PHOEBE PRINCE AND BEYOND

A BULLYING CASE STUDY

A Section 6, Frontier Torts White Paper
December 1, 2012

Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138
Project Steering
Emily Deddens
Victoria White
Tanya Shaby

Tort Doctrinalists
Kathryn Ranieri
Peter Williams
Katie Mullen

Historians
Meg Sullivan
Derek Cash
Stephanie Freudenberg

External Situationists
Adrienne Mendle
Sean Mirski
Maria Parra-Orlandoni

Internal Situationists
Michael Ingram
Spencer Haught
Maggie Dunbar

Economists
Arun Avva
Woong Jae Jung
Paul Lee

Policy Wonks
Elizabeth Hadaway
Andres Rapoport
Cecilia Vogel

Public Choice Experts
Paul Sitter
Romina Filippou
Kyle Fahey

Media Analysts
Chelsea Rogers
Anna Tutundjian
Dakotah Burns
# Table of Contents

EXECUTIVE SUMMARY ...................................................................................................................... 1

INTRODUCTION .................................................................................................................................. 2

THE HISTORICAL EVOLUTION OF BULLYING .................................................................................. 3

BULLYING AND THE MEDIA .............................................................................................................. 6

TORT DOCTRINALISTS ...................................................................................................................... 8

  Introduction .................................................................................................................................... 8
  Failed Bullying Torts: IIED ............................................................................................................ 8
  Negligence as a Potential Tort ...................................................................................................... 9
  Suggested Strategy ........................................................................................................................ 10

SITUATIONISM .................................................................................................................................... 11

  The Mind of the Bully .................................................................................................................... 11
  The Mind of the Victim ................................................................................................................. 12
  The Mind of the Bystander .......................................................................................................... 13
  The Role of Students .................................................................................................................... 14
  The Role of School Officials ....................................................................................................... 17
  The Role of Parents ....................................................................................................................... 18

AN ECONOMIC ANALYSIS .............................................................................................................. 19

THE CURRENT STATE OF ANTI-BULLYING LEGISLATION ............................................................ 22

GOALS AND ASPIRATIONS FOR ANTI-BULLYING LEGISLATION:
SCHOOL LIABILITY .............................................................................................................................. 25

APPLICATION TO CASE STUDIES ................................................................................................... 28

  Public Choice: Interest Groups ..................................................................................................... 28
  Public Choice: A Model for Success ............................................................................................ 29

CONCLUSION ........................................................................................................................................ 33
The Frontier Torts Project

At Harvard Law School in the fall of 2012, the 80 students in Section 6 participated in an experimental group project in their first-year torts class. The project required students to research, discuss, and write about a current policy problem for which tort law (or some form of civil liability) could provide a partial solution.

Based on their rankings and availability, students were each assigned to one of the following three policy problems:

1. Football Concussions
2. Native American Alcoholism
3. Bullying

Each of the three policy groups consisted of roughly 27 students. Each policy group was further divided into the following nine specialty groups consisting of 3 students each, according to the students’ rankings:

1. Project Steering Committee
2. Tort Doctrinalists
3. Historians
4. External Situationists – or Contextualists
5. Internal Situationists – or Mind Scientists
6. Economists
7. Policy Wonks
8. Public Choice Experts
9. Media Analysts

The name and role of each specialty group was necessarily vague and could vary for each of the three policy groups, depending on the nature of the policy issue itself and the interests and particular focus of the students working in the given specialty group.

Each policy group circulated a draft white paper, gave a presentation to the class about their policy problem and possible solutions to that problem, and arranged for an expert from outside of Harvard Law School to speak to the class about the topic. At the conclusion of the class presentations, each group led a class discussion and a class vote on what would be the best policy options. (Videos are available of the class various class presentations.)

Informed by their research, by those class presentations, discussions, and votes, and by direct written feedback from the class and teaching staff, each group completed the final draft of their white paper. This is one of those white papers.
Frontier Torts Terminology

Dispositionism is an attributional approach that explains human behavior and outcomes as primarily the result of individuals’ thoughts, preferences, and will.Dispositionism presumes that a person’s behavior reflects decisions and choices that reflect that person’s beliefs, attitudes, preferences, personality, thoughts, and intentions, the details of which he is generally conscious. The dispositionist model assumes a person’s preferences are revealed through his choices, since the actor has the will to choose his actions.

Naïve psychology is a model of human thinking and behavior that posits people are aware of, and able to explicate, the forces motivating their decisions and behaviors. The dominant naïve psychology model, particularly in western cultures, is dispositionism. That naïve model is found also at the foundation of law and in many of the most influential legal theories, including law and economics.

Situationism is an attributional approach that explains behavior, outcomes, and events by looking at situational influences—that is, non-salient internal and external forces operating within and around individuals. Situationism is informed by social science—particularly social psychology, social cognition, cognitive neuroscience and related fields—and the discoveries of market actors devoted to influencing consumer behavior—such as marketers and public relations experts. Situationism is premised on the social scientific insight that the naïve psychology—that is, the highly simplified, affirming, dispositionist model for understanding human thinking and behavior—on which our laws and institutions are based is largely wrong. In explaining human behavior, situationism looks to nonconscious psychological forces and non-obvious contextual behavioral constraints that might shape people’s behavior.
Executive Summary

In 2010, after months of verbal, physical, and emotional torment from her peers at school, fifteen-year-old Phoebe Prince committed suicide. Spawning a national outcry for reform, the case led to anti-bullying legislation in Massachusetts and a greater awareness of the dangers of bullying in the age of social media. Although the Prince family settled a case against the town, no tort actions were pursued against the bullies or school district.

With the growth of social media in the past decade, cyber-bullying has become a new source of inescapable torment for victims, as malicious peers continue their abuse beyond the classroom. Although media portrayals traditionally celebrate vigilante justice as an effective response to bullying, in recent years suicide has instead been on the rise.

A closer look reveals important situational factors that may encourage bullying. Psychological theories provide insight into the behavior and motives of the bystanders (school officials, students, parents) and the bullies involved. A victim’s personal history can also play a role, as did Prince’s history of emotional instability and prior experience with bullying.

Despite the passage of anti-bullying legislation in many states, seeking legal remedies continues to be a problematic endeavor for victims. The primary legal cause of action for plaintiffs is to prove negligence of a third party (for example, negligent supervision of school officials), establishing the usual elements of a tort: duty, breach, causation, and damage. However, there are substantial obstacles to asserting such claims, including the defense of sovereign immunity.

At the policy level, state anti-bullying policies must consider the holistic school environment including the incentives and repercussions for schools to manage bullying. Game theoretic models involving liability standards for school officials and bullies suggest that a strict liability standard would lead to a socially efficient outcome, but the assumptions involved may be unrealistic. Instead, we suggest a standard that places a default of strict liability on school districts, which those districts can opt out of by implementing reasonable bullying prevention strategies. Other suggestions include balancing prevention with punishment and implementation of grassroots school-specific policies. The effective anti-bullying programs and policies of certain school districts, such as Revere Public Schools, might also be studied as potential models of reform.
Introduction

In 2010, 15-year-old Phoebe Prince committed suicide, and bullying became a national topic of conversation. Prince and her family had recently moved from Ireland to the town of South Hadley, Massachusetts. On entering South Hadley High School as a freshman, Prince was initially popular. However, after she briefly dated a popular senior and was perceived to be flirting with a junior, Prince quickly became the target of verbal attacks by the young men’s girlfriends and friends.1 These attacks ranged from name calling to threats of physical violence. As a result, Prince withdrew socially, changed her cellphone number, and expressed concern for her own safety.2

Prince’s bullying did not occur out of the sight of school officials. When Prince entered South Hadley High School, her aunt notified school officials that Prince had been bullied in the past.3 As her bullying at South Hadley progressed, Prince spent time in the counselor’s office. Additionally, the bullying was witnessed and reported by teachers in the school. Despite a general awareness of the situation, South Hadley officials did little to conclusively address the situation.4

After Prince’s suicide, six of the teens involved in her bullying were charged with criminal offenses, ranging from statutory rape to criminal harassment to stalking. Although the charges against one student were dropped and the other five students were eventually placed on probation, the criminal case received widespread media coverage.5 Additionally, Prince’s mother brought a civil action against the town of South Hadley and eventually settled for $225,000.6

Prince’s suicide and the aftermath have led to the passing of anti-bullying legislation in Massachusetts and brought attention to the problem of bullying throughout the country and world.7 While the case demonstrated the potential for criminal and civil suits in response to bullying, no tort actions were brought against either the bullies or the school system. This white paper will explore the problem of bullying in the context of the Phoebe Prince case and will try to address the question of how the tort system fits into this framework.
The Historical Evolution of Bullying

Although the behavior currently classified as bullying may date back to the beginning of human history, the label itself did not gain prominence until the 19th century. Reports of juvenile bullying appear in English-language newsprint as early as 1825, though they are not explicitly referred to as such. Instead, early 19th century usage of the terms “bully” and “bullying” referred to a more general quality of pugnaciousness and dominance, particularly in regard to politics. By mid-century, a usage more akin to modern understanding emerged. Bullies were identifiable social figures associated with aggressive and belligerent behavior. The behavior of bullying was in particular associated with acts of physical violence, almost exclusively with acts of violence conducted by adult males.

By the late 1800s, bullying behavior in children was a recognized phenomenon. An 1897 study on bullying and teasing observed bullying behavior in boys and girls as young as three and as old as twenty. The study labeled primarily physical actions as bullying, whereas emotional species of torment mostly fell into the category of teasing. Although it was uncertain why children bullied others, theories repeatedly referenced demonology and the idea of vestigial instincts left over from humanity’s savage ancestry. Both theories tended to relieve the bully of agency, and the study even went so far as to say that the bully was a “victim” of his impulses. Participants in the study offered a few solutions to bullying, including severe punishment of the bully, bullying the bully, reasoning with the bully, and “cultivating rebellion in the victim.”

The seriousness of the bullying issue seemed to be alleviated by observations that children almost entirely grew out of the behavior as they reached adulthood, and the writers of the study itself were uncertain as to whether bullying may actually be a social good. In sum, both the writers and participants in the study seemed to attribute a minimized degree of control to bullies and some degree of control (and even enjoyment) to the victims, and their attitudes reflect a general feeling that bullying was not a major societal problem.

Many of the popular attributions regarding bullies and victims seen in the 1897 study continued to be widely accepted through much of the 20th century. Bullying was still depicted as instinctual. Victims were held somewhat responsible for the degree to which they were bullied and bullying itself was not considered...
much of a social problem. Discussions of bullies and bullying in the news media in the early to mid-20th century tended to discount the effect of bullying on victims, instead treating bullying as a ubiquitous aspect of adolescent life. Schools could only be held liable for injuries caused by bullying if the plaintiff could prove that the school’s negligent lack of supervision was the proximate cause of his injuries. Negligence was often a very difficult standard for plaintiffs to meet in these situations. Thus, tort law did not provide a good remedy for school bullying. Personal narratives in news and literature at the time often utilized stories of triumphant (or ill-fated) encounters with bullies for dramatic or humorous effect. A more serious, systematic focus on bullying in culture and society would not emerge until the latter decades of the 20th century.

It was not until 1978 that the first scientific research on bullying was published in the United States, revealing bullying to be prevalent in schools and bringing the idea of bullying as a serious problem into public awareness. This research, along with the suicide of several Norwegian teens, prompted anti-bullying school programs in Norway in the 1980s and anti-bullying legislation in Sweden and Norway by the mid-1990s. In the United States, change progressed more slowly. An emerging body of scientific research challenged traditional views of bullying and prompted a new focus on the psychology of bullies and victims. Parents increasingly recognized the negative effects of school bullying on their children and began to demand action from school administrators. By the mid-1990s, some American schools had launched bullying prevention programs. However, tort law was still not a good remedy against school districts that did not combat bullying, as negligence was still the standard applied against school districts in bullying cases. This was still a very high bar for recovery for plaintiffs. The slower response in the United States to enact anti-bullying programs and legislation might be attributed to remnants of public perception from the 1800s: that a simple solution—the solution of defeating the bully—still seemed viable. It was a solution that placed responsibility mostly with the victim, and it was repeatedly referenced in American pop culture through the decades. The positive treatment of this approach is seen as far back as 1838 in Oliver Twist. In books and movies, the sympathetic hero is the one that fights back or stands up to his tormentors. A drastic change in the perception, though, occurred after the Columbine shootings in 1999, a massacre that many Americans believed was prompted by a desire for revenge against the shooters’ bullies. When paired with firearms, the idea of “defeating the bully” suddenly became much less attractive, and bullying itself became more widely perceived as a serious problem. Legal action began to take the place of previous discredited solutions. In reaction to the shootings, Georgia became the first state to enact anti-bullying legislation.
Social media coupled with greater Internet accessibility blurred traditional distinctions between the work, home, and school spheres and thus weakened barriers that once limited where and when bullying occurred. In 1999, in 2002, statistics released by the Department of Education linked many school shootings to bullying. As of 2012, only one state in the United States lacked anti-bullying legislation. However, anti-bullying legislation is only as effective as the standards of care it provides for school districts.

The last decade witnessed a dramatic increase in the attention given to juvenile bullying. The emergence of social media coupled with greater accessibility to the Internet and other forms of electronic communication blurred traditional distinctions between the work, home, and school spheres and thus weakened barriers that once limited where and when bullying occurred. A wave of youth suicides linked to this new “cyber-bullying” prompted a surge of media attention, along with calls for action by policymakers. The increased attention to bullying was not, however, without controversy. As anti-bullying campaigns increasingly supported protections for gay and transgender students, a number of socially conservative organizations and conservative media outlets began expressing discomfort and skepticism with the anti-bullying movement. Yet despite some backlash, there remains a broad consensus that bullying is a serious problem that needs to be addressed and that the solution cannot rest with the victims. Attributional schemas have changed along with this public view. The victim is now seen as lacking any control over the situation and needing the help of others to combat bullying. Many foundations have been created to do just this or to encourage others to face this issue head on. The bully is at times situationalized and perceived as a sympathetic character of abuse himself; at other times, he is dispositionalized and seen as choosing to bully for personal pleasure, desire for power, or in order to get attention. Changing attributional stereotypes of both victim and bully have played a key role in shaping the social response to the issue. Perhaps no social actor has been as integral to the creation and alteration of attributional stereotypes as the media, to which we now turn our attention.
Bullying and the Media

Bullying has long been a part of American culture; however, our conceptions of bullying and its potential effects have evolved over the last decade. This change in perception may be due, in part, to the American media’s portrayal of bullying. Between 2001 and 2010, the percentage of students reporting instances of bullying or being bullied remained steady at approximately 30%. However, in 2010, media coverage of bullying increased dramatically. This disparity between actual events and media portrayal powerfully frames the public’s perception of bullying’s prevalence in American society.

As our conceptions of bullying have evolved, the nature and purposes of American media have also transformed in marked and meaningful ways. The field of American media is rapidly expanding, and individual media outlets struggle to assert themselves; consequently, journalists often maintain relevance by locating and repackaging the nation’s most popular media narratives. The result is a powerful homogenizing effect, in which the nuances of a news item diminish or disappear in favor of a simplified, easily digestible report. Social sciences often describe this phenomenon as mimetic isomorphism — when actors in an institution orient themselves toward an identical value or prize, they develop similar methods of resolving ambiguity.

When exposed to these streamlined and simplified portrayals, the public’s perceptions of current events undergo a similar process of simplification. This phenomenon may be understood through the lens of Cultivation Theory, which holds that popular media, such as television, has the power to influence our view of the world and is “primarily responsible for our perceptions of day-to-day norms and reality.” More specifically, these narratives influence not only our general conceptions of societal norms, but also our particular understanding of what elements of society are most worthy of our attention. This effect is best explained by Agenda-Setting Theory, which places somewhat less emphasis on the impact of the media on our perceptions of reality and more emphasis on what issues are actually covered in the media. It holds that while the media may not tell us what to think, it is successful in telling us what to think about. Thus, the pressures of market competition create a domino effect that ultimately frames the perceptions of the individual consumer: as media outlets necessarily homogenize their reporting, the choices they make shape the way the public understands and responds to current events.

This homogenization can be seen in the recent media portrayal of bullying cases. Since 2009, the media seems to have focused the issue of bullying on the sensational elements of homophobia and cyber harassment. Even within these subgroups, media actors have selected bullying victims that share similar characteristics. In 2010, 90% of news stories about teens being bullied due to sexual identity featured white, middle class males.

In 2010, 90% of news stories about teens being bullied due to sexual identity featured white, middle class males.
being bullied due to sexual identity featured white, middle class males. Yet, 75% of LGBTQ teens of each race and gender reported being bullied. Similarly, while only 13.5% of all teens reported cyber-bullying, the majority of teen suicide media stories focused on elements of cyber-bullying.

The case of Phoebe Prince also provides a strong example of such homogenization. Although the District Attorney in the case stated that “the actions of these students were primarily conducted on school grounds,” media outlets nevertheless forced the tragedy into the narrative of cyber-bullying. Sensational headlines such as “Cyberbullies Charged With Harassing Phoebe Prince, Teen Who Killed Herself After Rape” dominated coverage. In support of their claim, journalists often cited the school superintendent’s suggestion that “[the] real problem now is the texting stuff and the cyber-bullying.” Faced with potential accusations of liability for failure to protect Ms. Prince on school grounds, the superintendent insisted the bullying took place elsewhere. In this sense, the media’s calculated misrepresentation of a case may also encourage interested parties to re-conceptualize the relevant facts.

This effect underscores the often subtle and pervasive influence of media narratives. As the media carefully chooses what subjects to report, these stories are “assimilated and accommodated into the emotional fabric and cognitive structures of individual readers and viewers.”

Similarly, while only 13.5% of all teens reported cyber-bullying, the majority of teen suicide media stories focused on elements of cyber-bullying.

How the media chooses to report and to comment on particular events and issues inevitably influences every corner of American society, from ordinary citizens to policymakers. The implications of these choices, then, may be social, ethical, and, above all, legal. We now examine the legal framework within which victims of bullying must assert their rights by investigating in particular past, unsuccessful tort claims; analyzing negligence as a potential “bullying tort”; and suggesting strategies for expanding school liability.
Tort Doctrinalists

**Introduction**

While victims may at times have been able to find tort remedies by holding bullies themselves liable (as far back as *Vosburg v. Putney*, 80 Wis. 523 (Wisc. 1891)), the frontier tort in this field is holding the school and associated officials liable. Though the Prince family could also potentially bring tort cases against the bullies themselves, as a matter of policy such suits probably would not be as effective in deterring incidents of bullying as larger-scale suits against school districts. Thus, although suits against bullies might provide compensation for families on an individual level, they are ultimately not the most desirable path to expansion of liability for bullying as a tort. Since children are unlikely to change their behavior based on probable tort law consequences, holding school systems, school officials, and teachers liable for bullying seems to provide a much greater incentive for bullying prevention in the future. The question, then, is what kinds of tort claims can victims and their families bring against schools and school officials?

Phoebe Prince’s family brought a civil case against the school system and administrators under the Massachusetts Commission Against Discrimination, which settled for $225,000. Because the defendants were indemnified against further legal action on the matter, no tort suit was ever brought against the school system or administrators. If the Princes had not brought the original suit resulting in indemnification of the school administrators, however, they could have brought any of several tort claims.

**Failed Bullying Torts: IIED**

An obvious choice would seem to have been intentional infliction of emotional distress, and past bullying cases have attempted to assert this claim. In order to prove intentional infliction of emotional distress, a plaintiff must establish that the defendant (1) intentionally or recklessly engaged in (2) extreme or outrageous conduct that (3) caused the plaintiff (4) to suffer emotional distress. That such conduct can be reckless rather than subjectively intentional in nature might suggest the possibility of bringing this claim against administrators in bullying cases if case law did not provide evidence to the contrary. In the context of this claim, outrageous conduct is defined as that which exceeds all bounds of decency tolerated in a civilized society – and most intentional infliction of emotional distress claims against schools fail this requirement.

The plaintiff brought suit against school officials for several torts including intentional infliction of emotional distress. But the court held that since the defendants did not engage in any extreme and outrageous conduct *themselves*, they could not be liable for intentional infliction of emotional distress. On this precedent, the Prince family’s case would also fail. There is no suggestion that any administrator, school official, or teacher directly engaged in any outrageous conduct toward Phoebe Prince, thereby precluding the assertion of this tort. Indeed, this holding indicates that courts would be unlikely to find the schools liable for this tort in any bullying case, since it is exceedingly rare, if ever, that the problem stems from bullying at the hands of teachers or administrators themselves.

**Negligence as a Potential Tort**

It is likely that a change in the type of tort pursued would substantially increase the odds of success for a bullying tort suit against a third party. Specifically, the tort of negligence holds the best prospects. To win a negligence suit, the plaintiff must prove each of four elements - duty, breach, causation, and damages. Therefore, it must be shown that the defendant third party had a duty to prevent the bullying, that this duty was breached, and that this breach of duty in allowing the bullying to occur caused the damages to the bullying victim. However, it is important to note that, for the damages element to be fulfilled, the damages do not need to be physical in nature. This broad definition of damages is part of the reason why negligence may be a more successful tort with bullying, since the abuse is often emotional. In establishing the tort of negligence for bullying, the most difficult element to prove will likely be that of duty. Without establishing a duty, no breach can be claimed, and thus the defendant cannot be held liable. If duty can be established, the fact that bullying occurred will, in itself and through the use of the doctrine of *res ipsa loquitur*, prove that this duty was breached.

Therefore, the crucial task will be showing that the defendant had a duty to prevent the bullying act. In the context of school bullying, defendants traditionally have escaped liability by showing that they owed no duty to the student. There are two main hurdles in establishing bullying that can account for these failures - sovereign immunity and foreseeability. Municipal employees have qualified immunity in the performance of acts wholly for the benefit of the public and supervisory nature. Hence, sovereign immunity could likely immunize school administrators from bullying tort claims. The second obstacle to establishing duty is foreseeability, a sub-element of the element of duty. To successfully prove a duty, the harm caused by the breach must have been a foreseeable consequence of the breach. One problem for establishing foreseeability is that bullying is often viewed as an impulsive, unanticipated act by one student against another and therefore unforeseeable. Moreover, bullying is thought to be an
“underground” activity, and schools rarely see evidence that would alert them to an imminent violent incident. Common interpretation of tort law by courts indicates that schools are not insurers of student safety against every possible harm.\textsuperscript{62} Thus, foreseeability and sovereign immunity present two hurdles in establishing the duty necessary for a successful negligence tort.

\textbf{Suggested Strategy}

Despite the above-noted obstacles to defining bullying as a tort of negligence, negligence nevertheless remains the most viable means of establishing bullying as a tort. In order to do so, however, plaintiffs must overcome their current inability to establish that the school has a duty to prevent students from being bullied. Although the aforementioned stumbling blocks are indeed formidable, they are not insurmountable. Exceptions to both sovereign immunity and foreseeability doctrines both might be pushed upon to successfully establish the school’s duty.

Regarding sovereign immunity, as noted above, there are three exceptions that might be considered when trying to establish duty on the part of the school-defendant. Unfortunately, the first two exceptions—liability imposed for discretionary acts involving malice, wantonness, or intent to injure and for discretionary acts when statute provides cause of action for failure to enforce certain statutory laws—are likely to always fail. The former exception will almost always fail because school employees, whether administrators or teachers, typically are not the ones committing the bullying—instead, the bullies are typically always other students. Schools simply fail to stop these students. Likewise, liability imposed for discretionary acts involving statutes would be inapplicable to tort law, although they would work plausibly in the context of anti-bullying statutes.

More promising is the possibility of establishing the defendant-school’s duty by exploiting the following exception to the sovereign defense doctrine: liability imposed when circumstances make it apparent that the defendant’s failure to act would be likely to subject an identifiable person to imminent harm. Dornfried in particular offers some hope on this front, as the court in that case ruled that any student attending during schools hours would qualify as an identifiable person. The primary problem with this approach is that the protection does not apply to students engaged in extracurricular activities or any activities that do not take place on school grounds. However, “school grounds” is an admittedly vague standard, and one that more liberal courts and judges might be persuaded to expand.

As for foreseeability, courts have acknowledged that liability attaches when “specific facts have warned authorities that a particular threat existed and have indicated that action on the part of the school could have prevented injury.”\textsuperscript{63} Whether this condition was satisfied in the Phoebe

\textsuperscript{62} Thus, foreseeability and sovereign immunity present two hurdles in establishing the duty necessary for a successful negligence tort.
The Prince case is a matter of factual dispute, but the current trend in recent cases (as discussed throughout this paper) seems to indicate that schools’ foreseeability and duty to prevent bullying will eventually be expanded to apply in Phoebe Prince’s situation. However, we expect that this “turn” in tort law will require a judicial expansion of the concept of foreseeability as it applies to blame and responsibility.

**Situationism**

In order to assess best how tort law might effectively regulate bullying, it is also important to evaluate the actors involved by examining what motivates their behavior. The bully, the victim, and the bystander each contribute to why bullying occurs, the effects it can have on others, and the way society treats the problem. In the case of Phoebe Prince, bullying and the resulting suicide did not occur in a vacuum. Students, school officials, parents, and Phoebe herself were all influenced by their situational environments, and each of their situations was a crucial factor in determining their role in the ultimate tragedy. This section seeks to provide an overview of the behavioral/psychological motivations for each relevant actor and thereby reach a more complete understanding of the issues involved with bullying.

**The Mind of the Bully**

As the history and media portrayal of bullying suggest, the public has a complicated and ever-changing perception of what it means to be a bully. The conventional wisdom, however, tends to dispositionalize bullies as inherently bad actors who pick on the vulnerable. Recent research shows, to the contrary, that a number of factors, both inherent and environmental, may influence and even explain why one might exhibit bullying behavior.

One view, supported by a number of studies, is that bullying results from having callous-unemotional (CU) traits—a unique lack of empathy, deficient guilt/remorse, and shallow affect. The presence of bullying behavior correlates most strongly with high levels of CU traits as well as with conduct problems. Importantly, the presence of CU traits appears to have a strong genetic component, which may be present on the X chromosome, thus explaining a relatively higher inheritance of CU traits in males. Also contributing to the possibility of genetic/biological underpinnings is a recent study showing that teens with a history of bullying behavior exhibit increased brain activity when viewing others in pain. Teens exhibiting aggressive conduct disorder showed increased activity in areas of the brain linked with feeling rewarded (the amygdala and ventral striatum) in response to seeing others in pain, indicating that bullies may in fact get pleasure out of other peoples’ pain.
Many of these genetically-related factors have also been linked to environmental causes such as parenting. In one recent study, psychologist Douglas Gentile proposed six risk factors that appear to influence aggression: low parental involvement, exposure to violence in media, prior physical victimization, previous fights, bias towards hostility, and gender. In this way, a multiplicity of factors may be relevant in explaining why bullies exhibit such aggressive behavior. With the growth of the Internet and cyber-bullying, another important factor might be anonymity, or rather what John Suler terms the “disinhibition effect.” The Internet allows people to disassociate their “online” selves from the moral consequences of their actions. Within the context of the Phoebe Prince case, this could help explain the cruel cyber-bullying that occurred on Facebook and beyond. Furthermore, while not much is known about the internal situations and backgrounds of Prince’s perpetrators, Gentile’s six factors likely played an important role.

**Figure 1:** Selective Activation of Brain Regions when Participants Observe Dynamic Visual Stimuli that Depict Painful Situations Caused by Accident (a) Compared with Not Painful Situations (b)

**Figure 2:** Likelihood of Aggression

**The Mind of the Victim**

In the context of torts, it is important to consider the ramifications of bullying on the bullied. People who are bullied can experience both physical and psychological damage in the long term and the short term. Studies show that bullying can significantly inhibit academic performance, decreasing the likelihood that a child will reach academic benchmarks by almost half. Studies have attributed this to heightened stress and experiences of trauma generated by being bullied, potentially leading to truancy and increasing disinterest in academic engagement. Psychological effects include recurring nightmares of bullying incidents, anxiety in the school place, and a reduced ability to concentrate.

Longitudinal studies of bullying demonstrate that individuals
who were bullied as children are at a greater risk of depression and anxiety disorders in college.\textsuperscript{80} Furthermore, though there is no conclusive link, bullied individuals tend to self-report lower levels of self-confidence.\textsuperscript{81}

\textbf{The Mind of the Bystander}

Research suggests that bystanders can experience psychological distress in witnessing a bullying event, especially repetitive abuse.\textsuperscript{82} Further studies have shown that a bystander’s response to a bullying event can be a powerful force in reducing the frequency of bullying.\textsuperscript{83} Yet, despite this distress felt by the bystander, and the ability of the bystander to influence the situation, several internal phenomena known in social psychology contribute to bystanders’ propensities not to intervene.\textsuperscript{84} The bystander effect, groupthink, and social proof all contribute to inaction by the bystander and inhibit a third party from intervening during a bullying situation.

The bystander effect was first discovered almost fifty years prior to Prince’s death, in circumstances that nevertheless mirrored it. On March 13, 1964, Kitty Genovese was murdered, allegedly in the presence of thirty-eight onlookers.\textsuperscript{85} Although later evidence cast doubt on the number of supposedly apathetic observers, the case nevertheless spurred psychologists to investigate how bystanders react to emergencies.\textsuperscript{86} This research led to the discovery of the bystander effect: the inverse relationship between the number of bystanders and the likelihood that any one of them will seek help in an emergency situation.\textsuperscript{87} Although the bystander effect implicates many factors, one of the most important is the diffusion of responsibility, or the idea that onlookers will assume more and more that someone else will take responsibility for a situation as the total number of observers increases.\textsuperscript{88}

Two other theories, groupthink and social proof, further contribute to the apathy of bystanders. First, groupthink, the theory proffered by Irving Janis, refers to a mode of thinking that pushes people in groups to make decisions that minimize conflict in the group at the expense of better decisions.\textsuperscript{89} A bystander might feel pressure not to intervene if he or she feels that the intervention risks group harmony. Second, Cialdini’s idea of social proof states that a bystander may internally justify his or her inaction by noting that nobody else is acting either.\textsuperscript{90} This serves to reduce the internal stress in observing bullying and not intervening. These oft cited and frequently tested phenomena have serious implications for tackling bullying. While the solution to reducing bullying may lie in bystander intervention, these psychological phenomena may create situations that are difficult to overcome.

In the Phoebe Prince case, bystanders included students, school officials, and parents. Although dozens knew of the bullying, none sufficiently intervened. Social proof, groupthink, and the bystander effect likely contributed to bystanders’ inaction and subsequently Prince’s death. By understanding and acknowledging
the internal situational mechanisms that can drive human behavior, one can more deeply understand external implications and more effectively create external policies not only to mitigate bystander behavior but also potentially thwart another incident. The remainder of this section investigates the roles of students, school officials, and parents in greater detail.

The Role of Students

Among the various external factors that contributed to Prince’s tragic end lies the culture and norms of the students at her high school. The analysis of how students affected Prince’s situation will explore the complex web that Social Identity Theory, System Justification Theory, and gender norms weave.

Social Identity Theory (SIT), originally presented by Henri Tajfel and John Turner in 1979, can help explain some possible motivations for harassment, intimidation, and bullying. According to SIT, belonging to a social group is a source of self-identity and pride. To generate or perpetuate positive self-images, people tend to focus on and aggrandize the status of their pertinent social group, while simultaneously enhancing the differences of other groups, thus creating a clearly-defined “us” and “them.”

The cultural dynamics in South Hadley reflect a strong desire to make these distinctions. Jennifer Carleton, a lifelong resident of South Hadley, stated, “South Hadley is a nice, friendly place to live. Most of us were born here and chose to have a family here. We’re invested in keeping it a good place to be.” Simultaneously, demographics show that South Hadley also has a strong population of Irish immigrants. As an immigrant from Ireland already in her teenage years, Prince was new to an already well-established social hierarchy in South Hadley High School. Immediately apparent is an organic source for “us” and “them” groups to form, and the nationality-based distinction was evident in comments about Prince, such as, “Irish bitch...is a cunt.” Additionally, Prince was considered beautiful, and according to her close friend, “Girls envied [Prince].” Another friend commented that Prince gained popularity quickly at South Hadley High and that “[a]ll the guys wanted to talk to Phoebe.” This dynamic presented more opportunities to create “us” and “them” categories, namely “good” girls and “bad” girls.

During her first few months at South Hadley High, Prince had a brief relationship with the very popular senior captain of the football team, Sean Mulveyhill. Shortly thereafter, Mulveyhill reunited with past girlfriend, who was a junior, and thus marked the beginning of Prince’s bullying. Ashley Longe, a childhood friend of Mulveyhill, was average and not particularly popular. Longe began calling Prince names, using
Labeling and gossiping about the high school “slut” is a bonding activity that automatically creates group membership.

...
prefer members of an advantaged “them” group.\textsuperscript{117}

Given that Long and Prince represent distinct social groups, an applied analysis of SJT might play out as follows: Longe associates herself with modest, respectable females who presumably have “true” friendships with males (Mulveyhill in this case), and though less popular (disadvantaged), they at least have self-respect. Longe views Prince as part of a socially advantaged group (referring to Prince’s initial popularity with males), and Longe may actually desire to achieve that level of popularity. In other words, Longe prefers to have the status of the members of Prince’s group. In not being able to achieve that status, however, Longe rationalizes the discrepancy by resorting to stereotyping Prince and anyone like her as a “whore” or “stupid slut,” thus resolving the dissonance of the perceived injustice.

This combination of SIT and SJT creates a limited, yet still powerful, explanation for bullying. Accordingly, the significance of these cognitively based behaviors is arguably too large for the legal system to ignore. Considering this case, blaming bullying as the direct cause of Prince’s suicide is a stretch, especially since Prince had previous emotional issues.\textsuperscript{118} Law professor Joseph Kennedy points out: “If suicide is an abnormal response to the injury, then no causation [sic],”\textsuperscript{119} and Kennedy is quite right. The challenge, therefore, is for the law to recognize doctrinally that the aforementioned social dynamics, which sometimes do not look like bullying, may warrant liability at some level.

No matter what legal framework is implemented, a co-requisite to its success will be reshaping the natural social dynamics through education and leadership buy-in, which will create awareness and credibility. Schools must implement holistic programs that incentivize behavioral modifications from both students and teachers in addition to providing constructive remedies for those who do not comply with school policy. This will hopefully lead to a deterrent effect without the negative behavioral consequences that a straightforward, no tolerance policy might create amongst teenagers. Contingent upon implementation of a truly holistic anti-bullying program, a school could be held to negligence standards. Conversely, a school’s lack of such a program could mean strict liability standards for the school. Depending on the circumstances, some sort of injunctive relief against the individuals involved in bullying might also be useful. Examples include community service that relates to antibullying, conducting in-class presentations, etc. These remedies may lead to more constructive in-group and out-group dynamics. Or perhaps the result will merely be to peel back a behavioral layer, allowing more fundamental causes of bullying to be addressed.

Members of a disadvantaged “us” group tend to prefer members of an advantaged “them” group.
The Role of School Officials

In the aftermath of Phoebe Prince’s suicide, several parents argued that school officials had failed to act in time despite numerous signals that Prince was being bullied. More worrisome, these same parents argued that they too had informed the school district about the bullying of their own children, only to see the warnings fall on deaf ears. While these parents blamed the school officials for simply being callous, such a dispositionist explanation fails to consider the external situation. Although the school officials were likely affected by their external situation in a number of ways, two of the most powerful influences are (1) the bystander effect and (2) attitudes towards social bullying as filtered through a naïve realist lens.

Although the bystander effect has already been examined, it applies with distinctive force in the case of school officials. As previously mentioned, the bystander effect creates a diffusion of responsibility as the number of observers in an emergency situation increases. In Prince’s case, the bystander effect probably played a large role in the school officials’ inadequate response in part because the school did not seem to have had a centralized system to manage bullying. Prior to Prince’s death, a wide variety of school officials – including an assistant principal, her gym teacher, another teacher, and the school nurse – noticed that Phoebe was being bullied, but there is no evidence that any of this information was centralized or managed by one individual. Barring such centralization, each school official was left to fend for herself, engendering a diffusion of responsibility that prevented a more forceful response on the part of the school administration. When each school official felt that someone else would probably handle it, the result was that no one did.

Another explanation for the school officials’ apparent apathy can be found in adults’ attitudes towards bullying generally. While 95% of adults argue that schools should take action if a student feels physically threatened by another student, less than half (48%) agree that “isolating a student socially” definitely qualifies as bullying. In part, adults seem to have internalized social bullying as a necessary component of the high school experience. While attitudes towards physical violence have evolved within the last few decades, most adults still see social bullying as a normal part of a teenage girl’s life—a view that has been normatively supported by films such as Mean Girls. Because many adults experienced bullying themselves when they were younger, they see their experiences as contributing to the formation of their identity: while bullying may not have been pleasant, it was a necessary evil that made them stronger and helped them learn how to stand up for themselves. When school officials see a situation with similar contours repeating, they believe that they should not intervene; in fact, to do so would be to shelter a student paternalistically and prevent them from taking advantage of an
(admittedly taxing) opportunity for growth.

Rather than encouraging school officials to step in, parents’ warnings can have the opposite effect. As naïve realists, school officials believe that they are interpreting the situation accurately. When they see a parent advising a different course of action, they believe that this parent must not see the world as accurately as they do, either because she is overprotective or because she was never bullied and thus has less “life experience” (information) than the school officials do. In order to correct for the parents’ unreasonableness, school officials may feel a stronger pressure to allow the bullying to continue in order to compensate, in a sense, for the parent’s overprotective instincts.

The Role of Parents

Parental behavior contributes to bullying in a myriad of complex ways. One is the way that parental behavior shapes children; the dynamic of the home can have lasting effects on whether the child tends towards aggression or victimization. Parents who exhibit patterns of aggression and mimic a bullying power-dynamic at home can encourage bullying behavior. This effect is compounded when coupled with a failure to set boundaries and limits on the child when she exhibits aggressive behavior at home. On the other hand, parents who do not encourage their children to be “independent and social” can unintentionally put their child at risk of being bullied, by not teaching their child to be assertive and allowing them to become easy targets. In addition, parental neglect and dysfunction can lead to behavior in children that contributes to being singled out in social situations. When neglected by their parents, children may seek attention by acting out in various ways. These rebellious behaviors can take the form of bullying or engaging in “non-normal” activities that may make these children more susceptible to being targeted by their peers.

The level of parental involvement in a child’s school life also affects bullying. Of particular interest is parental awareness about bullying incidents at school and parents’ willingness to speak up when they become aware of bullying behavior. Parents tend to be unaware of bullying. Of victims who are being bullied, 62% inform their parents; 48% of bullies tell parents about their bullying antics. Children clearly seem hesitant, at the very least, to speak with parents about these issues, thus necessitating close and critical observation of child behavior on the part of the parent. This way, parents can detect signs that may indicate victimization/bullying without being explicitly informed of the child’s problems. When they are aware of bullying problems, parents also contribute to bullying depending on how likely or willing they are to report incidents to school officials. There are many reasons that may prevent a parent from doing this, including excuses such as, “bullying is normal,” “children ought to resolve conflicts on their own,” “my child does not want...
me to tell," and “my child could not be a bully.” Not informing the school, however, only serves to encourage bullying behavior.\textsuperscript{129} 130

Detailed information of Phoebe Prince’s family life is not known, and even less is known about her tormentors, such that a full analysis of the impact of the various parent-players on Phoebe’s suicide is not possible. We can, however, make reasonable inferences about how Phoebe’s family life contributed to her difficulties at school. Phoebe was clearly a troubled adolescent, as is evidenced in her history of self-mutilation and suicide attempts. The behaviors that led to Phoebe’s victimization cannot be separated from her emotional state, which developed and was formed within the context of her home life. Phoebe’s mother spent at least some time away from her daughter during the week, an indication of a lack of involvement that might have exacerbated bullying-inducing conditions. This lack of involvement could also have made it harder to notice any problematic behavior of Phoebe’s that might have elicited a more urgent response.\textsuperscript{131}

Indeed, given Phoebe’s history with mental illness and the extent of the bullying problems she had in South Hadley and had had in the past, parental vigilance seems to have been warranted. This lack of vigilance and awareness contributed to the lack of mitigation of the bullying behaviors. Given the tight nexus between parents and bullying, parental participation and involvement seems necessary in any anti-bullying policy that purports to be holistic.

An Economic Analysis

While the actions and failures of many actors contribute to instances of bullying, the full range of motivations underlying these behaviors is not always clear. This section will attempt to lay out the foundations for a legal economic analysis of bullying in order to better understand how the incentives of these different players affect their choices. Specifically, it will examine aspects of tort law and how different liability rules might alter policy decisions of schools in ways that may encourage or discourage bullying. While tort law can impose liability on the different actors involved in this phenomenon—including the victims, the bullies, bystanders, and families—much of the media portrayal and legislative efforts to address the issue have focused on the school’s role in preventing bullying. In most jurisdictions, tort suits involving bullying will address the liability of the school because “school officials are recognized as having both a right and a duty to provide a safe environment conducive to education.”\textsuperscript{132} For this reason we choose to focus our analysis on the impact of different liability rules for the school.

We develop a classical game theoretical model with three actors: the
The school can choose one of three policies: to punish the bully ex post, to monitor or educate and thereby prevent bullying ex ante, or no policy at all.

bully, the victim, and the school. The school can choose one of three policies: to punish the bully ex post, to monitor or educate and thereby prevent bullying ex ante, or no policy at all. The bully then chooses whether to bully the victim. This model assumes that the school has perfect information, meaning that the school knows the costs and payoffs of its policies. The model will show that under the negligence rule a socially efficient outcome may not be reached, whereas it will be reached under a strict liability rule.

In the basic model, the bully gains a small amount of utility from bullying, which represents the satisfaction he obtains. However, the victim suffers a much greater harm than the benefit enjoyed by the bully, which can be observed in the payoffs in Diagram 1. These payoffs need not represent exact costs and benefits, but need only highlight their relative proportions. For our model, it is sufficient to establish that the cost to the victim is significantly larger than the benefit to the bully.

Diagram 1. Simple Bullying Model

As shown in Diagram 1, the bully will choose to bully in the absence of any legal rules and a socially inefficient outcome will result since the total of payoffs at this outcome is -900 whereas if there was no bullying the total payoff would be zero.

In response to bullying, the school can implement one of three policies. It can implement a policy to punish and impose a cost on the bully ex post at some cost to itself (punishment policy). We assume that a reasonable punishment policy will impose a cost of 200 on the bully that is greater than his enjoyment from bullying at an administrative cost to the school of 200. This number is selected to illustrate that the punishment policy will cost less to the school than the harm done to the victim. Alternatively, the school can implement educational or monitoring programs to prevent bullying ex ante at some cost to itself (monitoring policy). We represent this cost as a variable in order to be able to compare the costs of this policy against the punishment policy. Finally, the school can choose to have no policy on bullying. These payoffs are shown with respect to the general rule of negligence in Diagram 2.

Diagram 2. Negligence Rule

Under this rule, the school faces liability if it has no policy on bullying and would have to compensate the victim fully. If it implements either the punishment or monitoring policy, then it will be assumed to have met its duty and will
not face any liability. If the school implements a punishment policy, the bully will face a payoff of -100 if he bullies and 0 if he does not, and therefore will choose not to bully. If the school has a monitoring policy, it can enjoin the bully from bullying. If it has no policy, the bully will choose to bully and the school will have to compensate the victim. Thus, the school will face a payoff of -200 for the punishment policy, -X for the monitoring policy, and -1000 for no policy. The optimal choice for the school is either the punishment or monitoring policy. If X is greater than 200, which means the monitoring policy costs more than the punishment policy, the school will choose the punishment policy. Either way, there is no bullying, which is the socially optimal outcome.

The above model assumed that the cost of punishment to the bully was greater than the perceived benefit. However, the punishment is imposed on the bully after the benefit is derived. Studies show that minors may not be responsive to punishment due to high future discounting. To account for this empirical finding regarding the decision-making processes and cost-benefit perceptions of minors, we show that the bully will perceive the cost of punishment to be lower because it occurs in the future. In this case, the bully discounts enough such that even considering the future cost of punishment at 200, he still expects a net benefit of 50 from bullying.

Diagram 3. Negligence Rule with High Discounting

Diagram 3 shows the payoffs under the negligence rule when the bully has high discounting. In this model, punishment will fail to deter the bully from bullying, whereas the monitoring policy still prevents bullying, which would be the socially optimal outcome. However, the school will implement the punishment policy if X is greater than 200 because the school can avoid liability by implementing either policy. Therefore, the model predicts that under a negligence rule with high discounting, if punishment is cheaper than monitoring, bullying will still occur and there will be a socially inefficient outcome.

Because a negligence rule may result in a socially inefficient outcome, we consider the outcome under a strict liability rule. Under this rule, if bullying happens, the school must fully compensate the victim, regardless of its policy, as shown in Diagram 4. For instance, if the school implements a punishment policy and bullying still happens, the school must compensate the victim for 1000 and incur the administrative costs of the policy of 200, for a total cost of 1200.
Based on this model, the negligence standard may not result in the socially efficient outcome if the bully cannot be deterred by punishment. Therefore, a strict liability rule is more likely to result in the socially efficient outcome. Despite this, there may be other factors that would cut against imposing strict liability on schools. For example, we assumed that the monitoring policy would be 100% effective. Relaxing this assumption would lead to a higher expected cost to the school because bullying would still happen in some cases. Giving the victim a choice of whether to report the bullying or not could also augment the model. Finally, this model did not consider imposing liability on bystanders, the bully, or the bully’s family. Placing complete and strict liability on the schools could disincentivize action by these parties to prevent bullying. Regardless, the model provides a useful starting point to understand the choices and incentive structures for one of the main actors in bullying cases.

The Current State of Anti-Bullying Legislation

Armed with a greater understanding of the actors involved and the incentives that motivate them, our discussion turns to devising policies that will encourage these players to reduce the frequency and severity of bullying. We begin by examining state law, which powerfully shapes bullying prevention and response. State statutes may define bullying; permit or mandate school districts to implement anti-bullying plans; incentivize school district compliance with liability; fund, license or regulate anti-bullying programming; influence how much control communities retain in their anti-bullying prevention strategies; and, most importantly, improve or worsen the daily learning environments of students, shaping their long term educational
Effective state anti-bullying policy must consider the school environment holistically, balancing both prevention and punishment, top-down minimum standards and grass-roots school-specific policies, as well as incentives and repercussions for schools to manage bullying.

Not all anti-bullying policies are equally effective. This section emphasizes that effective state anti-bullying policy must consider the school environment holistically, balancing both prevention and punishment, top-down minimum standards and grass-roots school-specific policies, as well as incentives and repercussions for schools to manage bullying. This section questions whether current state legislation successfully achieves this balance.

Although not specifically designed to address bullying, there is existing state and federal legislation under which schools can be held liable for bullying. Rights granted in federal statutes and the Constitution can provide a basis through litigation to remedy bullying in schools. The Equal Protection Clause of the 14th Amendment and Title IX of the Education Amendments Act of 1972 can be a basis for some types of lawsuits addressing bullying, such as cases where the victim was bullied on the basis of sex, race, or religion. The Equal Protection Clause mandates states to grant equal protection under its laws for all residents within the state. Title IX prohibits discrimination on the basis of sex in any educational program receiving federal financial support. For example, in *J.L. v. Mohawk Central School District*, No. 6:2009CV00943 (N.D.N.Y. filed Aug. 18, 2009), the plaintiff, an openly gay high school student who had been verbally and physically assaulted in his upstate New York school, relied on the Equal Protection Clause and Title IX to bring his case on the basis of sex discrimination. Moreover, Title VI of the Civil Rights Act of 1964 also prohibits discrimination on the basis of race, color, or national origin and Section 504 of the Rehabilitation Act of 1973 and Title II of the American with Disabilities Act prohibit discrimination on the basis of disabilities. These statutes can also be used to address bullying where victims are targeted on the basis of their race or disability. States have similar civil rights and anti-discrimination legislation which bullying victims can use to bring suits against schools. Victims of bullying can also find relief by holding schools liable under state tort law for negligence or wrongful death in bullying cases. Federal and state civil rights, anti-discrimination, and tort law, however, are not designed to address bullying specifically, and some bullying cases may not fall within the existing legal framework.

Since the Columbine massacre in 1999, at least 120 bills have been passed regarding bullying with varying success. As of 2012, forty-eight states had adopted specific anti-bullying legislation requiring schools to adopt anti-bullying policies.
However, it is unclear whether this tidal wave of legislation is having any positive effect on bullying. Although state laws regarding policy have many elements in common, there are many significant differences (see Figure 4 below). It is unclear which, if any, of these variations is most effective.

Figure 4: Key Components in District Policies: State Legislation Coverage of U.S. Department of Education-Identified Key Components, by Number of States (n=46)

Thirty-nine state laws covered the purpose or intent of the law and prohibitions against bullying. State bullying laws enacted through April 30, 2011.
A 2011 Department of Education anti-bullying legislation study has noted “an expanded role for law enforcement and the criminal justice system in managing bullying on campuses.”¹⁴⁷ Some laws provide new criminal charges for bullying, and other, non-bullying-specific legislation provides criminal charges for bullying behavior, but most state anti-bullying legislation focuses on school responsibility, prescribing minimum requirements for school policies.¹⁴⁸ Generally, state anti-bullying laws tend to emphasize 1) the school’s responsibility to investigate bullying incidents, 2) repercussions for bullies, and 3) reporting requirements from schools to their district administrations.¹⁴⁹

Fewer laws, however, require bullying education for students, teachers, families, and staff or provide funding sources to implement anti-bullying legislation.¹⁵⁰ Although the laws in about forty states include provisions to require or encourage bullying preventive education, the Department of Education found that state legislation emphasizes the traditional anti-bullying approach, which is to focus on addressing bullying incidents after they occur and deterrence.¹⁵¹ According to the Department of Education study, “the most commonly covered components in legislation are requirements to develop district policies, statements of scope defining school jurisdiction over bullying acts, definitions of prohibited behavior, and disciplinary consequences. Procedural components in laws are more likely to involve direct mandates, whereas programmatic components (e.g., training and prevention) are often prescribed using discretionary language.”¹⁵² This may indicate that state legislatures are not truly adopting a holistic school policy but instead are focusing on punishment while neglecting prevention. In fact, only three state laws include language in their legislation identifying sources of funding to support bullying prevention programs, and only two states (Massachusetts and Rhode Island) specify that disciplinary actions must be balanced with the need to teach appropriate behavior.¹⁵³

**Goals and Aspirations for Anti-Bullying Legislation: School Liability**

Emphasizing the need for policy to both prevent bullying and ensure accountability for responsible actors when bullying occurs, we support a liability standard for school districts that places responsibility with the school. Our recommendation is that a school’s liability should vary according to its efforts to ensure a safe school climate.

Effective bullying policy requires a standard of liability that forces school officials to take responsibility for their school culture and climate. Research suggests that school environment is the most
significant predictor of bullying. School officials are often ultimately responsible for bullying because “bullying and violence flourish in particular kinds of school climates, and those climates are largely within the control of school officials. School officials, then, should be forced to take control of climates in their schools and to reduce the prevalence of bullying.” Increasing school liability prevents bullying because school officials are most capable of controlling school culture.

Establishing school liability is not without legal obstacle. Many courts and legislatures will have to reformulate definitions of “reasonable supervision” to require schools to supervise students actively. Legislatures must also address sovereign immunity. With respect to bullying, there should be no sovereign immunity for schools.

To incentivize schools to properly implement anti-bullying policies, we recommend a tiered liability structure that includes “carrots” and “sticks.” School liability should vary according to schools’ good behavior, i.e. establishing a school environment that does not support bullying:

If the school, non-negligently and in good faith, has implemented a serious, research-based bullying prevention strategy… presumption that their actions were reasonable if a child is injured by the tortious actions of another student, absent substantial evidence of deliberate indifference to known threats or harassment directed at the victim. [If not]… school officials should be subject to a presumption that their actions were negligent and were the proximate cause of injury.

Non-negligent and good faith implementation of bullying prevention strategy absolves school officials of liability, offering schools a legal incentive to comply with policy. The “unless” clause clarifies the exception that when school actors are “indifferent to known threats,” the protection ceases. Liability fears motivate schools to implement programs.

The benefits of this policy are two-fold. First, the policy induces compliance by schools because it offers reduced liability for schools that in good faith implement prevention programs and comply with other regulations. Second, the policy shifts the focus towards prevention programming, a research-based solution that may help to address the wide variety of effectiveness noted in current anti-bullying initiatives. Thus, while legal sanctions should not be imposed on the bully, a bully must receive some consequence. However, the focus of the consequence should be rehabilitative rather than punitive.

Concerns related to implementation may be difficult to overcome. Some cash-strapped districts may not be able to afford programs without supplementary funds. Some districts may find programs insensitive to their community’s cultural or social needs and resist cookie-cutter approaches. Others might fear draconian measures.

Research suggests that school environment is the most significant predictor of bullying.
To incentivize schools to properly implement anti-bullying policies, we recommend a tiered liability structure that includes “carrots” and “sticks.”

by the school that effectively stop bullying but in so doing significantly harm the school culture rather than help it. Lastly, the concept of liability as a “carrot / stick” incentive poses its own shortcomings, namely that at some point, a school may be covered and a bully may be judgment-proof, leaving the victim without legal recourse. It is clear from these recommendations that policy should be well-funded, flexible and sensitive to particular communities, and respectful of student well-being.

There is a dire need to shift the approach of anti-bullying legislation from punishment to prevention by placing the onus of providing a safe, collaborative environment on schools and officials. Some studies have shown that “zero-tolerance” policies and highly punitive action against bullies are ineffective and may have adverse consequences; in fact, expulsion or suspension have proven to make some students “more likely to repeat a grade, drop out, or come in contact with the juvenile justice system.” The goal, thus, should be to foster camaraderie and positive interactions among students rather than remove them from schools, further depriving them of educational opportunities and likely increasing behavioral issues in the future. Ultimately, the bullying narrative that pits bully against victim—roles that are often blurred—should be supplanted with one that addresses the situations that create bullies, rather than dispositionalizing the actors involved.

In order to achieve the flexibility required to prevent future conflict, state laws that require collaboration between schools and grass-roots organizations, such as Steps to Respect, will aid in the development of positive school environments most conducive to bully prevention. Organizations using “evidence-based” curricula have proven to be most effective, having “been studied using rigorous evaluation methodology and demonstrated a positive impact, such as improved attitudes about bullying, improved bystander actions, or reduced rates of bullying victimization.” These programs utilize longitudinal studies enabling school officials to provide evidence on the incidence and kinds of bullying prevalent at their school that simultaneously collect useful data while helping to develop a curriculum ideal for their students. Some of the hallmarks of these programs are adult supervision, support for children and their “social-emotional learning,” decreasing prejudice, and promoting diversity—focuses that depend, of course, on the needs of each school.
Application to Cases Studies

In *Mohawk*, where the openly gay student bullied for his non-conformity to heteronormative gender roles, the United States Department of Justice argued “that the school district was deliberately indifferent in its failure to take timely, corrective action, and that the deliberate indifference restricted J.L.’s ability to fully enjoy the educational opportunities and benefits of his school.” As evidenced by the Phoebe Prince case, where adult supervision and school accountability were clearly lacking, the absence of effective school prevention programming can result in tragic consequences. It is imperative that schools take an active role in the remediation of existing conflicts and the prevention of future bullying. One can only wonder if stricter liability rules that compel schools to intervene in the presence of bullying might have prevented Prince’s suicide or J.L.’s need to pursue legal recourse, or if efforts to motivate positive social ties and counteract hate between students might have precluded these predicaments in the first place.

Prince was taunted and bullied for the alleged intimate relationships she had had with boys with previous romantic links to other girls. These girls regrettably opted to vilify and harass Prince, rather than share in the solidarity of social bonds that, if fostered in the school environment, might help students redirect negative thoughts and behaviors into workable solutions to their problems. By instituting anti-bullying programs that advance diversity in education in the form of, among other things, gender sensitivity and cultural relativism, schools may be able to correct the hateful interactions that result in cases of bullying like those of Prince and J.L. As a requirement of the settlement that resulted from *Mohawk*, the Mohawk Central School District is now required to “retain an expert consultant to conduct annual training for faculty and staff, and students as deemed appropriate by the expert, on discrimination and harassment based on sex, gender identity, gender expression, and sexual orientation,” a resource that would be invaluable, and should arguably be required, for all schools. Furthermore, the surge in anti-bullying legislation in Massachusetts since Prince’s suicide seems to reflect that legislators are beginning to recognize the school’s responsibility to curb bullying.

**Public Choice: Interest Groups**

The high-profile nature of the Prince case and others inspired public pressure to debate the merits of these and other anti-bullying strategies. On May 3, 2010 Governor Deval Patrick signed a landmark anti-bullying law which bans all forms of bullying on school grounds and mandates that schools investigate any incidents of bullying and report the results to both parents and students. Still, much of the law’s implementation was left up...
Virtually all interest groups have a common goal in reducing bullying’s impact, whether it stems from financial interests, public policy interests, or both.

to individual school districts. However, the decisions of policymakers do not take place in a bubble. When a legislature acts, their decisions are both influenced by and have an affect upon various formal and informal interest groups. This section of the paper will briefly analyze the roles of certain interest groups in the process of formulating policies concerning bullying and then examine one case study of how a school district and middle school implemented the changes promulgated by the legislature.

Various interest groups impact the formulation of bullying statutes at the state level and policies at the local level. While assigning blame or liability for who is responsible for bullying is a difficult task, virtually all interest groups have a common goal in reducing its impact, whether it stems from financial interests, public policy interests, or both. Municipalities and their school districts have an interest in curbing bullying from a financial perspective but also due to public pressure from citizens and a desire to promote a positive perception in the world. Perhaps the best-organized interest groups that address bullying prevention are teachers and their unions. Like school districts, tort law and harsh-bullying statutes encourage teachers to act conscientiously to prevent and intercept incidents of bullying. Furthermore, as educators who invest in their students, teachers have an inherent interest to protect their students. While not always as organized as teachers or school districts, parents can be the most vocal advocates for drafting and implementing revolutionary bullying policies. As the primary advocates for their children, parents can directly shape the formulation of bullying policies, especially, though not exclusively, at the local level. Civil rights groups, while rarely taking a first-hand role in shaping local bullying policies, can often provide information or guidelines to schools and districts that need help. Finally, as the people who will either suffer or prosper with the failure or success of bullying policies, students can and should be called upon to give perspective on their experiences.

Each of these interest groups can draw upon various sources for insight into what changes are necessary and how to effect them. School districts can and should communicate with other successful school districts that have effective programs in order to develop their own solutions. Teachers’ organizations have crafted various strategies for educators to spot, manage, and prevent bullying with both a top-down and bottom-up approach. Similar tools are available to parent groups at the national and local levels. Finally, students can draw upon many of these types of sources, but more importantly have the unique role and experience of being “on the ground” every day.

Public Choice: A Model for Success

As a response to the high-profile bullying cases in Massachusetts and the nation, the City of Revere, Revere Public Schools, teachers, parents, and students came together to
draft a new plan for curbing bullying whenever possible and eliminating its impact when it does occur. While public pressure played a significant role in the school district adopting a new policy, the true impetus was the bullying law signed by Governor Patrick mandating reform. Using funds targeted for professional development of staff, the school district developed a policy based on input from educators, administrators, students, and parents based on the results of public meetings. The policy takes a two-pronged approach. First, it incorporates state mandates to investigate, report, and eliminate bullying when it occurs. Second, the plan also takes a “bottom-up” approach of implementing an anti-bullying curriculum throughout the school system. This section will examine the middle school policies, when the threat of bullying is at its peak.

The mission of the Revere Public School’s anti-bullying and harassment policy is to provide a safe and welcoming environment for all students in the school system. In accordance with state law, the policy mandates reporting by all adults any suspicion of bullying that takes place in the school. Likewise the district incorporates strict disciplinary and rehabilitative measures for students who show a pattern of breaking the school’s ban on bullying and cyberbullying, even for incidents that do not take place on school grounds. Nevertheless, the district policy requires ongoing professional development and training for educators to manage incidents of bullying. Importantly, the school policy goes beyond reactionary responses to bullying and incorporates proactive measures for all interested parties. Along with proactive training of educators, the schools provide informational and education sessions for parents on how to talk to their children about bullying and what to do if they believe that their child may be the victim or aggressor in a bullying situation. Furthermore and perhaps most importantly, the school’s policy incorporates a proactive, preventative curriculum that encourages students to prevent, spot, and report bullying.

Finally, it is important to look at specific examples of what schools are doing in the classroom to address bullying preemptively. We will begin by looking at the curriculum of a sixth grade health teacher, presented with the help of a guidance and adjustment counselor at the Susan B. Anthony Middle School in Revere, Massachusetts. The curriculum lasted four days and was entitled “Don’t Pick on Me.” It began with a bullying survey, asking the students if they had ever been bullied or witnessed the bullying of other students. It used several methods in order to engage the students and help them understand bullying and the extent of the negative effect it had. Included in the curriculum were a discussion of the effects of bullying, an educational video, discussion questions and strategies, and role playing activities. The program also addressed the district’s bullying policy, as well as Massachusetts state law, which
requires school leaders to create and implement strategies to prevent and address bullying. These methods helped to address the mental states of the students - by deepening their understanding and empathy, the techniques helped to incentivize the students to help prevent bullying. The methods also highlighted the broader policy implications and the extent to which schools and the state are acting to address the problem.

The curriculum of two seventh grade health classes at the same middle school used similar but also unique techniques to help the students address the issue of bullying. The first was entitled, “Bystander 101”, and the overall unit, the “Violence Prevention Unit.” The presentation focused on the student as a bystander to a bullying attack, dividing the term into two subcategories, that of helpful and hurtful bystanders. It addressed why bystanders often do not get involved and why it is every student’s responsibility to do so, and it offered techniques for helping a student to become a helpful bystander. The presentation also addressed the definition of empathy, the factors that affect a student’s perception of the bullying event, as well as physical, verbal, and situational cues that should alert a bystander to a bullying attack and trigger the reaction of a helpful bystander. By encouraging self-reflection as well as the understanding of social psychology as it relates to bullying, the program also addressed the students’ mental states, allowing students to understand their own motivations and motivated attributions in order to incentivize them to prevent bullying. The second seventh grade classroom also had a “Violence Prevention Unit.” The program gave definitions and listed examples of bullying, including, notably, cyber-bullying. It also addressed the district’s bullying policy in order to underline the seriousness of the problem and the district’s commitment to addressing it. These approaches helped to open students’ minds to the possibility of bullying entering multiple arenas, including the cyber arena, and incentivize them to act to counter the problem.
The Voting Procedure

The vote on policy proposals took place at the conclusion of each group’s ninety-minute presentation and class discussion. Those presentations and discussions were informed by each group’s draft white paper, which all students were assigned to read, and by a one-hour talk delivered by a guest speaker who was expert on the underlying topic. The discussion and voting process lasted between fifteen and thirty minutes. Voting took place in an open forum, and students voted by raising their hands – with outcomes determined by majority rule. The policy proposals recommended in each of the Frontier Torts white papers reflect a class vote and not necessarily the views or recommendations of each white paper’s authors.

Following our presentation, our group proposed three alternative liability standards that could be adopted as anti-bullying policy. The first was strict liability, in which the school would be held to a strict liability standard. The second was a “carrot and stick” model. In this model, the school would be held to a negligence standard if it implemented its state-mandated anti-bullying policy; and if the school failed to make a good-faith implementation, it would be held to a strict liability standard. The third option presented was shifted liability, in which the liability would shift to parents of bullies and the bullies themselves if the school implemented anti-bullying policies to the best of its ability. In an overwhelming majority, the class voted that the "carrot and stick" model of liability would be the most desirable policy.
Conclusion

As media presentation and public perception of bullying has begun to focus on the now-familiar storyline of a victim who needs the help of others paired with either a malevolent or similarly abused bully, newly imagined policy responses to bullying have also emerged. Existing law is riddled with obstacles to relief for victims of bullying, and public momentum to rethink current policy presents the opportunity to offer not only redress for the victim but also prevention and support for all parties involved, from bullies, parents, and school districts, to victims and bystanders.

These policy responses, however, should be shaped by both an analysis of the situational factors common to instances of bullying as well as an appreciation for the incentive structures present in the school community as a whole. Psychological theories provide insight into the situation, illuminating the behavior and motives of the bystanders—including school officials, students, parents—and the bullies involved. Game-theoretic models highlight some of the incentives and repercussions policymakers should consider when considering options for curtailing bullying behavior. While the current liability standard for schools is a negligence standard, a game theory analysis suggests that a strict liability standard would lead to a socially efficient outcome. Some of the pitfalls of this approach can be circumvented by applying a default standard of strict liability, which school districts can reduce to a negligence standard by implementing reasonable bullying prevention strategies and by allowing for implementation of grassroots school-specific policies.

Bullying has come to the forefront as a major issue in recent years, and policy steps are being taken both within schools and within the legislature to address it. In terms of legislation, the Phoebe Prince case was a salient tragedy that mobilized a number of interest groups and catalyzing a range of anti-bullying policies. Parents, teachers, administrators, and students have all played some role in formulating anti-bullying policies mandated by state law. Districts and individual schools have implemented preventative and reactive measures to help curtail bullying. Schools are experimenting with curricula designed to address bullying preemptively from a bottom-up rather than top-down approach. Such multilayered combinations of responses promise to be the most effective at addressing the bullying problem which, itself, reflects a complex set of causes.


3 Ekhom & Zezima, supra note 1.

4 Giacobbe, supra note 2.


10 See From the Franklin Gazette, MD. GAZETTE & POL. INTELLIGENCER, Aug. 20, 1818; How to Treat a Bully DAILY NAT'l INTELLIGENCER, June 30, 1823; Another Instance of Mr. Clay’s Senatorial Bullying, 15 WKLY. OHIO STATESMAN, Oct. 16, 1844, at G.

11 See An Officer Seriously Stabbed by an Oregon Bully, 26 DAILY EVENING BULL., Nov. 6, 1861, at D; Crime and Criminals, 266 INTER OCEAN, Jan. 29, 1877, at C5.

12 See Frederick L. Burk, Teasing and Bullying, 4 PEDAGOGICAL SEMINARY 3, 336 (1897), available at https://webspace.utexas.edu/lab3346/School%20Bullying/Burk1897/Burk1897.pdf.

13 Id.

14 See id.

15 Id. at 337, 340.

16 Id. at 338, 368.

17 Id. at 349.

18 Id. at 367.

19 Id. at 336, 359, 366.

20 Id. at 338.

21 See WILLIAM GOLDING, LORD OF THE FLIES (Faber & Faber 1954) (A group of schoolboys stranded on a deserted island slowly devolve into savagery, implying a civilized society is all that stands between children and their violent impulses).

22 See BACK TO THE FUTURE (Universal Pictures 1985) (The bullied George McFly is told, “Stand tall, boy, have some respect for yourself! Don’t you know if you let people walk over you now, they'll be walking over you for the rest of your life?”).


26 See id.

27 Actor’s Pleasant Memories, supra note 24.


29 Id.

30 See Why Bullies Do It: To Really Have Fun, WASHINGTON POST, 1987; Bully-Victim Research Explodes School Myths, LOS ANGELES TIMES, 1986.


Carpenter, supra note 23.

CHARLES DICKENS, OLIVER TWIST (Richard Bentley 1838) (the hero of the story responds to a bullying fellow apprentice by attacking and beating him).

The Karate Kid (Columbia Pictures 1984) (bullied hero trains to take on and eventually defeat the bully, with the help and approval of adult mentors).

Susan Donaldson James, Surviving Columbine: What We Got Wrong (Apr. 20, 2009), http://abcnews.go.com/Health/MindMoodNews/story?id=7363898&page=1#.UJV-426e_gA.


See P.O.D., Youth of the Nation, on SATELLITE (Atlantic Records 2001).

See Paceley & Flynn, supra note 50, at 344.

See supra note 49, at 216.


See infra pp. 31-36.
need to rely on sources of self-esteem. At the same time, generation Y was raised with "self-esteem" as the catchword. Interestingly, Generation Y was raised with "self-esteem" as the catchword.

Generation Y are people born from the late 1970s to the late 1990s. Among many both positive and negative consequences, this suggests, though certainly not conclusively, a potential link between Generation Y and a greater need to rely on sources of self-esteem.

Giacobbe, supra note 94.

Giacobbe, supra note 94.

Id.


Payne, supra note 108.


Id. at 887.


Blasi & Jost, supra note 116, at 1121.


Id.


Id.

Adam Benforado & Jon Hanson, Seeing Bias: Discrediting and Dismissing Accurate Attributions, in IDEOLOGY, PSYCHOLOGY, AND LAW 453, 456–57 (Jon Hanson & John Jost eds., 2012).

Id.

DEBRA J. PEPLER & WENDY CRAIG, MAKING A DIFFERENCE IN BULLYING 11 (April 2000).

Id.

Id.


Bazelon, supra note 122.

The payoff for Diagram 1 is in the form: (bully’s payoff, victim’s payoff); the payoffs for Diagrams 2-4 are in the form: (school’s payoff, bully’s payoff, victim’s payoff).

For example, the school can punish the bully through detention, which would be a cost on the bully. The school will incur costs of administering the detention program.

Under an ex ante policy, the bully’s choice to bully is enjoined, signifying that he is successfully prevented from bullying by the school’s policy.


Arne Duncan, Key Policy Letters from the Education Secretary and Deputy Secretary (Dec. 16, 2010), http://www2.ed.gov/policy/gen/guid/secletter/101215.html.


See Weddle, supra note 62, at 699–700.

Naomi Shatz, Presentation at Harvard Law School (Nov. 15, 2012).


Stuart-Cassel et al., supra note 139, at xi.

Sacco, supra note 142, at 19.

Stuart-Cassel et al., supra note 139, at xi.

Id. at xiii.

Id. at 19.

Id. at xi.

Id. at 19.

See id. at 7, 9, 11.

Id. at 34; Sacco, supra note 142, at 8.

See Weddle, supra note 62, at 652, 701 (“Research has demonstrated empirically: bullying is a function of school climate—which is controlled by the faculty and staff...Research has demonstrated that bullying exists in nearly every school setting and that the most potent indicator of its prevalence and strength is the leadership of the administration and staff of the school.”).

Id. at 700.

See id. at 656 (“What such programs and their successes demonstrate is that supervision can no longer be viewed as mere monitoring and intervention. If it is to have any real impact on the hidden dynamics of bullying and victimization, supervision must be viewed as a global approach to creating a school climate in which students are physically and emotionally safe and in which children learn to treat each other with respect and to protect each other....”).

Id. at 683.

Id. at 700.

See infra p. 43.


Id. at 39.

Id. at 39.

Id. at 40.


Id. at 6-7.

Id. at 8-9.