

Western New England Law Review

Volume 35 35 (2013)

Issue 2 SYMPOSIUM: THE FORTIETH
ANNIVERSARY OF TITLE IX

Article 2

1-1-2013

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John G. Culhane

Yale University School of Public Health.

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Recommended Citation

John G. Culhane, *BULLYING, LITIGATION, AND POPULATIONS: THE LIMITED EFFECT OF TITLE IX*, 35 W. New Eng. L. Rev. 323 (2013), <http://digitalcommons.law.wne.edu/lawreview/vol35/iss2/2>

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BULLYING, LITIGATION, AND POPULATIONS: THE LIMITED EFFECT OF TITLE IX

JOHN G. CULHANE*

ABSTRACT

During the past few years, the problem of school bullying has gained national prominence. Scholars, policy-makers, and media outlets have belatedly begun to address the long-term physical consequences of bullying for children, as well as the corrosive effect of this destructive conduct on the learning environment. Because the problem is complex and multi-factored, however, solutions remain elusive.

This article examines and compares two approaches to dealing with bullying. First, litigation is considered as a way of responding to the most serious cases. Suing school districts that allow bullying to go unchecked can be helpful: victims are often entitled to compensation, officials in other school districts can be deterred by news of liability against other schools, and the ability to have one's story heard in court can be a powerful balm in some cases. Yet litigation has substantial limitations. It is only an option in a small number of cases involving the most serious harms, but most bullying does not result in that level of injury. And even where settlements compel a student to create anti-bullying initiatives, often the resulting programs are designed to avoid litigation rather than to address the deeper issues that cause bullying in the first place.

With the limitations of a litigation strategy thus described, the article moves on to consider how a public health approach can lead to better outcomes. Public health takes account of all affected populations, and is committed to an evidence-based model of problem-solving. The article examines state laws and policies for fit with sound public health principles, and provides analysis of how these initiatives might result in an overall reduction in the incidence and prevalence of bullying.

* Professor of Law and Director of Health Law Institute, Widener University School of Law; Lecturer, Yale University School of Public Health. Blog: wordinedgewise.org

INTRODUCTION

The bullying of vulnerable LGBT kids has only lately gotten the attention it needs.¹ Some of this attention is the result of high-profile cases that have come into the national consciousness.² Further fueling the perception that bullying is a serious problem were anti-bullying pronouncements by the megastar Lady Gaga (who urged the President to act),³ a successful and much-publicized video campaign (“It Gets Better”) by the sex columnist and blogger Dan Savage,⁴ and two conferences on the issue sponsored by the Obama Administration.⁵

Perhaps the less-than-sympathetic response by a few on the extreme political and religious right has also fed into the national sense that a comprehensive response is needed. For example, Congresswoman Michelle Bachmann responded to a question about how she would address the issue of bullying by stating that she would eliminate the Department of Education.⁶ Although she went on to explain that she believed the issue should be handled on the local level, her comments struck the wrong note given that a school district in her congressional district had been the site of nine teen suicides—several of whom were gay kids who had been bullied—during a two-year period.⁷ Tony

1. Of course, kids are bullied for many reasons. The focus of this Article, however, is on children who are either LGBT, or questioning their sexuality, or whose behavior is seen as gender-non-conforming. Although there are some universal facts about bullying, the experience of kids we might designate as “queer” (used in some deliberately provocative sense here) is unique in some ways—notably, in their frequent inability to either express or gain sympathy from their parents or guardians, whose own views on the proper expression of gender sometimes serve to impede communication.

2. See John G. Culhane, *More than the Victims: A Population-Based, Public Health Approach to Bullying of LGBT Youth*, 38 RUTGERS L. REC. 1, 2 (2010-2011) (discussing high-profile suicides that followed bullying).

3. Gerrick D. Kennedy, *Lady Gaga, At Obama Fundraiser, Urges End to Bullying*, L.A. TIMES MUSIC BLOG (Sept. 26, 2011, 12:03 PM), http://latimesblogs.latimes.com/music_blog/2011/09/lady-gaga-pushes-to-end-bullying-at-obama-fundraiser-in-silicon-valley.html.

4. See IT GETS BETTER PROJECT, <http://www.itgetsbetter.org> (last visited May 28, 2013). Some of these testimonials were recently compiled in a book, DAN SAVAGE & TERRY MILLER, *IT GETS BETTER* (2012).

5. See Shawna Shepherd, *White House Conference Tackles Bullying*, CNN POLITICS (Mar. 10, 2011, 12:32 PM), <http://www.cnn.com/2011/POLITICS/03/10/obama.bullying/index.html> (discussing 2010 Department of Education conference and 2011 White House conference).

6. Michele Bachmann: *To Fight School Bullying, Eliminate U.S. Department of Education*, HUFF. POST (Oct. 31, 2011, 12:40 PM), http://www.huffingtonpost.com/2011/10/29/michelle-bachmann-fightin_n_1065068.html.

7. For a discussion of the school district’s so-called “neutrality policy”—which had the effect of discouraging teachers to talk about homosexuality at all, even to address bullying—and its recent repeal, see Sabrina Rubin Erdely, *Minnesota School District Ends Policy Blamed for Anti-Gay Bullying*, ROLLING STONE POLITICS (Feb. 14, 2012, 2:30 PM),

Perkins, President of the Family Research Council, went further and denounced the “It Gets Better” video series (and President Obama’s support of the project) as sending the message that LGBT people were “okay” and characterizing the series as an attempt to recruit kids into homosexuality.⁸

Many cases of bullying are clear enough under a widely used definition: “A person is bullied when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself.”⁹ Whether or not a connection to self-inflicted injury or death can be reliably established in a given case, the bullying itself is often clear, and unmistakable. Kids are beaten, kicked, slammed into walls, and subjected to vicious and repeated insults (often in a very public way). The physical and emotional toll can be severe and long-lasting.

Yet not all cases are so clear, and harassing behavior can take many forms. An in-depth article by Ian Parker in *The New Yorker* discusses the case of Rutgers freshman Tyler Clementi, whose suicide in the fall of 2010 had been widely reported to have been caused by the actions of his roommate in recording him in a romantic (but non-sexual) embrace with another man, and then posting his reaction to what he’d seen to social media sites.¹⁰ The article masterfully details the complex web of relationships involving both Clementi and his roommate, Dharun Ravi, who did the recording, and casts doubt on whether the potential punishment Ravi faced—up to ten years’ imprisonment for invasion of privacy and “bias intimidation” (more commonly known as a “hate crime”)—fit the crime.¹¹ As it turned out, though, he was sentenced to only 30 days in prison, three years probation, community service, and a fine.¹² Parker’s article also delves into the complexity of cyberbullying,

<http://www.rollingstone.com/politics/blogs/national-affairs/minnesota-school-district-ends-policy-blamed-for-anti-gay-bullying-20120209>.

8. Carlos Maza, *FRC’s Perkins: “It Gets Better” Project Tries to “Recruit” Kids into “Lifestyle” of “Perversion”*, EQUALITY MATTERS BLOG (Aug. 19, 2011, 3:24 PM), <http://equalitymatters.org/blog/201108190009>.

9. *Recognizing Bullying*, OLWEUS BULLYING PREVENTION PROGRAM, http://www.violencepreventionworks.org/public/recognizing_bullying.page (last visited May 28, 2013). The site’s founder, Dan Olweus, is the author of an influential book, DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* (1993).

10. Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker.

11. *Id.*

12. See Emily Bazelon, *The Merciful End to the Trial of Dharun Ravi*, SLATE (May 21, 2012, 4:22 PM), http://www.slate.com/articles/news_and_politics/crime/2012/05/dharun_ravi_received_a_light_sentence_for_spying_on_tyler_clementi_.html.

noting that the adult view of such actions often differs markedly from the view of the involved teens themselves.¹³ And more generally, it's risky to draw a simple line from bullying to suicide. The decision to take one's own life is born of complex reasons that are not well understood, and connecting bullying too closely to suicides that follow (temporally speaking) risks creating a suicide culture, in which bullied kids emulate those who have taken this ultimate step. Yet a mainstream consensus has developed that bullying is a serious national problem in need of intervention.¹⁴

One response to the most serious class of cases has been civil litigation, often brought by the bullied kid (or the kid's family) against both the bully and the school district and school officials who are alleged and sometimes proven to have systematically ignored or even encouraged the bullying conduct. But, as the Tyler Clementi case illustrates, the complexity of the phenomenon itself, as well as the limited ability of litigation to address the underlying issues, counsels against reliance on lawsuits to stem the wave of bullying. What is needed instead is an approach that takes into account the multi-factorial, difficult human dimensions of the problem and that applies targeted solutions to particular populations based on the best evidence-based data. This Article argues for a population-based approach to LGBT bullying, and offers suggestions as to how we might assess the success of programs that are initiated.

Part I begins with a discussion of the value of civil litigation. I then explore its limitations. The pro-and-con approach of Part I leads into the exposition of the population-based approach in Part II. That approach takes into consideration all affected populations, considers evidence of success and failure seriously, and understands the importance of changing the culture of schools from one that often ostracizes LGBT students to one that celebrates their diverse contributions. Various laws, and the regulations and local plans that implement them, are analyzed for their potential efficacy in reducing the incidence and severity of bullying.

13. Parker, *supra* note 10.

14. *See supra* notes 3-5.

I. THE VALUE AND LIMITATIONS OF CIVIL LITIGATION: UNDER TITLE IX, TORT, AND CONSTITUTIONAL LAW

Although litigation is a limited and imperfect tool for combating bullying, it has unmistakable value as well. Most notably, civil accountability has at times been the only tool available to address the serious physical and emotional toll of bullying. The rigid policing of the gender-norm line means that many kids have no one to turn to, including their parents and teachers.¹⁵ Often, these adults are either overtly or tacitly complicit in the stereotypical views of gender that enable the harassment, taunting, and even assaults that LGBT kids face. Even if the events escalate to the point where criminal charges might be appropriate (always complicated where minors are involved), often no such charges are brought for a combination of reasons that might be obvious: failure of the child's parents, teachers, or school officials to report the incidents to law enforcement; and reluctance, refusal, or outright hostility by law enforcement even where the conduct was brought to their attention. Thus, the bullying might, and often does, continue for years. Civil litigation is a hammer, and sometimes the bluntest tool is the only one at hand.

Another obvious benefit of civil litigation is not limited to the bullying cases: civil claims create accountability, and can serve the deepest, most clearly intrinsic purposes of law—whether the source of law is tort, statute, or the U.S. Constitution. Before exploring how claims against school districts and officials to address injuries caused by bullying serve the goals of each of these sources of law, a few more general remarks are in order.

It seems clear that suits against those who enable the bullies to continue to oppress other kids are often justified. Indeed, it is hard to imagine a case in which the argument for liability against a party who has not actually committed the underlying physical harm is stronger. School officials have a responsibility to keep kids safe and unafraid; failure to do so interferes with their core mission of education in an obvious way. The law should stand with the victims, and send the message that those who enable bullying through inaction (or worse, through their own active misdeeds) will be held to account. This goal can be furthered through reliance on several different sources of law.

15. JOSEPH G. KOSCIW ET AL., 2011 NATIONAL SCHOOL CLIMATE SURVEY, REPORT FROM THE GAY, LESBIAN & STRAIGHT EDUCATION NETWORK 27-37 (in response to two separate questions, majorities of students stated they *never* reported bullying behavior to school personnel or to family members). The report also offers extensive quotations from students expressing their fear of discovery if they complained. *Id.*

A. *Principles of Corrective Justice Support Liability in Tort*

Inasmuch as the law has found liability against third parties who negligently entrust dangerous instruments to children (which then end up injuring innocent parties) and against landlords whose poor security creates the opportunity for criminal acts against their tenants,¹⁶ liability where school personnel “look the other” way constitutes an easy case—under a corrective justice model that attempts to redress the imbalance caused when one party’s negligent misconduct foreseeably causes harm to another.¹⁷ The situation is even clearer in cases involving intentional torts by those employed by the school; one study found that seven percent of students surveyed had been hurt by a teacher, and that a greater percentage of staff members collude with students.¹⁸ In one particularly painful case, a student reported being mocked by a physical education teacher who made him repeat certain words and then led the class in laughing at the student’s verbal expression.¹⁹ Corrective justice would also support liability against the bullying student, especially in cases involving physical harm or a course of conduct designed to humiliate another student.²⁰

Yet corrective justice can only address what it sees. Most cases of bullying never reach a court, for several reasons. Much of the bullying is in the form of verbal abuse, which although wrongful might not be cognizable as a tort—or, even if sufficiently serious to be actionable (perhaps by creating a pervasively hostile environment), would not be

16. See generally Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 438 (1999) (discussing the increased willingness of courts to hold defendants liable for conduct that “enables” others to cause injury).

17. The greatest champion of corrective justice as an explanatory theory for tort law is Ernest Weinrib, who has developed an extensive body of scholarship in development and defense of the theory. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987); Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002); Ernest J. Weinrib, *Substantive Corrective Justice*, 77 IOWA L. REV. 403 (1992); Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277 (1994); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW. & PHIL. 37 (1983).

18. IAN RIVERS, *HOMOPHOBIC BULLYING* 113 (2011).

19. *Id.* at 98-99.

20. I should qualify the statement in the text by noting that the application of corrective justice principles to children has been to an extent under theorized. But see generally Patrick Kelley, *Infancy, Insanity and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179 (2003). For intentional torts, the rule is that the ability to form the intent for a given tort suffices for liability—in the case of battery, the intent to make contact is enough. For the intentional infliction of emotional distress, the intent to cause such distress (a requirement that can be satisfied even by a showing of recklessness) will often be harder to establish. In either case, we can question whether the *judgment* behind the child’s conduct is sufficiently formed to justify liability under corrective justice principles.

considered a good case by a private attorney for economic reasons. There are other reasons (discussed in more detail below) why tort claims might not be brought, but the central point is that a narrow focus on corrective justice rationales for liability risks missing the bigger picture, which includes risks to LGBT kids that only later ripen into injury, and are very often neither brought as torts nor even recognizable as such.

Of course, certain instrumental goals of tort law would be served by liability, too—particularly the goal of creating incentives for good behavior through deterrence.²¹ Under that view, tort liability against officials and teachers who fail to stop the bullying seems well warranted, and may be the only civil recourse available to the victims.²² There is also, perhaps, some measure of visceral vindication of victim rights (here understood both to mean the plaintiff and the broader class of similarly bullied kids) that a successful suit signals. As we shall see, though, lawsuits are not unambiguously the best approach to deterring bullying under an instrumental account.

Whatever the theory, courts have made it difficult for these cases to succeed. Two primary obstacles block recovery.²³ First, school officials typically enjoy at least a qualified immunity for the decisions they make in the course of their employment.²⁴ This immunity is an important protection for officials who must make difficult decisions that can affect large populations and have pervasive effects, but (if *qualified* as opposed to absolute), should not be an effective shield against cases involving deliberate indifference to obvious dangers facing students—including bullying.

The second set of obstacles is embedded in judicial interpretation of

21. For the classic formulation of deterrence theory, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 68-94 (1970).

22. Civil recourse theory is yet another attempt to find broad underlying principles to tort law. This theory focuses on the victim's right to recover, and ties wrongfulness to agreed-upon societal norms. See John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 392, 402-06 (2005); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 608 (2005). But the theory has been criticized for failure to specify what counts as a wrong independent of instrumental concerns that the theory's defenders otherwise reject. See Christopher J. Robinette, *Two Theories Diverge for Civil Recourse Theory*, 88 IND. L.J. (forthcoming 2013). Whatever its limitations in the hard cases, though, it seems uncontroversial to say that social norms regard school professionals' failures to come to the aid of students they know are being bullied as wrongful behavior.

23. For a comprehensive, authoritative discussion of how courts have treated tort claims in this arena, see Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 682-95 (2004).

24. See *id.* at 685.

tort principles themselves. In many cases, the requirement that the harm to a student be foreseeable has been used to defeat a claim.²⁵ Sometimes a lack of foreseeability leads a court to find that the school (and its employees) owed no duty to the child who was injured by bullying conduct.²⁶ In other cases, courts have held school officials' failure to prevent harm to a student was, as a matter of law, not the legal cause of that harm—again, because it was unforeseeable.²⁷ Thus, it is only in rare cases that a court has found liability under a tort theory.²⁸ One such case is *Rupp v. Bryant*,²⁹ where it was established that hazing behavior was in fact anticipated by school officials. In general, though, immunity combines with restrictive interpretation of tort doctrine to make recovery more difficult than a sound application of corrective justice principles would require.

B. *Claims Brought Under Section 1983 of the Civil Rights Act for Violation of a Bullied Student's Right to Equal Protection can Advance LGBT Equality.*³⁰

It is difficult to succeed on a claim based on school officials' denial of equal protection. The equal protection clause imposes no general, affirmative obligation on schools to do anything to protect students—including LGBT students—from bullying. But plaintiffs can state a claim by alleging that officials treated students differently because of their sexual orientation (and sometimes also because of their sex). These claims are important because they establish that, whether or not distinctions based on sexual orientation are entitled to heightened scrutiny, there is simply no rational basis for schools to take claims of bullying less seriously just because they are made by students who

25. *See id.* at 687-90.

26. *See id.* at 688-89. This approach of restricting liability to unforeseeable plaintiffs is of course found in other factual contexts as well, most memorably in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), where Chief Justice Cardozo found that the defendant railroad could not reasonably have foreseen harm to people in the class of which Mrs. Palsgraf was a member (travelers on the railroad injured by concealed, explosive packages being carried by other passengers).

27. *See Weddle, supra* note 23, at 690-95.

28. *See id.* at 687-95.

29. 417 So.2d 658 (Fla. 1982).

30. It is also possible to bring a claim under § 1983 that alleges a violation of due process rights. *See Weddle, supra* note 23, at 663-70. But these claims have been almost uniformly unsuccessful, with courts finding that plaintiffs have failed to “shock the conscience” of the court even by alleging that school personnel affirmatively facilitated conduct by one student that resulted in serious injury to the plaintiff. *But see Carroll K. v. Fayette County Bd. Educ.*, 19 F. Supp. 2d 618, 624 (S.D. W.Va. 1998) (claim survived motion to dismiss).

identify as (or who are perceived by officials as) LGBT.

The best-known example of a successful use of equal protection based on sexual orientation is *Nabozny v. Podlesny*.³¹ There, a Wisconsin kid, Jamie Nabozny, was physically and emotionally bullied throughout middle school and high school—both for being gay and for acting in ways that were seen as not sufficiently “male.”³² Despite his parents’ ongoing efforts to help him, officials at Nabozny’s Wisconsin school district either ignored or enabled the horrific actions—actions that included urinating on him and kicking him so hard as to cause internal bleeding.³³ As the Seventh Circuit Court of Appeals succinctly noted in its 1996 decision reversing a grant of summary judgment in favor of the district and its officials: “[T]here is evidence to suggest that some of the administrators themselves mocked Nabozny’s predicament.”³⁴

Nabozny sued under a number of different statutory and common law theories, including § 1983, the federal law that allows a private right of action for the deprivation of civil rights by government officials, and tort law.³⁵ On remand from the Seventh Circuit’s decision, Nabozny’s attorney successfully argued to the jury that school officials had violated his right to equal protection under the law, treating his case differently because of both his sexual orientation and his sex.³⁶ Nabozny established that the officials would have, and did, take accusations of bullying and other inappropriate conduct toward girls much more seriously than they did Nabozny’s complaints, which alleged far more serious conduct.³⁷

This is an apt case to showcase for another reason: Nabozny’s ultimate recovery of almost \$1 million (in a settlement reached between the liability and damages phases of trial) represented the first victory of its type.³⁸

31. 92 F.3d 446 (7th Cir. 1996). The account that follows is largely drawn from an excellent account by CARLOS A. BALL, *FROM THE CLOSET TO THE COURTROOM* 67-98 (2010).

32. *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996).

33. *Id.* at 452.

34. *Id.* at 449.

35. 42 U.S.C. § 1983 (2012). The tort claim was not part of the appellate court’s consideration, however.

36. BALL, *supra* note 31, at 94-98.

37. *Id.*

38. *Id.*

C. *The Animating Purposes of Title IX are Served by Holding School Officials to Account for Permitting Bullying of Students Based on Their Non-Conforming Gender Expression*

Although private actions will be the most common vehicle for civil litigation, they need not be the only one. As this Article is part of a collection written on the occasion of the fortieth anniversary of the enactment of Title IX, it is especially apt to consider recent actions by the Obama Administration to use this law as a tool in the effort to combat bullying. Again, one recent case showcases the potential of this approach.

In a case that arose in Mohawk High School in New York, a fourteen-year-old kid (known from court documents and other reports as “J.L.” or “Jacob”) enlisted the assistance of the New York Civil Liberties Union in filing a complaint against the school for officials’ refusal to step in to help Jacob, who endured physical injury, death threats, destruction of property, and name-calling (including “pussy,” “cocksucker,” “faggot,” and “bitch”).³⁹ According to the complaint, the principal told Jacob’s dad that he wasn’t going to change what the school was doing in order “to cater to homosexuals.”⁴⁰

The evidence and the New York state law were clearly on Jacob’s side, and then his case received an unexpected and welcome jolt—the Obama Department of Justice (DOJ) moved to intervene on behalf of the bullied kid under Title IX.⁴¹ The DOJ’s position was very aggressive, especially since it required taking a controversial stand on an unsettled but important issue: Does Title IX—the federal law that protects against gender discrimination in education—also cover discrimination based on gender stereotyping?

There are compelling reasons to think that it does. A line of cases establishes that an action for employment discrimination grounded in Title VII of the Civil Rights Act of 1964 properly lies where an employee suffers adverse job consequences because of perceived inability to conform to prevailing gender norms,⁴² and this theory has

39. Amended Complaint at 1, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943 (N.D.N.Y. 2009).

40. BALL, *supra* note 31, at 42.

41. Press Release, Department of Justice, Justice Department Settles with New York School District to Ensure Students Have Equal Opportunities (March 30, 2010), *available at* <http://www.justice.gov/opa/pr/2010/March/10-crt-340.html>.

42. *See e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*,

been applied to where the gender nonconforming employee also “happened” to be gay.⁴³ In an influential decision by the Third Circuit Court of Appeals, *Prowel v. Wise Business Forms, Inc.*, a gay employee’s claim was allowed to survive summary judgment where the mistreatment he had suffered was allegedly based on sexual stereotyping.⁴⁴ The court held that so long as impermissible sex stereotyping was a motivating factor in the employer’s challenged action, the claim would be cognizable even if sexual orientation discrimination were also in play.⁴⁵

When applied to Title IX, such cases are a potentially rich vein of recovery for bullied youth, because, as the *Prowel* court noted, the line is thin and unclear between discrimination based on sexual orientation and discrimination grounded in impermissible gender stereotyping.⁴⁶ The plaintiff, Prowel, was eventually “outed” on the job, but the harassment he suffered appears mostly to have been grounded in fellow employees’ discomfort with his behavior, which surely was not stereotypically male.⁴⁷ Indeed, both Prowel’s behavior and that of the “real men” who harassed him are the stuff of easy parody. While he “filed” his nails, the other guys “ripp[ed] them off with a utility knife” (Utility knives? Really?).⁴⁸ Also, he “pushed the buttons on his machine at work with pizzazz!”⁴⁹

Jacob’s case was similar. The complaint details the following: “Both before and after J.L. came out as gay at school, students would tell him to get a sex change operation because he was so ‘girly’ and aggressively mocked him for dyeing his hair, wearing eye makeup, and speaking with a high-pitched voice.”⁵⁰ High school and middle school students, struggling with their own identities, are not particularly well-equipped to deal with the kind of outlandish diversity that someone like Jacob presents.

Although the New York case bears a strong resemblance to *Prowel*, the case law under Title IX does not as clearly establish a claim for discrimination based on gender stereotyping, so the Justice

194 F.3d 252 (1st Cir. 1999); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999).

43. *Prowel*, 579 F.3d at 293.

44. *Id.*

45. *Id.* at 292.

46. *Id.*

47. *Id.* at 287.

48. *Id.*

49. *Id.* (internal quotation marks omitted).

50. Amended Complaint at 2, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-CV-943 (N.D.N.Y. 2009).

Department's move was bold and therefore controversial. According to Roger Clegg, a former Civil Rights Division official under Presidents Reagan and (the first) Bush, the Obama DOJ was "making up a legal violation where there [hadn't] been one."⁵¹ At least some courts agree, and have dismissed claims under Title IX. A startling example is the recent decision by a federal district court in Texas, in *Carmichael v. Galbraith*.⁵² There, the court declined to hold that even the most outrageous acts of gender stereotyping could support liability.⁵³ There, the student "was called fag, queer, homo, and douche," and, on a separate occasion, stripped naked, tied up, and stuffed into a trash can—with the entire incident videotaped.⁵⁴ One day after the trashcan incident, the boy committed suicide.⁵⁵ For the court, though, neither of these appalling incidents was actionable under Title IX because the actions were not based on Jon Galbraith's sex—and the court simply did not address the possibility that the bullying took place because of impermissible gender stereotyping.⁵⁶

This view is based on the false assumption that these claim *really* are about sexual orientation discrimination, but, as the *Prowel v. Wise* court pointed out, that is not true.⁵⁷ The Obama Administration's approach, supported to an extent by emerging case law, provides a useful tool to supplement the existing legal remedies for serious bullying where a plausible case for harassment based on non-conformance with gender norms can be made.⁵⁸ In fact, such a case should usually be possible, because of the close association that bullies (and their enablers)

51. Ari Shapiro, *Justice Department Intervenes in Gay Rights Suit*, NPR (Jan. 15, 2010, 3:09 PM) (quoting Roger Clegg of the Center for Equal Opportunity), <http://www.npr.org/templates/story/story.php?storyId=122620723>.

52. No. 3:22-CV-0622-D, 2012 WL 13568, at *8 (N.D. Tex. Jan. 4, 2012).

53. *Id.* at *8.

54. *Id.* at *1.

55. *Id.*

56. *Id.* at *5-7.

57. 579 F.3d 285, 291 (3d Cir. 2009).

58. See *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 822-23 (C.D. Ill. 2008) (holding allegations were sufficient to support a claim against school under Title IX for "gender stereotyping"); *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F.Supp.2d 952, 964-65, 973-74 (D. Kan. 2005) (holding harassment of another male student based on false rumor that he had been caught masturbating in school bathroom was sufficient to support student's Title IX sexual harassment claim under "gender stereotyping" theory); *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 720 (N.D. Ill. 2004) ("Federal courts have looked to title VII precedent to inform their analyses of sexual discrimination claims under Title IX."); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092-93 (D. Minn. 2000) (concluding that plaintiff stated a cognizable Title IX same-sex harassment claim under "gender stereotyping" theory where he did not meet his peers' expectations of masculinity).

often make between perceptions of the proper expression of masculinity and femininity and a homosexual orientation.

Both the *Mohawk Central School District* and *Nabozny* cases point to another benefit of litigation in these cases. Imagine a similar situation involving a student without the financial or emotional resources to bring a lawsuit. Attracting the attention of a few sympathetic teachers (a technique that sometimes works) might be enough to get the matter to the local press, and then possibly to either an advocacy group (as in the New York case, where the state's branch of the American Civil Liberties Union lent its support) or to the federal government.

Moreover, litigation can have a catalytic effect. After *Nabozny's* case was successful, school officials that had long ignored or been downright hostile to the bullying directed at LGBT and other "non-conforming" students suddenly became quite interested in establishing programs and procedures designed to address these issues.⁵⁹ Moreover, *Nabozny's* success led to other suits that ultimately settled in the plaintiffs' favor, sometimes with express citation to the precedential case.⁶⁰

Despite the benefits just discussed, litigation is an ineffective tool for dealing with the deep causes of bullying. The most obvious problem, as tragically evidenced by the *Nabozny* case, is that it comes into play only after the bullying has already taken place, sometimes over the course of many years.⁶¹ While there is obviously a measure of justice and healing that the litigation process can bring about, it would have been better had the suit not been needed in the first place. In sum, and in spite of the possible deterrent effect of the negative publicity and judgments that they may bring about, lawsuits signal failure.

Worse, in the great majority of cases, no suits are brought. Even when bullied kids disclose that they have been targets of this conduct, the level of bullying does not reliably rise to a level where litigation is warranted, or likely to be pursued—by private attorneys working on a contingency fee, or even by advocacy groups in search of high-impact cases.

But the fact that bullying is not always legally actionable does not mean that it is insignificant. The effects are long-term, and often dramatic. In his recent, comprehensive book *Homophobic Bullying*, Ian Rivers collects and explains a number of studies that show a correlation between being bullied as a child and later issues with mental health and

59. See Ball, *supra* note 31, at 94-98.

60. See *id.*

61. See *id.* at 67-77.

self-esteem.⁶² Another study by public health researchers suggests a connection between bullying and post-traumatic stress disorder.⁶³

One can draw an analogy here between the kind of lower-level bullying that many kids face and the pervasive form of domestic violence that Evan Stark has identified and labeled “coercive control.”⁶⁴ Stark was the first to argue that our current approach to domestic violence is misguided in its narrow focus on the criminal prosecution of men who seriously injure their wives or female domestic partners. The more long-term problem is the domination that these men achieve through the *threat* of violence—a consistent background noise that enables them to achieve the systematic subjugation of women without often needing to resort to physical violence itself.⁶⁵ And the long-term effects can be devastating. Many of these women experience serious psychological consequences.⁶⁶ Similar sorts of effects have been reported in adults who described themselves as the victims of bullying in their childhood.⁶⁷ Given the economic and human cost of these long-tail effects, there is reason for concern about a litigation-focused, present-injury strategy for dealing with bullying.

Parents or guardians of the targeted kids might also be unlikely to think of litigation as a viable strategy, for a number of reasons. Among these might be lack of financial resources, unwillingness to bear the emotional stress of a lawsuit (either on their own behalf or on their children’s), and lack of information about what such a lawsuit could accomplish.

Perhaps the most serious limitation of civil litigation, though, is that lawsuits are simply not designed to address bullying in a comprehensive way. Where the suit is brought by the bullied kid (or adult family member), the central goal is typically money damages. The tort system and the contingency fee structure are designed in this way, and many of

62. IAN RIVERS, HOMOPHOBIC BULLYING 76-79 (2011).

63. See Andrea L. Roberts et al., *Pervasive Trauma Exposure Among US Sexual Orientation Minority Adults and Risk of Posttraumatic Stress Disorder*, 100 AM. J. PUB. HEALTH 2433, 2436-37 (2010).

64. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 198-99 (2007); see also Evan Stark, *Using Public Health to Reform the Legal and Justice Responses to Domestic Violence*, in RECONSIDERING LAW AND POLICY DEBATES: A PUBLIC HEALTH PERSPECTIVE 125, 135-36 (John G. Culhane ed., 2011) [hereinafter *Using Public Health*].

65. *Using Public Health*, supra note 64, at 135-36.

66. *Id.* at 139.

67. See Susanne Babbel, *Child Bullying’s Consequence: Adult PTSD*, PSYCHOLOGY TODAY BLOG (Mar. 15, 2011), <http://www.psychologytoday.com/blog/somatic-psychology/201103/child-bullyings-consequence-adult-ptsd>.

the plaintiffs are understandably focused on financial redress from the school officials (and districts) that enabled the bullying.

It is of course true that litigation can result in broader remedies, and often does. Both the Mohawk Central School District and the Nabozny cases discussed above resulted in settlements meant to address the bullying in a forward-looking way.⁶⁸ This more progressive result is likelier where a governmental or civil rights advocacy group becomes involved, because both have an interest in preventing similar cases from arising in the future.

Yet that very same goal of preventing future harm suggests a shortcoming of the litigation approach. Because the settlement is hammered out in the crucible of an existing case, it necessarily partakes, at least to a degree, of an adversarial approach: “Do this, or don’t do that, or (perhaps) you will be haled back into court.” This solution might work, to an extent, for the school or school district in which it is created, but is not likely to have a similar effect in other places.

There is also a deeper problem. Settlements are often blunt and, except for simple tasks, they are rarely effective by themselves. What is needed, instead, is a variety of tools, cumulatively designed to construct a complex solution to a problem that is multi-factorial. Perhaps the in terrorem effect of potential litigation can spur a broader recognition of the need to create, refine, and assess those tools, but that might happen in a less than systematic way.

The Mohawk Central School District itself serves as a useful example of how the litigation approach can result in policies that respond to the demand for accountability and monitoring without addressing the underlying problems. The website’s homepage has a direct link to “Bullying/Harassment,” but reading the documents accessible on that page cements the conclusion that the policies are limited.⁶⁹ There are two documents of direct relevance: “Bullying Prevention Policy” and “Recognizing and Dealing with Bullying.”⁷⁰ The latter offers a definition of bullying,⁷¹ lists the places where it occurs,⁷² and then lists those to whom reports of bullying should be

68. See Stipulation and Settlement Agreement at 2-5 J.L. v. Mohawk Cent. Sch. Dist., Index No. 09-CV-943 (N.D.N.Y. Mar. 29, 2010), available at http://www.nyclu.org/files/JL_Approved_Settlement_Order_3.29.10.pdf.

69. *Discrimination, Bullying, Harassment*, MOHAWK CENT. SCH. DIST., <http://www.mohawk.k12.ny.us/district.cfm?subpage=1362511>.

70. *Id.*

71. MOHAWK CENT. SCH. DIST., *RECOGNIZING AND DEALING WITH BULLYING*, <http://www.mohawk.k12.ny.us/district.cfm?subpage=1362511>.

72. *Id.*

made.⁷³ “The Bullying Prevention Policy,” though, is the more telling document. Revised in June 2011 (after the settlement), it is clearly geared toward the nuts-and-bolts of interdiction and punishment.⁷⁴ In fact, it is not a prevention policy at all—except indirectly, through the presumed deterrence of those who might otherwise bully (or who are sobered by the punishments meted out to other offenders). Rather, it is a policy that aims mostly to deal with bullying behavior that has already occurred. The policy focuses on “Reporting and Investigation,” ensures confidentiality, prohibits retaliation for reporting or opposing the behavior, and sets forth the punishments to be imposed.⁷⁵ The policy also mandates training, but only in conjunction with the other dictates of the policy.⁷⁶

This emphasis is not surprising. The policy was revised in light of the settlement, and the district has agreed to measures that ensure that bullying conduct is dealt with, not ignored. After all, officials’ alleged indifference (or worse) to the bullying is what gave rise to the lawsuit in the first place.⁷⁷ But such a policy is a limited vehicle for addressing the deep and twisted roots of the problem.

In sum, then, litigation serves several useful purposes, and, at least under an instrumental view of the law, has some claim to legitimacy. It must continue to be available, and to be used, to achieve compensation and deterrence. In some states and districts, it will be the only real tool available, and for at least some of the victims, it is decidedly better than nothing. But litigation is, overall, an imperfect solution to the pervasive problem of the bullying of LGBT kids. What is needed, instead, is an approach that looks at the underlying causes, and includes all affected populations in the proposed solutions. To that approach this Article now turns.

II. BULLYING AND PUBLIC HEALTH: TOWARD A POPULATIONS-BASED FOCUS

Is bullying really a public health problem? Under a modern conception of public health, the answer is surely “yes.” The Institute of

73. *Id.*

74. MOHAWK CENT. SCH. DIST., GENERAL COMMITMENTS 1101.1: STUDENT BULLYING PREVENTION AND INTERVENTION REGULATION, <http://mohawk.k12.ny.us/files/1362511/1101.1%20bullying-1.pdf> (last updated June 20, 2011).

75. *Id.*

76. *Id.*

77. See Amended Complaint at 2, *J.L. v. Mohawk Cent. Sch. Dist.*, Index No. 09-CV-943 (N.D.N.Y. filed Sept. 10, 2009), available at http://www.nyclu.org/files/JL_Amended_Complaint_9.10.09.pdf.

Medicine offers this broad definition of the term: “Public health is what we, as a society, do collectively to assure the conditions for people to be healthy.”⁷⁸ Under that formulation, it is not enough to focus on contagious diseases, which were once thought the chief concern of public health and its authority. What is instead required is attention to the broad determinants of population health, including the social and physical environment in which individuals reside and through which their choices are informed.

Yet some still question whether public health authorities (and the academics who provide the theoretical and policy justifications for their effort) should construct their enterprise so broadly.⁷⁹ They reason that, because public health officials have limited expertise and because individuals have the ability to make decisions regarding their own health, there is reason to be skeptical of a public health approach to issues such as smoking and obesity (to name two of the most often attacked instances of public health compromising its legitimacy).

This view is misguided because it overlooks that, at least in developed nations, the most important determinants of health today are rooted in a complex web of behaviors, signals, and the physical environment, over which individual control is incomplete at best. But even to the extent that this “old school” conception of public health retains any appeal, it is particularly atonal when it comes to the issue of bullying. Here, even a more modest public health approach argues for the development of interventions that would reduce the incidence, prevalence, and severity of bullying within the populations affected.⁸⁰

First, those victimized are children, whom the law understandably and consistently views as needing protection from harm. Unlike adults who might “choose” to eat unhealthy foods, for example, children are deemed incapable of consenting to harm. Beyond that, bullying is an act of violence, so that even if the victims were adults, the “free choice” construct (that is in any case an almost childish reductive view that ignores how our decisions are shaped by our environment, often in ways that we are not even aware of) has no application.

Moreover, in the case of bullying, the custodial environment in

78. INSTITUTE OF MEDICINE, *THE FUTURE OF PUBLIC HEALTH* 19 (1988).

79. Ken Wing, *Policy Choices and Model Acts: Preparing for the Next Public Health Emergency*, 13 *HEALTH MATRIX* 71 (2003).

80. In public health terms, “incidence” refers to the number of discrete occurrences of the studied phenomenon in a given period, while “prevalence” refers to the total burden of that phenomenon in the population studied. Thus, a study that looked only at the incidence of violent bullying would miss the *prevalence* of bullying behavior, broadly defined, within the same population.

which the bullying takes place also provides a venue for intervention.⁸¹ There are discrete populations whose behavior can be addressed in the educational setting. Just as schools enforce immunization by making vaccinations a condition of attending, so too can they deploy a host of strategies within their control to address and reduce the incidence of bullying. Just as with vaccination, one strategy is the ultimate weapon of barring access to school, but the very availability of that tactic provides school officials with leverage to implement more constructive solutions (to be discussed *infra*).

Moreover, because of the controlled environment in which bullying takes place, the gathering of evidence to inform future initiatives is facilitated. Many of the problems that the “new public” health confronts have so many complex determinants that isolating particular risk factors is especially challenging. But if a definition of bullying is settled upon, then we can measure the effectiveness of different interventions by whether (and by how much) they reduce the frequency of the problem. Thus, the evidence-based approach that is a hallmark of public health practice will perhaps yield clearer guidance for future programs and interventions than is available in many other kinds of cases. This is not to suggest that addressing bullying will be a simple matter that will yield readily to a purposeful, evidentiary approach. But on the continuum of public health problems, bullying does seem more amenable to adjustment based on available evidence than many others.

As the influential public health law scholar Wendy Parmet has recognized, a sound public health approach takes account of the studied behavior on all populations affected by that behavior—that is why the title of this section referred to “populations.”⁸² A litigation approach focuses on named parties—the bullied student, the school officials, and (sometimes) the student doing the bullying. In so doing, it betrays two limitations that a public health approach can address.

First, it neglects others affected by bullying. These include bystanders along a continuum: those who intervene on the side of the bullied kid; those who stand by and do nothing; and those who encourage or otherwise “assist” the bullying behavior. Others affected

81. An important caveat here is that most definitions of bullying recognize that these behaviors are not limited to the four walls of the school. Cyberbullying is correctly recognized as a significant and growing problem, and physical bullying can also occur off-premises, at a school-sponsored event. *See* statutes cited *infra* note 89. But even in these cases, the bullying will usually be the only one of the cluster of events that does not take place within the building. Training, counseling, and discipline are all within the purview and control of school officials.

82. WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 13-19 (2009).

include the remainder of the student population, given that a pervasively intimidating environment, where some students do not feel safe, can be expected to compromise the educational mission of the school. Finally, there is the entire local community, especially (but not exclusively) including parents whose children are situated on one side or the other of bullying incidents.

Second, casting the parties in opposition—as must be done in litigation, of course—freezes them in a given role, and thereby loses a signal insight of Parmet’s approach: populations are contingent and overlapping, and people move back and forth between them as contexts and facts change.⁸³ In the case of bullying, some kids move between the roles of victim and aggressors, and might also be bystanders at times. A carefully designed and implemented bullying policy considers all stakeholders, and recognizes that people do not remain in static roles. Accordingly, the most important general goal will be to transform the school’s culture into one where bullying is seen as inimical to broader values, including respect for diversity among the students and staff.

The remainder of this section evaluates current legislative approaches to the problem from this broader, populations-based perspective. Specifically, four issues are addressed: defining the acts that count as bullying; enumerating the classes protected; directing schools to implement plans to train and teach about bullying, and establishing clear reporting and disciplinary proceedings; and, perhaps most controversially, building LGBT-focused education into the curriculum. Each is discussed in turn.

A. *Defining Bullying and Enumerating the Protected Classes*

The first task for any law is to define the conduct covered. Some statutes, unfortunately, do not define bullying, but instead leave the interpretation of that term to local officials.⁸⁴ A far better approach is to spell out the conduct that the laws cover, thereby providing consistency and targeting the kind of conduct that must be addressed. Typical among laws that list the prohibited actions is the New Hampshire statute, which prohibits conduct that causes physical or emotional harm to the student or her property, interferes with a student’s education, “[c]reates a hostile educational environment,” or “disrupts the orderly operation of

83. *Id.*

84. *See, e.g.*, MINN. STAT. § 121A.0695 (2012) (requiring each school board to establish policies against intimidation and bullying without spelling out what these terms mean).

the school.”⁸⁵ Unlike many other statutes,⁸⁶ the New Hampshire law also recognizes that, although bullying usually involves repeated conduct, sometimes a “a single significant incident”⁸⁷ can cause the results the statute aims to prevent. In addition, the best of the statutes recognize that bullying takes place across a spectrum of physical and “virtual” contact.⁸⁸ They recognize the problems created by so-called “cyberbullying,” and accordingly include “electronic communication” or “expression” among the ways that bullying can occur.⁸⁹

Laws that contain these provisions represent a good start from a perspective that considers all affected populations. Note the concern with the overall environment and the school’s operation. Recognizing these dimensions to the problem is an important step toward dealing with those affected beyond the bullies and their victims. In some cases, the laws also contain provisions that set forth the reasons for their enactment. For example, the Maine statute notes that bullying “must be addressed to ensure safety and an inclusive learning environment,”⁹⁰ and in Massachusetts the legislature emphasizes the need “to increase public awareness of the devastating effects of verbal bullying”⁹¹

How important is it for the laws to name the *characteristics* that motivate the bullying behavior? In a theoretical sense, it might seem not to matter—the law should protect against bullying, no matter the reason for its occurrence. And listing the categories runs the risk that any other motivation for bad behavior won’t be seen as bullying, perhaps even if the list is explicitly non-exclusive. On the other hand, listing the categories of protection can send a strong message to all affected populations—pointedly including school officials and parents—that bullying against these groups is not to be tolerated, and not seen as just “kids being kids.”

These competing views, as well as a nakedly anti-homophobic motivation in some places, results in a split among the laws. Some of them—even in progressive states like Massachusetts—speak in general terms,⁹² and may even contain specific provisions prohibiting local anti-

85. N.H. REV. STAT. ANN. § 193-F: 3(I) (2012).

86. *See, e.g.*, MASS. GEN. LAWS ch. 71, § 37O(a) (2011); CONN. GEN. STAT. § 10-222d(a)(1) (2012).

87. N.H. REV. STAT. ANN. § 193-F: 3(I)(a) (2012).

88. *See, e.g., Id.*

89. *See, e.g.*, MASS. GEN. LAWS ch. 71, § 37O(a) (2011); CONN. GEN. STAT. § 10-222d(a)(1) (2012); R.I. GEN. LAWS § 16-21-33 (2012).

90. ME. REV. STAT. tit. 20-A, § 6554(1) (2012).

91. MASS. GEN. LAWS ch. 6, § 15NNNNN (2012).

92. MASS. GEN. LAWS ch. 6, § 15 (2011) (no mention of protected categories). A

bullying policies from listing protected classes.⁹³ Often, such legislation is enacted owing to pressure from conservative groups that object to enumeration on the ground that doing so is tantamount to providing “special treatment” to the kids named.⁹⁴ For example, Focus on the Family has decried these laws, seeing them as a means for smuggling into classroom discussion of the view that homosexuality is normal, or that same-sex marriages are permitted in certain states.⁹⁵

In an important sense, groups like Focus on the Family are correct: naming sexual orientation and (in fewer states) gender identity and expression signals legislative recognition that the problems these kids face are serious and in some ways unique, and are sometimes tied to training or classroom discussions about respect and diversity that include LGBT people. To the extent that such discussion reflects a policy decision to normalize sexual minorities, it can contribute to good outcomes (if part of a more comprehensive effort, as discussed more fully *infra*).

The results of the “no special treatment” approach has been tragically in evidence in places such as the Anoka-Hennepin School District in Minnesota, where the so-called “neutrality policy” required professionals to “remain neutral on matters regarding sexual orientation.”⁹⁶ There, a Department of Justice investigation led to findings that, under the policy, school officials blamed, punished, abandoned the victim, or made excuses for failing to deal with bullying and harassment⁹⁷—often with terrible consequences.⁹⁸ Although the caution about drawing conclusions about cause and effect mentioned

commission formed to study the law has recommended amending it to include enumeration.

93. MO. ANN. STAT. § 160.775(3) (West, Westlaw 2012) (“Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment.”).

94. *Id.*

95. Russell Goldman, *Some School Anti-Bullying Programs Push Gay Agenda, Christian Group Says*, ABC NEWS (Sept. 1, 2010), <http://abcnews.go.com/US/school-anti-bullying-programs-push-gay-agenda-christian/story?id=11527833>.

96. Margaret Hartman, *Bullied Teens Sue School Over Gay “Neutrality” Policy*, JEZEBEL (Aug. 14, 2011 at 11:46 PM), <http://jezebel.com/5830805/bullied-teens-sue-school-over-gay-neutrality-policy>.

97. The results of this investigation were reported in the complaint that the Department of Justice filed in the case. See Chris Geidner, *DOJ Files Civil Rights Lawsuit Against MN School District; Settlement Proposal With DOJ, Students Follows*, METRO WEEKLY (Mar. 5, 2012, 10:00 PM), <http://www.metroweekly.com/poliglot/2012/03/doj-files-civil-rights-law-suit.html>.

98. See Zack Ford, *How Anoka-Hennepin Failed Its Bullied LGBT Students*, THINKPROGRESS (Mar. 6, 2012, 2:02 PM), <http://thinkprogress.org/lgbt/2012/03/06/438785/how-anoka-hennepin-failed-its-bullied-lgbt-students/?mobile=nc> (discussing the case of Justin Aaberg, “who committed suicide after experiencing relentless bullying in the district”).

earlier applies, it is nonetheless striking that nine students committed suicide within a two-year period.⁹⁹ A five-year consent decree followed, requiring the district to take several important steps including: development of a comprehensive program to prevent and address harassment, training of staff, better reporting of incidents, and submission of compliance reports.¹⁰⁰ (As indicated in Part II, though, the federal government's authority under Title IX is limited to discrimination based on sex, however broadly defined. Much of the discrimination in the challenged district, though, was clearly motivated by discomfort (or worse) with deviations from gender norms.)

But many laws do spell out motivations for bullying. In Rhode Island, for example, the list includes such diverse characteristics as "race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression or mental, physical, or sensory disability, intellectual ability or . . . any other distinguishing characteristic."¹⁰¹

Commentators have argued in favor of such enumeration, contending that doing so

provides notice not only to teachers and staff, but also to LGBT students themselves that bullying on the basis of sexual orientation and sexual identity is not permitted in the school . . . [They] may find the confidence to report harassment sooner, knowing that their problem is worth reporting [and will be taken] seriously.¹⁰²

In a different context, the U.S. Supreme Court has endorsed a similar position. In *Romer v. Evans*, the Court found a violation of equal protection in a Colorado law that singled out sexual orientation as a class not entitled to the protection of anti-discrimination law, and noted that "[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."¹⁰³

99. Chris Johnson, *DOJ, DOE Reach Anti-Bullying Deal with Minn. School District*, WASH. BLADE (Mar. 6, 2012), <http://www.washingtonblade.com/2012/03/06/doj-doe-reach-anti-bullying-deal-with-minn-school-district/> (last visited May 28, 2013).

100. *See id.*

101. R.I. GEN. LAWS § 16-21-33 (a)(1) (2012).

102. Cristina M. Meneses & Nicole E. Grimm, *Heeding the Cry for Help: Addressing LGBT Bullying as a Public Health Issue Through Law and Policy*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 140, 163-64 (2012).

103. *Romer v. Evans*, 517 U.S. 620, 628 (1996). In an earlier article, I expressed uncertainty about whether enumeration was beneficial. Culhane, *supra* note 2, at 37-40. I no longer harbor such uncertainty, as I have become convinced that the balance of considerations discussed in the text establishes the superiority of the enumerating approach.

Empirical research lends some support to these qualitative conclusions. An online survey of about 8,500 students ages 13-20 conducted by the Gay, Lesbian, and Straight Education Network (GLSEN) found that better outcomes were consistently correlated with the type of anti-bullying policy the school had.¹⁰⁴ Four different categories were identified: comprehensive policies, which spelled out sexual orientation and gender identity; “partially enumerated policies,” which identified one or the other of these categories, but not both; generic policies that did not use either term; or no policy at all.¹⁰⁵ The results were stark. With one tiny exception, the stronger the policy, the better the outcome.¹⁰⁶ The association held across a continuum of problems, ranging from “hearing biased remarks,” to “experiences of victimization,” to the likelihood that staff will intervene and respond to reports of incidents seriously.¹⁰⁷ While the data are subject to the limitations of self-reporting and do not establish a causal connection between enumerating categories and positive outcomes,¹⁰⁸ the results are impressive. For example, the study found the following percentages of students who had experienced victimization because of their sexual orientation:

- No policy: 36.0%
- Generic policy: 31.9%
- Partially enumerated policy: 23.2%
- Comprehensive policy: 21.7%¹⁰⁹

The numbers were slightly higher in each category for gender expression, but the same correlation was observed: the more comprehensive the policy, the less likely it was that a student reported being a victim of bullying behavior.¹¹⁰

These findings led the study’s authors to echo the views expressed earlier: “[C]omprehensive policies are more effective than other types . . . in promoting a safe school environment for LGBT students. They may be most effective in messaging to teachers and other school staff that

104. KOSCIW, *supra* note 15, at 68-71.

105. *Id.* at 68.

106. *Id.*

107. *Id.* at 68-70. The data on “hearing biased remarks” are important not only for its own sake, but because they reveal important information about the school climate in which LGBT students abide. There are connections here to the distinction between incidence and prevalence that I will explore in a subsequent article.

108. For example, it may be that schools that are already more LGBT-friendly are likelier to have these policies in place.

109. KOSCIW, *supra* note 15, at 70 (results from the table referenced in figure 1.50).

110. *Id.* at 69.

responding to LGBT-based harassment is expected and vital.”¹¹¹ And while most of the data related to school policies rather than to statewide laws, the report also noted similar differences based on the type of law in force.¹¹² But the authors conclude that the most significant issue may be local implementation of these laws.¹¹³

B. *Requiring Schools to Establish Policies to Train Staff and Deal with Incidents*

Part of changing the culture is making sure all within the school environment understand bullying and its consequences, and are trained to deal with incidents when they occur. The Massachusetts law, while it does not enumerate the classes of protected students, is in these matters of training and responding an exemplary statute.¹¹⁴ First, the legislature has recognized the population-wide nature of the problem by requiring the Department of Education to consult with the Department of Public Health in developing a model plan for schools to consider in creating their own plans, tailored to their specific circumstances.¹¹⁵ That same section of the statute also acknowledges the scientific, statistical tools of public health in requiring consultation with that department on “evidence-based curricula” and “academic-based research.”¹¹⁶

The law recognizes that the bullied kids themselves are the population that most needs to be reached, and therefore provides a complex combination of prevention and treatment initiatives to address their needs.¹¹⁷ However, it also addresses the perpetrators of the bullying, the responsibility of school officials, and the learning environment.¹¹⁸ While it is too soon to assess how successful this comprehensive program will be, the pieces that have been put into place seem likely to have a significant effect. A brief discussion of some of the more central provisions follows.

This comprehensive approach is evident even in the very definition of bullying. In addition to the acts typically covered,¹¹⁹ first, an act is considered “bullying” if it “materially and substantially disrupts the

111. *Id.*

112. *Id.* at 71.

113. *Id.*

114. MASS. GEN. LAWS ch. 71, § 37O (2011).

115. *Id.* § 37O(j).

116. *Id.*

117. *Id.* § 37O(d).

118. *Id.* § 37O(g).

119. *See supra* Part II.A.

education process or the orderly operation of the school.”¹²⁰ Note that the focus of this last sort of action is not on harm to the victim at all. Thus, it recognizes that the effect on *other* students, school staff, and the parents and guardians, is significant in the effort to address the problem.

The law’s commitment to the creation of, training for, and implementation of a plan to deal with the manifold consequences of bullying is also comprehensive. The statute requires, among other things, that schools: (1) establish “clear procedures” for reporting, responding and investigating allegations of bullying; (2) ensure that any disciplinary action taken “balance the need for accountability with the need to teach appropriate behavior”; (3) involve parents; (4) and develop “a strategy for providing counseling or referral for appropriate services for perpetrators and victims and for appropriate family members of said students.”¹²¹ Professional development relating to the issue is also specifically required; not only teachers and administrators, but “all staff members” are to be included in such training.¹²²

Consider, again, the various populations within the school, and outside of it, covered by this process. As noted earlier, bullies not only cause harm to their victims but are often in need of help themselves. The impulse to bully can reflect issues that are best addressed with a thoughtful combination of sanctions and treatment of the underlying problems. Inasmuch as family dynamics often contribute to bullying—for example, kids who are bullied, but don’t have sympathetic parents; and kids who bully in response to problems at home—getting parents, guardians and siblings involved in the response is a sensible approach.

This comprehensive way of dealing with the problem, especially since the law also requires follow-up reporting, stands the best chance of actually reducing the incidence of bullying and its effects—which is the goal. From the perspective of public health, success is measured by a reduction in the incidence of the behaviors that the intervention seeks to prevent. While it is unrealistic to believe that even the best-designed program can entirely eliminate bullying, a substantial reduction in the number of cases of bullied students and—just as significantly—in the *severity* of the cases that do arise would represent a public health triumph.

120. MASS. GEN. LAWS ch. 71, § 37O(a) (2011).

121. *Id.* § 37O(d).

122. *Id.*

C. *The Importance of Designing and Utilizing LGBT-Inclusive Curricula*

One of the significant skirmishes in the culture war has been over the extent that LGBT issues are made part of the school curriculum. Two polar views can be identified. At one end is the “don’t say gay” movement, which attempts to scrub any mention of LGBT issues from the curriculum entirely,¹²³ even in classes—such as sex education—where such topics might reasonably be thought indispensable. At the other end stands the state of California, which in 2011 became the first in the nation to pass a law requiring that the contributions of LGBT people be taught in social studies classes, and that mandated the adoption of textbooks that cover these issues.¹²⁴ The law was predictably decried as indoctrination by religious conservatives,¹²⁵ but survived an effort to repeal it in 2012. Opponents were not even able to obtain the 500,000 signatures they needed to take the issue to the voters in a ballot initiative.¹²⁶

The California law has yet to be implemented, and some school officials have expressed confusion as to how the mandate is to be carried out.¹²⁷ Yet the idea behind the LGBT history measure is sound: “Many experts in multicultural education believe that a curriculum that is inclusive of diverse groups—including culture, race, ethnicity, gender, and sexual orientation—instills a belief in the intrinsic worth of all individuals”¹²⁸ Such a curriculum can make the LGBT students themselves feel more valued, and “promote more positive feelings about LGBT issues and persons among their peers . . . resulting in a more positive school climate for all students.”¹²⁹

Again, the on-line survey that GLSEN conducted supports these observations. On a number of measures, LGBT students had a more

123. See, e.g., John Celock, *Missouri ‘Don’t Say Gay’ Bill: GOP Sponsors Wary of ‘Homosexual Agenda’*, HUFFINGTON POST (April 23, 2012, 5:59 PM), http://www.huffingtonpost.com/2012/04/23/missouri-dont-say-gay-bill_n_1447121.html.

124. Judy Lin, *California Gay History Law: Governor Brown Signs Landmark Bill*, HUFFINGTON POST (July 14, 2011, 9:22 PM), http://www.huffingtonpost.com/2011/07/14/california-gay-history-law-jerry-brown_n_898745.html.

125. *Id.*

126. *Effort to Undo California Gay History Law Fails*, ABC NEWS (July 18, 2012), <http://abclocal.go.com/kabc/story?section=news/state&id=8740149>. <http://abclocal.go.com/kabc/story?section=news/state&id=8740149>.

127. Diana Lambert, *Gay History Lessons Required by New California Law Will Be Slow to Arrive*, THE SACRAMENTO BEE (Jan. 10, 2012), <http://www.sacbee.com/2012/01/10/4175434/gay-history-lessons-required-by.html>.

128. KOSCIW, *supra* note 15, at 60 (citations omitted).

129. *Id.*

positive experience in schools with inclusive curricula. For example, more than one-third of students in schools without inclusive curricula reported being victimized because of their sexual orientation (34.3%) or gender expression (36.4%), while for students in schools with inclusive curricula, the percentages fell to 16.3% and 21.2%, respectively.¹³⁰ As with the data on enumeration of classes protected against bullying,¹³¹ these findings on the correlation between inclusive curricula and positive outcomes for LGBT students have limitations. It may be, for example, that some of the effect reported owes to a more LGBT-friendly climate in schools that develop these curricular resources. Nonetheless, the data are in line with other research showing that LGBT persons' (not just students') mental health outcomes are affected by their legal¹³² and social environs.¹³³ As one student stated: "This year in my U.S. History class, my teacher used a textbook [that] actually did mention LGBT rights during the civil rights movement of the 60s, along with Harvey Milk, Stonewall Riots, etc.—that made me happy!"¹³⁴

But inclusion of the contributions of LGBT persons continues to be the exception. The GLSEN survey revealed that only 16.8% of respondents were "taught positive representations of LGBT-related topics in class."¹³⁵ Perhaps even more surprisingly, fewer than half the students reported that LGBT-related resources were available in their schools: only 44.1% said that their libraries had resources, while an even smaller 42.1% reported having internet access to such resources.¹³⁶ This latter finding suggests that school officials were affirmatively blocking access to websites with LGBT-related content.

Although further empirical data would be helpful, it seems unexceptionable to conclude, from a populations-based perspective, that including accurate presentations of the historical and cultural content of

130. *Id.* at 60-61.

131. *See supra* Part II.A.

132. In one fascinating study, researchers demonstrated a decrease in visits to a medical clinic by gay men in the year immediately following the recognition of marriage equality in Massachusetts. This correlation was not dependent on whether the men studied themselves took advantage of the new law. *See* Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men*, 102 AM. J. PUB. HEALTH 285, 287-88 (2012). The results suggest (although they certainly do not prove) a relationship between laws that confer full(er) citizenship on LGBT persons and improved health.

133. RIVERS, *supra* note 18, at 81-85 (discussing several correlations between childhood experience and later mental health, including the extent of parental acceptance).

134. KOSCIW, *supra* note 15, at 48.

135. *Id.* at 49 (Figure 1.28).

136. *Id.* at 49 (Figure 1.29).

LGBT persons and movements would benefit not only the LGBT students, but all other populations within the school, and within the larger community in which the school is situated. Presenting these materials in a matter-of-fact way demystifies LGBT people, gives them a three-dimensional shape, and inevitably makes bullying treatment of LGBT-identified students less acceptable. It also sends a strong message to teachers and school officials themselves, too often complicit or worse in the bullying behavior, that these students deserve the same respect as others—even when their sexual orientation or gender expression causes initial discomfort.

Indeed, LGBT-related course materials will educate many teachers on a part of history they've missed, thereby decreasing their discomfort. In short, not all anti-bullying initiatives need be directly related to the prevention of and response to the problem, narrowly defined. Under a public health model that broadly considers the complex constellation of factors underlying behaviors, insisting on curricular inclusion of the contributions of LGBT people stands to yield results that will, perhaps even in relatively short order, reduce bullying and bring LGBT students a level of respect that—for now, and for many—seems a fantasy.

CONCLUSION

This Article may strike some as apostasy, questioning the value of litigation generally, and Title IX particularly, as a tool to combat the bullying of LGBT students. After all, sometimes a club is exactly what's needed, and it cannot be doubted that the Obama Administration's willingness to use Title IX aggressively (but appropriately) has not only brought relief to bullied students, but has also helped to change the climate in many schools. Such suits can turn up the heat on policy-makers and legislators to take bullying seriously, and have doubtless done some good.

But civil lawsuits should be seen as only one of a number of tools for achieving the sound public health outcome of reducing the incidence and severity of bullying. A more comprehensive approach that systematically takes account of all affected populations is the only reliable way to address this pervasive problem. Bullying behavior is rooted in ways of thinking about LGBT students (and people) as "other," and therefore as suitable targets for victimization. To combat this thinking, legislators and local school districts must make clear that bullying takes many forms, and should enumerate LGBT students as one of the classes especially in need of protection. Indeed, because of the lack of support many of these students receive at home, it may be that

these students are *most* in need of protection. Policy-makers should design programs designed to teach and train all affected students about bullying, and should forge interventions that consider the multi-faceted nature of the problem. Finally, they should recognize that bullying occurs in a culture that too often keeps LGBT lives invisible, and create curricula that work to reveal and value these lives. Only then will this vexing problem truly be addressed in a comprehensive, long-lasting way.