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# To Lynch a Child: Bullying and Gender Nonconformity in our Nation's Schools

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# To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools<sup>†</sup>

MICHAEL J. HIGDON<sup>\*</sup>

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“Ignorance is a mighty ugly thing to watch in action.”<sup>1</sup>

## INTRODUCTION

Emmett Till was only fourteen years old when he was taken at gunpoint from his uncle’s home in Mississippi.<sup>2</sup> The next day, his mutilated corpse was found floating in the nearby Tallahatchie River.<sup>3</sup> Although this gruesome crime took place more than fifty years ago, the tragic story of Emmett Till remains a chilling reminder of one of the darker periods in American history: the lynching of African Americans in the American South.<sup>4</sup> So much so, in fact, that one would be hard-pressed to find any discussion of this part of American history without coming across the name of Emmett Till.<sup>5</sup> Likewise, it would be quite difficult to find a

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1. GLORIA NAYLOR, MAMA DAY 179 (1988).

2. See STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL 20 (1991).

3. See *Designed to Inflamm*, JACKSON DAILY NEWS, Sept. 2, 1955, reprinted in THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE 19, 20 (Christopher Metress ed., 2002) (“His body was found in the Tallahatchie River, weighted with a gin fan, a bullet behind one ear and his face badly torn by what must have been a savage beating.”).

4. Indeed, “[t]he lynching of black Americans was chiefly a Southern phenomenon.” PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA, at viii (2003); see also Joseph Edwin Proffit, *Lynching: Its Cause and Cure*, 7 YALE L.J. 264, 264 (1898) (“At present the South and lynch law are synonymous.”).

5. See, e.g., THE COMPANION TO SOUTHERN LITERATURE: THEMES, GENRES, PLACES,

written description of Till's murder that did not use some form of the verb "to lynch." But what exactly do we mean when we say someone was "lynched"? And how is lynching different from a simple murder? Well, one of the primary distinctions is, quite simply, motivation. Specifically, lynchings were typically used as a form of vigilante justice, directed at "an individual who had committed an alleged crime."<sup>6</sup> This definition, of course, raises the question of what crime did Till commit. His offense? He allegedly whistled at a white woman.<sup>7</sup>

The seemingly trivial nature of Till's "crime" demonstrates yet another defining characteristic of lynching: social control. As Professor Roberta Senechal de la Roche explains, lynching is "a process by which people define or respond to deviant behavior."<sup>8</sup> In the American South during this time, lynchings were largely employed to maintain a social hierarchy "in which every white stood above all blacks."<sup>9</sup> Professor Dwight Aarons describes the phenomenon as follows: "[L]ynching and 'lynch law' were vernacular methods of administering justice, which underscored the social control that some whites exercised over the indigenous black population and anyone who was sympathetic to former slaves."<sup>10</sup> Against this backdrop of white supremacy, Till's alleged act of whistling at a white woman was regarded as an egregious violation of "a deadly serious code."<sup>11</sup>

Lynch law then operated as an enforcer of social norms by relying on two elements: fear and community involvement. First, in terms of fear, the act of lynching carried a much deeper meaning than merely punishing a discrete

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PEOPLE, MOVEMENTS, AND MOTIFS 903 (Joseph M. Flora, Lucinda H. MacKethan & Todd Taylor eds., 2002) ("The preoccupation with the murder . . . is especially notable, as depictions of the death of Emmett Till can be found in virtually all literary genres.").

6. DRAY, *supra* note 4, at viii. Or, as history professor Roberta Senechal de la Roche explains, "southern lynching typically was a form of 'popular justice' directed against conduct widely regarded as criminal." Roberta Senechal de la Roche, *The Sociogenesis of Lynching*, in UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 48, 49 (W. Fitzhugh Brundage ed., 1997).

7. *Designed to Inflame*, *supra* note 3, at 20. For an explanation of why Till might have been whistling, see Ronald Turner, Essay, *Remembering Emmett Till*, 38 HOW. L.J. 411, 414 (1995) ("Till had a severe stutter, the aftermath of nonparalytic polio which he had suffered at an early age. . . . [A]s he was instructed to do by his mother, Till whistled when he thought that he would stutter. After whistling, he was able to speak clearly.").

For other "crimes" that could result in a lynching, see DRAY, *supra* note 4, at x (listing some of the proffered justifications for a number of individual lynchings, ranging from serious crimes like murder and rape to such benign "offenses" as "wanting a drink of water," "sassing a white lady," being "found in a white family's room," and "being troublesome.").

8. See Senechal de la Roche, *supra* note 6, at 49.

9. STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930, at 14 (1995).

10. Dwight Aarons, *Reflections on The Killing State: A Cultural Study of the Death Penalty in the Twentieth Century United States?*, 70 TENN. L. REV. 391, 440 (2003). As Professor Aarons points out, "[m]ob lynchings were most likely to occur when southern whites felt threatened by blacks and when other cultural factors, such as economic leverage and social ostracism, could not be used quickly to assuage the perceived threat." *Id.*; see also Proffit, *supra* note 4, at 265 (writing in 1898 that "[t]he white man saw in the negro the destroying instrument of his political dominance").

11. Turner, *supra* note 7, at 416.

individual (or group of individuals) for a specific act of wrongdoing. Instead, lynchings also served as a clear warning to others who may be contemplating similar challenges to the prescribed social order: “Lynching’s immediate text sent a message to Black men, women, and children that they lived in peril; that mutilation, burning, mob frenzy, and innocence could combine at any time to produce” a violent death.<sup>12</sup> Further, the threat of lynching was not just limited to deterring specific “crimes” but to any action that threatened white supremacy.<sup>13</sup> Consider, for example, the breadth of the warning issued by J.J. Breland (the attorney who represented Till’s murderers) shortly after Till’s lynching: “There ain’t gonna be no integration . . . There ain’t gonna be no nigger votin’. And the sooner everybody in this country realizes it, the better. If any more pressure is put on us . . . the Tallahatchie River won’t hold all the niggers that’ll be thrown into it.”<sup>14</sup> As you can see, Breland at least hoped that Till’s lynching would go far beyond merely deterring African American men from whistling at white women.

Of course, fear alone would be an insufficient way to enforce social norms (1) if the targets felt as though only a small number of people would ever go so far as to actually carry out such threats; and (2) if the people who made such threats lacked the support of their peers. Lynching, however, effectively took care of both impediments in the degree to which the larger community participated in these horrific acts. Lynchings, as they existed in the American South, were forms of “collective violence” that typically involved the entire community.<sup>15</sup> “Nearly everyone in [the] community [was] welcome to join,” and “people from all walks of life attended and celebrated the lynching of a black accused of a crime.”<sup>16</sup> In fact, even women and children participated in the lynchings of African Americans.<sup>17</sup> Further, children who were present were even “encouraged to participate,”<sup>18</sup> such as in the infamous lynching of Claude Neal where children, some “mere tots,” were seen driving “their weapons [sharpened sticks] deep into the flesh of the dead man.”<sup>19</sup> As Professor Emma Coleman Jordan explains: “Integrating children ensured that the underlying narrative of hatred upon which lynching was based would be carried forward to successive generations.”<sup>20</sup> And, of

12. Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43, 55 (1992).

13. See *supra* note 7.

14. WHITFIELD, *supra* note 2, at 54 (emphasis omitted) (internal quotation marks omitted).

15. MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY 1874–1947*, at 38 (2004) (“As acts of collective violence, lynchings were deeply rooted in the social arrangements of the late nineteenth- and early twentieth-century Midwest, West, and South. Many mob killings were performed or condoned by communities.”).

16. Senechal de la Roche, *supra* note 6, at 51.

17. Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 574 (2003).

18. *Id.* at 565.

19. DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB 138* (2004). For more on the horrific torture and murder of Claude Neal at the hands of an entire community, see generally JAMES R. MCGOVERN, *ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL* (1992).

20. Jordan, *supra* note 17, at 565.

course, community involvement stretched not only to those involved with the lynching act itself, but also to those in the community who stood by quietly while such brutal attacks were carried out.<sup>21</sup> Lynching then helped enforce the prescribed social order not only by explicitly demonstrating the penalty that would befall those who tried to upset the delicate social balance but also by communicating the fact that such penalties had both the support and the active involvement of the larger community.

Fortunately, the community support for lynching began to wane after news of Till's gruesome murder began to circulate.<sup>22</sup> Till's mother had insisted on a public funeral with an open casket so that, in her words, "the world could see what they done to my child."<sup>23</sup> And not only did the world see, but many were outraged at what they saw.<sup>24</sup> Indeed, while some might have previously turned a blind eye to the horrors of Southern lynchings, the torture and murder of a child was much harder to ignore.<sup>25</sup> As such, "[t]he unspeakable horror of Emmett's death caused shock to ripple through the entire nation."<sup>26</sup> So poignant was this tragic story that, for many, the death of Emmett Till served as a call to action. Looking back, scholars now point to how the death of this one child "galvanized a people perched on the fragile border between heroes and fear to courageously pursue meaningful and complete equality."<sup>27</sup> In fact, many of those who would go on to play crucial roles in the civil rights movement would point to the lynching of Emmett Till as inspiration for the vigor of their fight.<sup>28</sup>

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21. See Turner, *supra* note 7, at 421 ("Those seeking to put Till's death in 'perspective' should recognize that the 'blood of Emmett Till was on the hands of every person who watched in malignant silence' as black men were lynched . . .") (quoting Charles Early, *Mother of Teen Slain in '55 Tries to Keep Case Live*, DALL. MORNING NEWS, Dec. 20, 1991, at 16A).

22. See WHITFIELD, *supra* note 2, at 140 (describing the aftermath of the Emmett Till lynching wherein "[t]he old ultra-violence . . . was becoming less impulsive and available, and the vast majority of Southern whites abstained from participation in the brutality that became the price of maintaining segregation" (internal quotation marks omitted)).

23. KARLA FC HOLLOWAY, PASSED ON: AFRICAN AMERICAN MOURNING STORIES: A MEMORIAL 25 (2003) (internal quotation marks omitted). Till's mother would later tell reporters: "Have you ever sent a loved son on vacation and had him returned to you in a pine box, so horribly battered and water-logged that someone needs to tell you this sickening sight is your son,—lynched?" WHITFIELD, *supra* note 2, at 23 (internal quotation marks omitted).

24. See *The Shame of Our Nation*, DAILY WORKER, Sept. 26, 1955, reprinted in THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE, *supra* note 3, at 118 (noting the "universal sense of outrage").

25. After all, human beings tend to be "especially moved by the tragedy of children being killed," with such acts frequently "excit[ing] feelings of moral outrage." CHRISTINE ALDER & KEN POLK, CHILD VICTIMS OF HOMICIDE 1, 17 (2001).

26. Turner, *supra* note 7, at 420 (quoting MICHAEL E. DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM 196 (1993)).

27. *Id.* (quoting DYSON, *supra* note 26, at 196); see also DAVIS W. HOUCK & MATTHEW A. GRINDY, EMMETT TILL AND THE MISSISSIPPI PRESS 161 (2008) ("[T]he Reverend Jesse Jackson asserts that Emmett Till's death was the 'big bang' of the civil-rights movement.").

28. Turner, *supra* note 7, at 420–21 (noting the influence Till's death had on a variety of

Of course, as more individuals became involved in the civil rights movement, more light was shed on the various forms of discrimination that existed. As a result, we soon learned an important lesson about lynching: namely, a person need not suffer physical death to be lynched. For example, many came to understand that the segregation of African American children within Southern school districts provided its own form of lynching.<sup>29</sup> As noted historian and civil rights activist Carter G. Woodson described, “to handicap a student by teaching him that his black face is a curse and that his struggle to change his condition is hopeless is the worst sort of lynching.”<sup>30</sup> Sadly, it was this very lesson that segregation offered African American students. Even if segregation itself did not result in the actual death of school children, the resulting harms were in many ways no less destructive. Even the Supreme Court made note of this harm when it ultimately struck down segregation in *Brown v. Board of Education*: “To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>31</sup> Professor Pamela Smith perhaps best describes the impact segregation had on these children: “These children . . . were truly lynched spiritually, emotionally, and mentally.”<sup>32</sup>

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What then is my point in resurrecting the story of Emmett Till and the way in which his lynching influenced the civil rights era? My purpose is twofold. I want first to highlight how far we have come as a nation and a legal community in the way in which we treat children. Indeed, today most of us would agree that children, as “the most vulnerable of people,”<sup>33</sup> deserve our utmost protection. And, just as we would not tolerate the physical lynching of a child today for violating a social norm, so too must we remain guarded against other social constructs like segregation, which, although not resulting in death, nonetheless are so destructive a force as to result in a child’s virtual lynching. It is this need for vigilance that leads me to my second, more specific purpose. Today, in schools across this country, we are allowing a number of children to be lynched at the hands of school bullies. Almost all children are teased of course, but a somewhat smaller percentage is actually bullied.<sup>34</sup> However, an even smaller percentage still becomes persistent victims of bullying behavior.<sup>35</sup> The focus of this Article is that latter category of

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civil rights leaders, including Rosa Parks, Medgar Evers, and Martin Luther King, Jr.).

29. CARTER GODWIN WOODSON, *THE MIS-EDUCATION OF THE NEGRO* 8 (2010) (“This crusade is much more important than the anti-lynching movement, because there would be no lynching if it did not start in the schoolroom.”).

30. *Id.*

31. 347 U.S. 483, 494 (1954).

32. Pamela J. Smith, *Our Children’s Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 *HOW. L.J.* 133, 220 (1999).

33. *Id.*

34. *See infra* notes 61–64 and accompanying text.

35. *See infra* notes 65–67 and accompanying text.

victims, a group that is, as I explain in Part I, heavily populated with gender-nonconforming children.<sup>36</sup>

Indeed, the student who fails to conform to generally accepted gender stereotypes frequently finds him or herself among the chronically victimized.<sup>37</sup> In essence, these children are isolated and demonized for their failure to adhere to our society's unwritten "code" of what is required of boys and girls.<sup>38</sup> As such, I contend that the treatment these students are subjected to frequently goes beyond bullying and instead becomes a form of lynching. After all, just as the violence that befell African Americans like Emmett Till was often the result of perceived violations of that society's racial hierarchy, the bullying I focus on in this Article is predicated on the child's "violation" of our society's rather rigid gender roles.<sup>39</sup> Further, just as the violence used during the civil rights era was designed to produce compliance through fear, such bullying likewise operates to create fear in those who are bullied, sending them the powerful message to either conform to their expected gender role or face continued bullying.

In addition, just as the entire community participated in and supported the practice of race-based lynching, gender-based bullying goes far beyond the individual perpetrator(s). As discussed below, such bullies operate with relative impunity and often, in fact, with the explicit approval of school administrators and the larger school community.<sup>40</sup> Even in the absence of explicit approval, however, it is largely the community standards of appropriate gender roles that drive this form of bullying.<sup>41</sup> Finally, and perhaps most importantly, this bullying often results in death, either at the hand of the bully or by suicide.<sup>42</sup> However, even when physical death is not a direct result, a number of studies have shown that the psychological harms that typically result from such bullying, like those harms suffered by African American children during segregation, are tantamount to death given the destructive role these harms can play throughout the remainder of the bullied student's life.<sup>43</sup> In some ways, these harms are even more pronounced in those children who are bullied on the basis of gender nonconformity given the lack of support these children face in their communities and sometimes even in their own families.<sup>44</sup>

My overall purpose in making this comparison is that it is only after we begin to see this kind of bullying for what it is—a form of lynching—that our society and legal community can even begin to hope to craft a solution to the problem. Although other legal scholars have discussed the problem of bullying in our nation's schools,<sup>45</sup> they have failed to focus on two important components: (1) the role that

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36. *See infra* notes 69–72 and accompanying text.

37. *See infra* notes 69–72 and accompanying text.

38. *See infra* notes 73–79.

39. *See infra* Part I.A.

40. *See infra* Part I.B.

41. *See infra* Part I.B.

42. *See infra* Part II.A.

43. *See infra* Part II.B.

44. *See infra* notes 240–245 and accompanying text.

45. *See, e.g.,* Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000);

gender stereotypes often play in shaping this bullying; and (2) the long-range psychological harms that result from this form of violence. Instead, most articles have taken a narrower view, focusing exclusively on the discrete school environment and the immediate harms caused by bullying.<sup>46</sup> Not surprisingly, such articles frequently paint the solution as one requiring greater litigation, legislation, or both.<sup>47</sup> When we begin to see the problem more as an example of lynching, however, we begin to see that the solution is much more complex. Instead, just as it took a change in public consciousness (which, again, was largely prompted by the revelation of how these practices were hurting children) to effectively end the incidence of African American lynching in the American South, so too will the path to ending bullying on the basis of gender nonconformity in our nation's schools rely on such change.<sup>48</sup> And, once we understand the extent of how harmful gender-based bullying is on our children, perhaps there will be a greater impetus to begin walking that path.

With that then as my goal, Part I of this Article provides an in-depth discussion of the problem of bullying in American schools, including the incidence of bullying, the degree to which gender stereotypes contribute to bullying behavior, and the role that the larger community plays in allowing such bullying to occur. Next, Part II describes the variety and severity of harms that frequently befall the chronic victims of school bullying—again, a group in which gender-nonconforming children routinely find themselves. Using this data, Part III will then make the point that bullying on the basis of gender nonconformity is a form of lynching and, in light of that realization, will discuss how we can use this information to help craft a more effective solution to this very serious problem.

#### I. BULLYING AND ITS GENDERED ROOTS

School bullying is by no means a new phenomenon,<sup>49</sup> nor is it limited to certain societies or even locales.<sup>50</sup> Instead, the practice of bullying is one that “cuts across

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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 (2005); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147 (2009); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004).

46. See, e.g., Eisemann, *supra* note 45; Weddle, *supra* note 45.

47. See Eisemann, *supra* note 45, at 138–39 (“To combat these problems, there must be a federal law that supercedes [*sic*] state law and local politics, to ensure that school officials will not only be allowed to address the needs of gay students, but will be required to do so.” (emphases omitted)); Weddle, *supra* note 45, at 703 (arguing for a new state standard for liability).

48. See *infra* Part III.C.

49. See Joyce Hunter, *Introduction: Safe Passage*, 19 J. GAY & LESBIAN SOC. SERVICES 1, 1 (2007) (“Meant to intimidate, terrorize, torment, and socially isolate vulnerable individuals in a society, bullying has undoubtedly been a tool of tyrants since the beginning of time.”).

50. See *id.*; see also Cheryl E. Sanders, *What Is Bullying?*, in BULLYING: IMPLICATIONS FOR THE CLASSROOM 2–3 (Cheryl E. Sanders & Gary D. Phye eds., 2004).



race, class, and geographical boundaries.”<sup>51</sup> Nonetheless, despite the history and prevalence of this practice, only relatively recently have scholars begun to focus on the nature and consequences of bullying behavior.<sup>52</sup> What’s more, recent studies indicate that this behavior is actually becoming more frequent.<sup>53</sup> Some have even gone so far as to describe the contemporary practice of bullying as being “a ubiquitous phenomenon in schools today.”<sup>54</sup>

To better understand the practice, however, we must first ask what one means by “bullying.” Although the term has been defined in numerous ways, in essence, bullying “is said to take place when an individual, unable to defend him- or herself, is exposed repeatedly and over a long period of time to intentional harm by one or several others, either directly . . . or indirectly.”<sup>55</sup> As this definition makes clear, a person can bully another without necessarily using physical violence.<sup>56</sup> Indeed, “[s]ome forms of harassment are overt and direct (e.g., physical aggression), while other forms are covert and indirect (e.g., spreading rumors).”<sup>57</sup> Of course, in the school setting, most bullying is done by peers.<sup>58</sup> Additionally, one of the hallmarks of bullying, and what distinguishes it from other forms of abuse, is the regularity with which a person is targeted.<sup>59</sup> As one expert on bullying describes, “[u]nless the behavior is severe in its harm, a single incident does not typically constitute

51. Jaana Juvonen & Sandra Graham, *Preface to PEER HARASSMENT IN SCHOOL: THE PLIGHT OF THE VULNERABLE AND VICTIMIZED*, at xiii (Jaana Juvonen & Sandra Graham eds., 2001) [hereinafter *PEER HARASSMENT IN SCHOOL*].

52. See ELIZABETH J. MEYER, *GENDER, BULLYING, AND HARASSMENT: STRATEGIES TO END SEXISM AND HOMOPHOBIA IN SCHOOLS* 12 (2009) (noting that the first in-depth study of bullying was in 1978); see also Hart, *supra* note 45, at 1115 (noting that, “[u]ntil recent years, bullying was viewed by most parents and educators as a typical part of growing up”).

53. See Weddle, *supra* note 45, at 650 (“Bullying has increased in frequency and seriousness in schools in recent years and now constitutes a significant problem.”).

54. Sandra Graham & Jaana Juvonen, *An Attributional Approach to Peer Victimization*, in *PEER HARASSMENT IN SCHOOL*, *supra* note 51, at 49.

55. Beate Schuster, *Rejection and Victimization by Peers: Social Perception and Social Behavior Mechanics*, in *PEER HARASSMENT IN SCHOOL*, *supra* note 51, at 290. For a longer and more comprehensive definition, see DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* 8–10 (1993).

56. See MARY JO MCGRATH, *SCHOOL BULLYING: TOOLS FOR AVOIDING HARM AND LIABILITY* 6 (2007) (identifying three types of bullying—physical (“Harm to another’s person or property”), emotional (“Harm to another’s self-concept”), and relational (“Harm to another through damage (or the threat of damage) to relationships or to feelings of acceptance, friendship, or group inclusion”)—and noting that “in these types of bullying are nonverbal, verbal, and physical behaviors”).

57. Jaana Juvonen & Sandra Graham, *Part II: Subtypes and Age-Related Changes in Peer Harassment*, in *PEER HARASSMENT IN SCHOOL*, *supra* note 51, at 145.

58. See Andrea Daley, Steve Solomon, Peter A. Newman & Faye Mishna, *Traversing the Margins: Intersectionalities in the Bullying of Lesbian, Gay, Bisexual and Transgender Youth*, 19 *J. GAY & LESBIAN SOC. SERVICES* 9, 10 (2007) (“Peers are involved in the majority of bullying episodes.”).

59. JUDY S. FREEDMAN, *EASING THE TEASING: HELPING YOUR CHILD COPE WITH NAME-CALLING, RIDICULE AND VERBAL BULLYING* 5 (2002) (“[B]ullying is ongoing and frequent . . .”).

bullying. Most bullying is either persistent (happening frequently and relentlessly) or pervasive (happening everywhere) in the school environment.”<sup>60</sup>

Bullying, then, is much different than mere teasing.<sup>61</sup> Indeed, almost all children are teased at some point during their school career,<sup>62</sup> but not all are bullied. Nonetheless, studies reveal that a large percentage of students reports having been the target of bullying behavior.<sup>63</sup> For example, one study found that, among students in public schools, 76.8% of middle and high school students reported having been bullied while at school.<sup>64</sup> However, within this rather large percentage of students lies a smaller subset of children, those who are hit hardest and most frequently by bullying:

Aggressive children do not distribute their aggression evenly across all available peer targets. Instead, they selectively direct their attacks toward a minority of peers who serve *consistently* in the role of victim. By the later elementary school years, individual differences in victimization by peers become quite stable, with the same children often occupying the role of victim year after year.<sup>65</sup>

What percentage of students occupies this group? Well, a 2002 study by the American Medical Association found that 11% of students in grades six through ten were frequently bullied.<sup>66</sup> This study is consistent with other research that indicates approximately 10% of school-age children become continual victims of bullying.<sup>67</sup> These are the children who are most at risk of suffering severe

60. McGRATH, *supra* note 56, at 5.

61. BARBARA COLOROSO, THE BULLY, THE BULLIED, AND THE BYSTANDER 32 (2009) (“Teasing is a fun thing you do with friends—with people you care about. Taunting is a choice to bully someone for whom you have contempt.”); *see also* FREEDMAN, *supra* note 59, at 5 (“Some experts view the difference between teasing and bullying as only a matter of degree.”).

62. DANIEL L. CLAY, HELPING SCHOOLCHILDREN WITH CHRONIC HEALTH CONDITIONS: A PRACTICAL GUIDE 76 (2004) (“At some point or another, almost all children have to endure teasing from friends, classmates, siblings, etc.”).

63. John H. Hoover, Ronald Oliver & Richard J. Hazler, *Bullying: Perceptions of Adolescent Victims in the Midwestern USA*, 13 SCH. PSYCHOL. INT’L 5 (1992); *see also* MEYER, *supra* note 52, at x (describing study where “researchers found that approximately 52% of students have been bullied at school”); Juvonen & Graham, *supra* note 51, at xiii (“Survey data reveal that anywhere from 40% to 80% of students report that they personally have been the targets of such peer hostilities at school.”). Part of the variation of percentages reported in these various studies “may be attributed to how survey questions were phrased, what time period was being investigated (entire school career, the past year, the past month), and how the data were analyzed and reported.” MEYER, *supra* note 52, at 13.

64. Hoover et al., *supra* note 63, at 8.

65. David G. Perry, Ernest V.E. Hodges & Susan K. Egan, *Determinants of Chronic Victimization by Peers: A Review and a New Model of Family Influence*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 73 (emphasis added) (internal citations omitted).

66. STAN DAVIS WITH JULIA DAVIS, SCHOOLS WHERE EVERYONE BELONGS: PRACTICAL STRATEGIES FOR REDUCING BULLYING 22 (2d ed. 2007).

67. Michael Boivin, Shelley Hymel & Ernest V.E. Hodges, *Toward a Process View of Peer Rejection and Harassment*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 266

psychological harm, and it is thus these children who are the focus of this Article.<sup>68</sup> Before getting to the harms these children face as a result of being bullied, however, we need to take a closer look at the kinds of children who frequently fall into the category of chronic victim. In so doing, we begin to see that gender plays a rather large role in determining the occupants of this class.

#### A. *The Bully as Gender Enforcer*

The sad reality is that “[t]hose young people whose gender expression challenges society’s sex role expectations are particularly targeted for violence.”<sup>69</sup> According to clinical psychologist Jean Baker, such children “may be teased and tortured on a daily basis.”<sup>70</sup> These findings, however, should come as little surprise when we consider the large role that gender stereotypes play in school bullying. As Professor Elizabeth Meyer points out in her book, *Gender, Bullying, and Harassment*, “[t]he social constructs of ideal masculinity and femininity are at the core of much bullying behavior.”<sup>71</sup> Indeed, studies on bullying tend to reveal that “harassers’ behaviors reinforce expected cultural norms for boys and girls and punish students who don’t fit the ideals of traditional (heterosexual) gender roles.”<sup>72</sup>

These cultural norms, of course, are not constructs that exist exclusively within the school environment but instead mirror those stereotypes that exist within our society at large.<sup>73</sup> As Professor James Sears has pointed out, “schools, however, are not the culprits [but instead] are merely an institutional appendage of the State.”<sup>74</sup> As such, “[s]chools are microcosms of the communities they serve and thus often reflect the culture and values of the dominant group in the school.”<sup>75</sup> And, as has been well documented by a number of legal scholars, gender plays a crucial role in various social components of American culture.<sup>76</sup> In fact, most gender scholars think of “gender” as not merely an individual state of being but rather as a complex display carried out for those around us.<sup>77</sup> For example, social scientist Judith Butler

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(“Research on bully/victim problems indicates that approximately 10% of children in elementary and middle schools are repeatedly harassed and victimized by schoolmates.”).

68. See *infra* Part II.B.

69. Hunter, *supra* note 49, at 2.

70. JEAN M. BAKER, HOW HOMOPHOBIA HURTS CHILDREN: NURTURING DIVERSITY AT HOME, AT SCHOOL, AND IN THE COMMUNITY 39 (2002). Indeed, Baker notes that “the most victimized and intimidated students are very often those boys who most obviously fail to conform to masculine stereotypes.” *Id.* at 86.

71. MEYER, *supra* note 52, at 8 (emphasis omitted); see also *infra* notes 104–105.

72. MEYER, *supra* note 52, at 2.

73. James T. Sears, *Preface*, 19 J. GAY & LESBIAN SOC. SERVICES ix, xiv (2007) (stating that “[b]ullying is simply how we do business in the United States”).

74. *Id.*

75. MEYER, *supra* note 52, at 23.

76. See, e.g., David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135 (2009) (looking at the degree to which single-sex education perpetuates harmful gender stereotypes); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) (analyzing the role that “masculinities” plays in the workplace).

77. See C.J. PASCOE, DUDE YOU’RE A FAG: MASCULINITY AND SEXUALITY IN HIGH

describes gender as “a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.”<sup>78</sup> During each of our “performances,” those around us assist in making sure we are doing it properly: “People are supposed to act in ways that line up with their presumed sex. That is, we expect people we think are females to act like women and males to act like men. People hold other people accountable for ‘doing gender’ correctly.”<sup>79</sup> It is against this backdrop then that bullies frequently serve as a form of “gender police,” deputized by the larger society to ensure that all are toeing the gender line.<sup>80</sup>

Adding to the gendered nature of bullying are a number of studies that reveal that it is boys who are both more likely to bully and also be bullied.<sup>81</sup> That boys would play such a dominant role in both capacities can be explained by the central yet complicated role that masculinity plays in American society. Indeed, as a result of “society’s tendency to devalue qualities associated with femininity,”<sup>82</sup> masculinity takes on a much more prominent role. Like most things, however, all masculinities are not equal. Instead, our society tends to prize highest of all a form of masculinity referred to as “hegemonic masculinity,” which is characterized by “power and the subordination of both women and non-hegemonically masculine men.”<sup>83</sup> Among the qualities associated with hegemonic masculinity are “heteronormativity, aggression, activity, sports-obsession, competitiveness, stoicism, and not being female or feminine.”<sup>84</sup> Although “[v]ery few men, if any, are actually hegemonically masculine,”<sup>85</sup> it is this form of masculinity that has,

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SCHOOL 13 (2007) (“As scholars of gender have demonstrated, gender is accomplished through day-to-day interactions. In this sense gender is the ‘activity of managing situated conduct in light of normative conceptions of attitudes and activities appropriate for one’s sex category.’” (internal citations omitted) (quoting Candace West & Don Zimmerman, *Doing Gender, in* THE SOCIAL CONSTRUCTION OF GENDER 102, 127 (1991)); McGinley, *supra* note 76, at 369 (“Masculinities theorists . . . see gender as complicated and negotiable. Gender is not a natural occurrence resulting from biology, but a socially constructed phenomenon.”).

78. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 43–44 (1999).

79. PASCOE, *supra* note 77, at 13.

80. See LORI B. GIRSHICK, *TRANSGENDER VOICES: BEYOND WOMEN AND MEN* 155 (2008).

81. See, e.g., MEYER, *supra* note 52, at 16 (citing studies); OLWEUS, *supra* note 55, at 19 (summarizing a number of studies that found “boys were more often victims and in particular perpetrators of direct bullying” (emphasis omitted)); see also BAKER, *supra* note 70, at 88 (citing a study that found “boys were more likely to be victimized in high school than were girls”).

82. MEYER, *supra* note 52, at 7 (“Being creative, caring, good at school, and quiet, however, are often considered to be feminine qualities and are viewed by many as signs of weakness . . .”).

83. Cohen, *supra* note 76, at 144; see also R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 *GENDER & SOC’Y* 829, 832 (2005) (“[Hegemonic masculinity] embodied the currently most honored way of being a man, it required all other men to position themselves in relation to it, and it ideologically legitimated the global subordination of women to men.”).

84. Cohen, *supra* note 76, at 144.

85. PASCOE, *supra* note 77, at 7; see also R.W. CONNELL, *MASCULINITIES* 79 (2d ed. 2005) (“The number of men rigorously practicing the hegemonic pattern in its entirety may

nonetheless, become normative.<sup>86</sup> As Michael Kimmel points out in his book, *Manhood in America*: “[A]ll American men must also contend with a singular vision of masculinity, a particular definition that is held up as the model against which we all measure ourselves.”<sup>87</sup>

Our society’s preference, then, for hegemonic masculinity, helps explain the reason why bullies and their dominantly aggressive behavior tend to be so well regarded by their peers. In fact, bullies are “often popular and enjoy high status among their peers.”<sup>88</sup> This popularity stems largely from the fact that bullies are often described as “physically strong, aggressive, dominating, and impulsive”<sup>89</sup>—masculine qualities that, as discussed above, are highly prized in American society. For these reasons, social scientists counsel against classifying bullying as a form of antisocial behavior. As Gerald Walton explains, “bullying affords dominance and social status and is often rewarded and supported by other children. It may not be nice, but it is, nevertheless, very social.”<sup>90</sup>

If bullies demonstrate the highest levels of hegemonic masculinity, it comes as little surprise to find that their go-to victims tend to exhibit the lowest.<sup>91</sup> Indeed, these victims are typically “physically weak, timid, anxious, sensitive, and shy”—qualities that are antithetical to the notion of hegemonic masculinity.<sup>92</sup> Other scholars have, likewise, posited that boy-on-boy bullying tends to be directed more at those boys who are “soft, shy, smart”—qualities which seemingly demonstrate an “insufficient commitment to male peer group structures and values.”<sup>93</sup> On the other hand, femininity receives much less scrutiny, with the result being that young girls are allowed greater leeway when it comes to engaging in masculine activities: “In general, role expectations for females tend to be more fluid in our society than they are for males, and girls, at least during childhood, are usually less stigmatized

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be quite small.”).

86. See Connell & Messerschmidt, *supra* note 83, at 832; see also STEPHEN M. WHITEHEAD, MEN AND MASCULINITIES: KEY THEMES AND NEW DIRECTIONS 90–91 (2002) (“[W]hile it is stressed that ‘not many men meet the normative standards [of hegemonic masculinity]’, and even that ‘many men live in some tension with, or distance from, hegemonic masculinity’, hegemonic masculinity remains the ‘guarantor’ of men’s dominant position and the ‘currently accepted strategy’ for ‘defending patriarchy.’” (alteration in original) (citations omitted) (quoting CONNELL, *supra* note 85, at 79, 5, 77)).

87. MICHAEL S. KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY 4 (2d ed. 2006).

88. Sears, *supra* note 73, at xi.

89. MEYER, *supra* note 52, at 8.

90. Gerald Walton, *Bullying and Homophobia in Canadian Schools: The Politics of Policies, Programs, and Educational Leadership*, 1 J. GAY & LESBIAN ISSUES EDUC. 23, 33 (2004).

91. See PASCOE, *supra* note 77, at 7 (describing this form of masculinity as “subordinated masculinity,” which “describes men who are oppressed by definitions of hegemonic masculinity”).

92. MEYER, *supra* note 52, at 8; see also David Schwartz, Laura J. Proctor & Deborah H. Chien, *The Aggressive Victim of Bullying: Emotional and Behavioral Dysregulation as a Pathway to Victimization by Peers*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 147 (describing the “persistently targeted child” of bullying as “submissive, inhibited, or socially withdrawn”).

93. David C. Plummer, *The Quest for Modern Manhood: Masculine Stereotypes, Peer Culture and the Social Significance of Homophobia*, 24 J. ADOL. 15, 19 (2001).

when they bend the rules of so-called feminine behavior . . . .”<sup>94</sup> Of course, as Dr. Jean Baker points out, with this greater flexibility, “comes the nagging thought that, sadly, it may be the lesser value placed upon females in our society that makes it less important for them to conform.”<sup>95</sup>

However, for these boys, what makes them perpetual victims of school bullying is not solely their lack of stereotypically masculine traits, but also how students on the other end of the masculinity spectrum go about expressing their gender.<sup>96</sup> As Kimmel explains, “American men define their masculinity, not as much in relation to women, but in relation to each other.”<sup>97</sup> Further, gender theorists have pointed out that “processes of repudiation are central to a masculine sense of self,” and require the repudiation of such things as “femininity, weakness, and, most importantly, the specter of the ‘fag.’”<sup>98</sup> Thus, bullying a “less masculine” boy is one way society has taught young boys to establish the sufficiency of their own masculinity.

It should come as little surprise then that, within this group of gender-nonconforming children, one would find many lesbian, gay, bisexual, and transsexual (LGBT) students.<sup>99</sup> That being said, it would be a mistake to view gender-based bullying as a problem only affecting LGBT children. Instead, as Professor Joyce Hunter explains:

Whether a young person is gay or straight, behaviors or dress that appear outside the social norms for males or females can trigger bullying. Those male youth who are seen as “effeminate,” or female youth who are seen as too “butch,” are targets for “gay bashing.” While a high correlation has been found between lesbian/gay orientation and gender non-conformity, straight youth can also be “mistaken” for lesbian/gay and victimized as a result.<sup>100</sup>

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94. BAKER, *supra* note 70, at 36–37; *see also* Mary E. Kite & Bernard E. Whitley, Jr., *Do Heterosexual Women and Men Differ in Their Attitudes Toward Homosexuality?*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 39, 41 (Gregory M. Herek ed., 1998) (“Research suggests that male gender roles are particularly nonpliant compared with female roles.”).

95. BAKER, *supra* note 70, at 50.

96. KIMMEL, *supra* note 87, at 5 (“Women have, in men’s minds, such a low place on the social ladder of this country that it’s useless to define yourself in terms of a woman . . . . What men need is men’s approval.”).

97. *Id.*

98. PASCOE, *supra* note 77, at 157; *see also* Kite & Whitley, *supra* note 94, at 41 (“[H]eterosexual men are especially likely to be pressured toward displaying antigay prejudice.”).

99. *See* KATHERINE VAN WORMER, HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT, MICRO LEVEL: INDIVIDUALS AND FAMILIES 183 (2d ed. 2010) (describing gender-nonconforming children as “a population that includes many gays and lesbians, kids who fear they might be gay or lesbian, and male heterosexuals who are effeminate”).

100. Hunter, *supra* note 49, at 2; *see also* BAKER, *supra* note 70, at 86 (“Being effeminate is equated with being gay [even if some such boys aren’t gay] . . .”).

Thus, the stick against which children are being measured is not so much concerned with sexual orientation but rather with gender expression. For example, as Professor Pascoe points out, “[m]ale homosexuality is not pathologized, but gay male effeminacy is. The lack of masculinity is the problem, not the sexual practice or orientation.”<sup>101</sup>

However, regardless of whether a child is in fact LGBT or not, children who commit the cardinal sin of violating normative gender roles are nonetheless often quickly assailed with homophobic slurs.<sup>102</sup> The nature of these insults again arises from the normative role that hegemonic masculinity plays in our nation’s schools. As Professor Pascoe points out, “[h]omophobia is central to contemporary definitions of adolescent masculinity.”<sup>103</sup> Indeed, “[f]eminist scholars of masculinity have documented the centrality of homophobic insults and attitudes to masculinity, especially in school settings.”<sup>104</sup> This is so because homophobia is in essence a “valorization of masculinity” coupled with “an implicit societal devaluation of women and anti-feminine sentiment.”<sup>105</sup>

Further, these notions of gender constraints are so strong that children are frequently observed hurling such insults at one another at a fairly young age.<sup>106</sup> As psychiatrist Francis Mark Mondimore notes, “children are exquisitely sensitive to gender roles at a very young age.”<sup>107</sup> For example, Mondimore points out that one need only visit a school playground to see the gender differentiation that occurs between children: “In a playground full of children under the age of ten or so, boys will be observed to play with boys and girls with girls.”<sup>108</sup> And it is within this same playground setting that children first encounter homophobic insults: “Elementary school children can be heard using words like *sissy*, *tomboy*, and even *queer* and *faggot* as terms of contempt for each other . . . .”<sup>109</sup> These findings demonstrate the degree to which such homophobia-laced comments go beyond perceived sexual orientation. After all, as Mondimore reports, children begin using

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101. PASCOE, *supra* note 77, at 59 (emphasis omitted).

102. *See id.* at 53.

103. *Id.* at 81; *see also* Michael S. Kimmel & Matthew Mahler, *Adolescent Masculinity, Homophobia, and Violence: Random School Shootings, 1982–2001*, in RACE, ETHNICITY, AND GENDER: SELECTED READINGS 155, 159 (Joseph F. Healey & Eileen O’Brien eds., 2d ed. 2007) (“[H]omophobia is far less about the irrational fears . . . that one might actually be gay or have gay tendencies, and more the fears that heterosexuals have that others might (mis)perceive them as gay.” (emphases omitted)).

104. PASCOE, *supra* note 77, at 53 (citations omitted).

105. Daley et al., *supra* note 58, at 16.

106. FRANCIS MARK MONDIMORE, *A NATURAL HISTORY OF HOMOSEXUALITY* 162 (1996).

107. *Id.*

108. *Id.* Further, Mondimore notes that “[r]esearch has confirmed that this is true across many cultures.” *Id.*

109. *Id.* (emphasis in original). Mondimore notes that children typically associate such words with “gender-nonconforming behaviors” as well as simply “being different and unwanted.” *Id.* at 162–63; *see also* PHILIP H. HERBST, WIMMIN, WIMPS & WALLFLOWERS: AN ENCYCLOPAEDIC DICTIONARY OF GENDER AND SEXUAL ORIENTATION BIAS IN THE UNITED STATES 88 (“Young children, even without understanding the meaning of sexual orientation, may use *fag* to insult boys (even sometimes girls) with the implication of being a ‘sissy.’” (emphasis in original)).

such terms “years before they have mature sexual feelings or become familiar with concepts of sexual orientation.”<sup>110</sup>

As a result of the powerful social constructs behind these insults, such words carry quite a punch. For example, in describing the results of her study on students and bullying, Pascoe reports the following: “[B]oth the boys and girls I interviewed told me that *fag* was the worst epithet one guy could direct at another.”<sup>111</sup> As one student said, “To call someone *gay* or *fag* is like the lowest thing you can call someone. Because that’s like saying that you’re nothing.”<sup>112</sup> Sadly, children are not alone in their use of such terms. Consider the following statement by noted musician Marshall Mathers (a.k.a. “Eminem”): “The lowest degrading thing you can say to a man . . . is to call him a faggot . . . . Call him a sissy, call him a punk. ‘Faggot’ to me doesn’t necessarily mean gay people. ‘Faggot’ to me just means taking away your manhood.”<sup>113</sup> As this quote suggests, children do not necessarily reserve such slurs for those children who happen to be LGBT. Instead, these insults stem first and foremost from societal gender norms: “[B]ecoming a fag has as much to do with failing at the masculine tasks of competence, heterosexual prowess, and strength or in any way revealing weakness or femininity as it does with a sexual identity.”<sup>114</sup>

Not surprisingly then, homophobic insults are extremely common among children.<sup>115</sup> As Professor Meyer notes, “[a]ny student whose behavior is perceived to be different in some way can be isolated and harassed using anti-gay insults.”<sup>116</sup> In fact, one study of middle school students in the U.S. reported that two-thirds of the students had been subjected to one or more homophobic epithets in the last week.<sup>117</sup> One might think that the frequency of such insults would somehow dilute

110. MONDIMORE, *supra* note 106, at 162; *see also* Daley et al., *supra* note 58, at 11 (“Anti-homophobia workshops with Canadian elementary students reveal that anti-gay attitudes and beliefs begin early.”).

111. PASCOE, *supra* note 77, at 55 (emphasis in original); *see also* Marina Angel, *The School Shooters: Surprise! Boys Are Far More Violent than Girls and Gender Stereotypes Underlie School Violence*, 27 OHIO N.U. L. REV. 485, 499 (2001) (“[T]he greatest insult for a boy—worse than any type of physical sexual harassment—is being called gay.”).

112. PASCOE, *supra* note 77, at 55 (emphases in original) (internal quotation marks omitted).

113. Richard Kim, Editorial, *Eminem—Bad Rap?*, NATION, Mar. 5, 2001, at 4, 5 (internal quotation marks omitted).

114. PASCOE, *supra* note 77, at 54.

115. *See* PATRICIA G. RAMSEY & LESLIE R. WILLIAMS, WITH EDWINA BATTLE VOLD, *MULTICULTURAL EDUCATION: A SOURCE BOOK* 78 (2d ed. 2003) (“Homophobic insults (often not fully understood by the children who are making them) are common in the elementary grades and even some preschools.”).

116. MEYER, *supra* note 52, at 4. Sadly, relationships between boys are often built on this kind of peer harassment. *See* PASCOE, *supra* note 77, at 60 (“Fag discourse is central to boys’ joking relationships. Joking cements relationships among boys and helps to manage anxiety and discomfort. Boys both connect with one another and manage the anxiety around this sort of relationship through joking about fags.” (citations omitted)).

117. *See* V. Paul Poteat & Dorothy L. Espelage, *Exploring the Relation Between Bullying and Homophobic Verbal Content: The Homophobic Content Agent (HCAT) Scale*, 20 VIOLENCE & VICTIMS 513, 514 (2005); *see also* MEYER, *supra* note 52, at 4 (“In another U.S.



their impact—actually, the reverse is true: “This fluidity of [the fag] identity is what makes [it] such a powerful disciplinary mechanism. It is fluid enough that boys police their behaviors out of fear of having the fag identity permanently adhere and definitive enough so that boys recognize a fag behavior and strive to avoid it.”<sup>118</sup> William Pollack described this intense pressure that is put on boys as “gender straitjacketing,” whereby boys are shamed for any behavior that deviates from the masculine norm.<sup>119</sup>

Despite that fact that it is typically gender nonconformity, more so than sexual orientation, which causes the “fag identity” to adhere, many gender-nonconforming students are also LGBT children, thus subjecting such students to extreme levels of bullying.<sup>120</sup> For example, one study found that LGBT students experienced bullying at twice the rate of non-LGBT students.<sup>121</sup> Further, the bullying these children receive can be extremely severe. In fact, one study of LGBT youth found that 81% experienced verbal harassment, 38% had been physically threatened, 22% had objects thrown at them, 15% suffered physical assaults, 6% suffered assaults with a weapon, and 16% had been sexually assaulted.<sup>122</sup> Once again, however, it is gender stereotypes and not sexual orientation that are largely responsible for the frequency and severity of bullying directed at an LGBT student. As one report on LGBT bullying reports, “[a]ll LGBT youth are likely to experience some form of peer victimization . . . . Gender intersects with sexual orientation, however, in both increasing the likelihood that LGBT youth will be bullied and influencing the ways in which they are bullied.”<sup>123</sup> More specifically, “peer victimization is evoked in key informants’ identification of gay youth whose gender expression is more stereotypically feminine . . . as more likely to be bullied compared to those youth whose gender presentations ostensibly conform to their sex.”<sup>124</sup> Further, a 2004 study by the California Safe Schools Coalition looked at both sexual-orientation harassment, as well as harassment based on gender nonconformity.<sup>125</sup> The results

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survey, 91% of GLBT students report hearing homophobic remarks in school frequently or often.”).

118. W. C. HARRIS, *QUEER EXTERNALITIES: HAZARDOUS ENCOUNTERS IN AMERICAN CULTURE* 54 (2009) (quoting PASCOE, *supra* note 77, at 54).

119. WILLIAM POLLACK, *REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD* 43 (1998); *see also* BAKER, *supra* note 70, at 48 (“For boys especially, the pressure to conform to the masculine ideal is extreme and they are often exposed very early to a culture that values male toughness and dominance.”).

120. Daley et al., *supra* note 58, at 18 (“[G]endered stereotypes, attitudes, and behaviors are used as a means of demeaning gay- and lesbian-identified youth.”); *see also* MEYER, *supra* note 52, at 19 (discussing study that “found that harassment for gender nonconformity was ‘clearly related to actual or perceived sexual orientation’” (citation omitted)).

121. Daley et al., *supra* note 58, at 11.

122. Anthony R. D’Augelli, *Developmental and Contextual Factors and Mental Health Among Lesbian, Gay, and Bisexual Youths*, in *SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY AND DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE* 37, 45 (Allen M. Omoto & Howard S. Kurtzman eds., 2006).

123. Daley et al., *supra* note 58, at 17. As these authors note, “the likelihood of LGBT youth being bullied [is] associated with the extent to which youth [step] out of prescribed gender norms.” *Id.* at 15.

124. *Id.* at 23.

125. MEYER, *supra* note 52, at 19.

showed that gender nonconformity “was clearly related to actual or perceived sexual orientation,” given that 49% of students who were harassed solely on the basis of sexual orientation were also harassed on the basis of gender, compared with only 27% of the overall school population who reported harassment on the basis of gender nonconformity.<sup>126</sup>

*B. Beyond the Bully: The Complicity of Educators*

As discussed above, those children whose gender expression is at odds with what society tells us is expected from boys and girls often find themselves in that class of students who are persistently bullied.<sup>127</sup> It would be, however, both inaccurate and unfair to pin all the blame on the bully. After all, the bully is merely acting on standards of “appropriate” gender expression that are crafted and perpetuated by the larger community.<sup>128</sup> Of course, just because something takes place or is permitted in adult society does not mean we allow children to exhibit similar behavior in school. To successfully draw such limits, however, we rely on school administrators.<sup>129</sup> And, as this subpart will explore, when it comes to bullying on the basis of gender nonconformity, school administrators frequently turn a blind eye, and, in some cases, even lend a helping hand.

A victim of bullying once said, “[w]hen people watch you being bullied and do nothing, that makes you believe that you deserve it.”<sup>130</sup> Sadly, many school officials adopt such a hands-off approach. As an initial matter, when it comes to bullying in general, “[r]esearch shows that both students and teachers tend to place the blame for being bullied on the student who is being bullied.”<sup>131</sup> More specifically, however, bullying on the basis of gender nonconformity seemingly elicits even less concern. For instance, one study reports that the two forms of verbal harassment students most often encountered were based on sexual orientation and gender nonconformity.<sup>132</sup> These also happened to be the two forms

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126. *Id.* Furthermore, “[r]esearch has demonstrated that more rigid adherence to traditional sex roles correlates with more negative attitudes and violent behaviors toward gays and lesbians.” *Id.* at 7.

127. *See supra* Part I.A.

128. *See supra* Part I.A.

129. *See* KATHLEEN LYNNE LANE, JEMMA ROBERTSON KALBERG & HOLLY MARIAH MENZIES, *DEVELOPING SCHOOLWIDE PROGRAMS TO PREVENT AND MANAGE PROBLEM BEHAVIORS: A STEP-BY-STEP APPROACH 1* (2009) (describing the role that teachers play in “promoting prosocial behaviors” in students).

130. DAVIS, *supra* note 66, at 23.

131. MCGRATH, *supra* note 56, at 19; *see also* Laurence Owens, Phillip Slee & Rosalyn Shute, *Victimization Among Teenage Girls: What Can Be Done About Indirect Harassment*, in *PEER HARASSMENT IN SCHOOL*, *supra* note 51, at 223 (“The teachers in our study were more likely to blame the victims’ lack of social skills (e.g., difficulty in making friends or in apologizing for wrongdoing) or having a home background that did not model constructive conflict resolution.”).

132. MOLLY O’SHAUGHNESSY, STEPHEN RUSSELL, KATHERINE HECK, CHRISTOPHER CALHOUN & CAROLYN LAUB, *CAL. SAFE SCHS. COAL. & 4-H CENT. FOR YOUTH DEV., UNIV. OF CAL., DAVIS, SAFE PLACE TO LEARN: CONSEQUENCES OF HARASSMENT BASED ON ACTUAL OR PERCEIVED SEXUAL ORIENTATION AND GENDER NON-CONFORMITY AND STEPS FOR*

of harassment that students reported teachers were least likely to do anything about.<sup>133</sup> Additionally, a study of LGBT youth found that 83% of respondents reported that teachers rarely or never intervened when hearing homophobic remarks.<sup>134</sup> Another study found that gay students hear homophobic comments more than twenty-five times a day, yet faculty only intervene about 3% of the time.<sup>135</sup> Thus, as one commentator describes it, teen bullies often “act with impunity in schools that do nothing to curb teens from calling other teens ‘fags,’ ‘homos,’ and ‘lezzies’ because they dress and/or behave differently from other kids.”<sup>136</sup>

But why would school educators fail to respond to such behavior? There are a number of possible explanations. First, it could be quite simply, as one educator described, that “[i]t would be difficult to respond to [homophobic insults] because they occur so much—they’re part of the school culture.”<sup>137</sup> Another explanation could be that educators simply see such behavior as a normal part of childhood. As Professor Daniel Weddle points out, “teachers and other school personnel seldom address bullying directly with students, and many believe that bullying is nothing more than a normal part of growing up that should be ignored unless it ‘crosses the line into assault or theft.’”<sup>138</sup> The final and more troubling explanation could be that teachers and administrators refuse to intervene because of their own prejudices. Lending some support to this theory are studies showing that 80% of prospective teachers and 67% of guidance counselors report negative attitudes about sexual minority youth.<sup>139</sup>

Particularly hard hit by such homophobia are LGBT students, who sometimes face more than mere neglect at the hands of school administrators. As one commentator noted, “[i]n many schools it is simply too ‘dangerous mentally and physically to come out,’ especially since school administrators and teachers typically not only ‘refuse to protect gay youth from peer violence’ but themselves

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MAKING SCHOOLS SAFER 15 (2004).

133. *Id.* at 16.

134. MEYER, *supra* note 52, at 4.

135. Yuval Simchi-Levi, *Amending the Massachusetts Parental Notification Statute*, 14 CARDOZO J. L. & GENDER 759, 776–77 (2008).

136. Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 447–48 (1998); *see also* Linda L. Morrison & Jeff L’Heureux, *Suicide and Gay/Lesbian/Bisexual Youth: Implications for Clinicians*, 24 J. ADOLESCENCE 39, 43 (2001) (“An overwhelming majority (97%) of GLB youth report hearing homophobic remarks within their immediate school environment, and some of these remarks are made in front of school personnel that do nothing to challenge the peers’ anti-gay attitudes.” (internal citation omitted)); Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 311 (1996) (“While teachers typically do not beat up gay and lesbian students, they almost invariably let homophobic acts by others go unchallenged and often engage in them themselves.”).

137. MEYER, *supra* note 52, at 23.

138. Weddle, *supra* note 45, at 650 (quoting Ron Banks, *Bullying in Schools*, ERIC DIGEST, Apr. 1997, at 1, 2); *see also infra* note 315 and accompanying text.

139. Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays’ Schools? The Dilemma of Sexual Orientation Segregation in Public Schools*, 7 U. PA. J. CONST. L. 183, 188 (2004).

‘harass, misinform, and unfairly punish gay students.’”<sup>140</sup> For example, Professor James Sears relates how, as a child, he was continually subjected to such taunts as “You little faggot,” “Fuckin’ queer,” and “Homo.”<sup>141</sup> Yet, according to Sears, “the only time I fought back found *me* in the office of the principal who admonished me for not being able to ‘get along’ with others!”<sup>142</sup> When it comes to LGBT students, stories like Professor Sears’s abound. For example, in 1999, a substitute teacher in Arkansas placed a harassing note in a student’s locker.<sup>143</sup> When the student complained, the administration, instead of investigating the substitute’s behavior, questioned the student about his sexual orientation and ultimately suggested that the student was to blame for being so open about his sexuality.<sup>144</sup> The principal then informed the student’s mother that her son needed to see a therapist.<sup>145</sup>

Of course, a victim of gender-based bullying need not be LGBT to have school officials blame him for the actions of his bullies. For example, in *Seamons v. Snow*,<sup>146</sup> Brian Seamons, a heterosexual male student and member of the football team, was grabbed by his teammates as he came out of the shower, at which time he was “forcibly restrained and bound to a towel rack with adhesive tape.”<sup>147</sup> Teammates also taped Brian’s genitals, and then “one of his teammates brought a girl that Brian had dated into the locker room to view him . . . while other members of the team looked on.”<sup>148</sup> When Brian complained, his coach “brought Brian before the football team, accused Brian of betraying the team . . . and told Brian to apologize to the team.”<sup>149</sup> As a result of Brian’s complaint, however, the school district canceled the final football game of the year—a state playoff game—thus prompting another round of harassment for Brian.<sup>150</sup> School officials intimated that Brian had brought the harassment upon himself by making the initial complaint, and thus he “should have taken it like a man.”<sup>151</sup>

Consider also the case of *Patterson v. Hudson Area Schools*,<sup>152</sup> where the court described the treatment one student, Dane Patterson, endured at school—again, not

140. Ruskola, *supra* note 136, at 271 (quoting GILBERT HERDT & ANDREW BOXER, CHILDREN OF HORIZONS: HOW GAY AND LESBIAN TEENS ARE LEADING A NEW WAY OUT OF THE CLOSET 126 (1993) and Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL’Y REV. 446, 448 (1986)).

141. Sears, *supra* note 73, at ix.

142. *Id.* (emphasis in original).

143. MICHAEL BOCHENEK & A. WIDNEY BROWN, HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS, 84–85 (2001).

144. *Id.* at 84.

145. *Id.* at 84–85.

146. 84 F.3d 1226 (10th Cir. 1996).

147. *Id.* at 1230.

148. *Id.*

149. *Id.* Brian, however, refused to apologize, and the coach dismissed him from the team. *Id.*

150. *Id.* (“Brian alleges that he was subjected to a ‘hostile environment’ because he was branded as the cause of the football team’s demise, and that he was threatened and harassed.”).

151. *Id.*

152. No. 05-74439, 2007 WL 4201137 (E.D. Mich. Nov. 28, 2007), *rev’d* *Patterson v.*

only at the hands of school bullies, but also from the faculty and administration of his school:

In seventh grade at Hudson Middle School, Dane experienced (1) daily name calling, including such things as “fag,” “faggot,” “gay,” “fat pig,” “man boobs,” and “big boobs” (allegedly more than 200 times that year); (2) being called “Mr. Clean” (allegedly a derogatory term that referred to a lack of pubic hair) on a regular basis; (3) being jostled and pushed in the hallways on a frequent basis (allegedly more than 200 times that year); (4) being slapped by a seventh grade girl named Brittany when Dane attempted to intervene on behalf of a girl being teased and taunted by Brittany; (5) being teased by a teacher, John Redding (“Mr.Redding” [sic]), later that same day when Mr. Redding asked Dane in front of the class “How does it feel to be slapped by a girl?” . . .

. . . .  
[Additionally, in] late May 2005, Dane was assaulted in the locker room after one of his junior varsity baseball team’s practices. The perpetrator was a student named Lance . . . [and] after baseball practice one Friday, Lance was naked and rubbed his penis and scrotum against the back of Dane’s neck and side of his face (an act called “teabagging”). Another student, Nick, blocked Dane’s exit from the locker room. . . .

. . . .  
At some point following the incident, the varsity baseball coach convened a team meeting of junior varsity and varsity players and commented (with Dane present) that players should only joke with men who can take it.<sup>153</sup>

Although tragic, Dane’s story is by no means unusual. Indeed, one study found that more than 23% of LGBT students report hearing homophobic comments by faculty and school staff,<sup>154</sup> while in another study, the percentage climbed to 53%.<sup>155</sup> As these statistics show, homophobia in our nation’s schools is neither a tool reserved solely for school bullies, nor is it, as previously discussed, solely directed at LGBT students.<sup>156</sup>

The bottom line is that, when school officials fail to protect a gender-nonconforming student from bullying, the child is being taught a very debilitating lesson: specifically, “[t]his inaction on the part of educators teaches students that the institution of the school—and by extension society as whole—condones such activity.”<sup>157</sup> As a result, bullies are much more prone to continue, and even intensify, their harassment.<sup>158</sup> After all, “where students perceive that victims will not receive serious support from the adults in the school, bullies ‘could’ conclude

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Hudson Area Schs., 551 F.3d 438 (6th Cir. 2009).

153. *Id.* at \*1–4.

154. Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 *FORDHAM URB. L.J.* 611, 612 (2001).

155. Harris & Dyson, *supra* note 139, at 188.

156. *See supra* notes 100–01 and accompanying text.

157. MEYER, *supra* note 52, at 5.

158. *See* Weddle, *supra* note 45, at 654.

that they have ‘permission for further attacks.’<sup>159</sup> At the same time, the victim of this persistent bullying will internalize the administration’s neglect with the result that “[t]he isolation and vulnerability experienced by these students [will be] exacerbated by the refusal of teachers and administrators to intervene on their behalf.”<sup>160</sup> Not surprisingly then, studies show that these victimized students report less harassment and greater feelings of school safety when teachers do intervene in such bullying.<sup>161</sup>

Finally, we cannot lose sight of the fact that, when it comes to understanding gender, schools play an important role. As Michael Kimmel points out, schools serve as “old-fashioned factories, and what they produce is gendered individuals.”<sup>162</sup> For that reason then, the administrative inaction discussed above only perpetuates the rigid gender stereotypes that prompted the bullying in the first place, thus ensuring that the cycle will continue to repeat itself.<sup>163</sup> Indeed, “[b]y allowing students to believe that there is only one set of identities that are acceptable, schools reinforce traditional notions of heterosexual masculinity and femininity that create hostile school environments and effectively reduce educational opportunities for all students.”<sup>164</sup> More simply, the cycle of bullying does not just harm the individual student who is being harassed but the entire school. Or as Professor Meyer puts it: “Harassment poisons an entire school community.”<sup>165</sup>

## II. THE HARMS OF CHRONIC BULLYING: A PSYCHOLOGICAL AND SPIRITUAL LYNCHING

I began this Article by arguing that bullying on the basis of gender nonconformity is, in essence, a form of lynching. As detailed above, part of the similarity comes from the fact that, like lynching, which was used as a means of preserving the social code of white supremacy, this form of bullying is driven and fostered by the strict code of how men and women may appropriately express their gender.<sup>166</sup> However, that bullying is meted out as “justice” against those who

159. *Id.*; see also KATHLEEN STASSEN BERGER, *THE DEVELOPING PERSON THROUGH THE LIFE SPAN* 322 (2005) (“Bullies and victims share one firm cognitive assumption: Adults will not intervene.”).

160. MEYER, *supra* note 52, at 5.

161. *Id.* at 6; see also BAKER, *supra* note 70, at 40 (“[T]eachers can play a significant and positive role when they model empathy and acceptance of individual differences and when they establish a classroom atmosphere where bullying, taunting, and teasing of those who are not quite in the mainstream are not tolerated.”).

162. MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 151 (2000) (“Both in the official curriculum—textbooks and the like—and in the parallel, ‘hidden curriculum’ of our informal interactions with both teachers and other students, we become gendered.”).

163. See *supra* notes 130–36 and accompanying text.

164. MEYER, *supra* note 52, at 7; see also BAKER, *supra* note 70, at 14 (“Public schools can play a vital role for gay children and adolescents by helping to counteract stubborn societal prejudices and also by reflecting the changes in public opinion about gays that have occurred in recent years.”).

165. MEYER, *supra* note 52, at 2.

166. See *supra* Part I.A.

violate social norms is not enough by itself to elevate it to the level of lynching. Rather, in addition to motive, it is also the extreme harm that results from such bullying which causes bullying on the basis of gender nonconformity to more closely approximate a lynching.

Quite simply, “[o]f all possible human conditions, few carry more negative weight than that of being victimized.”<sup>167</sup> Bullying, certainly a form of victimization, is no exception. Indeed, “[b]eing constantly harassed by other children hurts in many ways.”<sup>168</sup> In fact, bullying not only produces physical injuries, but also psychological harm: “It is not uncommon for bullying to lead to a combination of physical and psychiatric consequences.”<sup>169</sup> And, make no mistake, these harms can be extremely destructive. As Professors Becky and Gary Ladd have stated, “peer harassment constitutes a form of abuse that undermines children’s healthy development.”<sup>170</sup>

Of course, these consequences can befall any student who is subject to bullying. However, for those students who are routine victims of bullying, these harms are even more severe: “Chronic harassment by peers is associated with serious adjustment problems, including depression, anxiety, emotional dysregulation, social withdrawal, low self-esteem, loneliness, suicidal tendencies, dislike and avoidance of school, poor academic performance, rejection by mainstream peers, and a lack of friends.”<sup>171</sup> As stated earlier, chief among the chronically bullied are those children with nonconforming gender presentations.<sup>172</sup> Thus, these children are very much at risk for the extreme consequences that can flow from bullying. As Professor Meyer points out, those targeted because of homophobia or on the basis of gender nonconformity “have been identified as being at even greater risk for these harmful behaviors.”<sup>173</sup>

Much of this harm relates to the psychological damage that such bullying produces: as one study reports, “[p]erhaps the most defining feature of victimized children’s social-cognitive functioning is their poor self-concept.”<sup>174</sup> But what is it

167. William M. Bukowski & Lorrie K. Sippola, *Groups, Individuals, and Victimization: A View of the Peer System*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 355, 355. After all, “[v]ictimization is an assault on the human need for dignity and safety.” *Id.* at 357.

168. Boivin et al., *supra* note 67, at 266.

169. DES A. BUTLER & BEN MATHEWS, SCHOOLS AND THE LAW 46 (2007).

170. Becky Kochenderfer Ladd & Gary W. Ladd, *Variations in Peer Victimization: Relations to Children’s Maladjustment*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 25, 25.

171. Perry et al., *supra* note 65, at 73; *see also* Graham & Juvonen, *supra* note 54, at 50 (“[Y]oungsters who are repeatedly victimized by peers are at risk for a whole host of maladaptive outcomes.”); Ladd & Ladd, *supra* note 170, at 27 (“[I]nvestigators have linked peer victimization to loneliness, depression, anxiety, low self-esteem, social problems (e.g., peer rejection, friendlessness), and school maladjustment.”).

172. *See supra* notes 69–72 and accompanying text.

173. MEYER, *supra* note 52, at 1.

174. Perry et al., *supra* note 65, at 78; *see also* Susan M. Swearer, Samuel Y. Song, Paulette Tam Cary, John W. Eagle & William T. Mickelson, *Psychosocial Correlates in Bullying and Victimization: The Relationship Between Depression, Anxiety, and Bully/Victim Status*, in BULLYING BEHAVIOR: CURRENT ISSUES, RESEARCH, AND INTERVENTIONS 95, 98 (Robert A. Geffner, Marti Loring & Corinna Young eds., 2001) (“Previous research

about bullying that causes these problems, and why are children who are bullied on the basis of gender nonconformity so at risk? Well, part of what makes this form of bullying so potent is quite simply the frequency with which these victims are targeted.<sup>175</sup> However, the complex nature of gender also plays a key role. Specifically, there are a number of facets that make up gender—the two most relevant to this discussion are gender identity and gender expression. As Professor Lori B. Girshick explains: “*Gender identity* is an individual’s internal sense of gender (whether that person feels masculine or feminine, a bit of both or neither . . .).”<sup>176</sup> In contrast, gender presentation “is the way an individual chooses to present his/her gender to others through dress, speech, actions, and grooming.”<sup>177</sup> These two components of gender are, of course, linked in that gender expression is the way in which a person goes about communicating his gender identity.<sup>178</sup>

As noted earlier, it is not so much a person’s gender identity or sexual orientation that triggers bullying but the person’s gender presentation.<sup>179</sup> Now, theoretically, a person can control his gender presentation. Indeed, as the above quote from Professor Girshick makes clear, there is some degree of choice in how a person presents his gender to others.<sup>180</sup> This element of control is relevant to our discussion here because, as studies reveal, the level of bullying is positively correlated with the degree to which the bullied person is perceived as being capable of changing the offending behavior:

When the cause of someone’s need is perceived as uncontrollable, that individual is not held responsible. The absence of responsibility tends to elicit pity and prosocial actions such as help. Thus, we pity physically handicapped persons and want to help because they are perceived as not responsible for their plight. In contrast, attributing someone’s need to controllable factors gives rise to the inference that the person is responsible. Perceived personal responsibility for a negative event often elicits anger, and help tends to be withheld.<sup>181</sup>

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indicates that victims of bullying tend to display unique characteristics and behaviors. Victims typically possess lower self-esteem and experience more feelings of loneliness, anxiety, and depression than nonvictimized individuals.”)

175. See *supra* Part I.A.

176. GIRSHICK, *supra* note 80, at 2 (emphasis in original).

177. *Id.*

178. See *id.*; see also CHARLES H. ZASTROW & KAREN K. KIRST-ASHMAN, UNDERSTANDING HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT 371 (8th ed. 2010) (“*Gender expression* concerns how we express ourselves to others in ways related to gender that include both behavior and personality.” (emphasis in original)); David T. Ozar, *Towards a More Inclusive Conception of Gender-Diversity for Intersex Advocacy and Ethics*, in ETHICS AND INTERSEX 17, 41 (Sharon E. Sytsma ed., 2006) (discussing the way in which gender expression is used to affirm gender identity).

179. See *supra* notes 100–01 and accompanying text.

180. See *supra* note 176 and accompanying text; see also Kim Surkan, *Drag Kings in the New Wave: Gender Performance and Participation*, in THE DRAG KING ANTHOLOGY 161, 166 (Donna Jean Troka, Kathleen LeBesco & Jean Bobby Noble eds., 2003) (discussing the degree to which people can alter their gender expression “and the relationship of that expression to their sense of identity”).

181. Graham & Juvonen, *supra* note 54, at 57–58.



Given this research, one can begin to understand why bullying on the basis of gender nonconformity can be so harsh. After all, it is largely gender expression, a quality that is at least theoretically controllable, which prompts and seemingly justifies the bullying.<sup>182</sup> As discussed above, some school administrators have held the victimized child responsible for any bullying he receives on the basis of gender nonconformity,<sup>183</sup> thus lending weight to the argument that bullies (and bystanders) view these gender “violations” as correctable.

Although the seemingly mutable nature of gender expression might explain the frequency and intensity of bullying on the basis of gender nonconformity; by itself, it fails to explain why this form of bullying is so particularly destructive. For that, we need to look closer at the nature of gender identity. Specifically, although a child may have control over her gender presentation, such presentation is mostly governed by the child’s gender identity, a characteristic over which the child does not have control.<sup>184</sup> And it is this lack of control over the seeming impetus for the harassment that can be so devastating. Indeed, a study that attempted to uncover what forms of bullying are most harmful found that, for victims of bullying, “if victimization is attributed to a stable and uncontrollable cause (e.g., ‘It’s something about me’) rather than to an unstable and controllable cause (‘It’s something about what I did in this situation’), then we would predict particularly maladaptive motivational consequences.”<sup>185</sup> In other words, students who are bullied on the basis of some controllable behavior seemingly suffer less harm than those who are bullied on the basis of characteristics over which they have little control: “[I]ndividuals who make characterological self-attributions for negative outcomes cope more poorly, feel worse about themselves, and are more depressed than individuals who make behavioral self-attributions.”<sup>186</sup> In essence, because the child cannot control that part of himself that is so clearly unacceptable, the child begins to feel an acute sense of shame.<sup>187</sup>

In sum, whereas the bully of a gender-nonconforming child may be focusing on gender expression (a mutable quality and thus one more “deserving” of bullying behavior), the victim can easily see the attacks being directed more at gender identity, an immutable quality. For these reasons, the child may feel that the reason he is being attacked so frequently is simply a result of who he is. Such beliefs of course lead to a profound impact on self-esteem, causing the child to “repress their

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182. *See supra* Part I.A.

183. *See supra* Part I.B.

184. *See, e.g.*, SUZANNE ROMAINE, COMMUNICATING GENDER 45 (1999) (“[M]any psychologists believe that our gender identity becomes fixed during the first 3 years of life . . . .”); 1 ENCYCLOPEDIA OF WOMEN AND GENDER 57 (Judith Worell ed., 2001) (“Research indicates that gender identity is fixed relatively early in a person’s development.”).

185. Graham & Juvonen, *supra* note 54, at 53.

186. *Id.* at 54; *see also* Craig A. Anderson, Rowland S. Miller, Alice L. Riger, Jody C. Dill & Constantine Sedikides, *Behavioral and Characterological Attributional Styles as Predictors of Depression and Loneliness: Review, Refinement, and Test*, 66 J. PERSONALITY & SOC. PSYCHOL. 549, 550–51 (1994) (reviewing literature).

187. Graham & Juvonen, *supra* note 54, at 53.

deepest emotions” and become “ashamed of who they are.”<sup>188</sup> And, as research shows, “the disconnect between who one is and who one must pretend to be can be tremendously damaging.”<sup>189</sup> Thus, the harm that comes from bullying on the basis of gender nonconformity is not simply the hurt feelings that flow from each discrete attack, but is more importantly the way in which this cumulative bullying begins to make the victim question his or her worth as a human being. As one scholar aptly put it: “The harm to queer youth goes far beyond the mental or physical impact of slur or fist, though these are horrible enough. The greater harm to queer youth from homophobic and heterosexist bias is degradation of their ability to envision a healthy, meaningful future.”<sup>190</sup>

As this last quote indicates and as is discussed in greater detail below,<sup>191</sup> the psychological harm that flows from such bullying lasts well beyond childhood. In fact, many studies show that such effects can last forever: “The damage to the victims of bullying may be physical, emotional, and/or psychological, and the resulting trauma can last a lifetime.”<sup>192</sup> These findings have led some to describe the damage that results from childhood bullying as “persistent scars”<sup>193</sup> given the “serious and often life-long” consequences that result from being bullied as a child.<sup>194</sup>

Thus, the harm that results from chronic bullying is extremely damaging to a child’s health, so much so that the child may be faced with a lifetime of hardship. But what exactly are those discrete harms? The remainder of this Part will look at some of the more common effects that chronic bullying tends to produce, focusing specifically on those which often afflict the child who is bullied on the basis of gender nonconformity. To do that, I will first look at the physical effects of bullying and then at the emotional effects and corresponding behavioral problems (including educational harms) that can result from chronic bullying.

#### *A. Physical Effects: A Growing Body Count*

Although this Article has so far focused more on the extreme psychological harms that result from chronic bullying, make no mistake: the physical harms caused by chronic bullying can be quite severe. Indeed, bullying often takes the form of physical abuse ranging from acts of pushing and shoving to punching and kicking and even sexual assault and rape.<sup>195</sup> Aside from the bodily injuries these forms of physical bullying can cause, research has also shown that bullying can likewise lead to more frequent childhood health complaints such as “headaches, abdominal pain, nausea, recurrent upper respiratory tract infections, sore throats

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188. BAKER, *supra* note 70, at 48.

189. CHARISSE JONES & KUMEA SHORTER-GOODEN, *SHIFTING: THE DOUBLE LIVES OF BLACK WOMEN IN AMERICA* 8 (2003).

190. Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1058.

191. *See infra* notes 234–38 and accompanying text.

192. MCGRATH, *supra* note 56, at 6.

193. Boivin et al., *supra* note 67, at 267 (internal quotation marks omitted).

194. Weddle, *supra* note 45, at 642.

195. MCGRATH, *supra* note 56, at 6–7.

and palpitations.”<sup>196</sup> As a result, bullied children tend to consistently report poorer scores on health-related quality of life questionnaires.<sup>197</sup>

Most troubling, however, is the fact that children are actually being killed on the basis of their nonconforming gender expression. Take for example, the tragic story of Lawrence King, a fifteen-year-old who attended E.O. Green Junior High School in Oxnard, California.<sup>198</sup> On February 12, 2008 during school, King was shot twice in the head by a fourteen-year-old classmate in a room full of students.<sup>199</sup> King was placed on life support and died two days later.<sup>200</sup> Why would King attract such a violent response? Well, King, who was described as “effeminate,” was “being bullied for being proudly gay and flouting male conventions by accessorizing his school uniform with eye shadow and high-heeled boots.”<sup>201</sup> In fact, although his murder would be the last act of violence King would have to endure, it certainly was not the first:

“I heard that there were a lot of kids picking on Larry because he was different,” says Brianna, a 12-year-old sixth-grader at E.O. Green. “[The bullies] made fun of him a lot,” says another peer. “He had a lot of enemies,” says 13-year-old E.O. Green eighth-grader Matthew Weber-Hernandez.<sup>202</sup>

King’s increasing displays of gender nonconformity only escalated this tension:

In the months leading up to that morning [of King’s murder], King had undergone a metamorphosis. Guided by a welcoming support system at the group home where he lived, the teenager was encouraged to dress as he pleased and live as the person he wanted to be. What King and others didn’t recognize was that this encouragement—and his response to it—placed him on a collision course with a culture that found him repulsive.

Even before his death, Larry King was notorious. He was the sassy gay kid who bragged about his flashy attire and laughed off bullying, which for him included everything from name-calling to wet paper towels hurled in his direction. King was an easy target—he stood 5 foot 4 and was all of 100 pounds.<sup>203</sup>

Fortunately, stories of gender-nonconforming children being outright murdered are relatively rare. Nonetheless, it does not take a murder to create a dead body.

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196. Stephen Allison, Leigh Roeger & Nova Reinfeld-Kirkman, *Does School Bullying Affect Adult Health? Population Survey of Health-Related Quality of Life and Past Victimization*, 43 AUSTL. & N.Z. J. PSYCHIATRY 1163, 1163 (2009) (summarizing studies).

197. *Id.*

198. See Neal Broverman, *Mixed Messages*, ADVOCATE, Apr. 2008, at 29.

199. *Id.*

200. *Id.* at 33 (“[B]y Wednesday he was brain-dead. He was kept on life support until Thursday so his organs could be harvested.”).

201. *Id.* at 29.

202. *Id.* at 32; see also JAMES A. BANKS & CHERRY A. MCGEE BANKS, MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES 218 (2009) (“Larry endured daily taunting.”).

203. Broverman, *supra* note 198, at 29–30.

Indeed, incidences of suicide among children who have been bullied on the basis of nonconforming gender expression are plentiful. Consider, for example, the following story from April 2009: “On April 6, just before dinner, Carl Joseph Walker-Hoover, a Massachusetts boy who had endured relentless homophobic taunts at school, wrapped an extension cord around his tiny neck and hanged himself. He was only 11 years old. His mother had to cut him down.”<sup>204</sup> The tragedy of Carl’s suicide took on ever greater meaning when, only ten days later “[o]n April 16, just after school, Jaheem Herrera, a Georgia boy who had also endured relentless homophobic taunts at school, wrapped a fabric belt around his tiny neck and hanged himself as well. He too was only 11 years old. His 10-year-old sister found him.”<sup>205</sup> As if the specter of eleven-year-old boys committing suicide was not distressing enough, in January of 2010, Montana Lance, a nine-year-old student in Texas, hung himself in the school bathroom because, according to a friend, “he was just bullied too much.”<sup>206</sup>

These three little boys are but three of the children who have committed suicide after being repeatedly bullied by their peers.<sup>207</sup> As Professor Ken Rigby explains, “[s]everal cases of suicide by schoolchildren have been attributed to the experience of repeated victimization,” and additionally, “peer victimization is related to suicidal ideation, that is, the tendency to think about killing oneself.”<sup>208</sup> Such consequences can be explained by the fact that bullying often produces feelings of hopelessness for the bullied child,<sup>209</sup> with research showing a strong correlation between such feelings and thoughts of suicide.<sup>210</sup> In fact, children, given their youth and inexperience, are perhaps at even greater risk of experiencing such feelings. According to professor and psychologist Dr. Betsy Kennard, “youths typically don’t have the long-term view of the world that adults do. They may think their despair won’t go away, so there’s more hopelessness.”<sup>211</sup>

One set of highly instructive statistics discusses the rate of suicide among LGBT youth, a group that, although not reflective of all students who are bullied on the basis of gender stereotypes, is heavily comprised of students who are targeted on

204. Charles M. Blow, *Two Little Boys*, N.Y. TIMES: BY THE NUMBERS (Apr. 24, 2009, 3:04 PM), <http://blow.blogs.nytimes.com/2009/04/24/two-little-boys/>.

205. *Id.*

206. *Boy, 9, Found Hanged in Texas School: Autopsy Results Pending on Apparent Suicide After Hospital Pronounces Elementary School Student Dead*, CBS NEWS (Jan. 22, 2010), <http://www.cbsnews.com/stories/2010/01/22/national/main6130070.shtml>.

207. *Cf.* MCGRATH, *supra* note 56, at 13–14 (listing other incidences).

208. Ken Rigby, *Health Consequences of Bullying and Its Prevention in Schools*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 310, 311.

209. *See* COLOROSO, *supra* note 61, at 128 (pointing out the “helplessness and hopelessness felt by the bullied child”).

210. Susan M. Swearer, Amie E. Grills, Kisa M. Haye & Paulette Tam Cary, *Internalizing Problems in Students Involved in Bullying and Victimization: Implications for Intervention*, in BULLYING IN AMERICAN SCHOOLS: A SOCIAL-ECOLOGICAL PERSPECTIVE ON PREVENTION AND INTERVENTION 63, 66 (Dorothy L. Espelage & Susan M. Swearer eds., 2004).

211. Matthew Haag & Jessica Meyers, *Questions, Grief Follow Suicide*, DALL. MORNING NEWS, Jan. 23, 2010, at B1, *available at* [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-studentdeath\\_23met.ART0.State.Edition1.4c0f05b.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-studentdeath_23met.ART0.State.Edition1.4c0f05b.html).

the basis of gender nonconformity.<sup>212</sup> Many of these studies have revealed that LGBT youth are as much as four times more likely than heterosexual youth to attempt suicide.<sup>213</sup> Of the various studies that have looked at this issue, most found that “30–50 per cent of gay, lesbian and bisexual youths have attempted suicide, usually in the past year and often with multiple attempts.”<sup>214</sup> Furthermore, a 1989 report by the U.S. Department of Health and Human Services found that, among all adolescent suicides, thirty percent were committed by LGBT youth.<sup>215</sup> Although alarming, these findings are consistent with the sociological theory of suicide, which posits that “one of the major reasons people kill themselves is a lack of integration into the dominant culture.”<sup>216</sup> As one teen said of his coming out process, “I found myself staring at pills or a knife on more than one occasion as I came out, and nearly succeeded in destroying myself. I vividly remember the long hours of glaring at the mirror, trying to decide if the image I saw was worth saving.”<sup>217</sup>

And, of course, the deaths that can result from chronic bullying sometimes include more than just the victimized students. Take for instance the 1999 school shooting at Columbine High School, where fifteen people (including the two teenage perpetrators) were killed and twenty-three more were wounded.<sup>218</sup> Since this horrific event, many in the United States have come to believe that the two perpetrators of the school massacre, Eric Harris and Dylan Klebold, were simply “reacting to years of bullying, rejection, and abuse by their peers.”<sup>219</sup> Specifically, in a videotape made the night before the shooting, Klebold explained that, for years, he had received “constant gay-baiting, being called ‘queer,’ ‘faggot,’ ‘homo,’ being pushed into lockers, grabbed in hallways, and mimicked and ridiculed with homophobic slurs.”<sup>220</sup> In fact, following the shooting at Columbine,

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212. See *supra* notes 99–101 and accompanying text.

213. See James Lock & Hans Steiner, *Gay, Lesbian, and Bisexual Youth Risks for Emotional, Physical, and Social Problems: Results from a Community Based Survey*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 297, 297 (1999) (summarizing studies that found increased emotional, social, and physical health problems among LGBT youth, including a “two- to threefold increased rate of suicide attempts”); see also MEYER, *supra* note 52, at 19 (saying LGBT youth are “four times more likely to have attempted suicide”).

214. See Ritch C. Savin-Williams, *A Critique of Research on Sexual-Minority Youths*, 24 J. ADOLESCENCE 5, 9 (2001) (summarizing studies from the late 1990s); see also Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 45 ADVANCES IN PEDIATRICS 107, 122–23 (1998) (“[R]ates of attempted suicide among gay and lesbian youth have consistently been found to be greater than expected in the general population of adolescents, ranging from 20% to 42%.”).

215. See Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in 3 U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, REPORT OF THE SECRETARY’S TASK FORCE 110, 110 (1989).

216. Morrison & L’Heureux, *supra* note 136, at 39.

217. *David, 19*, in TWO TEENAGERS IN TWENTY: WRITINGS BY GAY AND LESBIAN YOUTH 68, 73 (Ann Heron ed., 1994).

218. Kimmel & Mahler, *supra* note 103, at 160–61.

219. McGRATH, *supra* note 56, at 13.

220. Kimmel & Mahler, *supra* note 103, at 161. In addition, the “school newspaper had recently published a rumor that Harris and Klebold were lovers.” *Id.* at 160.

a school athlete offered an extremely telling “defense” to these charges of bullying—a defense which only seems to corroborate Klebold’s claims:

Columbine is a clean, good place except for those rejects [Harris and Klebold] . . . Sure we teased them, but what do you expect with kids who come to school with weird hairdos and horns on their hats. It’s not just jocks; the whole school’s disgusted with them. They’re a bunch of homos, grabbing each other’s private parts. If you want to get rid of someone, usually you tease ‘em. So the whole school would call them homos, and when they did something sick, we’d tell them, “You’re sick and that’s wrong.”<sup>221</sup>

Of course, the tragedy at Columbine is not an isolated event, nor, as we now know, are the events that seemingly triggered such a violent reaction.<sup>222</sup> In fact, a study by the United States Secret Service found that, in looking at thirty-seven school shootings that took place between 1974 and 2000, seventy-one percent of the attackers “felt persecuted, bullied, threatened, attacked or injured by others prior to the incident. . . . In several cases, individual attackers had experienced bullying and harassment that was longstanding and severe.”<sup>223</sup> In an attempt to explain why bullying can produce such violent consequences, gender theorists have again pointed their finger at the role gender plays in our society. As Michael S. Kimmel and Matthew Mahler explain: “being constantly threatened and bullied *as if you are gay* as well as the homophobic desire to make sure that others know that you are a ‘real man’—plays a pivotal and understudied role in these school shootings.”<sup>224</sup> Indeed, as Michael Carneal (who at fourteen years old, after years of homophobic bullying, opened fire on a group of students at school, killing three and wounding five) would later say when asked why he committed such a crime: “I just wanted the guys to think I was cool . . . . [P]eople respect me now.”<sup>225</sup>

*B. Emotional Effects: “First they bully you, then you bully yourself.”<sup>226</sup>*

Just as the resulting sense of isolation is partly responsible for the high rate of suicide among the chronically bullied, so too is this sense of isolation responsible for a whole host of severe emotional problems.<sup>227</sup> Without supportive peer relationships, a child’s emotional development is seriously stunted. Indeed, “[n]umerous theories have emphasized the importance of supportive peer

221. BAKER, *supra* note 70, at 94.

222. See KIMMEL, *supra* note 87, at 244–45; MCGRATH, *supra* note 56, at 13–14 (listing similar incidents).

223. U.S. SECRET SERV. & U.S. DEP’T OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 21 (2002), available at [http://www.secretservice.gov/ntac/ssi\\_final\\_report.pdf](http://www.secretservice.gov/ntac/ssi_final_report.pdf).

224. Kimmel & Mahler, *supra* note 103, at 161 (emphasis in original).

225. Jonah Blank, *The Kid No One Noticed*, U.S. NEWS & WORLD REPORT, Oct. 12, 1998, at 27.

226. DAVIS, *supra* note 66, at 20 (quoting a student).

227. See *supra* notes 209–14 and accompanying text.

relationships and a sense of belonging for individuals' well-being and subsequent development."<sup>228</sup> In fact, many feel that chronic bullying is particularly destructive largely because of the way in which bullying can inhibit the formation of supportive peer relationships; after all, "[s]tudents who were bullied in school but did not experience social isolation concomitant with the bullying reported fewer long-term effects of the stress of bullying."<sup>229</sup> For those who do develop feelings of isolation, however, the resulting psychological harm can be quite debilitating.

Research reveals a significant relationship between bullying and a variety of psychological distress, including loneliness, acute anxiety, and moderate to severe depression.<sup>230</sup> Perhaps one of the most damaging harms that can result from chronic bullying, however, is traumatic stress.<sup>231</sup> Indeed, many experts classify bullying as a form of chronic trauma.<sup>232</sup> To understand the pernicious effects that trauma can have, consider how clinical psychologist Dr. Herbert Gravitz defines the term: "Trauma is learning to have so few wants or needs that you can't possibly be disappointed. Trauma is praying every night to a god who never answers and feeling abandoned and disconnected from life's beauty and mystery. Trauma is the constantly breaking heart."<sup>233</sup>

As a result of such trauma, a child's self-esteem becomes seriously eroded, which can then "show up later in addictions, compulsive behaviors, depression and anxieties."<sup>234</sup> And, as mentioned earlier, these subsequent affective and behavioral problems are not limited to childhood, but form "persistent scars," which can haunt the victim throughout the rest of his life.<sup>235</sup> As Professor Daniel Weddle describes, "[n]ot only do victims suffer the immediate pain and humiliation of being the subject of the bully's torment, they suffer emotional and psychological effects that can remain with them well into their adult lives."<sup>236</sup> Specifically, studies have found that "childhood victimization was still significantly associated with greater

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228. Nicki R. Crick, David A. Nelson, Julie R. Morales, Crystal Cullerton-Sen, Juan F. Casas & Susan E. Hickman, *Relational Victimization in Childhood and Adolescence: I Hurt You Through the Grapevine*, in PEER HARASSMENT IN SCHOOL, *supra* note 51, at 196, 197.

229. Mark Henrickson, "You Have to Be Strong to Be Gay": *Bullying and Educational Attainment in LGB New Zealanders*, 19 J. GAY & LESBIAN SOC. SERVICES 67, 69 (2007).

230. See Rigby, *supra* note 208, at 316 (summarizing studies); see also Stephen S. Leff, Thomas J. Power & Amy B. Goldstein, *Outcome Measures to Assess the Effectiveness of Bullying-Prevention Programs in Schools*, in BULLYING IN AMERICAN SCHOOLS, *supra* note 210, at 269, 271 ("Victims of peer aggression are also at risk for internalizing problems, including depression, anxiety, loneliness, and low self-esteem.").

231. See MCGRATH, *supra* note 56, at 17–18.

232. *Id.* at 18.

233. HERBERT L. GRAVITZ, *MENTAL ILLNESS AND THE FAMILY: UNLOCKING THE DOORS TO TRIUMPH* 135 (2004).

234. MCGRATH, *supra* note 56, at 18 ("Trauma causes the victim to view life through a distorted lens, resulting in a loss of self-esteem, misdirection in life, lack of a purpose, an inability to adapt to stress, and/or a disconnection from other people."); see also Bukowski & Sippola, *supra* note 167, at 355 ("Empirical evidence shows that persons who are victimized are more likely than others to show subsequent affective and behavioral problems.").

235. Boivin et al., *supra* note 67, at 267; see *supra* notes 192–94 and accompanying text.

236. Weddle, *supra* note 45, at 646–47.

depression and lower self-esteem in adulthood.”<sup>237</sup> In fact, one longitudinal study found that boys who had been bullied during middle school showed higher levels of depression and self-esteem issues as young adults over a decade later.<sup>238</sup>

For gender-nonconforming children, these risks are particularly high. As one commentator explains, “[p]eer rejection, taunting, and bullying can cause long-lasting psychological damage. Especially for the gender atypical child, particularly male, this can be a very dangerous and frightening period of life.”<sup>239</sup> To understand what makes those children who are bullied on the basis of gendered stereotypes so at risk, one has to consider the child’s larger environment outside the school. For many of these children, isolation is pervasive. Indeed, “[t]he heteronormity and homophobia that pervade our culture also infect our families, schools, courts, and child welfare organizations.”<sup>240</sup> As a result, many of these children lack any kind of support network, even at home.<sup>241</sup> For instance, statistics reveal that one-third of LGBT youth has faced both verbal<sup>242</sup> and physical abuse<sup>243</sup> from family members as a result of the child’s perceived sexual orientation. Further, as many as half of these children have faced some form of parental rejection.<sup>244</sup> These circumstances only increase the sense of isolation and stress experienced by LGBT youth, leading some to the conclusion that “[f]or many gay youth, the closet is the only safe home.”<sup>245</sup>

Even if these children do have a supportive family network, the unfortunate reality is that those who are bullied on the basis of gender nonconformity are frequently too ashamed to take advantage of this support. As one commentator

237. Boivin et al., *supra* note 67, at 267; *see also* Allison et al., *supra* note 195, at 1167 (“The present findings . . . indicate that reports of school bullying are associated with significant adult mental health problems in the general community.”).

238. Dan Olweus, *Victimization by Peers: Antecedents and Long-term Outcomes*, in *SOCIAL WITHDRAWAL, INHIBITION, AND SHYNESS IN CHILDHOOD* 315, 327 (Kenneth H. Rubin & Jens B. Asendorf eds., 1992); *see also* Leff et al., *supra* note 230, at 271 (“[M]any of these children experience increasing psychological difficulties as they grow older.”).

239. BAKER, *supra* note 70, at 39.

240. Valentine, *supra* note 190, at 1054–55 (footnotes omitted).

241. *See* Eisemann, *supra* note 45, at 150 (“One cannot assume that parents will always support their children and assist them in gaining help from school officials.”).

242. Sonia Renee Martin, *A Child’s Right to Be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 *HASTINGS L.J.* 167, 169 (1996) (citing Gibson, *supra* note 215, at 127). Further, such verbal abuse is not limited to those adolescents who have disclosed their sexual orientation. *See* Anthony D’Augelli, Arnold H. Grossman & Michael T. Starks, *Parents’ Awareness of Lesbian, Gay, and Bisexual Youths’ Sexual Orientation*, 67 *J. MARRIAGE & FAM.* 474, 481 (2005) (“Parents who suspect their children to be LGB may make more antigay comments, which may lead to learning that they have an LGB child.”).

243. Joseph J. Wardenski, Note, *A Minor Exception? The Impact of Lawrence v. Texas on LGBT Youth*, 95 *J. CRIM. L. & CRIMINOLOGY* 1363, 1378 (2005).

244. BENNETT L. SINGER & DAVID DESCHAMPS, *GAY AND LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES* 77 (1994).

245. Ruskola, *supra* note 136, at 270. Of course, any teen, regardless of sexual orientation, may face abuse within the home. However, “studies clearly demonstrate that the rate of psychological abuse among queer teens is higher than that among heterosexual teens.” *See* Martin, *supra* note 242, at 169.



points out, “victims are often unwilling to tell adults of their plight because doing so seems like a humiliating admission of their own weakness, as well as an admission of their unpopularity.”<sup>246</sup> The specter of being thought a “fag” is also a powerful incentive for children to remain silent.<sup>247</sup> Professor James T. Sears describes his experience: “[T]elling anyone was not a reasonable option for a scraggly 14-year old. To do so would be to admit my frailty within a male-dominated culture, to confront privilege and power, and to legitimate insults.”<sup>248</sup>

Accordingly, any sense of isolation that these children might feel as a result of the being chronically bullied is likely to be further intensified by their fear of reporting this abuse to anyone.<sup>249</sup> In addition, the resulting hit that these children then take to their self-esteem leads not only to the psychological disorders discussed above, but further, these disorders can manifest themselves in a number of self-destructive behaviors that only serve to further cripple the victim’s emotional development. Indeed, there is evidence that chronically abused children are more prone to abuse drugs and alcohol,<sup>250</sup> engage in risky sexual behavior,<sup>251</sup> and even to end up homeless.<sup>252</sup> In looking at what these behaviors have in common, they are very much like the resulting suicidal tendencies discussed in the previous Part.<sup>253</sup> Namely, they all show the degree to which the bullied child devalues his life and the relative lack of concern he puts on a healthy future.

It should come as little surprise, then, that these children also begin to put less value on education. Now, in looking at harm, I have thus far focused on the broader categories of physical and emotional harm. However, because we are talking about public schools, the central purpose of which is to educate American children, it is

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246. Weddle, *supra* note 45, at 651.

247. BAKER, *supra* note 70, at 90 (“Since parents often don’t know they have a gay child, if their child were to come to them about having been harassed at school, the reason for the harassment would likely have to be revealed. The child might be afraid to do that.”); *see also* Eisemann, *supra* note 45, at 149–50 (“Some gay children may not even want their parents or teachers to know that they have been victims of sexual orientation harassment for fear that these adults will learn or assume they are gay.”).

248. Sears, *supra* note 73, at ix.

249. *See* Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 76 (1994) (“When gay teens realize they cannot speak to their parents, their educators, or their peers about their feelings, they often ‘internalize at least some homophobic stereotypes, and some experience self-hatred resulting from their belief and fears about their homosexual feelings.’” (quoting Deborah Zera, *Coming of Age in a Heterosexist World: The Development of Gay and Lesbian Adolescents*, 27 ADOLESCENCE 849, 850 (1992))).

250. *See* WILLIAM VOORS, *THE PARENT’S BOOK ABOUT BULLYING: CHANGING THE COURSE OF YOUR CHILD’S LIFE* 34 (2000) (“[T]he stress experienced by targets of bullying can result in significant problems with substance abuse.”).

251. *See* Lock & Steiner, *supra* note 213, at 298 (“[A] study of homosexual and bisexual youth, found an association between lower sexual risk-taking and higher self-esteem suggesting that perception of self-worth (a possible corollary for level of internalized homophobia) may contribute to behaviors of gay youth.”).

252. *See* Wardenski, *supra* note 243, at 1377 (“Flowing from these problems, LGBT youth are disproportionately likely to experience periods of homelessness . . .”).

253. *See supra* Part III.A.

important to also take a more specific look at the academic effects that flow from bullying. As one commentator recently stated, “[t]he more sex stereotypes are reinforced and affirmed in society, the more difficult it is for people, whose natural self-expression is in conflict with sex-role expectations, to accept themselves and to function well within society.”<sup>254</sup> The “society” that children inhabit frequently centers around their schools, and as the above quotation makes clear, those children who fail to conform to traditionally accepted gender stereotypes have great difficulty functioning in that school society, often at the expense of the child’s education.

As an initial matter, those students who are frequently the targets of bullying “tend to develop negative attitudes toward school and may try to avoid school as it becomes an increasingly unpleasant place to be.”<sup>255</sup> Indeed, increased absenteeism is common among chronically bullied students.<sup>256</sup> For instance, studies of LGBT children reveal that thirty-one percent report having missed at least one day of school in the previous month because they did not feel safe at school.<sup>257</sup> In fact, studies reveal that LGBT children are three times more likely to skip school out of safety concerns,<sup>258</sup> thus resulting in a decline in academic performance.<sup>259</sup> Further, research indicates that the academic difficulties experienced by many of these bullied children are “a consequence rather than a cause of peer harassment.”<sup>260</sup>

An additional effect that flows from absenteeism and poor academic performance is low educational attainment. Studies of LGBT individuals are instructive in this regard. For instance, a 2002 study found that educational attainment is negatively impacted by awareness of possessing a nonheterosexual orientation, especially for those who realize their sexual identity early in school.<sup>261</sup> Similarly, a New Zealand study found that “coming out early as LGBT appears associated with lower levels of education attainment. This apparent early selection out of education appears associated with bullying and assault, together with what the literature suggests is a lack of social and formal supports from teachers, administrators, and families.”<sup>262</sup> In looking at both these studies, then, “[t]his research seems to posit a kind of heteronormative educational Darwinism that

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254. Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 23 (2009).

255. Boivin et al., *supra* note 67, at 266–67.

256. See MEYER, *supra* note 52, at 1 (“Lower academic performance, absenteeism, drug and alcohol abuse, and suicidal behaviors have all been linked to victims of schoolyard bullies.”).

257. Hirschfeld, *supra* note 154, at 612.

258. MEYER, *supra* note 52, at 19. Overall, “LGBT high school students are . . . six times more likely to skip school than heterosexual students.” L. Michael Gipson, *Race, Poverty and LGBT Youth*, in POVERTY & RACE IN AMERICA: THE EMERGING AGENDAS 387, 393 (Chester Hartman ed., 2006).

259. Boivin et al., *supra* note 67, at 267.

260. *Id.*

261. See Donald C. Barrett, Lance M. Pollack & Mary L. Tilden, *Teenage Sexual Orientation, Adult Openness, and Status Attainment in Gay Males*, 45 SOC. PERSP. 163, 178 (2002).

262. Henricksen, *supra* note 229, at 79–80.

results in young LGBTs, who are aware of an act on their identities relatively early in life, self-select out of education because of overt hostility and discrimination that they encounter.”<sup>263</sup> In other words, why would someone subject herself to more time in school when school has, thus far, proved to be such a unrelentingly cruel environment?

In sum, all of these effects on victims, including effects on academic achievement and physical and emotional well-being, stem from the way in which chronic bullying leads to an “erosion of self-confidence and self-esteem.”<sup>264</sup> Of course, compared to the physical harms that flow from bullying, including death, the emotional harms might appear relatively benign. However, given the long-term limitations they can inflict on a child,<sup>265</sup> emotional harms are in some ways worse than death. As noted psychiatrist and author, Elisabeth Kübler-Ross explained in her book *The Final Stage of Growth*:

It is not the end of the physical body that should worry us. Rather, our concern must be to *live* while we’re alive—to release our inner selves from the spiritual death that comes with living behind a façade designed to conform to external definitions of who and what we are. Every individual human being born on this earth has the capacity to become a unique and special person unlike any who has ever existed before or will ever exist again. But to the extent that we become captives of culturally defined role expectations and behaviors—stereotypes, not ourselves—we block our capacity for self-actualization.<sup>266</sup>

It was precisely this form of death—a spiritual death—that civil rights activists referred to when they spoke out against the harms that segregation had inflicted on African American children.<sup>267</sup> And, as outlined above, it is this form of death that now haunts the daily lives of those children in our public schools who fail to attain the prescribed social model for gender expression. Thus, just as the children of segregation were lynched “spiritually, emotionally, and mentally,”<sup>268</sup> so too are these young victims of gender-based bullying.

### III. GOING FORWARD: A SOLUTION?

I began this Article talking about lynch law and the way it once operated in the American South. I did so because, as I have outlined above, there are many similarities between gender-based bullying and lynching:

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263. *Id.* at 70.

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

265. *See supra* notes 230–34 and accompanying text.

266. ELISABETH KÜBLER-ROSS, *DEATH: THE FINAL STAGE OF GROWTH* 164 (1997).

267. *See supra* notes 29–32 and accompanying text.

268. Smith, *supra* note 32, at 220; *see supra* note 32 and accompanying text.

- Both are driven by unwritten social codes—in one instance, white supremacy; in the other, gender stereotypes.<sup>269</sup>
- Both are carried out by perpetrators who do not act in isolation but rather with the support and sometimes involvement of the larger community. As noted above, one of the reasons gender-based bullying is so frequent is the degree to which peers and school administrators ignore such behavior and, in some instances, even become active participants.<sup>270</sup>
- Both result in extreme harm—lynching, in its most basic form, resulted in dead bodies; however, as we now understand, a lynching need not be defined so narrowly.<sup>271</sup> In the case of segregation, for example, we had living children with “lynched” spirits. Chronic bullying on the basis of gender stereotypes carries similar results. Yes, there are some deaths that are directly attributable to this form of bullying.<sup>272</sup> But there are innumerable incidences of children who, at the hands of bullies, are lynched both spiritually and emotionally, resulting not only in immediate pain but a lifetime of struggle.<sup>273</sup>
- Finally, both lynching and gender-based bullying achieve maximum effectiveness by the way in which they generate fear in others. The clear message of both is the same: obey the “code” or pay a steep price.<sup>274</sup>

It is the contention of this Article that only after seeing bullying on the basis of gender nonconformity as a means of lynching will we be in a position to even begin to craft an effective remedy. Ironically, however, once we do begin to look at gender-based bullying in this light, we must first acknowledge that a solution is going to be very difficult to attain. Indeed, when one looks at the incidences of lynching in the American South, it is not as though lynch law suddenly made a dramatic entrance one day and then subsequently, as a result of some discrete cause, made an abrupt exit. Instead, the practice waxed and waned for years.<sup>275</sup> Although we tend to think of the lynching of African Americans as a thing of the past, as recently as 1998, an African American named James Byrd Jr. was dragged to his death after having his feet tied to the end of a pickup truck by three white men in Texas.<sup>276</sup> In light of such incidences (which, at the very least, are *lynch-like*), we must remember that, as one scholar puts it, “while lynch mobs are no

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269. *See supra* Part I.A.

270. *See supra* Part I.B.

271. *See supra* Part II.A.

272. *See supra* Part II.A.

273. *See supra* Part II.B.

274. *See supra* notes 115–18 and accompanying text.

275. *See* DRAY, *supra* note 4, at 457 (“When did [lynching] stop? Even among students of the phenomenon there is no recognized end point in lynching history.”).

276. *See* RICARDO C. AINSLIE, *LONG DARK ROAD: BILL KING AND MURDER IN JASPER, TEXAS* (2004).

longer active . . . their spirit survives elsewhere in the world, and the savagery that lynching represented remains fully part of the human repertoire.”<sup>277</sup>

So, if gender-based bullying is a form of lynching, how are we to target this phenomenon if, like lynching, it is driven by such seemingly intractable human behavior? After all, as discussed above, the gender stereotypes that give rise to this form of bullying did not originate in the school setting, but instead are direct carry-overs of our society’s deep-seated and venerable notions of what it means to be male and female.<sup>278</sup> As education professor Catherine G. Taylor correctly points out, “[p]rejudices are difficult to dislodge because they are reinforced by so many social institutions and practices.”<sup>279</sup> Likewise, it is this widespread acceptance that makes these societal forces so potentially damaging. Indeed, psychologists agree that “[p]rejudice and cultural bias are among the most intractable, pervasive, and damaging of all the kinds of psychological abuse of children.”<sup>280</sup>

Of course, even if we could prevail over these social forces, the nature of gender-based bullying presents further challenges. For instance, unlike the visible harms (assuming one chose to look) that lynch law inflicted on relatively discrete communities of African Americans, the victims here can be quite difficult to discern as gender-based bullying is a problem that cuts across race, socioeconomic status, and geography.<sup>281</sup> Further, identifying victims is further compounded by the fact that the resulting harms can be all but invisible given that bullying often occurs behind the backs of teachers and administrators<sup>282</sup> and, further, as discussed above, many victims are simply too ashamed to report this type of bullying.<sup>283</sup> In addition, even when there are visible signs that something is wrong, it is often not clear that these symptoms are a result of bullying,<sup>284</sup> and, even clear signs may not show up until much later on,<sup>285</sup> when the ability to help the child is greatly diminished. Finally, because the children who are impacted by

277. DRAY, *supra* note 4, at 459.

278. Hunter, *supra* note 49, at 3 (describing some “root causes” as “rigid societal expectations of male and female behavior”); see *supra* notes 74–76 and accompanying text.

279. Catherine G. Taylor, *A Human Rights Approach to Stopping Homophobic Bullying in Schools*, 19 J. GAY & LESBIAN SOC. SERVICES 157, 163 (2007); see also *supra* note 240 and accompanying text.

280. Daniel J. Reschly & Susan Graham-Clay, *Psychological Abuse from Prejudice and Cultural Bias*, in PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH 137, 137 (Marla R. Brassard, Robert Germain & Stuart N. Hart eds., 1987).

281. See *supra* note 51 and accompanying text.

282. See *infra* note 315 and accompanying text.

283. See *supra* notes 246–48 and accompanying text.

284. See SAMEER HIDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 155 (2008) (“It is often difficult to determine whether behavioral or attitudinal changes in youth are signs of distress or simply the usual ‘adolescent angst’ commonly associated with this often-tumultuous transitional period in their lives.”); KENNETH SHORE, THE ABC’S OF BULLYING PREVENTION: A COMPREHENSIVE SCHOOLWIDE APPROACH 72 (2006) (“Recognizing and responding to bullying can be a real challenge for school staff . . .”).

285. KATHY B. GRANT & JULIE A. RAY, HOME, SCHOOL AND COMMUNITY: CULTURALLY RESPONSIVE FAMILY INVOLVEMENT 193–94 (2009) (noting that the signs of psychological abuse “might not become apparent until later in the child’s maturation”).

gender-based bullying are found in a variety of different communities (i.e., urban/rural, conservative/liberal, religious-based/secular, etc.), have different levels of family support, experience different educational needs, and so on, any solution—to the extent there is a single solution—would need to be flexible enough to accommodate these disparities.

Despite these challenges, the lessons we learned in combating lynch law are nonetheless instructive. True, lynch law was and likely never will be eradicated; even so, a number of discernable factors did contribute to its extreme decline. As historian Philip Dray explains:

Lynching diminished for numerous reasons—changing ideas about women and their role in society, the sobering example of European barbarity during two world wars, the influence of white commerce and industry in the South, the due-process revolution in the courts that reflected a new concern for the sanctity of the person, the binding together of the nation by technology and ever-faster modes of transportation.<sup>286</sup>

Likewise, any decline we might ultimately achieve as to the incidence of gender-based bullying will likely be attributable to a variety of diverse factors—some legal, some societal. Of course, looking back at Dray's list, some of those forces, like technological advances and world wars, were completely unrelated to lynch law yet nonetheless generated a kind of ripple effect that coincidentally had a positive impact on the incidences of race-based lynching. Even so, such disparate forces and the contributions they would yield would have been quite difficult to predict in advance. So too must we be mindful of other, seemingly disparate and unforeseeable forces that may likewise eventually benefit the problem of gender-based bullying. What we can be somewhat sure of, however, is that any solution that we ultimately craft will likely involve at least three elements. They are: (1) litigation brought by victims; (2) legislation aimed at preventing such bullying; and (3) education concerning the harms caused by bullying on the basis of gender nonconformity. Accordingly, the remainder of this Part, taking into account the complex way in which gender-based bullying operates, will detail how each of these factors both individually and collectively can help achieve greater protection in our nation's schools for those students who do not conform to traditional gender stereotypes.

#### *A. Litigation*

Some commentators have pointed to litigation as a means of forcing schools to take more proactive steps to protect children from school bullying.<sup>287</sup> For example, Vanessa Eisemann, in an article discussing bullying directed at LGBT students, notes that “if schools are threatened with liability and the possibility of paying large sums in damages and/or settlements, many are likely to institute policies that will

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286. DRAY, *supra* note 4, at 461.

287. *See supra* note 47 and accompanying text.

do much to improve the educational environment of gay students.”<sup>288</sup> Such a view is consistent with the popular notion that courts are sometimes best suited to bring about social change. As Gerald Rosenberg describes in his book, *The Hollow Hope: Can Courts Bring About Social Change?*:

Courts can provide publicity for issues and serve as a “catalyst” for change. Where the public is ignorant of certain conditions, and political elites do not want to deal with them, court decisions can “politicize issues that otherwise might have remained unattended.” This may put public pressure on elites to act. . . . By bringing conditions to light, and showing how far from constitutional or statutory aspirations practice has fallen, court cases can provide a “cheap method of pricking powerful consciences.”<sup>289</sup>

As this quote makes clear, there is indeed a benefit in using litigation to bring to light the abuse that is going on in our nation’s schools as a result of peer bullying. In fact, the number of such cases is growing, each of which further reminds the public of how widespread and also how severe this form of victimization has become.<sup>290</sup> For example, the story of Dane Patterson, recounted above, only came to light publicly after Dane’s parents brought suit against the school district for failing to adequately protect their son from repeated acts of school bullying.<sup>291</sup> Hopefully, the publicity that cases like Dane’s are receiving will prompt other school districts to take more proactive steps to prevent similar cases from arising in their districts.

Beyond negative publicity, the fact that some victims of childhood bullying have received large verdicts as a result of litigation could provide further inducement to school districts to better deal with incidences of school bullying. For instance, in *Theno v. Tonganoxie Unified School District*,<sup>292</sup> a federal district court in Kansas awarded Dylan J. Theno over \$500,000 after the court found that “a rational trier of fact could infer that plaintiff was harassed because he failed to satisfy his peers’ stereotyped expectations for his gender” and that “the primary objective of plaintiff’s harassers appears to have been to disparage his perceived lack of masculinity.”<sup>293</sup> Such verdicts not only provide a remedy for the discrete

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288. Eisemann, *supra* note 45, at 159 (footnotes omitted).

289. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 25 (2d ed. 2008) (quoting Charles R. Halpern, *The Right to Habilitation: Litigation as a Strategy for Social Change*, in *THE RIGHT TO TREATMENT FOR MENTAL PATIENTS* 73, 75 (Stuart Golann & William J. Fremouw eds., 1976); Daniel J. Monti, *Administrative Foxes in Educational Chicken Coops*, 2 *LAW & POL’Y Q.* 233, 237 (1980); Note, *Implementation Problems in Institutional Reform Litigation*, 91 *HARV. L. REV.* 428, 463 (1977)). “Indeed, litigation may ‘often’ be ‘the best method of attracting public attention to institutional conditions and publicly documenting abuses.’” *Id.* (quoting ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 29 (1982)).

290. *See supra* notes 53–54 and accompanying text.

291. *See supra* notes 152–53 and accompanying text.

292. 377 F. Supp. 2d 952 (D. Kan. 2005) (denying defendant school district’s motion for summary judgment).

293. *Id.* at 965; *see Theno v. Tonganoxie Unified School District*, 394 F. Supp. 2d 1299,

plaintiff but can also serve as a call to action to other school districts, thus ultimately benefiting a number of both actual and potential victims.

Nonetheless, when it comes to bullying on the basis of gender stereotypes, litigation can only do so much. In fact, given the way in which this form of bullying operates, litigation may offer only marginal benefits. As an initial matter, yes, school districts are getting sued for failing to adequately protect children from bullying. However, for this litigation to send any sort of message to other school districts, those districts must first take a more realistic view as to the incidences of bullying in their schools. As noted above, many school districts turn a blind eye to this problem.<sup>294</sup> Take, for example, a 1999 study that looked at the incidences of bullying in a number of different schools.<sup>295</sup> Quite tellingly, the principal at the school researchers found to have had the highest incidence of bullying was under the impression that there was, in fact, no bullying taking place at his school.<sup>296</sup> Additionally, even if school officials are paying attention, there are a number of other obstacles that make it very hard for childhood victims to bring suit, resulting in a false “message” that perhaps the problem of bullying is not quite that widespread.<sup>297</sup>

First, the causes of action available to those child victims of school bullying are extremely restrictive. Because other scholars have already discussed these limitations, I will not go into detail here.<sup>298</sup> Briefly, however, the most likely cause of action arises under Title IX, which prohibits discrimination on the basis of sex “under any education program or activity receiving Federal financial assistance.”<sup>299</sup> However, the Supreme Court has interpreted Title IX in such a way that it only allows recovery against the defendant school districts “where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectionably offensive that it can be said to deprive the

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1301 (D. Kan. 2005) (denying defendant school district’s motion for judgment as a matter of law after the jury returned a verdict of \$250,000); *Theno v. Tonganoxie Unified School District*, 404 F. Supp. 2d 1281 (D. Kan. 2005) (awarding \$268,793.51 in plaintiff’s attorney fees and expenses).

294. *See supra* Part I.B.

295. *See* Debra Pepler, Wendy M. Craig & Paul O’Connell, *Understanding Bullying from a Dynamic Systems Perspective*, in *THE BLACKWELL READER IN DEVELOPMENTAL PSYCHOLOGY* 440, 448 (Alan Slater & Darwin Muir eds., 1999).

296. *Id.*; *see also* Susan P. Limber, *Implementation of the Olweus Bullying Prevention Program in American Schools: Lessons Learned from the Field*, in *BULLYING IN AMERICAN SCHOOLS*, *supra* note 210, at 351, 358 (“Some adults seriously underestimate its frequency. As one administrator reported to me recently, ‘We don’t have bullying at this school. We simply don’t allow it.’”).

297. *See* SUSAN M. SWEARER, DOROTHY L. ESPELAGE & SCOTT A. NAPOLITANO, *BULLYING PREVENTION AND INTERVENTION: REALISTIC STRATEGIES FOR SCHOOLS* 64 (2009) (noting that “actual increases and trends in litigation are difficult to measure for several reasons”).

298. *See, e.g.*, Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 *TUL. L. REV.* 387 (2002); Eisemann, *supra* note 45, at 129–32; Susan Hanley Kosse & Robert H. Wright, *How to Best Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer*, 12 *DUKE J. GENDER L. & POL’Y* 53 (2005); Sacks & Salem, *supra* note 45, at 153–70; Weddle, *supra* note 45, at 659–63.

299. 20 U.S.C. § 1681(a) (2006).



victims of access to the educational opportunities or benefits provided by the school.”<sup>300</sup> As other commentators have explained, the burden such a standard places on the plaintiff is quite onerous.<sup>301</sup> Further, although Title IX does allow recovery on account of discrimination based on nonconformance to gender stereotypes, as one commentator explains, “[t]he often illusive distinction between ‘sexual orientation’ [i.e., a category not covered by Title IX] and non-conformity with gender stereotypes yields . . . strikingly irrelevant disputes over semantics.”<sup>302</sup> Of course, litigation pursuant to state law is often even more difficult given that “[i]mmunity and problems with foreseeability and causation doom most attempts by victims to obtain remedies from schools that have allowed the victimization to occur.”<sup>303</sup>

Regardless, even if all these problems could be solved, a much bigger obstacle prevents litigation from being an effective solution to bullying on the basis of gender nonconformity. Specifically, even if the available causes of action were more expansive, it is extremely unlikely that many of these childhood victims would actually pursue litigation. Again, children who are bullied on the basis of gender nonconformity often suffer in silence, much too ashamed to let others know what is happening to them.<sup>304</sup> There can, of course, be no litigation if the child does not let anybody know the harm she is suffering. Further, even if the child does tell her parents, the parents may be less than sympathetic. As noted above, children who do not conform to gender stereotypes are at much greater risk of suffering parental abuse and neglect.<sup>305</sup> In such family settings, it is questionable at best whether the parents would be sufficiently concerned about their child’s well being to commence litigation. Of course, even when the child does tell her parents about the bullying and the parents are sympathetic, they still may be unwilling to bring a lawsuit as a result of the social stigma associated with admitting they have a gender-nonconforming child.<sup>306</sup>

Finally, even if a child reports the bullying to his parents and the parents then are willing to bring suit, the fact remains that the child has already been harmed.<sup>307</sup> The degree to which a monetary judgment—assuming the child can even prevail—would cure any psychological harms the child has already suffered as a result of his victimization is very much in doubt. Thus when it comes to targeting the overall incidence of gender-based bullying, to the extent a lawsuit can provide some

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300. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

301. *See supra* note 298 and accompanying text; *see also* SWEARER ET AL., *supra* note 297, at 66 (noting the “high hurdles for many litigants” under Title IX).

302. Sacks & Salem, *supra* note 45, at 164.

303. Weddle, *supra* note 45, at 683.

304. *See supra* notes 246–48 and accompanying text.

305. *See supra* notes 240–44 and accompanying text.

306. Gerald P. Mallon, *Practice with Transgendered Children*, 10 J. GAY & LESBIAN SOC. SERVICES 49, 56 (2000) (“I have more often than not, seen parents who are greatly distressed by their gender variant child. Even mild, typical gender-nonconformity sends terror into the hearts of most parents.”).

307. Sacks & Salem, *supra* note 45, at 150 (“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 is well past eighteen.”).

remedy, litigation by itself it is entirely ineffective. Indeed, litigation in this context does little to protect future victims from bullying, and it is doubtful whether litigation can even “remedy” the child who brought the litigation.

### B. Legislation

A legal scholar in 1898, when writing about the problem of lynching, made the following observation: “The remedy is not to be found in legislation.”<sup>308</sup> The author of those words was Joseph Edwin Proffit, and what he said was somewhat prophetic given that legislation would ultimately prove to have very little (if anything) to do with the decline of lynch law in the American South. Congress, for example, could not even pass an anti-lynching bill despite repeated attempts.<sup>309</sup> Although the states fared somewhat better in that many of them (including a number of Southern states like Georgia, South Carolina, and Alabama) were successful in passing anti-lynching legislation,<sup>310</sup> the laws were largely ineffective. As historian Philip Dray describes: “At the county and local level these laws were unpopular and their impact slight, and more often than not they were completely ignored.”<sup>311</sup>

In response to bullying, many states have likewise enacted anti-bullying legislation that requires schools to develop anti-bullying policies.<sup>312</sup> However, like anti-lynching legislation, these anti-bullying codes have little impact on bullying *in general*, much less bullying on the basis of gender stereotypes. Although these statutes vary somewhat from state to state, in essence they all require that local school boards adopt policies on how teachers and administrators are to report suspected incidences of bullying and how students found guilty of bullying are to be punished.<sup>313</sup> As other commentators have pointed out, there are a number of problems with these statutory schemes—problems which become even more pronounced when we look at how these statutes fail to protect those children who are bullied on the basis of gender-nonconforming behavior.

First, in many instances, state anti-bullying statutes leave it to the individual school boards to define “bullying.”<sup>314</sup> Given the way in which many teachers and

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308. Proffit, *supra* note 4, at 266.

309. Congressman Leonidas C. Dyer introduced an anti-lynching bill in 1918. Marilyn K. Howard, *Dyer, Leonidas C. (1871–1952)*, in 1 *ENCYCLOPEDIA OF AMERICAN RACE RIOTS* 182, 182–83 (Walter Rucker & James Nathaniel Upton eds., 2007). “The Dyer Anti-Lynching Bill made participation in a lynch mob a federal crime. It also contained sections that would punish local, county, and state officials who failed to prevent lynchings. Finally, the bill allowed counties in which lynchings took place to be sued for damages.” *Id.* at 183. Although the bill passed the House, it was ultimately filibustered in the Senate. *Id.*

310. *See* DRAY, *supra* note 4, at 262.

311. *Id.*

312. *See* SWEARER ET AL., *supra* note 297, at 54 (“Currently, 33 states have anti-bullying laws in place, and at least 10 others are considering passing similar laws.”). For a list of these states and the citations to those states’ anti-bullying statutes, see *id.* at 55–56.

313. Weddle, *supra* note 45, at 674.

314. *See* Kosse & Wright, *supra* note 298, at 62 (“Most often, this task is left entirely within the discretion of the local school board.”).

administrators have historically turned a blind eye to gender-based bullying, often not even seeing it as a form of bullying, but merely “part of growing up,”<sup>315</sup> there is a real concern that an institutional definition of bullying might likewise fail to take account of gender-based bullying. Second, although teachers are required to report suspected acts of bullying,<sup>316</sup> many actual incidences of bullying will go unreported given that “[m]ost bullying occurring at school takes place outside the view and hearing of teachers and other school officials.”<sup>317</sup> Furthermore, to the extent an unsympathetic teacher is disinclined to ever report acts of bullying that arise from gender nonconformity, the reporting requirements might prove an incentive for the teacher to pay less attention to situations she thinks might yield evidence of this form of bullying.<sup>318</sup> Finally, these statutes create no private cause of action for victims of bullying,<sup>319</sup> which in light of the social isolation and political powerlessness of these victims means, in effect, that there will be little to no consequences for school boards that fail to comply. At the heart of each of these limitations then, is the mistaken assumption that school officials want to and will do the right thing. To the extent we as a society feel that protecting gender-nonconforming children from persistent bullying is part of “the right thing,” then these statutes fail to offer the necessary incentives. After all, the societal prejudices that animate this form of bullying are often shared by the school officials themselves.<sup>320</sup>

But perhaps the biggest weakness in these forms of legislation is the degree to which they focus almost exclusively on how schools should *respond* to bullying without paying sufficient attention to how schools can help *prevent* bullying.<sup>321</sup> Most experts agree that, in many ways, “[p]revention [i]s [b]etter [t]han [i]ntervention”<sup>322</sup> because simply focusing on individual incidences of bullying limits the effectiveness of the overall program. After all, to the extent schools are

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315. See Limber, *supra* note 296, at 358 (“Others acknowledge the presence of bullying in all schools but view the experience of bullying as a rite of passage or even a positive learning experience for children . . .”); see also *supra* note 138 and accompanying text.

316. See Weddle, *supra* note 45, at 675; see, e.g., ARK. CODE ANN. § 6-18-514(b)(4) (2007) (requiring that “a school employee who has witnessed or has reliable information that a pupil has been a victim of bullying as defined by the district shall report the incident to the principal”).

317. Hart, *supra* note 45, at 1149.

318. See Weddle, *supra* note 45, at 677 (“Such reporting requirements . . . provide . . . a disincentive for discovering problems.”). This resulting lack of supervision could, of course, lead to further acts of bullying. See SWEARER ET AL., *supra* note 297, at 23 (“[L]ess structure and supervision are associated with concomitant increases in bullying rates among middle school students . . .”).

319. Kosse & Wright, *supra* note 298, at 66 (“No current state anti-bullying law creates a private cause of action for bullying.”).

320. See *supra* text accompanying notes 138–40.

321. See Kosse & Wright, *supra* note 298, at 64–69 (describing and quoting a number of state anti-bullying statutes).

322. Arthur M. Horne, Pamela Orpinas, Dawn Newman-Carlson & Christi L. Bartolomucci, *Elementary School Bully Busters Program: Understanding Why Children Bully and What to Do About It*, in BULLYING IN AMERICAN SCHOOLS, *supra* note 210, at 297, 300.

merely responding to incidences of bullying, they are limited in what course of action they can take. In essence, all a school could then do is to implement programs designed to “change the perpetrator, . . . change the response of the victim, or . . . modify the relationship between the perpetrator and the victim.”<sup>323</sup> As a result, “[b]y focusing more on the regulation of the behavior instead of the prevention of the behavior, policy makers leave children—the bullies, victims, and bystanders—without adequate skills to combat this phenomenon.”<sup>324</sup> Thus, just as one of the problems with litigation is the fact that such an alternative would not really present itself until the damage had already been done, much anti-bullying legislation suffers from the same limitation.

Some states, however, do attempt to create some preventative strategies. New Jersey, for example, has anti-bullying legislation which encourages schools “to establish bullying prevention programs, and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members.”<sup>325</sup> Other states have similar provisions.<sup>326</sup> Although certainly a step in the right direction, again the problem is that these laws give current administrators the complete discretion to craft these prevention programs. To the extent that gender-nonconforming children have, thus far, largely been ignored by school officials, it would be extremely naive to think this generally worded legislation would somehow automatically change that.

Of course, it is perfectly understandable, and in many ways advisable, that anti-bullying legislation include some flexibility to accommodate various school districts. After all, “it is important to acknowledge that every school is unique and that what may work in one school community may not be successful in another.”<sup>327</sup> At the same time, however, too much discretion can render the attempt to limit bullying—or certain forms of bullying—a nullity if school administrators are not fully in support of such a remedy. As one commentator correctly points out, “[e]ducator beliefs inevitably become the modus operandi of schools and classrooms thereby rendering the teaching biased and leading to the perpetuation of social prejudice and intolerance.”<sup>328</sup> Although balancing the concern over clear standards with the need for flexibility is extremely difficult, any legislation aimed at gender-based bullying will likely fail so long as schools are allowed to ignore the societal stereotypes driving this form of bullying within the school. And it is this problem that Professor David Weddle describes as the “fatal flaw” in anti-bullying legislation.<sup>329</sup> As Weddle explains: “The statutes seem clearly to be based, at least

323. *Id.* at 299 (“[M]ost individually oriented approaches have shown limited effectiveness.”).

324. Hart, *supra* note 45, at 1151; *see also* Horne et al., *supra* note 322, at 300 (“The bullies and victims are affected directly, but numerous other students—whom we call bystanders or observers—observe bullying interactions and are impacted by the . . . pain of bullying.”).

325. N.J. STAT. ANN. § 18A:37–17(a) (West Supp. 2010).

326. *See* Kosse & Wright, *supra* note 298, at 67.

327. MEYER, *supra* note 52, at 65.

328. Michael Ernest Sweet & Sarah DesRoches, *Citizenship for Some: Heteronormativity as Cloaked Bullying*, 19 J. GAY & LESBIAN SOC. SERVICES 173, 178 (2007).

329. Weddle, *supra* note 45, at 678.

in part, on current educational research; but they too often stop short of forcing the schools to engage in the kind of cultural reform that the educational literature consistently says must take place.”<sup>330</sup>

### C. Education

Although some have pointed to the need for improved legislation and more expansive opportunities for litigation as a means of ameliorating the problems of school-based bullying, the reality is that such solutions, as discussed above, will do little to solve the problem of gender-based bullying given that neither strategy does anything to unhinge the intractable stereotypes upon which this form of bullying so comfortably rests. To see what else is needed to bring about this necessary change, once again, the words of Joseph Edwin Proffit prove instructive. After predicting that legislation would not remedy the problem of lynching, he instead proposed that “[t]he true remedy is in education.”<sup>331</sup>

Likewise, when it comes to solving the problem of gender-based bullying, education will need to be the key ingredient. After all, “[i]t is a truism to observe that prejudice is learned.”<sup>332</sup> Thus, bullying will never end as long as the underlying gender stereotypes persist, and as others have pointed out, whenever there has been need for social change, education has played a crucial role. Indeed, “[e]ducation, in short, is democracy’s substitute for violent methods of bringing about social change.”<sup>333</sup> Not surprisingly then, commentators have encouraged schools to implement educational programs that would help curb the incidence of school bullying: “Students, educators, and parents need the knowledge and skills to tackle bullying effectively.”<sup>334</sup> The question remains, however, of how exactly schools could go about achieving this goal, especially in light of the problems, discussed above, inherent in bullying on the basis of gender stereotypes.<sup>335</sup>

Most commentators are in agreement that the solution lies not so much in punishing the bullies, but in changing the social system that allows such bullying to take place. As one commentator describes, “[w]hat is required to reduce the prevalence of bullying is nothing less than a change in the school climate and in the norms of behavior.”<sup>336</sup> Thus, to reduce the incidence of gender-based bullying, school districts will need to make fairly radical changes to the way in which their entire school community treats gender diversity. What follows are some of the steps likely to be necessary in making such a change.

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330. *Id.*

331. Proffit, *supra* note 4, at 266 (emphasis added).

332. Reschly & Graham-Clay, *supra* note 280, at 141.

333. EDUC. POLICIES COMM’N, EDUCATION FOR ALL AMERICAN CHILDREN 4 (1948).

334. IAN RIVERS, NEIL DUNCAN & VALERIE BESAG, BULLYING: A HANDBOOK FOR EDUCATORS AND PARENTS 179 (James T. Sears ed., 2007).

335. *See supra* notes 278–80 and accompanying text.

336. Limber, *supra* note 296, at 359.

### 1. Drafting an Anti-Bullying Policy

Most agree that the first step in this process is to institute an anti-bullying school policy, the purpose of which “is to promote a consistent approach and to create a climate in which all types of bullying are regarded as unacceptable.”<sup>337</sup> Doing so not only sends a message to students in the school as to the administration’s view on bullying, but the process of actually crafting such a statement (1) encourages teachers and administrators to take a hard look at their current school climate<sup>338</sup> and (2) allows them to design a plan for dealing with such problems in advance, thus obviating the need to develop solutions on an *ad hoc* basis as incidences of bullying arise. Such planning is crucial because, as one commentator has pointed out, “healthy school climates are not an accident of geography or economics—they are the result of deliberate and informed planning on the part of school staff and administration.”<sup>339</sup>

As to what should go in such a policy, Professor Ken Rigby offers the following suggestions:

1. A strong, positive statement of the school’s desire to promote positive peer relations and especially to oppose bullying and harassment in any form it may take by *all* members of the school community
2. A succinct definition of bullying or peer victimization, with illustrations
3. A declaration of the right of individuals and groups in the school—students, teachers, other workers, and parents—to be free of victimization by others
4. A statement of the responsibility of those who witness peer victimization to seek to stop it
5. Encouragement of students and parents with concerns about victimization to speak with school personnel about them
6. A general description of how the school proposes to deal with the bully/victim problem
7. A plan to evaluate the policy in the future<sup>340</sup>

The benefits to such a policy statement are many. First, it sends a strong message to both bullies and victims that bullying will not be tolerated. As discussed above, both bullying and the resulting psychological harm increase when students perceive that school officials are agnostic about such conduct.<sup>341</sup> Second, at the same time this policy announces the school’s refusal to tolerate bullying, it also acknowledges

337. ELIZABETH A. BARTON, *BULLY PREVENTION: TIPS AND STRATEGIES FOR SCHOOL LEADERS AND CLASSROOM TEACHERS* 41 (2d ed. 2006).

338. See Rigby, *supra* note 208, at 324 (“The first requirement is that the staff of a school become well informed about the nature and quality of peer relations at their school.”).

339. Weddle, *supra* note 45, at 655.

340. Rigby, *supra* note 208, at 325 (emphasis in original).

341. See *supra* notes 154–61 and accompanying text; see also Horne et al., *supra* note 322, at 299 (“[B]ullying would be significantly reduced if the system in which it occurs did not allow the payoffs and if there were costs—punishment—for engaging in the behavior.”).

the fact that any member of the school community, and not just fellow students, can act as a bully. Given that school officials can sometimes act as bullies themselves,<sup>342</sup> it is important that the policy proscribe such behavior for everyone. Third, given that some forms of bullying take place outside the presence of teachers and administrators, the policy invites all members of the school community, and not just teachers, to be vigilant in reporting suspected incidences of bullying. Finally, such a policy allows the school some flexibility in defining and dealing with the problem of bullying, with the opportunity to revisit those choices should circumstances require.

## 2. Educating School Personnel

Of course, as discussed above,<sup>343</sup> too much flexibility could prove harmful if school administrators simply created policies that reflected their own prejudice about what forms of bullying were worrisome and what forms were more understandable. Thus, another integral part of any education strategy to combat bullying is the need to better involve school personnel. In fact, as Susan P. Limber points out, likely the two most important components to successfully implementing any anti-bullying program are “(1) awareness of a majority of school staff regarding problems of bullying, and (2) commitment of a majority of the staff to its prevention.”<sup>344</sup> In order to achieve these two goals, schools need to provide training to their personnel.<sup>345</sup>

Before discussing what form such training should take, however, it is first important to consider who should receive this training. Indeed, as the above quote from Professor Limber indicates, for any school program on bullying to work, most (if not all) school employees need to be in agreement when it comes to how to go about identifying and dealing with acts of bullying. This is referred to as the “whole school approach,” which “requires that all the staff of a school act together in a planned and agreed-upon way to counter bullying.”<sup>346</sup> As Professor Weddle explains: “Ultimately, for supervision to succeed in preventing victimization, all of the actors in the school—administrators, teachers, support staff, and students—must be clear about the behavioral standards that all of the adults will enforce and how those standards will be enforced.”<sup>347</sup> It is particularly crucial that any anti-bullying policy has the support of school administration, given that the “power that administrators have to shape and influence their school environments has been widely documented.”<sup>348</sup>

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342. *See supra* Part I.B.

343. *See supra* text accompanying notes 316–18.

344. Limber, *supra* note 296, at 359.

345. *See* Horne et al., *supra* note 322, at 298 (“Thus, detecting and stopping bullying requires special training of school personnel and specific education of students.”).

346. Rigby, *supra* note 208, at 324.

347. Weddle, *supra* note 45, at 657.

348. MEYER, *supra* note 52, at 66. As Professor Limber points out, without such support, “a program may founder.” Limber, *supra* note 296, at 359 (“Staff may not feel supported in efforts to discipline children for bullying behavior or develop safety plans for victimized children; teachers may be reluctant to spend class time focusing on bullying prevention; and

Nonetheless, even if all school personnel will be consistent in handling incidences of bullying, this “whole school approach” will be meaningless if school personnel have not received the training necessary to accurately identify the various forms of bullying behavior. In fact, many teachers express frustration over their own lack of training on this issue. As a teacher in one study said: “[I never got any] training in school [on] bullying. . . . Maybe that’s why I wasn’t so aware that it was going on because as a part of my training it had never really been brought up as an issue to be concerned with.”<sup>349</sup> In looking at how to remedy this lack of training, consider the program that the Winnipeg School Division (WSD) in Canada has instituted as part of a campaign to end homophobic bullying in its schools:

The main plank of the WSD program is a workshop for all employees including administrators and secretaries, teachers and resource consultants, counselors and psychologists, bus drivers, engineers and pipe fitters, cafeteria staff, janitors and groundskeepers. The workshops put homophobia squarely in the context of human rights legislation and anti-harassment policies with the clear message that employees have a legal and professional obligation to combat homophobic intolerance and discrimination. . . . First, [the workshop] attaches the fight against homophobia to the defense of human rights. Second, no matter what their job, employees know they are important in the capacity-building effort and that the Division will support them when they act against homophobic bullying.<sup>350</sup>

Likewise, when it comes to putting school personnel in a position to combat gender-based bullying, such training is likely necessary given the fact that many of these employees will first need to recognize and overcome their own gender stereotypes before they can help effectively work toward a school solution. Of course, to do that, such training must include content that is sufficient to allow personnel to fully understand the problems posed by gender-based bullying and, thus, the need for school intervention. After all, “[h]elping teachers understand how the antecedent—what led up to the bullying—influences the outcome is powerful for preventing problems from occurring.”<sup>351</sup> At a minimum, such training should include discussions of:

- gender stereotypes and the prevalent role those stereotypes play in American society<sup>352</sup>
- the degree to which our society’s preference for hegemonic masculinity drives these stereotypes<sup>353</sup>
- the relationship between (1) gender expression and gender identity<sup>354</sup> as

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students, parents, and staff may accurately perceive that bullying prevention is not a priority at the school.”).

349. MEYER, *supra* note 52, at 27.

350. Taylor, *supra* note 279, at 163.

351. Horne et al., *supra* note 322, at 301 (“We can change the consequences by changing the antecedent or the behavior.”).

352. *See supra* Part I.A.

353. *See supra* notes 81–93 and accompanying text.

354. *See supra* notes 176–78 and accompanying text.



well as (2) homophobia and discrimination on the basis of gender expression<sup>355</sup>

- the harms, both immediate and long-term and both physical and psychological, that bullying on the basis of gender nonconformity can cause not only the child victim, but also other members of the school community<sup>356</sup>
- how to recognize the signs of this form of bullying and how to better identify potential or actual victims<sup>357</sup>
- how to best assist affected children<sup>358</sup>

Further, this training should be made mandatory either as a result of school policy or perhaps even state law. For example, the WSD program discussed above is required by law, providing no exception for religious beliefs or other forms of dissent: “Whatever their personal beliefs, workshop participants know it is their professional responsibility and legal obligation to support the policy. . . . [P]eople are told that they are not being asked to change their beliefs, but they are being required to treat everyone with full and equal respect.”<sup>359</sup>

### 3. Educating Children

Establishing an anti-bullying policy that encompasses gender-based bullying coupled with educating school personnel on how to identify and respond to such bullying would certainly go a long way in helping those children who have been victimized on the basis of gender nonconformity. Again, however, successful programs need to also take steps to better prevent such bullying from ever occurring. Thus, schools need to implement education programs for their students aimed at combating those gender stereotypes that drive this form of bullying. As psychologists Reschly and Graham-Clay point out, “[i]f prejudice is to be prevented, interventions must begin fairly early and continue throughout the developmental years.”<sup>360</sup>

Some schools have already come to realize the need for education in combating the problem of bullying. For instance, the Olweus Bullying Prevention Model, which is the most commonly used model in the United States for targeting school bullying, relies heavily on education.<sup>361</sup> Specifically, the Olweus model works primarily by a “restructuring of the child’s social environment at school.”<sup>362</sup> With

355. *See supra* notes 100–05 and accompanying text.

356. *See supra* Part II.

357. For a list of signs and symptoms that may indicate that a child is the victim of bullying behavior, see MCGRATH, *supra* note 56, at 20; *see also* OLWEUS, *supra* note 55, at 53–58 (providing a list of both primary and secondary signs of victims).

358. *See infra* Part III.C.4.

359. Taylor, *supra* note 279, at 163–64.

360. Reschly & Graham-Clay, *supra* note 280, at 141.

361. *See generally* Limber, *supra* note 296.

362. Susan P. Limber, *The Olweus Bullying Prevention Program: An Overview of Its Implementation and Research Basis*, in HANDBOOK OF SCHOOL VIOLENCE AND SCHOOL SAFETY: FROM RESEARCH TO PRACTICE 293, 295 (Shane R. Jimerson & Michael J. Furlong

this goal in mind, the program calls for “classroom meetings, establishing a strictly enforced code of conduct concerning bullying, and engaging students with activities which . . . attempt to help them understand the emotional impacts of bullying.”<sup>363</sup> Although this is certainly a laudable goal, the criticism of programs like the Olweus model is that they fail to identify “any issues of difference among students” and thus do not address “sexual diversity in schools.”<sup>364</sup>

For these reasons, schools need to develop policies whereby children are informed, not simply about bullying and the harms it causes, but the societal forces that motivate and perpetuate bullying. For instance, because gender-based bullying arises after the bully perceives that a victim has violated society’s gender code, part of the school’s solution must include efforts to shed more light on the faulty assumptions driving these societal norms. Thus, in the context of gender-based bullying, for example, children need to learn that what it means to be “male” or “female” need not be defined so narrowly. One such solution could involve workshops or discussion groups, which “can provide a forum about school culture and solicit students’ help and support in challenging gendered harassment and other forms of bias in the school.”<sup>365</sup>

What precise form this education ought to take, however, should largely be left to the individual school districts. In general, the topics of instruction will be much the same as those identified above as being appropriate for school personnel training.<sup>366</sup> However, the degree to which students in any one school will need such information and how in-depth that information should be presented will depend on a number of factors: the age of the children, the prevalence of gender-based bullying in the school, the degree to which programs already exist to provide this information, and the likelihood of community opposition.

Sadly, community opposition is a factor that any school must necessarily consider before instituting any change to its curriculum. For instance, there are many examples of schools that have faced bitter opposition to proposed changes to the curriculum when those changes would have the effect of introducing children to LGBT issues.<sup>367</sup> My focus here, however, is on the need to educate our children on the subject of gender stereotypes. Nonetheless, as discussed above, there is some overlap between discrimination on the basis of gender nonconformity and discrimination on the basis of sexual orientation.<sup>368</sup> For some school districts, this degree of overlap may be enough to spark controversy within the local community. It would be naive to assert that school districts should simply ignore any resulting controversy. What school districts should do, however, is to try to minimize any such controversy by involving the community whenever possible into the school’s efforts to curb gender-based bullying. As Professor Meyer points out, one of the essential steps a school must take in implementing an anti-bullying policy is

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eds., 2006).

363. Sweet & DesRoches, *supra* note 328, at 176.

364. *Id.* (“Neglecting to attend to the unique needs of this community insinuates a white-washing of sexual diversity issues in the classroom.”).

365. MEYER, *supra* note 52, at 69.

366. *See supra* notes 349–58 and accompanying text.

367. *See, e.g.,* Armstrong, *supra* note 249, at 76–84 (discussing a number of such proposals and the controversy those proposals have elicited).

368. *See supra* notes 99–110 and accompanying text.

“community consultation,” which is “an important step in developing a broad base of support for policy changes and allowing members to voice concerns early in the process.”<sup>369</sup> As Meyer explains, “[b]y including various stakeholders when revising policy, leaders can anticipate opposition and find ways to meet the objectives of a more inclusive school environment.”<sup>370</sup>

Should community opposition ultimately prove to be too immovable of a force in the quest to end gender-based bullying in our nation’s schools, perhaps a more drastic legal solution—as was necessary in the case of school segregation—may be in order. However, I leave for another day the question of whether lawmakers should affirmatively require school districts to offer instruction on issues relating to gender nonconformity/sexual orientation. In light of the extreme harm gender-based bullying has already and will continue to cause, it is my hope that school districts will be sufficiently motivated to voluntarily take the necessary steps to combat this critical problem.

#### 4. Helping Victims

Much of my discussion so far has been directed at ways schools can prevent gender-based bullying and, to the degree they cannot prevent such incidences, how to effectively deal with the perpetrators of such bullying. Any educational program aimed at this form of bullying, however, must include ways in which to assist those who have already been victimized. Sadly, however, most schools have paid little attention to providing the victims of bullying with support.<sup>371</sup> Such omissions simply cannot be tolerated given the degree to which children who face chronic bullying are at much greater risk for a whole host of physical and psychological problems. Thus, to the extent schools are unable to eradicate all instances of chronic bullying, “[s]chools have an obligation to provide help for children who are repeatedly victimized.”<sup>372</sup>

For this reason, it is important that any training schools provide for their personnel include instruction on how to help children who have been chronically bullied deal with any resulting harms. Indeed, “[v]ictims need to know [not only] whom to go to for help [but] that help will be available.”<sup>373</sup> Such solutions may range from merely lending a sympathetic ear to suggesting professional help.<sup>374</sup> These options, of course, would be in addition to the steps the school should take to end the bullying behavior to which the child has been exposed. Finally, in seeking ways to help these children, we must keep in mind the multiple ways in which chronic bullying can harm a child, thus requiring that any treatment program be somewhat holistic in its approach.

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369. MEYER, *supra* note 52, at 67.

370. *Id.*

371. SWEARER ET AL., *supra* note 297, at 47 (“Within states’ model/sample policies, alarmingly little attention has been paid to providing support for victims of bullying.”).

372. Rigby, *supra* note 208, at 327.

373. BARRY E. MCNAMARA & FRANCINE J. MCNAMARA, KEYS TO DEALING WITH BULLIES 103 (1997).

374. Rigby, *supra* note 208, at 327–28 (listing some of the actions a school might take to help a child who has been bullied).

In sum, gender-based bullying is by no means a school problem; instead, it is a societal problem that has naturally spilled over into our nation's schools. It may seem somewhat ironic, then, to suggest that any solution to this problem will likely come at the hands of our nation's schools. However, as I have discussed throughout this Article, the impetus for this form of bullying is society's stereotypical norms of what is appropriate gender expression for each sex. Accordingly, to best combat the problem of gender-based bullying, what is most needed is a societal change in how we think of gender. Our legal system, through litigation or legislation, can assist in this regard, primarily by bringing these problems to the public's attention. However, until society is ready to accept that bullying children on the basis of gender nonconformity not only serves no utilitarian purpose,<sup>375</sup> but is in fact a pernicious harm we should actively seek to avoid, any attempt at a legal solution would likely be premature and perhaps even counterproductive. Instead, to best effectuate social change, we first need education, and our nation's schools are best equipped to provide that education. As one commentator correctly points out, "[p]ublic education is a unique societal institution because education, although it is supposed to transmit widely accepted cultural norms and values to children, is a process through which the child develops as an individual and grows into a mature and discerning adult."<sup>376</sup>

#### CONCLUSION

Far from simply being "child's play," bullying is a serious problem in our nation's schools. Almost all children are bullied at some point or another; however, for some of those children, this victimization becomes chronic. When we take a closer look at the children who fall within this group of habitual victims, we often see some commonalities, chief among them being gender nonconformity. Indeed, children whose gender expression fails to conform to society's rigid definition of "male" and "female" are often subjected to very frequent, very severe forms of bullying. To say that these children pay a heavy price would be an understatement. It is the position of this Article that they have been lynched. Death, physical injury, behavioral problems, severe psychological problems—those who are bullied on the basis of gender nonconformity are faced with all these potential harms, simply because they "violate" a social gender code. Accordingly, this behavior is not a school issue, but as James Sears correctly points out, "[b]ullying, on the basis of perceived sexual orientation or gender non-conformity, is a human rights issue."<sup>377</sup>

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375. The only such argument in support of allowing this form of bullying to continue would be that children really should conform to societal standards of male and female and that deviation from that standard can in fact be "cured." As noted earlier, however, there are strong arguments that gender identity, from which flows gender expression, is an immutable quality. *See supra* note 184 and accompanying text. Of course, even if we were to conclude that gender identity is a mutable quality, we would still have to agree that the heavy casualties produced by this form of bullying are somehow outweighed by the benefits of any gender conformity that might result from such bullying.

376. William B. Senhauser, *Education and the Court: The Supreme Court's Education Ideology*, 40 VAND. L. REV. 939, 942 (1987) (footnotes omitted).

377. Sears, *supra* note 73, at x.

In many ways, in fact, this form of bullying resembles the human rights abuses that African American children endured during the civil rights era—both at the hands of lynch mobs and under the ruse of “separate but equal.” The children of this era taught us an important lesson: children cannot and should not pay the price for societal prejudices. When it comes to remembering and implementing this lesson, however, students who fail to conform to gender stereotypes have sadly fallen through the cracks, with the result that children like Lawrence King Jr., Carl Joseph Walker-Hoover, Jaheem Herrera, Montana Lance, and who knows how many others are becoming modern-day examples of what once happened to children like Emmett Till. This simply has to stop. Admittedly, any solution is going to be difficult to craft given the degree to which it requires a change in public consciousness. Nonetheless, as the civil rights movement demonstrated, our legal system can do much to help effectuate such change. The same is true here as, with legislation and litigation, the law can greatly assist in the problem of gender-based bullying. It is our public schools, however, which are in the best position to most effectively combat this problem. Indeed, when it comes to gender stereotypes, education here is key. After all, as Martin Luther King, Jr. once famously said, “Nothing in all the world is more dangerous than sincere ignorance and conscientious stupidity.”<sup>378</sup>

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378. MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 46 (Fortress Press 1981) (1963).