana. The Louisiana Code specifically defines cyberbullying as “the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.”⁸⁴ It further defines such transmission as “any communication of any kind made through the use of a computer online service, internet service, or any other means of electronic communication, including but not limited to a local bulletin board service, internet chat room, electronic mail, or online messaging service.” The potential penalties for cyberbullying in Louisiana are a maximum \$500 fine and/or six months in jail.⁸⁵

Because cyberbully laws criminalize speech, the free speech protection of the U.S. Constitution is invoked. The First Amendment prohibits the making of any law “abridging the freedom of speech.”⁸⁶ Through the incorporation doctrine, the courts have held that this protection applies to both the federal government and the states.⁸⁷ The

⁸¹ *Id.*; *School Bullying Statistics*, BULLYING STAT., <http://www.bullyingstatistics.org/content/school-bullying-statistics.html> (last visited July 11, 2014).

⁸² *Bullycide*, BULLYING STAT., <http://www.bullyingstatistics.org/content/bullycide.html> (last visited July 15, 2014).

⁸³ Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENTER (Jan. 2015), <http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf>.

⁸⁴ LA. REV. STAT. ANN. § 14:40.7(A) (2010).

⁸⁵ *Id.*

⁸⁶ U.S. CONST. amend. I.

⁸⁷ *Gitlow v. New York*, 268 U.S. 652 (1925).

U.S. Supreme Court has held that a few “well-defined and narrowly limited classes of speech” generally are excluded from First Amendment protection.⁸⁸ The clearest example of such limited classes includes a threat or “fighting words,” defined by the U.S. Supreme Court as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁸⁹ Thus, this class of speech is excluded because it is particularly likely to provoke disorder and violence.⁹⁰ As a result, when legislators draft and enact anti-cyberbullying legislation, they must be careful to closely follow the Supreme Court’s definition of a threat or “fighting words” so as not to run afoul of the Constitution.

2. U.S. Cyberbullying Civil Action

Just as civil causes of action are available to victims of traditional bullying, there are also several causes of action available to cyberbullying victims. These actions include negligent entrustment, IIED, invasion of privacy, and defamation.

According to the Restatement, the tort of negligent entrustment involves permitting:

a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.⁹¹

For example, Arthur (A) permits Betty (B) to drive his car. B is a person who, to A’s knowledge, has never driven a car before. B’s inexperience causes a collision in which Charlene (C) is hurt. A is therefore negligent toward C. Or similarly, A lends his gun to Bill (B), whom he knows to be intoxicated. B’s intoxicated condition leads him to harm Charlie (C) by accidentally shooting him. A is negligent toward C.⁹² An analogy to cyberbullying would be an adult permitting a child to use a computer and/or social media, such as Facebook, to harm another child.

Another potential civil action available to victims of cyberbullying is IIED. As mentioned above, the focus of IIED is the infliction of severe emotional distress through outrageous behavior.⁹³ For example, as a practical joke, Alice (A) falsely tells Bernice (B) that her mother has been badly injured in an accident and is in the hospital with both legs broken.

⁸⁸ U.S. v. Stevens, 559 U.S. 460, 468–69 (2010) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

⁸⁹ See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); *Chaplinsky*, 315 U.S. at 571–72.

⁹⁰ *Black*, 538 U.S. at 359–60; *Chaplinsky*, 315 U.S. at 573.

⁹¹ RESTATEMENT (SECOND) OF TORTS § 308 (1965).

⁹² *Id.*

⁹³ *Id.* § 46.

B suffers severe emotional distress. A is therefore subject to liability to B for her emotional distress. If that then causes shock or other resulting illness, A is subject to liability to B for her illness.⁹⁴ However, insulting conduct in itself is generally insufficient to be held liable for IIED. For example, Albert (A) makes a telephone call but is unable to get the number he wanted from the telephone operator, Bernice (B). In the course of an altercation with B, A calls B a god-damned liar, and says if he were there he would break her god-damned neck. B suffers severe emotional distress, broods over the incident, is unable to sleep, and is made ill. A's conduct, although insulting, is not so outrageous or extreme as to make A liable to B.⁹⁵ Thus, discerning insult from outrageous conduct is an important facet of IIED cases.

Yet another potential civil action available to cyberbullying victims is invasion of privacy. The right of privacy can be defined simply as the right to be left alone. The invasion of the right of privacy cause of action has developed into four distinct wrongs: (a) the "unreasonable intrusion upon the seclusion of another"; (b) the "appropriation of the other's name or likeness"; (c) "unreasonable publicity given to the other's private life"; and (d) "publicity that unreasonably places the other in a false light before the public."⁹⁶ Often, a person's right to privacy can be invaded by an act or series of acts that constitute two or more of these four wrongs, though the victim will only be able to have one recovery of damages.⁹⁷ For example, Albert (A) secretly records Betty (B) having intimate relations with her boyfriend in her bedroom. A publishes the video on the internet for sale along with false statements about B that would be highly objectionable to a reasonable person. A is therefore subject to liability to B for invasion of privacy by (a) intrusion upon B's seclusion; by (b) the appropriation of her likeness; by (c) giving publicity to B's private intimate relations; and by (d) giving publicity to B that places her in a false light before the public. B may proceed upon any or all of these grounds, but she may have only one recovery of damages.

Defamation may be another civil cause of action available to cyberbullying victims. Generally, to recover for defamation, a victim of cyberbullying must prove that the alleged cyberbully: "1. published a statement; 2. that was defamatory concerning the victim; 3. while acting with at least negligence regarding the truth of the statement; and 4. that the victim suffered damages as a result."⁹⁸ Generally speaking, the second

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* § 652A.

⁹⁷ *Id.* § 46.

⁹⁸ See Adrienne Morris, *Cyberbullying in Texas: Reform is Necessary to Keep the Virtual Playground Safe*, 63 BAYLOR L. REV. 498, 501 (2011), available at <http://www.baylor.edu/content/services/document.php/144792.pdf>.

element is the most difficult to prove because the plaintiff must show that the statement is actually defamatory, meaning that the statement was delivered as an actual fact, rather than only as an opinion.⁹⁹ U.S. Courts look at four different factors to determine what the connotation of a statement was: “(1) the common usage or meaning of the specific language of the challenged statement itself; (2) whether the statement is capable of being objectively characterized as true or false; (3) the context in which the statement was made; and (4) the broader context or setting in which the statement appears.”¹⁰⁰ A challenge for cyberbullying cases is the difficulty in showing whether statements can be “objectively characterized as being true or false.” For example, if Alice posts a message on Facebook stating that Betty is a “nasty whore,” it would be difficult to characterize this statement as objectively true or false (rather than a statement of opinion) because there is no objective definition of the term “nasty whore.” The court determines whether a statement is fact or opinion as a question of law. As a result, a defamation cause of action will not survive a cyberbullying victim’s motion for summary judgment if the court finds that statements made by a cyberbully are opinions rather than statements of fact.¹⁰¹

VI. CONCLUSIONS

Bullying and related forms of violence and harassment are caused by a complex interplay of social-cultural, economic, family, peer, and individual factors.¹⁰² The rapid rise of cyberbullying, in particular, is obviously due to the rapid advancement and availability of social communication technology, but other important factors must be considered as well. For example, sociological factors (beyond the expectation for near-constant access to communication technology) must include the cultural erosion of an agreed-upon standard for social morality.¹⁰³ Family-related factors include changes in adult attention, supervision, and moral education of children due to increased single-parent family structures, increased hours at work and changing disciplinary practices. Finally, bullies may themselves be victims of abuse

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *E.g.*, Austl. Human Rights Comm’n, *supra* note 79; *Why Do Kids Bully?*, EDUCATION.COM (July 15, 2013), <http://www.education.com/reference/article/why-do-kids-bully>.

¹⁰³ *E.g.*, CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (Harvard Univ. Press 1992).

at home or elsewhere, and they may thereby have learned that social power can be gained through harming or controlling others.¹⁰⁴

With the increase in single-parent or other non-traditional family structures, the routines and values that have acculturated children towards socially-acceptable behavior have eroded. This change then pressures schools to take up even greater socialization responsibilities in addition to traditional education. However, few schools are equipped to provide extensive socialization given their already-stretched budgets and tremendous performance demands on teachers. Even so, schools have tried several means of deterring bullying through zero-tolerance policies or programs to foster a positive school climate. However, these kinds of one-size-fits-all approaches may have little effect in deterring complex bullying behavior that is seductively rewarded by social power and easily committed in the nebulous jurisdiction of cyberspace.

Outside of the school environment, a variety of legal tools, both civil and criminal, are available to victims and society to attempt to address bullying. While filing criminal charges against juvenile bullies is very serious, sometimes it may be the only effective legal method to deter further harm. Charges filed early in a bullying situation may have both a specific and general deterrent effect upon bullying behavior. Unfortunately, there are significant challenges to using these tools. Ordinarily, until a situation has reached a crisis point, police and prosecutors often do not get involved in what is perceived as low-priority, “schoolyard” bullying. Therefore, criminal charges are typically invoked only after bullying has resulted in serious injury to the victim or even his/her loss of life. In limited circumstances, schools may be legally responsible for children’s actions, but it is less clear how to assess school responsibility for off-campus bullying or that which happens in cyberspace. In addition to these difficulties, if a criminal charge is pressed in cases involving cyberbullying, then complex issues involving free speech come into play. If the law is not carefully written to comply with narrow exceptions to that right, then an alleged bully would likely be able to escape criminal liability for the charge.

Likewise, civil legal remedies may also be the most plausible legal method for the victim to deter further harm in that the burden of proof is much lower for the plaintiff in a civil action than in a criminal case. Yet, civil remedies also face significant challenges as potential anti-bullying strategies. Pursuing civil litigation against alleged bullies is costly, time-consuming, and even if a victim prevails he/she may not be able to collect monetary damages for the harm caused to him/her. In limited circumstances it may be possible to hold parents responsible for bullies’

¹⁰⁴ *Why do People Bully?*, BULLYING STAT., <http://www.bullyingstatistics.org/content/why-do-people-bully.html> (last visited July 11, 2014).

actions, but in many cases the parents are also judgment proof. For negligent entrustment, unlike a car or a gun, a computer and the words a child bully generates using a computer do not appear to objectively create a risk of harm to anyone (they are “just words”). Similarly, insults delivered via electronic means would likely not be seen as conduct extreme or outrageous enough to allow a victim to prevail under IIED. It would be very difficult for a cyberbullying victim to prevail in a defamation case as well. Many things a cyberbully might say about a victim via social media would likely be characterized as opinions and not statements of fact, thus not meeting the second required element of a defamation action. Invasion of privacy may be a plausible cause of action for a cyberbullying victim as long as he/she could prove that the cyberbully had met one of the four technical grounds.

Certainly we have seen numerous laws, policies, and practices intended to deter bullying, but in isolation these are probably insufficient for significantly decreasing bullying behaviors and their serious costs to victims. Instead, the challenges to the legal system should be redressed through vigorous cooperation of family and schools. That is, increased communication among parents, school personnel, police, and prosecutors about specific bullying cases may facilitate early criminal prosecution in other bullying situations and perhaps prevent serious consequences for many potential victims. Individual/family approaches may include “bullyproof” training for children and careful parental monitoring of children’s internet, social, and media activity. Schools can ban the use of phones on school grounds and on school busses and restrict available internet sites in computer labs. Legislators must continue to craft legal recourses for victims, parents, and schools that complement other avenues of combatting bullying behavior. In short, the legal system should constantly cooperate with family, and schools to overcome its shortcomings and to maximize the prevention and deterrence of both traditional bullying and cyberbullying.

American society has a mixed attitude about children, treating them both as adults whose independence and right to privacy are to be respected and as innocent children who must be protected from all possible injury. As the culture’s values and technology continue to evolve, careful attention must be paid to how these changes directly and indirectly affect our children’s well-being.