

# REMOVING STATUTORY DAMAGE CAPS IN FLORIDA: BULLYING VICTIMS NEED COMPLETE REDRESS

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## **I: Introduction**

Before the founders of America considered putting quill to parchment paper to draft the laws of the United States, education was a philosophical cornerstone of every known nation state.<sup>2</sup> In the 1950's, the United States Supreme Court<sup>3</sup> declared education to be the most important function of state and local government.<sup>4</sup> Recently, an epidemic of bullying has plagued the function of education and has slowly been whittling away at the foundation of modern societal development.<sup>5</sup> Bullying<sup>6</sup> besieges the effectiveness of the United States public school system because student victims feel physically and emotionally threatened, and consequently their desire and ability to learn withers.<sup>7</sup> Henceforth, the State carries a

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<sup>2</sup> John Y. Cole, *On These Walls*, LIBRARY OF CONGRESS (Jan. 11, 2006), <http://www.loc.gov/loc/walls/> (explaining that Philosopher Dionysius is quoted saying “the foundation of every state is the education of its youth” on the walls of the Library of Congress).

<sup>3</sup> See generally 12A FLA. JUR 2D *Courts and Judges* § 255–26 (explaining that state courts are bound by decisions of the United States Supreme Court). Although, the Florida Supreme Court has the power and authority to construe the state constitution differently from the way the United States Supreme Court has construed similar provisions of the Federal Constitution. *Id.*

<sup>4</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (creating a landmark United States Supreme Court case in which the Court declared state laws establishing separate public schools for black and white students to be unconstitutional). To make the determination of constitutionality, the Court looked to the importance of education and the necessity to have equal access and opportunity to education in America. *Id.* The court declared education is the very foundation of good citizenship and that it is the principal instrument to awaken children to cultural values, prepare them for professional life, and help them adjust normally to their environments. *Id.* The Court in *Brown* doubted that any child who is denied the opportunity of education will be reasonably able to succeed in life. *Id.*

<sup>5</sup> C.P. Bradshaw, A.L. Sawyer, & L.M. O'Brennan, *Bullying and Peer Victimization at School: Perceptual Differences Between Students and School Staff*, 36 SCHOOL PSYCHOLOGY REVIEW, 361–82 (2007) (studying the correlation between the potential differences among student and staff perceptions of the frequency of bullying). According to the study, the following percentages of middle schools students had experienced these various types of bullying: name calling (forty-four percent); teasing (forty-three percent); spreading rumors or lies (thirty-six percent); pushing or shoving (thirty-two percent); hitting, slapping, or kicking (twenty-nine percent); leaving out (twenty-eight percent); threatening (twenty-seven percent); stealing belongings (twenty-seven percent); sexual comments or gestures (twenty-three percent); e-mail or blogging (ten percent). *Id.*

<sup>6</sup> See FLA. STAT. § 1006.147 (2014). The “Jeffery Johnson Stand Up for All Students Act” defines bullying as “systematically and chronologically inflicting physical hurt or psychological distress on one or more students.” *Id.*

<sup>7</sup> *Effects of Bullying*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (last visited Sept. 9, 2014), <http://www.stopbullying.gov/at-risk/effects/index.html> (explaining the significance of bullying on the desire and

fundamental interest in providing a safe environment<sup>8</sup> for children to learn in, and it is essential the State eliminate bullying problems in schools.<sup>9</sup> Therefore, when the State—by either an affirmative act,<sup>10</sup> an omission of an act,<sup>11</sup> or a breach of duty<sup>12</sup>—allows students to bully and consequently harm one another, the innocent bully victim should be able to fully recover damages directly from the school.<sup>13</sup>

Although under current law Florida’s public schools can be found civilly liable for harm arising from bullying,<sup>14</sup> a statutory glass ceiling exists in the form of a damage cap statute, which limits the possible damages a school must afford a victim.<sup>15</sup> This limitation not only unfairly

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ability for kids to learn because the harm caused from bullies mentally distracts them). Kids who are bullied are more likely to experience depression and anxiety, increased feelings of sadness and loneliness, and loss of interest in activities they used to enjoy, and these issues may persist into adulthood. *Id.* Additionally, a decrease in academic success—GPA and standardized test scores—and school participation are common signs of bullying. *Id.*

<sup>8</sup> FLA. CONST. art. IX, § 1(a) (declaring that children’s education is a fundamental value of the people of the State of Florida). The Florida Constitution enumerates a “*paramount duty* of the State to make adequate provision for the education of all children (emphasis added).” *Id.*

<sup>9</sup> Press Release, Am. Psychological Ass’n, Bullying May Contribute to Lower Test Scores (Aug. 7, 2011)(on file with author) (reporting high schools with a high rate of bullying had significantly lower scores on standardized tests that students must pass to graduate, according to research presented at the 119th Annual Convention of the American Psychological Association). Dewey Cornell, PhD, a clinical psychologist and professor of education at the University of Virginia, said, “Our study suggests that a bullying climate may play an important role in student test performance.” *Id.* This research underscores the importance of treating the school wide bullying problem. *Id.*

<sup>10</sup> See generally FLA. STAT. § 1006.147 (2014) (declaring that schools shall adopt a procedure for the prompt investigation of a report of bullying or harassment and the person responsible for the investigation). “The Jeffery Johnston Stand Up For All Kids Act” creates an affirmative duty for teachers, school administrators, counseling staff, and school volunteers to respond to bullying or they may be held liable for causes of action arising from their lack of action. *Id.* § 1006.147(4)(g); see *infra* note 70 and accompanying text.

<sup>11</sup> 105 AM. JUR. 3D *Proof of Facts* § 93 (2009) (explaining a direct and proximate result of a violation, omission, and/or refusal to provide a safe environment, can be used as proof at trial as to scope, extent, and amount of damages).

<sup>12</sup> *Id.* (clarifying negligence principles generally require that the defendant must owe a duty of care to the plaintiff which, when affirmatively breached, may give rise to a cause of action in bullying); see *infra* note 90 and accompanying text.

<sup>13</sup> Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 151 (2009) (presenting an overview of current legal theories available to victims of peer harassment to show how the law is inadequate either to deter bullying or to provide victims redress). The aim of this article is to encourage advocates to help schools develop comprehensive, inclusive anti-bullying policies, which equally protects all students. *Id.*

<sup>14</sup> FLA STAT. § 768.28(5) (2012) (finding the state, state agencies, and subdivisions can be liable for tort claims in the same manner and to the same extent as a private individual).

<sup>15</sup> FLA STAT. § 768.28(5) (2012) (determining that liability shall not include punitive damages or complete damages for a claim exceeding \$200,000 or any judgment, exceeding \$300,000).

limits compensation to the victims the law was designed to protect,<sup>16</sup> but also inadvertently refuses to hold the liable public schools fully accountable for inattentiveness to the bullying problem in their hallways.<sup>17</sup> Due to the egregious level of harm that results from bullying,<sup>18</sup> and in the interest of allowing juries to award fair, accurate, and complete verdicts,<sup>19</sup> Florida should expeditiously amend the damage cap statute<sup>20</sup> to remove the limit on damages in cases of bullying and fully embrace the State constitutional “paramount duty” to provide safe schools.<sup>21</sup>

In Part II this comment takes a glance back in time to examine the historical framework that built the education system and the fundamental relationship between a school and its students which gave rise to the modern legal duty for a school to provide a safe, educational environment.<sup>22</sup> Part III highlights how the modern bullying epidemic in schools has defiled the foundational goals of education and also created causes of action for victims to recover directly from a school.<sup>23</sup> Part IV raises the iniquities underlying limiting recovery for bullying victims,<sup>24</sup> and Part V exploits the intolerable violations of public policy the Florida damages cap statute causes.<sup>25</sup> Part IV, recommends the Florida legislature immediately amends the statute to rectify these injustices.<sup>26</sup>

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<sup>16</sup> Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (explaining when one person has been wrongfully injurs another, justice requires the injurer makes the injured party whole).

<sup>17</sup> FLA STAT. § 768.28(5) (2012) (precluding a liable state actor from paying more than \$200,000 per claim, \$300,000 total, in a civil suit where damages exceed the limitations upon to any amount).

<sup>18</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7 (stating victims of bullying often experience the residual effects of depression, anxiety, increased feeling of loneliness, change in sleep and appetite, loss of interest in activities, substance abuse, and even thoughts of suicide).

<sup>19</sup> Matthew W. Light, *Who’s the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 330 (2001) (finding the jury’s discretion is a constitutional mandate that is violated upon a judge using remittitur or statutory damage caps).

<sup>20</sup> FLA STAT. § 768.28(2012) (providing statutory damage caps for civil claims against state actors in Florida).

<sup>21</sup> FLA. CONST. art. IX, § 1(a) (declaring the paramount duty of the state to make adequate provisions for the education of the citizenry).

<sup>22</sup> *See infra* Part II.

<sup>23</sup> *See infra* Part III.

<sup>24</sup> *See infra* Part IV.

<sup>25</sup> FLA STAT. § 768.28(5) (2012); *see infra* Part V.

<sup>26</sup> *See infra* Part VI.

## II: Historical Background

### A. The Public School System and the Importance of Education

After the American Revolution,<sup>27</sup> the federal government began explicitly encouraging the establishment of public school districts and raising tax revenues to support them in response to the influx of immigrants.<sup>28</sup> In 1642, the New England Colonies began a movement<sup>29</sup> of compulsory education laws to cultivate schools, establish social order, and develop an educated citizenry for the benefit of the State.<sup>30</sup> In the mid-1800's, the Whig Party<sup>31</sup> encouraged common schooling and zealously advocated for universal public education as the best way to turn the nation's unruly children into disciplined, judicious citizens.<sup>32</sup> By 1917, all the states<sup>33</sup> agreed

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<sup>27</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 1 (Presidents and Fellows of Harvard College, enl. ed., 1956) (quoting a conversation between John Adams to Thomas Jefferson regarding ideals behind the revolution). “What do we mean by revolution? The war? That was no part of the Revolution; it was only the effect and consequence of it. The Revolution was in the minds of the people, and this was effected, from 1760 to 1775.” *Id.*

<sup>28</sup> *A Brief History of Education in America*, CLARE BOOTH LUCE POLICY INSTITUTE (last visited Sept. 11, 2014), <http://www.cblpi.org/ftp/School%20Choice/EdHistory.pdf> (labeling 1827–1951 as the “Encouraging Era” of public schools which describes a period when children were not compelled to attend public school because the government had not begun requiring the establishment of a free public school system).

<sup>29</sup> *Boston Latin School History*, BOSTON LATIN SCHOOL (last visited Sept. 12, 2014), [http://www.bls.org/apps/pages/index.jsp?uREC\\_ID=206116&type=d](http://www.bls.org/apps/pages/index.jsp?uREC_ID=206116&type=d) (providing the history of Boston Latin School, which was founded in 1635 and is both the first public school and oldest existing school in the United States.) The New England Colonies, included Connecticut, Colony of Rhode Island and Providence Plantations, Massachusetts, and Province of New Hampshire. *Id.* The larger towns in New England set up grammar schools, a template for the modern day high school. *Id.* In the south, states such as Georgia and South Carolina left the schooling to be carried on by private venture teachers and a hodgepodge of publicly funded projects. *Id.*

<sup>30</sup> Andrew J. Coulson, *Market Education: The Unknown History* (1999), <http://www.cblpi.org/ftp/School%20Choice/EdHistory.pdf> (explaining that American public schools were designed in response to an influx of immigrants with a variety of religions and cultures and the primary goals of that system).

<sup>31</sup> Editors of the Encyclopedia Britannica, *The Whig Party*, ENCYCLOPEDIA BRITANNICA (July 21, 2014), <http://www.britannica.com/EBchecked/topic/641788/Whig-Party>. The Whig Party was a major political party active in the period 1834–1854 that espoused programs for national development, but succumbed to their own sectional antagonism, which crumbled their platform. *Id.* The Whig Party was formally organized conjoining a loose coalition of groups which were united in their opposition to what party members viewed as the executive tyranny of “King Andrew” Jackson. *Id.* Their peculiar name, “Whig,” derived their opposed to royal prerogatives and British symbolism of aristocracy. *Id.*

<sup>32</sup> See Mark Groen, *The Whig Party and the Rise of Common Schools, 1837–1854*, 35 AM. EDUC. HIST. J., 251, 251–60 (2008) (establishing that Horace Mann, Secretary of Education in Massachusetts, won the support from the Whigs to build public schools in the mid–1800s to educate citizens to become the foundation of a modern society); see also Ted Brackemyre, *Education to the Masses: The Rise of Public Education in Early America*, U.S. HISTORY SCENE (Aug. 9, 2014), <http://www.ushistoryscene.com/uncategorized/riseofpubliceducation>; see also Horace Mann,

that a strong public education system was pivotal to further develop America, and state legislators passed laws mandating elementary school attendance.<sup>34</sup> The intrinsic societal progression that education encourages is undeniable and must be protected at all costs.<sup>35</sup>

## **B. State Constitutional Obligations to Educate**

While many state constitutions use varied terms,<sup>36</sup> most similarly obligate their respective governments to provide children, between ages five and sixteen, with education that prepares them for challenges later in life—whether it be college, trade school, work, or the obligations of citizenship.<sup>37</sup> Florida’s duty to provide a safe environment to educate its citizenry is codified in

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*Tenth Annual Report of the Secretary of the Massachusetts State Board of Education, 1846*, TEACHING AMERICAN HISTORY, <http://www.tahg.org/resources.php?subcategory=Education&category=19th%20Century> (last visited Nov. 20, 2014) (“the Pilgrim Fathers amid all their privations and dangers conceived the magnificent idea, not only of a universal, but of a free education for the whole people. . . two divine ideas filled their great hearts—their duty to God and society). Mann highlights how Massachusetts had become a much more “parental” state and was becoming increasingly involved in the lives of its citizens through free public education. *Id.*

<sup>33</sup> *Flag Timeline*, INDEPENDENCE HALL ASS’N (July 4, 1995), <http://www.ushistory.org/betsy/flagfact.html> (explaining “All the states” in 1917 included all fifty states except Hawaii and Alaska).

<sup>34</sup> Coulson, *supra* note 30, at 84 (sharing that in 1852, Massachusetts was the first state to enact a compulsory education law because they already enacted a public schooling template as a British colony in 1647). *See generally Compulsory Education Laws: Background*, Thomson Reuters (last visited October 3, 2014), <http://education.findlaw.com/education-options/compulsory-education-laws-background.html#sthash.XATy6GZ8.dpuf> (declaring the 1852 law required every city and town to offer primary school, focusing on grammar and basic arithmetic). Parents who refused to send their children were fined or even stripped of their parental rights and their children became apprentices for other people. *Id.* Prior to the 1852 law school was primarily done at church or in private schools for the wealthy. *Id.* Compulsory attendance became law in all the states after a growing public concern over child labor and the belief that compulsory attendance at school would discourage factory owners from exploiting children and States now universally recognize the value of an educated workforce. *Id.*

<sup>35</sup> Michael L. Buckner, *The Adequacy Provision in the Florida Constitution: The Next Step After Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 71 FLA. B.J., 24, 24 (explaining that because the quality of education has been subject to increased scrutiny citizens are urging immediate and definitive action from their elected representatives to address and resolve the inadequacies of the education their children receive in public schools).

<sup>36</sup> Ryan M. McCabe, Esq. & Lori J. Parker, Esq., *Cause of Action Against School District for Injuries to Student Resulting from Bullying by Another Student*, 59 CAUSES OF ACTION 2D 307 § 7 (2013) (providing a variety of state constitutional standards for education). States use various qualitative standards in the text of their constitutions such as: “general and uniform,” ARIZ. CONST. art. XI, § 1; “general, suitable, and efficient,” ARK. CONST. art. XIV, § 1; “thorough and uniform,” COLO. CONST. art. IX, § 2; “general and efficient,” DEL. CONST. art. X, § 1; “uniform” and “adequate,” FLA. CONST. art. IX, § 1; “general, uniform, and thorough,” IDAHO CONST. art. IX, § 1; “efficient” and “high quality,” ILL. CONST. art. X, § 1; or “complete and uniform,” WYO. CONST. art. VIII, § 1, to describe the standards to which their education must be proffered to the citizens of each respective state. Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1336 (1992).

<sup>37</sup> 20 U.S.C.A. § 6311 (2006) (mandating quality of education for every student). The “No Child Left Behind Act,” arguably the most important federal education law in our nation’s history, is designed to boost academic

the State’s Constitution.<sup>38</sup> The text declares education is a “fundamental value”<sup>39</sup> to the people of Florida.<sup>40</sup> The constitution further bestows a “paramount duty”<sup>41</sup> upon the State to make adequate provisions to ensure “efficient, safe, secure, and high quality, free public schools.”<sup>42</sup> Complimenting this constitutional duty, and in the interest of curtailing unsafe distractions from education, Florida statutory law also mandates schools—agents of the State<sup>43</sup>—to implement anti-bullying policies which require investigations of bullying reports and prevention programs.<sup>44</sup>

### III: The Modern Bullying Epidemic

#### A. Bullying Plagues State Educational Goals and Opportunities

Because students who are bullied are more likely to miss, skip, or drop out of school,<sup>45</sup> it is evident that bullying squanders the ability to learn and diminishes educational opportunities.<sup>46</sup>

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achievement and to eliminate the achievement gap among students from different backgrounds. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U.L. REV. 932, 932–33 (2004). To accomplish these goals, the Act requires states to establish “challenging” academic standards for all schools and to test all students regularly to ensure that they are meeting those standards. *Id.*

<sup>38</sup> FLA. CONST. art. IX, § 1(a) (declaring the paramount duty of the state to make adequate provisions for the education of the citizenry).

<sup>39</sup> *Id.* (“The education of children is a fundamental value of the people of the State of Florida.”)

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (“It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders.”)

<sup>42</sup> *Id.* (“Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.”) The statute further requires these provisions were made by the beginning of the 2010 school year. *Id.*

<sup>43</sup> FLA. STAT. § 768.28(5) (2010) (declaring the state, its agencies, its subdivisions may be liable for tort claims).

Perkins, H. W., Perkins, J. M., & Craig, D. W., *No Safe Haven: Locations of Harassment and Bullying Victimization in Middle Schools*, JOURNAL OF SCHOOL HEALTH, 84: 810–818 (2014) (concluding that vigilant attention to bullying is needed across all school environments, especially in the classroom.) Following from the presumption that bullying victimization is a serious issue in public schools and adolescent development, it is evident that identifying where victimization occurs in public schools is salient. *Id.*

<sup>44</sup> FLA. STAT. § 1006.147 (4)(a)–(n) (2014) (requiring each school district to adopt a policy prohibiting bullying which conforms with the Department of Education’s model policy); Alison Bethel, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 185 (2004) (arguing that federal law should impose on school officials an affirmative, albeit limited, duty to protect students from harm by other students when school officials know or reasonably should know that the students are harming each other). In Florida, school districts are mandated to include a statement prohibiting bullying and describing the prohibited behavior, a procedure for prompt investigation of a report, and consequences for a student or employee who commits an act of bullying. *See generally* FLA. STAT. § 1006.147 (4)(a)–(n) (2014).

<sup>45</sup> Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 648 (2004) (“Victims begin to avoid school to escape the torment that accompanies it.”)

Growing national, state and local coalitions of educators,<sup>47</sup> youth development organizations,<sup>48</sup> physicians,<sup>49</sup> social scientists,<sup>50</sup> civil rights advocates,<sup>51</sup> and law enforcement officials<sup>52</sup> agree bullying is neither inevitable nor acceptable.<sup>53</sup> Schools have become “a rough-and-tumble place”<sup>54</sup> where students learn new vulgarities, erupt with anger, tease and embarrass each other,

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<sup>46</sup> See U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7 (explaining bystanders, or kids who witness bullying, are also affected and have increased use of tobacco, alcohol and other drugs); see also Weddle, *supra* note 45 at 648 (2004) (“The pattern of victimization does not confine itself to a single school year for a child; many students who are victims early in their schooling are still being victimized years later.”). Further, victims or bullying and bystanders have increased mental health problems including depression and anxiety that can easily distract from their studies. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7.

<sup>47</sup> See, e.g., Nat’l Educ. Ass’n., *Bridging the Gap in Federal Law: Promoting Safe Schools and Improved Student Achievement by Preventing Bullying and Harassment in Our Schools* 5-7 (June 2007), available at: <http://www.nea.org/schoolsafety/images/bridginggap.pdf> (explaining the proposition of member organizations which include: the National Education Association, the National PRA, the American Association of School Administrators, and the National Association of Secondary School Principals). These organizations recommend that Congress amend the federal law to ensure: (1) schools and districts have comprehensive and effective student conduct policies that include clear prohibitions regarding bullying and harassment; (2) schools and districts focus on effective prevention strategies and professional development designed to help school personnel meaningfully address issues associated with bullying and harassment; and (3) states and districts maintain and report data regarding incidents of bullying and harassment. *Id.*

<sup>48</sup> See *Id.*; also see *Share Your Story*, THE YOUTH UNITE, <http://www.theyouthunite.com> (2014) (providing a safe, online environment for students to share their stories about bullying and find solace in the stories of others). Author, Brittnay Wittnebel, founded The Youth Unite in 2008 and continues to use the non-profit to visit local schools in Southern Wisconsin to provide essential tools through the Character Education Assembly. *Id.*

<sup>49</sup> See generally *Youth Violence and Electronic Media: Similar Behaviors, Different Venues?*, 41 J. ADOLESCENT HEALTH S1 (2007) available at [http://www.jahonline.org/issue/S1054-139X\(07\)X0249-0](http://www.jahonline.org/issue/S1054-139X(07)X0249-0) (discussing the problem of bullying in special supplement funded by the Center for Disease Control). The Department of Education, Department of Health and Human Services, and four other, federal departments reacted to the bullying epidemic in 2009 by launching a national task force that held the National Bullying Summit of 150 state, local, civic, and corporate stakeholders. Jon M. Philipson, *The Kids Are Not All Right: Mandating Peer Mediation As A Proactive Anti-Bullying Measure in Schools*, 14 CARDOZO J. CONFLICT RESOL. 81, 86 (2012). The task force also gathers federal resources on bullying and manages the “Safe and Supportive Schools” grant program. *Id.*

<sup>50</sup> See generally *Youth Violence and Electronic Media: Similar Behaviors, Different Venues?*, *supra* note 49 (discussing the problem of bullying in special supplement funded by the Center for Disease Control).

<sup>51</sup> See generally *Bullying*, THE SIKH COALITION, <http://www.sikhcoalition.org/our-programs/advocacy/bullying> (2012) (according to the U.S. Commission on Civil Rights, roughly 50 to 75% of Sikh students experience bullying in American schools).

<sup>52</sup> See generally Rana Sampson, *Bullying in Schools*, U.S. DEP’T OF JUSTICE: CMTY. ORIENTED POLICING SERVICES, (last updated 2012) available at: <http://www.cops.usdoj.gov/Publications/e07063414-guide.pdf> (reporting that most students do not report bullying to adults). Because of a lack of reporting, teachers may underestimate the extent of bullying in their schools and may be able to identify only a portion of the actual bullies. *Id.*

<sup>53</sup> See *supra* notes 47–52 and accompanying text.

<sup>54</sup> See Brief for National School Boards Ass’n et al. in Support of Respondent at 11, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) [hereinafter *Brief*] (No. 97-843), 1998 WL 84120 (suggesting what four justices reiterated in the dissent of *Davis* that schools have become a “rough and tumble” place); see also Asf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN’S RTS. L. REP. 117, 117–18 (2008) (“These ‘newly learned vulgarities,’ eruptions of anger, and teasing create and perpetuate a hostile school environment that interferes, if not impedes, a targeted student’s ability to learn, a right nearly every state construction upholds.”).

share offensive notes, flirt, push, and shove one another rather than learn valuable life skills and focus on academic courses.<sup>55</sup> Since few safe havens exist for bullying victims,<sup>56</sup> these children often take drastic measures to stop the bullying themselves—such as physical retaliation or even suicide—which innately perpetuates the problem.<sup>57</sup> This abhorring conduct is common in bullying; and most recently, in September 2014 fourteen year-old Lamar “Shaq” Hawkins committed suicide in the bathroom of his Miami middle school because his classmates viciously mocked him, knocked down the stairs, and unceasingly tormented him.<sup>58</sup>

Although statistics show eighty percent of adolescents report being bullying victims<sup>59</sup>—as high as ninety percent of fourth through eighth graders<sup>60</sup>—desensitized adults often dismiss this conduct as mere teasing, and schools are simply unaware or deny the pervasiveness of the problem.<sup>61</sup> Despite a lack of awareness and disinterest to remedy the breaking system, statistics

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<sup>55</sup> *Brief, supra* note 54; Orr, *supra* note 54, at 117–18.

<sup>56</sup> President Barack Obama, Address Regarding Anti-Bullying (Oct. 21, 2010), available at <http://www.whitehouse.gov/blog/2010/10/21/president-obama-it-gets-better> (“We’ve got to dispel the myth that bullying is just a normal rite of passage that it’s some inevitable part of growing up. It’s not. We have an obligation to ensure that our schools are safe for all of our kids.”)

<sup>57</sup> *Bullying and Suicide*, OLWEUS BULLY PREVENTION PROGRAM (copyright 2013), <http://www.bullyingstatistics.org/content/bullying-and-suicide.html> (explaining the significance of bullying to suicide rates in youth). Though too many adults still see bullying as “just part of being a kid,” it is a serious problem that leads to many negative effects for victims, including suicide. *Id.* In recent years, a series of bullying-related suicides in the US and across the globe have drawn attention to the connection between bullying and suicide. *Id.* The problem has recently culminated in Florida when, on September 15, 2014, Lamar Hawkins, a fourteen year old boy, took his own life with his father’s gun in the bathroom of Greenwood Lakes Middle School because he was the victim of relentless bullying. *See also* Rick Folbaum, *Parents: Son Committed Suicide Because of Bullying*, CBS MIAMI, Sept. 15, 2014, <http://miami.cbslocal.com/2014/09/15/parents-son-committed-suicide-because-of-bullying/>. According to Hawkin’s Mother, the bullies pushed Lamar down stairs, mocked him due to his size and repeatedly attacked him with the intent to emotionally harm him. *Id.* The Hawkins’ said they went to the middle school several times to discuss what their son was experiencing, but they did not elaborate on the school’s position. *Id.*

<sup>58</sup> Folbaum, *supra* note 57 and accompanying text.

<sup>59</sup> Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 54 (2005) (saying that victims of bullying do not want to attend school, do not want to talk as much in class, and find it harder to pay attention in class—some children even reported considering changing schools).

<sup>60</sup> *Id.* (explaining bullying often occurs at schools in areas where there is minimal or no supervision; however, students are frustrated that teachers or other adults in the classroom ignore bullying incidents when they are present).

<sup>61</sup> *Id.*; Philipson, *supra* note 49, at 85 (explaining that many assume that bullying is a rite of passage, a time old tradition of adolescence). “Regardless of the cause, this misconception of bullying fails to understand the short-term and long-term impacts of bullying on the bullied and the bullies.” *Id.*



continue to climb and estimate a child is bullied every seven minutes.<sup>62</sup> Although students uniformly express their desire for teachers to become more involved and intervene, school administration commonly ignores teasing or dismisses bullying behavior as a non-issue.<sup>63</sup>

“Bullying” is a term that is used interchangeably with “peer harassment” because both terms define overlapping types of conduct.<sup>64</sup> Each is similarly associated with the physical,<sup>65</sup> social,<sup>66</sup> emotional,<sup>67</sup> and mental<sup>68</sup> harm a perpetrator or bully inflicts upon on a victim; yet, harassment tends to reflect more severe conduct and bullying uniquely occurs in school settings.<sup>69</sup> Despite differing national definitions, in 2008, Florida boldly defined “bullying” in the “Jeffery Johnson Stand Up for All Students Act”<sup>70</sup> as “systematically and

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<sup>62</sup> *Bullying and School Violence Statistics*, RAD KIDS: PERSONAL EMPOWERMENT SAFETY DIVISION, (Oct. 3, 2014) available at: [http://www.radkids.org/files/7713/7382/3859/radkids\\_Bullying\\_statistics2pg.pdf](http://www.radkids.org/files/7713/7382/3859/radkids_Bullying_statistics2pg.pdf) (reporting teachers or other adults intervene only four percent of the time, peers will intervene eleven percent of the time, and no intervention occurs eighty-five percent of the time); Philipson, *supra* note 49, at 81.

<sup>63</sup> *Bullying and School Violence Statistics*, *supra* note 62 (showing statistics which prove that regardless of the administration’s awareness, each month 282,000 students are physically attacked in secondary school, and every day 160,000 children stay home from for fear of being bullied at school).

<sup>64</sup> *What Is Bullying: Related Topics*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES <http://www.stopbullying.gov/what-is-bullying/related-topics/> (last visited Sept. 12, 2014) (explaining the difficulty to create all-encompassing and effective bullying and harassment definitions because bullying and harassment sometimes overlap). In addition to the blurred lines between “harassment” and “bullying,” there are many types of aggressive behavior do not fit within the definition of bullying: peer conflict, teen dating, violence, hazing, gang violence, and stalking.” *Id.* OLWEUS, a national anti-bullying organization, defines bullying with peer victimization by saying a “student is being bullied or victimized when he or she is exposed repeatedly over time, to negative actions on the part of one or more students. *See generally* Dan Olweus, *Peer Harassment in Schools: The Plight of the Vulnerable and the Victimized*, 5–6 (Jaana Juvonen & Sandra Graham, 2001).

<sup>65</sup> *Belong To Resources, Mental & Emotional & Physical Health*, <http://www.belongto.org/resource.aspx?sectionid=196> (last visited October 27, 2014) (explaining the difference between physical, mental, emotional, and social harm). Physical wellbeing refers to one’s health. *Id.*

<sup>66</sup> *Id.* (explaining the difference between physical, mental, emotional, and social harm). Mental health refers to one’s self-confidence and personal abilities. *Id.*

<sup>67</sup> *Id.* (explaining the difference between physical, mental, emotional, and social harm). Emotional wellbeing is not the absence of emotions, but an ability to understand the value of one’s emotions and to use them to move forward positively. *Id.*

<sup>68</sup> *Id.* (explaining the difference between physical, mental, emotional, and social harm). Social wellbeing refers to one’s position in society and the ability to enter into promising and genuine relationships. *Id.*

<sup>69</sup> *See, e.g.*, National Education Association, *supra* note 47 (suggesting a recommendation to the Elementary and Secondary Education Act [ESEA] to incorporate one definition for bullying and harassment).

<sup>70</sup> *See* FLA. STAT. § 1006.147 (2014) (providing Florida anti-bullying laws); *see also A Watch-dog Organization: Advocating for Bullied Children and Reporting on State Anti-Bullying Laws*, BULLY POLICE USA, <http://www.bullypolice.org/> (grading various state anti-bullying laws); *see also, e.g.*, Nicole Brochu, *Mother Turns Tragedy Into Triumph With Anti-Bullying Law*, SUN SENTINEL, Sept. 18, 2011, at [http://articles.sun-sentinel.com/2011-09-18/health/fl-nbc0l-bullying-jeff-johnston-column-20110918\\_1\\_anti-bullying-jeffrey-johnston-](http://articles.sun-sentinel.com/2011-09-18/health/fl-nbc0l-bullying-jeff-johnston-column-20110918_1_anti-bullying-jeffrey-johnston-)

chronologically inflicting physical hurt or psychological distress on one or more students.”<sup>71</sup> The same act separately defines “harassment” as any written, verbal, or physical conduct that reasonably causes fear of harm and substantially interferes with the victim’s educational performance or benefits at school.<sup>72</sup> Although there is no direct cause of action called “bullying,” state statutory definitions can be used to prove a school was negligent if the school has breached the “paramount duty”<sup>73</sup> to protect students from such harmful conduct.<sup>74</sup>

Although the United States Constitution<sup>75</sup> does not enumerate an equivalent “paramount duty” as the states have, the Supreme Court has established a “custodial duty,”<sup>76</sup> which finds

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mother (providing the background story for the statute). The “Jeffery Johnston Stand Up for All Kids Act” was inspired by a fifteen year-old Cape Corals High School honors student who decided he could no longer endure a life of relentless torment by the bullies who had targeted him for more than three years. *Id.* Tired of being called “faggot,” “fat,” and “ugly,” beaten down by cyber-attacks, and worn out from the perpetual assault that made him question his own sexuality, on one summer night in 2005 Jeffery kissed his mother good night, closed his bedroom door, and hung himself in his closet. *Id.* His mother and an older brother found him the next morning, and like any family that experiences such a traumatic loss, they would never be the same. *Id.* The “Jeffery Johnston Stand Up For All Students Act,” passed by a rarely unified legislature, requires all Florida school districts implement anti-bullying policies that specifically ban harassment and intimidation; create a reporting procedure; require immediate investigation; and establish consequences for students and school employees who violate the policy. *Id.* Graded “A++” and called “the best anti-bullying law written to date” by the watchdog group Bully Police USA, Jeffrey’s Act also includes a key component that may have saved its namesake had it been in place on his darkest days: a ban on cyber bullying. BULLY POLICE USA, <http://www.bullypolice.org/>.

<sup>71</sup> FLA. STAT. § 1006.147(3)(a) (2014) (providing instances of bullying such as teasing; social exclusion; threat; intimidation; stalking; physical violence; theft; sexual, religious, or racial harassment; public or private humiliation; or destruction of property).

<sup>72</sup> *See* FLA. STAT. § 1006.147(3)(c) (2014) (defining harassment); *see also* FLA. STAT. § 1006.147(2)(a)–(d) (2014) (banning harassment by any student or school employee). Harassment is expressly banned during any programs or activities conducted by the school; during any school-sponsored activity; on the school bus; through the use of school computers; and through the use of computers at a non-school locations if the bullying substantially interferes with or limits the victim’s ability to participate in or benefit from the opportunities offered at school. *Id.*

<sup>73</sup> FLA. CONST. art. IX, § 1(a) (creating a duty for the State). Florida has a paramount duty to make adequate provisions for children to uniformly, efficiently, safely, and securely have the ability to attend a high quality system of free public education. *Id.*

<sup>74</sup> Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and A New Approach to Conflict Resolution in Our Schools*, 9 NEV. L.J. 545, 560 (2009). (finding under state law, bullying victims can attempt to hold a school tortiously liable for failing to prevent the bullying behavior; for example, students can raise negligent supervision claims against schools); Matthew Earhart, *Bullying: What’s Being Done and Why Schools Aren’t Doing More*, 25 J. JUV. L. 26, 28 (2005) (“Immunity, . . . problems with foreseeability, and causation doom most attempts by victims to obtain remedies from schools that have allowed the victimization to occur.”)

<sup>75</sup> *See generally* 12A FLA. JUR 2D *Courts and Judges* § 225–26 (explaining the United States Supreme Court is the supreme law of the land).

<sup>76</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 189 (1989) (finding the “custodial duty rule,” also called the “affirmative duty rule,” exists when “special relationships” are created or assumed by the State with respect to particular individuals and that relationship is enforceable and protected through the Due Process).

when a State affirmatively acts to restrain a person of their personal liberty, the protections of Due Process<sup>77</sup> are subsequently triggered.<sup>78</sup> Although, the “custodial duty” rule mimics Florida’s constitutional “paramount duty,” which undoubtedly extends to students,<sup>79</sup> whether that affirmative duty extends to public schools is subject to varied interpretation.<sup>80</sup> The duty of a public school arises from the “special relationship” the institution has with the students, which forcible compulsory attendance mandates has created.<sup>81</sup> Therefore, the “custodial duty” is limited in scope and only applies when the student is in the direct custody of the school district, which unfortunately will not extend to injury caused at a voluntary school-hosted event<sup>82</sup> or off school premises.<sup>83</sup>

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<sup>77</sup> Due Process Definition, Black’s Law Dictionary (9th ed. 2009), available at Westlaw Next (explaining that due process is “the conduct of legal proceedings according to established rules . . . for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.”).

<sup>78</sup> *DeShaney*, 489 U.S. at 189 (declaring a State may have a duty to protect when an individual has cannot use his “freedom to roam” because the State has imposed a condition on the citizen that results in the inability for the individual to leave, causing a deprivation of a constitutional right).

<sup>79</sup> *Concepcion By & Through Concepcion v. Archdiocese of Miami By & Through McCarthy*, 693 So. 2d 1103, 1004 (Fla. Dist. Ct. App. 1997) (finding Florida schools have duty to reasonably supervise students’ activities when students are under the custody of the school); *see, e.g. Doe v. Escambia Cnty. Sch. Bd.*, 599 So. 2d 226, 227 (Fla. Dist. Ct. App. 1992) (finding the common law and statutory duties of a school board and its teachers is to supervise activity of students under their care and control as determined from circumstances involved, applicable statutes). *See generally* 48 AM. JUR. 587 *Trials* § 14 (1993) (finding an educator’s deliberate indifference to provide a safe school environment gives rise to a liberty interest claim under the “custodial duty” theory in some jurisdictions).

<sup>80</sup> *Daniels v. Williams*, 474 U.S. 327, 334–35 (1986) (acknowledging troublesome distinctions among intent, recklessness and gross negligence); 48 AM. JUR. 587 *Trials* § 14 (1993) (declaring the Supreme Court has never ruled on the precise relationship among gross negligence, deliberate indifference, and recklessness).

<sup>81</sup> *Rupp v. Bryant*, 417 So. 2d 658, 665 (Fla. 1982) (holding that public schools undoubtedly owe a general duty of supervision to the students placed within their care). A cause of action exists when a public school negligently fails to carry out its general duty of supervision of students placed within its care. *Id.* at 659. Compulsory attendance became law in all the states after a growing public concern over child labor and the belief that compulsory attendance at school would discourage factory owners from exploiting children. *See Coulson, supra* note 30; *see also* 48 AM. JUR. 587 *Trials* § 14 (1993); *see also supra* notes 34–35 and accompanying text.

<sup>82</sup> *Concepcion*, 693 So. 2d at 1103 (concurring with the opinion in *Oglesby*, 328 So. 2d, that schools have no duty to supervise off-campus, non-school related activities engaged in by students during non-school hours). Where the duty begins and ends is the logical point at which the school’s obligation of reasonable supervision ends and the parent or guardian’s duty of supervision resumes, such as when a student leaves school premises after school hours and is no longer involved in school-related activities. *Id.* at 1105.

<sup>83</sup> *Matallana v. Sch. Bd. of Miami-Dade County*, 838 So. 2d 1191, 1192 (Fla. Dist. Ct. App. 2003) (finding a high school was under no duty to supervise student when he was involved in an incident off school premises with another student that was unrelated to any school activity, and thus, school was not liable); *see Oglesby v. Seminole County Bd. of Public Instruction*, 328 So.2d 515, 516 (Fla. Dist. Ct. App. 1976) (suspending a student from all school related facilities and programs also suspends the duty to supervise or oversee the conduct of that student at locations which are off campus and non-school related).

## **B. Florida Leads the Anti-Bullying Legislative Movement**

Despite the lack of federal action to carve out redress for bullying,<sup>84</sup> a number of states,<sup>85</sup> including Florida,<sup>86</sup> have statutorily mandated school boards adopt anti-bullying policies to prevent and discipline bullying behavior; thus, creating a statutory duty for schools to respond to reported harm arising from bullying incidents.<sup>87</sup> For example, Florida schools can be found civilly liable for violation of the “Jeffery Johnston Stand Up for All Kids Act” when school administration or teachers fail to investigate reported incidents of bullying.<sup>88</sup> As a matter of national public policy, all state legislators should use Florida’s comprehensive bullying law as a template to protect students from harm and eradicate the national epidemic of bullying.<sup>89</sup>

### **i. Redress for Victims of Bullying**

The state tort law of negligence<sup>90</sup> suffices as a remedy to bullying victims in many states<sup>91</sup>—such as Florida—that have encrypted a statutory duty in their laws that requires schools

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<sup>84</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7 (sharing although no federal law directly addresses bullying, in some cases, bullying overlaps with discriminatory harassment when it is based on race, national origin, color, sex, age, disability, or religion).

<sup>85</sup> *A Watch-dog Organization: Advocating for Bullied Children and Reporting on State Anti-Bullying Laws*, BULLY POLICE USA, <http://www.bullypolice.org/> (declaring all of the United States, except Montana, have passed school anti-bullying legislation, the first being Georgia in 1999).

<sup>86</sup> See FLA. STAT. § 1006.147(4)(g) (2014).

<sup>87</sup> FLA. STAT. § 1006.147(4)(g) (2014) (declaring that schools shall adopt a procedure for the prompt investigation of a report of bullying or harassment and the person responsible for the investigation). The “Jeffery Johnston Stand up for All Kids Act” created an affirmative duty for teachers, school administrators, counseling staff, and school volunteers to respond to bullying or they may be held liable for causes of action arising from their lack of action. *Id.*

<sup>88</sup> See FLA. STAT. § 1006.147 (2014).

<sup>89</sup> Bethel, *supra* note 44, at 185 (arguing that federal law should impose on school officials an affirmative, albeit limited, duty to protect students from harm by other students when school officials know, or reasonably should know, that students are harming other students).

<sup>90</sup> 105 AM. JUR. 3D *Proof of Facts* § 93 (2009) (providing the elements of negligence). The elements of negligence that relate to bullying claims are: (1) duty, the school has a duty to keep students safe, to supervise conduct at the school, and/or to maintain an environment conducive to learning; (2) breach, the school breached its duty by permitting, condoning, or creating an environment that encouraged bullying; (3) causation; and (4) damages. See, e.g. *Id.*; see also McCabe & Parker, *supra* note 36, at §§ 13, 14, 30, 33, 35, 37, 38.

<sup>91</sup> Sacks & Salem, *supra* note 13 at 147.

to protect students while they are under the school’s custody.<sup>92</sup> For a bully victim to bring a negligence suit, the defendant school must have owed a duty to that student and the harm must be a foreseeable result of the breach of duty.<sup>93</sup> Since claims sounding in negligence are based on the general rule that schools have a duty to protect students in their custody from reasonably foreseeable harm, the determinative inquiry of the jury is whether the harm was actually reasonably foreseeable.<sup>94</sup> Many school districts’ adoption of anti-bullying policies and state legislatures’ enactment of anti-bully legislation<sup>95</sup> suggest that bullying is indeed foreseeable, imminent, and inevitable.<sup>96</sup>

Alternative and related actions may also arise from bullying incidents.<sup>97</sup> For example, if a school’s duty to the student victim cannot be established,<sup>98</sup> alternative causes of action can

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<sup>92</sup> FLA. STAT. § 1006.147(2)(g)–(h) (2014) (declaring that if a teacher, school administrator, counseling staff, or school volunteer learns of an incident of bullying through a report, they must reasonably investigate the situation through a specified process expressed in the statute).

<sup>93</sup> 105 AM. JUR. 3D *Proof of Facts* § 93 (2009). Negligence principles generally require that the defendant must owe a duty of care to the plaintiff, that duty must be breached, and the breach must cause harm to the plaintiff, which was foreseeable to the defendant. *Id.* As applied to a bullying claim, in order to find the school district liable in negligence for failing to protect the student from the bullying, it is sufficient to allege that the school district had a duty to its students to provide a safe school environment. *See id.*; *see also supra* note 8 and accompanying text.

<sup>94</sup> McCabe & Parker, *supra* note 36, at § 3; Allan E. Korpela, LL.B., *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision*, 38 A.L.R.3d 830 (1971) (“There is no liability predicated on lack or insufficiency of supervision where the event in connection with which the injury occurred was not reasonably foreseeable.”)

<sup>95</sup> Maggie Clark, *49 States Now Have Anti-Bullying Laws. How’s that Working Out?*, GOVERNING THE STATE AND LOCALITIES, Nov. 4, 2014, <http://www.governing.com/news/headlines/49-States-Now-Have-Anti-Bullying-Laws-How’s-that-Working-Out.html> (stating that forty-nine states have enacted laws requiring schools to implement anti-bullying policies).

<sup>96</sup> *See Earhart, supra* note 74, at 28. (finding a minority of courts, which includes Florida, views bullying behavior and misconduct as foreseeable rather than as an intervening cause and are willing to impose the ordinary negligence standard upon school officials and teachers). Some courts hold that bullying behavior is often unknown to school officials and when that behavior will escalate into violence is unforeseeable, thus no liability attaches. *Id.* at 29. In these jurisdictions, the unlikelihood of liability creates no sense of urgency to prompt change and help the children who are injured at school by bullying. *Id.*

<sup>97</sup> McCabe & Parker, *supra* note 36, at § 3 (sharing that other additional or alternative causes of action are the intentional torts of assault, battery, or intentional infliction of emotional distress against the bully).

<sup>98</sup> *See Concepcion*, 693 So. 2d at 1105 (holding a school had no duty to supervise a student who was assaulted on public sidewalk and—even though this type of severe injury would give rise to cause of action against school for negligent supervision); *see also Oglesby*, 328 So. 2d at 515 (deciding that a school was not liable because failure to supervise a suspended student, even though the student had known violent propensities, after school hours was unconnected with any school-related program and therefore not within the scope of supervision). Florida courts will not find a duty to protect students from injuries that did not occur during school hours or on school’s premises, nor during a school-related activity. *Concepcion*, 693 So. 2d at 1105; *Oglesby*, 328 So. 2d at 515.

raised under the state common law claims of intentional infliction of emotional distress (“IIED”)<sup>99</sup> or defamation.<sup>100</sup> Related actions—suits against defendants other than the school—may be brought directly against a bully or a third party agent of the school, such as contracted security personnel.<sup>101</sup>

## ii. Florida’s Sovereign Immunity

Injudiciously, victims seeking redress under state tort law are often confronted with a version of the common law doctrine of sovereign immunity.<sup>102</sup> Sovereign immunity is grounded in the sovereign status of a state and derived from the Eleventh Amendment to the Constitution.<sup>103</sup> Therefore, this doctrine is a powerful defense available to schools in bullying cases.<sup>104</sup> Sovereign immunity limits a state’s compensatory damages for harm arising in tort.<sup>105</sup>

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<sup>99</sup> See generally McCabe & Parker, *supra* note 36, at §§ 3, 30–33, 35–38 (providing claims arising from student-on-student bullying, intimidation, or other harassment that arises in a school or at a school-related location). To satisfy an intentional infliction of emotional distress (“IIED”) claim, the victim must prove: (1) the defendant school’s conduct was extreme, outrageous, and beyond all boundaries of decency, (2) the conduct was intentional or reckless, and (3) the conduct caused the victim severe emotional distress. *Id.* at § 3.

<sup>100</sup> McCabe & Parker, *supra* note 36, at § 3 (suggesting defamation may be particularly relevant in claims arising from cyberbullying); see King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845 (2010) (saying it may be difficult for cyberbullying victims to prevail in defamation because a victim must prove not only that the statement was false, but also that by publishing that statement the perpetrator caused material damage to the victim’s reputation—high hurdles to clear). See generally Thomas A. Jacobs, CYBERBULLYING AND THE LAW 1–4 (Free Spirit Publishing, Inc 2010), available at [http://www.freespirit.com/files/OTHER/TeenCyber\\_Foreword\\_Intro.pdf](http://www.freespirit.com/files/OTHER/TeenCyber_Foreword_Intro.pdf) (providing general background about the pervasiveness of cyberbullying.) To recover for defamation, the victim must prove: (1) the defendant school uses defamatory language to make assertions of fact “about or concerning” the victim, (2) the defendant published the defamatory language to a third person, (3) the publication of the defamatory language caused the plaintiff’s reputation to be damaged. McCabe & Parker, *supra* note 36, at § 3.

<sup>101</sup> *Id.* (explaining that in certain circumstances, these causes of action may also be asserted against school personnel who directly caused harm to a student or who intervened and further harmed the victim).

<sup>102</sup> FLA. STAT. § 1006.147 (2014) (waiving sovereign immunity in Florida); see Sacks & Salem, *supra* note 13 at 150; Sovereign Immunity Definition, Black’s Law Dictionary (9th ed. 2009), available at Westlaw Next (explaining that sovereign immunity allows a government to be exempt from being sued in its own courts without its consent).

<sup>103</sup> U.S. CONST. amend XI (“precludes the adjudication of pendent state law claims against non-consenting state defendants.”); McCabe & Parker, *supra* note 36, at § 19 (finding when claims are based on the principles contained in this amendment, many states have provided governmental immunity to schools).

<sup>104</sup> McCabe & Parker, *supra* note 36, at § 19.

<sup>105</sup> 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 8 (2014) (explaining that because “sovereign immunity” is used to refer to the immunity of the State and because “governmental immunity” refers to similar immunities enjoyed by the State, the State’s political subdivisions and schools, though the two are often interchanged in case law).

Fortunately, counterintuitive to the sovereign immunity doctrine, the policy arguments surrounding bullying have compelled some states to statutorily waive immunity<sup>106</sup> and allow claims to be brought in situations where a private person could be held liable for bullying harm.<sup>107</sup> Florida, yet again on the forefront of the anti-bullying movement, permits actions against the State or schools, as agents of the state, for negligently caused injury.<sup>108</sup> This statutory waiver allows recovery for harm caused by school employees' wrongful acts or omissions while the employee is acting within the scope of their duties and when a private person would similarly be held liable.<sup>109</sup>

### **C. The Unfair Implications of Limiting Compensation in Statutory Damage Caps**

Once liability is established, a victim may seek both economic<sup>110</sup> and non-economic<sup>111</sup> damages including: physical or mental injuries; medical expenses; and past or future pain, suffering, or emotional trauma.<sup>112</sup> Bullied students not only experience physical harm, typically quantifiable as economic damages, but more frequently experience non-economic harm, such as diminished mental health, emotional stability, and increased social issues.<sup>113</sup> Depression,

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<sup>106</sup> FLA STAT. § 768.28(5) (2012) (expressing a waiver of sovereign immunity, and consent to civil liability whereby the state and its agencies are liable for tort claims in the same way a private individual would be); Erwin Chemerinsky, CONSTITUTIONAL LAW 268 (Wolters Kluwer, 4th ed. 2013) (stating state may consent to suits in federal court by waiving their Constitutional Eleventh Amendment immunity).

<sup>107</sup> 105 AM. JUR. 3D *Proof of Facts* § 93 (2009) (declaring that sovereign immunity may be waived by a statute which creates a private right against the school district for violation of an anti-bullying statute).

<sup>108</sup> *E.g.*, FLA. STAT. § 768.28(5) (2012). (“[T]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages.”)

<sup>109</sup> *Id.*

<sup>110</sup> 108 AM. JUR. 3D *Proof of Facts* § 87 (2009) (saying economic damages caps encompass mostly documented expenses such as medical bills from treatment of physical bullying injuries).

<sup>111</sup> *Id.* (explaining non-economic damages may include: physical injuries not treated in a hospital, pain and suffering, life changes, emotional distress, punitive damages, loss of consortium, loss of educational opportunity, etc.).

<sup>112</sup> *See* 118 AM. JUR. *Trials* 387 (2010) (explaining particular issues that arise when proving damages owed to public school students by the school district or individual school district employee arising from harassment of bullying).

<sup>113</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 7; 118 AM. JUR. *Trials* 387 (2010) (determining damages involving injury to a minor can require a court to inquire into a number of factors including: age, intelligence, and the maturity of the victim).

anxiety, increased feelings of loneliness, change in sleep, loss of appetite, disinterest in activities, substance abuse, and even suicide are common bullying harms.<sup>114</sup>

Despite Florida’s applause-worthy attempt to provide a remedy for bullying victims, Florida’s sovereign immunity waiver inappropriately limits the victim’s recovery against a liable school at \$200,000 per claim, with a maximum recovery of \$300,000.<sup>115</sup> This damage cap does not change the ability for a jury to find a Florida school liable for harm arising from bullying, rather it refuses to force a liable school to compensate a student victim past \$300,000<sup>116</sup>—even in cases where a jury returns a verdict which exceedingly surpasses this limit.<sup>117</sup>

#### **IV: Focus on Damage Caps**

##### **A. The General Problem Underlying Tort Law Limiting Recovery for Bully Victims**

Tort law involves a series of interrelated damages and procedural rules which heavily complicate the potential claims a victim can recover under.<sup>118</sup> At a conceptual level, any

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<sup>114</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7 (expressing kids who are bullied can experience negative physical, school, and mental health issues).

<sup>115</sup> FLA. STAT. § 768.28(5) (2012)

“[N]either the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000.”

<sup>116</sup> *Id.*

<sup>117</sup> Colleen Jenkins, *Bullying Costs School \$4 Million*, Tampa Bay Times, Oct. 23, 2007, at: [http://www.sptimes.com/2007/10/23/news\\_pf/Hillsborough/Bullying\\_costs\\_school.shtml](http://www.sptimes.com/2007/10/23/news_pf/Hillsborough/Bullying_costs_school.shtml) (reporting about a returned jury verdict of \$4,030,000 on a negligent supervision claim brought by a sixteen-year-old male student who suffered a badly fractured arm when another student jumped him at a football game). In this case, the jury returned a verdict against the school for negligence, which rested on the fact that the plaintiff victim had verbally complained to school officials about the bullying fifteen months earlier, and the defendant school acted negligently by not providing supervision during the school event. *Id.*

<sup>118</sup> Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 440 (2006) (pointing out that tort law encompasses such a broad range of “wrongs” that there can be no one determinative test or definition of a wrong; however, it is arguable that the harm resulting from bullying is egregious enough to warrant special protections under tort law); 5 Fla. Prac., Civil Practice § 27:5 (2014 ed.) (finding apart from the limitations imposed by statute, the court must determine whether an award of punitive damages violates the defendant’s due process rights). To determine whether an award of damages violates the defendant’s constitutional rights, Florida courts consider whether (1) “the manifest weight of the evidence does not render the amount of . . . damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct”; (2) the award “bears some relationship to the defendant’s ability to pay and does not result in economic castigation or bankruptcy to the defendant”; and (3) a reasonable relationship exists between the compensatory and punitive amounts awarded. *Id.*



definition of tort reform must recognize this series of interconnections, and the resulting arbitrariness, to effectively draw lines between substantive rules of law and the procedural ability to fully recover for harm.<sup>119</sup> Because tort law is traditionally a matter of state law, a minuscule attempt, if any, has been made to create federal tort reform.<sup>120</sup> Therefore, it is the responsibility of the State to adjust damages in accordance with their own constitutional prerogatives and public interests.<sup>121</sup>

When reforming, a State should tread lightly and recognize that the unequal allocation of tort damages raises fundamental moral and political issues.<sup>122</sup> By definition, “reform” is advantageous because the term connotes that change will remove or reduce faults and abuses of the system to effectuate the mission of tort law— compensation.<sup>123</sup> Therefore, it is incontrovertibly good public policy to reform the tort system when there is a need to do so.<sup>124</sup>

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<sup>119</sup> Hubbard, *supra* note 118, at 440 (recognizing interconnections of tort law and the resulting arbitrariness of line-drawing between the substantive rules of tort liability and the rules concerning evidence, damages, and procedure).

<sup>120</sup> *Id.* at 483 (using products liability examples to demonstrate the difficulty in getting federal participation in tort reform).

<sup>121</sup> Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law-Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1190 (2006) (stating that State statutes may limit a remedy by modifying the collateral source rule or capping recovery of compensatory or punitive damages.) Therefore, it is the duty of the state to monitor provisions for adequate remedies for victims and not extensively limit recovery. *Id.*

<sup>122</sup> Hubbard, *supra* note 118, at 445 (sharing that the three policy goals which drive the distribution and allocation of tort damages); Jill Wieber Lens, *Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation*, 59 U. KAN. L. REV. 231, 235 (2011) (citing RESTATEMENT (SECOND) OF TORTS § 901 (1979) which finds the purposes of tort law are “(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help.”) Damages are allocated in accordance with: (1) the liability for payment of compensatory damages prevents wrongdoing and thus protects rights; (2) our sense of fairness requires that, as a matter of “corrective justice,” victims who suffer recourse to a system that requires wrongdoers to correct by paying compensation; and (3) compensation is, by itself, a goal of tort law). Hubbard, *supra* note 118, at 445.

<sup>123</sup> Hubbard, *supra* note 118, at 457 (explaining people frequently disagree about whether a particular proposal for change in tort is, in fact, a “reform”). One side of the reform debate argues the tort system suffers from some defect that must be addressed by adopting the proposed reform, while the other side argues the defect does not exist or that, even if there is a problem, the proposed reform will be ineffective or will make the system worse. *Id.*

<sup>124</sup> *Id.* (“[I]t is generally good policy to reform the tort system where possible.”).

## V: Damage Caps Violate Public Policy Interests

### A. The Jury Trial

The right to a jury trial is one of the twenty-seven enumerated rights set forth in Article I of the Florida Constitution; the text explicitly provides that this right “shall be secure to all and remain inviolate.”<sup>125</sup> Determining whether damage caps violate the guarantee to a jury trial requires consideration of the specific purposes behind the individual roles of the jury and the judge.<sup>126</sup> Under common law, a jury is responsible for making findings of fact and for rendering a verdict,<sup>127</sup> and the judge applies the law and enters the judgment.<sup>128</sup> The judge and jury must be careful not to impede upon one another’s constitutional territory.<sup>129</sup> Further, each must recognize that the jury’s verdict should satisfy the individual constitutional right to having a jury determine damages.<sup>130</sup> After the jury makes their determination, the judge applies remittitur<sup>131</sup> to the verdict, regardless of whether the substantive law will ultimately limit recovery or not.<sup>132</sup>

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<sup>125</sup> See FLA. CONST. art. I, § 22; see also KAN. CONST., Bill of Rights, § 5 (providing for civil trials by jury); see also MD. CONST., Decl. of Rights art. 23 (same); see also OR. CONST. art. I, § 17 (same); see also VA. CONST. art. I, § 11 (same); cf. *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 475 (Or. 1999) (sustaining challenge to damage cap based on jury trial guarantee). See generally Light, *supra* note 18, at 320 (finding the right to a jury trial involves questions concerning the power of juries at common law and the power of legislatures to change common law).

<sup>126</sup> Light, *supra* note 19, at 330 (explaining that a proper understanding of this relationship highlights constitutionality of the right to jury right in two ways). First, under the common law, a party had no right to judgment solely on the basis of a jury verdict; thus, damage caps do not interfere with the right to a jury trial. *Id.* Second, using the “splitting theory,” courts can conceptualize damage caps by defining separate roles for the judge and jury and finding damage caps do not impair the jury function. *Id.*

<sup>127</sup> Jury Definition, Black’s Law Dictionary (9th ed. 2009), available at WestlawNext (defining jury as “a group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them); see Question of Fact Definition, Black’s Law Dictionary (9th ed. 2009), available at WestlawNext (defining question of fact as a disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial); see also *infra* note 180 and accompanying text.

<sup>128</sup> See Question of Law Definition, Black’s Law Dictionary (9th ed. 2009), available at WestlawNext (defining question of law as an issue to be decided by the judge, concerning the application or interpretation of the law). A jury cannot decide questions of law, which are reserved for the court. *Id.*

<sup>129</sup> Light, *supra* note 19, at 330 (explaining that under the “splitting theory” the judge and the jury are viewed as having distinct roles and each cannot impede upon one another’s constitutional territory and assigned roles).

<sup>130</sup> *Id.* (explaining under the “splitting theory,” the verdict itself satisfies the common law right to the jury determination of the amount of damages thus fulfilling the “constitutional mandate” of the jury).

<sup>131</sup> David Fink, *Best v. Taylor Machine Works, the Remittitur Doctrine, and the Implications for Tort Reform*, 94 NW. U. L. REV. 227 (1999) (explaining remittitur to be the “mundane common law procedure” which gives a judge the authority to order a remit or reduction in excessive damages with the plaintiff’s consent, or a new trial); see, e.g. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997) (holding that remittitur is an inherent power of the

The re-examination of the jury-determined facts through a remittitur is a constitutional aberration,<sup>133</sup> which violates Florida’s constitutional requirement to keep jury trials “inviolable.”<sup>134</sup> A damage cap unjustly requires a single judge to effectively exonerate a wrongdoer after the jury has already duly considered the facts of a case and submitted a corresponding verdict to the level of fault, which the jury found under the circumstances.<sup>135</sup> Under the current system, the judge is essentially forced to effectuate a legislative remittitur<sup>136</sup> in place of the jury’s prerogative.<sup>137</sup> The damage cap statute sets an inflexible limit that cannot correlate to the particularized harm each victim experiences; thus, encroaching on the jury’s

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judicial branch, and as such a damages cap with a “legislative” remittitur violated the separation of powers provision of the state constitution).

<sup>132</sup> Light, *supra* note 19, at 330 (explaining that after the jury determines the damages, the judge then takes the facts found by the jury, in the form of a monetary damages award, and applies the substantive law of the jurisdiction, which may or may not cap the damages).

<sup>133</sup> *See, e.g.* Smith v. Dep’t of Ins., 507 So. 2d 1080 (Fla. 1987) (holding a section of the Tort Reform and Insurance Act, which placed an absolute, \$450,000 cap on damages violated the victim’s constitutional right to access the courts because the legislature did not provide an alternative remedy, and court could only speculate as to whether the victim would ultimately benefit from the design of the damages cap statute); *see also* Light, *supra* note 19, at 330 (finding the jury’s discretion is a constitutional mandate that is violated upon a judge using remittitur or statutory damage caps).

<sup>134</sup> FLA. CONST. art. I, § 22 (“The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.”); 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, 559 (2005) (finding constitutional language requires states attend to basic governmental duties, including the duty to provide a law of redress).

<sup>135</sup> State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1095 (Oh. 1999) (striking down damage caps because it is “unreasonable and arbitrary,” language under the rational basis standard of constitutional scrutiny); Andrew F. Popper, *Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability*, 60 DEPAUL L. REV. 975, 979 (2011) (finding arbitrariness in industry specific limitations set by Congress which “reduce accountability, undermine deterrence, and more often than not, fail to keep pace with actual costs, including inflation.”). *See* Light, *supra* note 19 at 339 (giving examples of other states). Virginia rejected allegations of violations of equal protection clause because the damage cap was found to be “reasonable” and not “arbitrary”. *Id.* Ohio held damage cap statues were constitutional unless they were “unreasonable or arbitrary.” *Id.* Illinois held a damage cap statute unconstitutional for being “arbitrary” and “superfluous.” *Id.*

<sup>136</sup> George R. Wise, Jr., *Tort Reform – The Unconstitutionality of Tort Restrictions*, THE BRAD HENDRICKS LAW FIRM (Nov. 17, 2014 at 5:54 PM), <http://www.bradhendricks.com/articles/tort-reform-unconstitutionality-tort-restrictions/> (explaining that any restrictions on damages in tort cases violates the separation of powers doctrine). Remittitur is a general power of the courts and damages caps have been equated to a legislative remittitur. *Id.* The legislative remittitur is impermissible and unconstitutional under the separation of powers doctrine. *Id.*; *see, e.g.* Best v. Taylor Machine Works, 689 NE 2d 1057, Ill 1997 (setting precedent when the Illinois Supreme Court threw out a \$500,000 cap on non economic damages as an impermissible legislative remittitur).

<sup>137</sup> David Fink, *Best V. Taylor Machine Works, the Remittitur Doctrine, and the Implications for Tort Reform*, 94 NW. U. L. REV. 227, 262 (1999) (finding since remittitur is an inherent power of the judicial branch, a legislative remittitur violates the separation of powers). When a legislature enacts a damage cap statute they do so without authority. *Id.*

constitutional territory to determine damages in accordance with a totality of the circumstances.<sup>138</sup> Therefore, Florida's damage cap statute violates the constitutional guarantee to a jury trial.<sup>139</sup>

Since it is common for the text of a state's constitution to establish a right to a jury trial, damage cap statutes are frequently challenged on constitutional grounds.<sup>140</sup> Of the twenty-nine states that have adopted non-economic damage caps, seventeen states have upheld constitutional challenges, twelve states have not challenged the caps, and eight states have found damage caps unconstitutional and abolished them.<sup>141</sup> State supreme courts in Alabama,<sup>142</sup> Florida,<sup>143</sup> Georgia,<sup>144</sup> Illinois,<sup>145</sup> Missouri,<sup>146</sup> New Hampshire,<sup>147</sup> Oregon,<sup>148</sup> and Washington<sup>149</sup> have declared damage cap statutes unconstitutional either altogether or in part.<sup>150</sup>

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<sup>138</sup> Mark Geistfeld, *Placing A Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 790 (1995) (explaining how capping damages are problematic and fail to address the fundamental problems created by the current system); Standardized Civil Jury Instructions for the State of Florida, No. 501.1 (2014 ed. rev.), available at: [http://www.floridasupremecourt.org/civ\\_jury\\_instructions/instructions.shtml#500](http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500) ("You should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for [his] [her] [loss] [injury] [or] [damage], including any damage (claimant) is reasonably certain to [incur] [experience] in the future."). Since damage cap reform does not help juries determine the appropriate award in the first place, any awards below the cap are subject to the same claims of arbitrariness and unfairness, which are inherent in the faults of the system. Geistfeld at 790.

<sup>139</sup> FLA. CONST. art. I, § 22 ("The right of trial by jury shall be secure to all and remain inviolate."); Fink, *supra* note 141, at 227 (explaining remittitur doctrine); Light, *supra* note 19, at 330.

<sup>140</sup> J. Chase Bryan, Walter H. Boone, & Jordan M. Mason, *Are Non-Economic Caps Constitutional?*, 80 DEF. COUNS. J. 154 (2013) (presenting summaries of the various arguments against and for the constitutionality of damage caps and finding the most common argument to be the violation of a right to a right trial or an argument surrounding the legitimacy of state interests). *See generally* Symposium, *State Constitutional Law*, 32 RUTGERS L.J. 897 (2001) (discussing various constitutional challenges to state tort reform legislation).

<sup>141</sup> Bryan, Boone, & Mason, *supra* note 140, at 154.

<sup>142</sup> *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 159 (Ala. 1991) (finding section 6-5-544 which provided a \$400,000 cap on non-economic damages in medical malpractice actions, unconstitutional as a violation of the right to jury trial and equal protection clause).

<sup>143</sup> *See Smith v. Dept. of Insurance*, 507 So. 2d 1080 (Fla. 1987) (finding the "Tort Reform and Insurance Act of 1986," which imposed a cap on non-economic damages of \$450,000, was held unconstitutional as unnecessarily restrictive of access to courts and in violation of state constitutional rights to jury trial); *see also Estate of McCall ex rel. McCall v. U.S.*, 642 F.3d 944, 944 (11th Cir. 2011) (finding a cap did not violate the United States Constitution, but certified to Florida Supreme Court questions of whether the cap violated Florida's constitution); *see also George N. Meros, Jr. & Chanta G. Hundley, Florida's Tort Reform Act: Keeping the Faith with the Promise of Hoffman v. Jones*, 27 FLA. ST. U. L. REV. 461, 470 (2000) (explaining that Florida's Tort Reform Act provides necessary reform by addressing a plaintiff's right to recover punitive damages).

<sup>144</sup> *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 218 (2010) (finding a statutory cap on non-economic damages unconstitutional and violating the right to a jury trial).

## B. For Fairness Sake!

Florida should amend the statutory damage cap to ensure complete and fair non-economic compensation—such as mental anguish and diminished educational experience—which are common in bullying cases and limited by the damage cap statute.<sup>151</sup> In the interest of fairness, and as a matter of “corrective justice,” tort law requires the injurer fully compensate the victim for the harm caused in order to completely correct their wrongful conduct and attempt to make the victim whole.<sup>152</sup> The injurers deserve to bear the costs of their wrongs, and those costs should not become the burden of innocent victims.<sup>153</sup> When Florida schools fail to investigate

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<sup>145</sup> Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1076 (Ill. 1997) (holding that a statutory non-economic damages cap violates constitutional separation of powers and the bar against special legislation); *see also infra* note 131, 137 and accompanying text.

<sup>146</sup> Watts v. Lester E. Cox Medical Centers, (Mo. July 31, 2012), 2012 WL 3101657 (holding the cap on non-economic damages violated the right to trial by jury under the Missouri Constitution).

<sup>147</sup> Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991) (finding a damage cap on medical malpractice to violate the equal protection clause and that the purpose of legislation does not outweigh individual rights).

<sup>148</sup> Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001); *Lakin*, 987 P.2d, *supra* note 125.

<sup>149</sup> Sofie v. Fibreboard Corp., 771 P.2d 711, 717 (Wa. 1989) (finding Washington law RCWA 4.56.250, which was a limit on non-economic damages in all actions for personal injury or death on sliding scale based on average annual wage and life expectancy, to be unconstitutional and violate the right to jury trial).

<sup>150</sup> *See supra* notes 141–142 and accompanying text.

<sup>151</sup> Galligan, *supra* note 121, at 1255 (explaining that non-economic damages are determined by a totality of the harm resulting from the case and require the jury to determine the value of the victim’s loss). The court should use the guideposts of reprehensibility, ratio, and comparison to other civil penalties when determining damages. *Id.*

<sup>152</sup> Kenneth S. Abraham, *What is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD.L.REV. 172, 187 (1992) (“Statutory caps compromise the traditional principle of full compensation for both economic and noneconomic loss suffered by a successful tort claimant.”); Elliot M. Blake, *Comment, Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401, 404 (1988) (asserting the premise behind a tort compensation system to compensate the wrongfully injured by the responsible party); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW.U.L.REV. 908, 909–10 (1989) (commenting that it is universally agreed that the compensatory goal of tort law is to make the plaintiff “whole”); Hubbard, *supra* note 111, at 446 (raising the point that a comparison between liability and wrongdoing should be equal and damage caps frustrate that balance by remedying disproportionately large amounts of liability with insufficient amounts of damages).

<sup>153</sup> Zipursky, *supra* note 16, at 695 (stating the theory of “corrective justice” is based on a simple and elegant idea: justice requires when one person has been wrongfully injured by another, the injurer must make the injured party whole). This idea of justice presupposes the Aristotelian idea of normative equilibrium. *Id.*

reports of bullying pursuant to the “Jeffery Johnston Stand Up for All Kids Act,”<sup>154</sup> the costs must not be passed on to a blameless, child victim.<sup>155</sup>

It is easily observable that the damage cap statute most dramatically reduces the ultimate recovery in larger cases,<sup>156</sup> and consequentially, lawyers’ contingent fees are limited because these fees are often hidden in and taken out of their client’s ultimate recovery.<sup>157</sup> Thus, damage caps effectually discourage attorneys from litigating expensive cases because attorneys do not want to expend time and resources to cheaply settle or not be fully reimbursed after trial because the lawyers know that a remittitur awaits them.<sup>158</sup> In extreme cases with potentially high damages, the victim may be essentially denied a fair trial because lawyers are apprehensive to

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<sup>154</sup> FLA. STAT. § 1006.147 (2014).

<sup>155</sup> See FLA. STAT. § 1006.147 (f)–(n) (2014) (requiring schools districts implement procedures to ensure reports of bullying are properly prevented and investigated); see also Hubbard, *supra* note 118, at 446 (comparing liability and wrongdoing).

<sup>156</sup> Heidenberg v. Hillel School of Tampa, Inc., 2007 WL 5086229 (Fla.Cir.Ct.) (awarding a \$4,000,000 verdict by a Florida jury against a school district for harm that came to a student who was attacked on the playground, sustained an arm fracture and nerve damage from bullying). *Contra* Holman v. School District of Palm Beach County, Florida, 13 FJVR 1-30 (finding a school district not able to prevent every single incident of injury in every situation and not finding a school district liable when a student and his mother had complained about bullying on several prior occasions and on the day of the assault, the student warned a teacher he was going to be attacked after class). Emerson Straw Injury Law, *School Bullying Liability*, EMERSON STRAW P.L. (last visited Oct. 10, 2014), <http://www.emersonstraw.com/school-bullying-liability.php> (telling the story of a Palm Beach, Florida jury awarding \$1.7 to the family of a developmentally disabled child was raped on a school bus—the district continues to deny the claims); Ari Odzer, *Jury Awards \$5.25 Million in Downtown Miami Charter School Sex Assault Case*, NBC Miami, April 15, 2014, at <http://www.nbcmiami.com/news/local/Jury-Awards-525-Million-in-Downtown-Miami-Charter-School-Sex-Assault-Case-255357051.html> (reporting a jury has awarded \$5.25 million to a boy who claims he was raped and bullied by a fellow student at Downtown Miami Charter School).

<sup>157</sup> Dobbs, Hayden & Bublick, *supra* note **Error! Bookmark not defined.** (finding the limitation on punitive damages may cut the funds from which attorneys’ fees and litigation costs are achieved and this might cause some suits to not be pursued at all).

<sup>158</sup> *Id.* (suggesting other various side-effects will accrue such as: (1) awards that would otherwise have been lower than the capped amount will tend to gravitate toward the cap, and (2) close questions of law will lean in favor of the plaintiff because they will never be asked to give more than the damage cap allows); e.g., Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341 (1999) (concluding that caps increase the likelihood of settlement, even though some negotiators might truncate their estimates of the case’s value at the cap level while others might recalibrate their estimates completely). Moreover, damage caps hinder the potential for an injured party to partake in fair settlement negotiations. *Id.*

expend their time and resources for a limited recovery.<sup>159</sup> In the interest of fairness, this system of selective representation cannot be encouraged.<sup>160</sup>

### C. Arbitrariness of Damage Cap Limitations

Damages caps were originally promulgated in the hopes of providing guidance to jurors and to encourage consistency.<sup>161</sup> The caps provide parameters that are particularly useful when juries are prone to rely solely on their own moral predilections of “fair compensation” and “reasonableness” to determine pain and suffering damages without having a more definite guide.<sup>162</sup> Although proponents of damage caps often use the arbitrariness of jury awards as the primary justification behind the caps, the caps themselves are just as arbitrary as the damage awards the caps seek to control.<sup>163</sup> Accordingly, a wide range of damage caps exists—from \$150,000 in Texas<sup>164</sup> to \$1,000,000 in Wisconsin.<sup>165</sup> This range is particularly unsettling since damage caps most drastically limit recovery in the cases with the most severe harm.<sup>166</sup>

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<sup>159</sup> Compare Geistfeld, *supra* note 138, at 709 (finding damage caps are a form of unfairness in themselves because studies show that caps do not affect all tort cases equally, but instead are targeted and applied most drastically on victims with the most severe injuries), with W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT’L REV. L. & ECON. 203, 214–16 (1988) (describing study of over 10,000 products liability claims closed by 23 insurance companies between mid-1976 and mid-1977). The data shows that the most severe injuries involve inadequate rather than excessive damages awards. *Id.*

<sup>160</sup> See *supra* text accompanying notes 156–159.

<sup>161</sup> Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 Case W. RES. L. REV. 197, 203 (1993) (citing Edward C. Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL. ADVOC. 317, 329 (1986)); see also James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 176 (1991) (citing Jeffery O’Connell, *THE LAWSUIT LOTTERY* 8–9 (1979), which notes that plaintiffs are generally under or over compensated because “[t]he operation of the tort system is akin to a lottery”). *But see* Philip J. Hermann, *Injured? How to Get Every Dollar You Deserve*, 116–25 (1990) (asserting that jury awards are predictable because juries award damages in accordance with previous awards for similar claims and follow predictable patterns, and because valid tables for injury values and verdict outcomes are available).

<sup>162</sup> Bovbjerg, *supra* note 152, at 912 (quoting Dobbs, *supra* note **Error! Bookmark not defined.**).

<sup>163</sup> Edward C. Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL. ADVOC. 317, 322 (1986) (finding that proponents assert that procedural discretion also contributes to this arbitrariness); Jerry J. Phillips, *To Be or Not to Be: Reflections on Changing Our Tort System*, 46 MD.L.REV. 55, 60 (1986) (“[a] fixed damage figure . . . is as arbitrary as the uncertainty in amount of recovery it seeks to cure”); see *infra* notes 178–180 and accompanying text.

<sup>164</sup> TEX. STAT. 4590i, §11.03 (1993) (currently imposing a limit of \$500,000 on total awards in an action on a health care liability claim [§ 11.02(a)] with a proposed alternative of \$150,000 on non-economic damages only).

<sup>165</sup> WIS.STAT.ANN. § 893.55 (West Supp.1992).

<sup>166</sup> See Bovbjerg, *supra* note 152, at 957–58.

In April 2014, a Miami jury found bullying harm so egregious the conduct warranted a verdict of \$5.25 million in favor of a young boy who was being repeatedly sexually abused by an older classmate.<sup>167</sup> The victim, now ten years old, told the jury he was abused in the bathrooms, forced to perform sex acts, and threatened—but the school just did not believe him.<sup>168</sup> The school was found liable for failure to protect the boy after numerous reports of abuse,<sup>169</sup> and the jury returned a \$5.25 million verdict.<sup>170</sup> Even though his trial is over, Florida law requires this child face yet another legal obstacle on appeal when an application of the statutory damage cap could force him to forego almost ninety-four percent of recovery—\$4,950,000.<sup>171</sup> The Florida damage cap statute mandates the relinquishment of this boy’s compensation.<sup>172</sup> This statute should be amended immediately so this boy, and other victims of bullying, may be fully redressed and to ensure that Florida’s arbitrary damage cap will no longer prevent legitimate damage awards from reaching the pockets of injured bully victims.<sup>173</sup>

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<sup>167</sup> Mary Ann Martinez, *Jurors Award \$5.25M In Charter School Sex Abuse Trial*, CBS MIAMI, April 15, 2014, at <http://miami.cbslocal.com/2014/04/15/deliberations-resume-in-charter-school-sex-abuse-trial/>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY’S L.J. 797, 825 (1987) (finding that decisions regarding the size of exemplary damage awards must be in alignment with the factual determination of the appropriate deterrent necessary to protect the public good—a decision that should be left to the jury to speak on behalf of the community); Ruda, *supra* note 161 at 205–6.

<sup>172</sup> FLA. STAT. § 768.28(5) (2014)

Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000.

<sup>173</sup> Compare Damian Stutz, *Non-Economic-Damage Award Caps in Wisconsin: Why Fardon Was (Almost) Right and the Law Is Wrong*, 2009 WIS. L. REV. 105, 139 (2009) (finding that a medical malpractice damage cap sent a clear message to the citizens of Wisconsin that if they suffer harm through malpractice, they should not expect to receive full compensation for their injuries, thus suggesting damage caps are a violation of public policy), with Dobbs, Hayden & Bublick, *supra* note **Error! Bookmark not defined.** (finding only the most severe tort reform statutes limit or cap recovery of compensatory damages, and a majority of states have adopted these types of statutes). The Florida Legislature has recently revalidated and amended the statute to require and empower the Auditor General to notify the Legislative Auditing Committee if a district school board fails to take corrective. S.B. 1226, 116th Gen. Assemb., Reg. Sess. (Fla. 2014).



#### D. Disparity Between Level of Harm and Damage Awards

There should be a reasonable correlation between the plaintiff actually suffered and the amount of damages.<sup>174</sup> Commonly, victims of bullying bare harsh scars and bruises from physical bullying, but victims also experience even more traumatic harm with diminished mental health, emotional instability, and social issues.<sup>175</sup> Bullying victims often experience difficulty when trying to quantify their harm<sup>176</sup> because their hurt results from withdrawing from society, detaching from relationships, and losing interest in interactive activities.<sup>177</sup> Furthermore, bullying victims are more likely to abuse drugs, experiment with alcohol, skip class, and drop out of school—all nonfinancial harm and non-economic damages.<sup>178</sup> Because Florida’s damage cap limits non-economic damages, the statute directly impedes bullying victims from recovering to the full extent of their injury, with no regard for how vicious, villainous, or vindictive the school district’s conduct might have been.<sup>179</sup>

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<sup>174</sup> *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1263–64 (Fla. 2006) (using factors, derived from federal law, to determine whether a punitive damages award violates constitutional rights); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. Dist. Ct. App. 2012) (same); *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11 (Fla. Dist. Ct. App. 2012) (same). Often referred to as guideposts, these factors question: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Engle*, 945 So. 2d, at 1246.

<sup>175</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7 (“Bullying can affect everyone—those who are bullied, those who bully, and those who witness bullying. Bullying is linked to many negative outcomes including impacts on mental health, substance use, and suicide.”); Philipson, *supra* note 49, at 86 (“[F]or these students, the schoolyard becomes a prison yard for emotional and physical abuse.”). Non-economic damages, such as pain and suffering or loss of enjoyment, are common among victims bullying. U.S. DEP’T OF HEALTH, *supra* note 7.

<sup>176</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 7 (reporting bullying can cause decreased academic achievement and school participation). Grade Point Average (“GPA”) and standardized test scores will diminish as students are more likely to miss, skip or drop out of school if they are being bullied, thus causing a residual affect to society as a whole. *Id.*

<sup>177</sup> *Id.* (expressing kids who are bullied can experience negative physical, school, and mental health issues).

<sup>178</sup> Philipson, *supra* note 49, at 85 (finding that in the short-term, bullied students suffer from headaches, sleeping problems, fear of going to school or to the bathroom, loss of interest in school, and difficulties concentrating).

<sup>179</sup> *E.g.*, FLA. STAT. § 768.28(5) (2012) (allowing the state and its agencies and subdivisions to be liable for tort claims, but not extending liability to include punitive damages); Hubbard, *supra* note 118, at 492 (explaining the

Juries are necessarily designed to examine the surrounding circumstances giving rise to the harm of bully victims and the potential aftereffects of that harm.<sup>180</sup> The value of a non-economic loss cannot be determined in a specific formula, thus, great deference must be given to the jury to estimate a monetary equivalent of a victim's mental and emotional pain and suffering.<sup>181</sup> Jury verdicts are neither erratic nor excessive because the rules of evidence and judge provided jury instructions are strict controls.<sup>182</sup> The Florida damage cap unfairly eliminates the ability for the jury to use their observations to award a verdict over the arbitrary amount of \$300,000—no matter how compelled the jury feels to award more.<sup>183</sup>

### **E. Deterrence and Preventative Measures**

If a school is found liable, compensatory damages function to protect students' rights in two regards—deterrence and prevention.<sup>184</sup> The Florida Supreme Court agrees it is good public policy to favor compensatory damage awards in excess of actual harm incurred to societally deter

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amount of damages for noneconomic injuries—which includes pain and suffering, mental distress, and loss of enjoyment of life—is determined by the jury based on the evidence at trial).

<sup>180</sup> See *supra* note 127–128 and accompanying text; see Question of Fact Definition, Black's Law Dictionary (9th ed. 2009), available at WestlawNext (defining question of fact as a disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial); see RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 8 (2010) (“When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.”).

<sup>181</sup> *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 78 (Fla. Dist. Ct. App. 2013), reh'g denied (Oct. 29, 2013), *review denied*, SC13-2359, 2014 WL 4441205 (Fla. Sept. 9, 2014) (finding that because the trial court jury has a unique opportunity to observe the plaintiff and to hear and consider all the evidence presented throughout trial, the jury is in the best position to evaluate and determine the intensity and weight of the loss and to place a monetary value on that loss).

<sup>182</sup> Hubbard, *supra* note 118, at 493.

<sup>183</sup> FLA STAT. § 768.28(5) (2012) (finding the state, state agencies, and subdivisions can be liable for tort claims in the same manner and to the same extent as a private individual, but liability shall not include punitive damages or complete damages for a claim exceeding \$200,000 or any judgment exceeding \$300,000); RESTATEMENT (SECOND) OF TORTS § 903 (1979) (explaining that when harm is merely monetary, compensatory damages can easily match that amount to place a victim in a position substantially equivalent to the position which he would have been in had no tort been committed). However, when the tort causes harm, such as emotional distress, monetary damages cannot so easily restore the injured person to his previous position. *Id.* Despite the inability to be easily quantified, the emotional scars left from pain and humiliation of bullying should also be encompassed by compensatory damages. *Id.* These damages also give the victim a pecuniary return for what he or she has suffered or will suffer in the future. *Id.*

<sup>184</sup> Hubbard, *supra* note 118, at 446 (finding payment of compensatory damages prevents wrongdoing).

wrongful conduct.<sup>185</sup> The payment becomes a type of specific deterrence, which incentivizes school administration to avoid residual, wrongful conduct.<sup>186</sup> Furthermore, the potential for an award of high compensatory damages provides a general societal deterrent to other entities which have not yet been sued, but may be sued later.<sup>187</sup> Compensatory damages deter wrongful behavior and provide incentives for school administration to go beyond the standard duty of care to mitigate preventable injuries.<sup>188</sup>

The reality of bullying is that children are physically and emotionally unequipped to end the problem without adult interference.<sup>189</sup> The very nature of bullying reduces children victims to fear, freezes their muscles, and renders them unable to adequately defend themselves.<sup>190</sup> Bullying is repetitive,<sup>191</sup> unwanted<sup>192</sup> conduct that creates a social power imbalance amongst

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<sup>185</sup> See, e.g., *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1262, 1264–65 (Fla. 2006); *Owen-Corning Fiberglass Corp. v. Ballard*, 749 So. 2d 483, 486 (Fla. 1999) (“The punitive damage issues in this case are significant and have major public policy ramifications. This was the largest punitive damage verdict awarded by Florida courts, and what is significant to [the court] is that this punishment, by way of punitive damages, is awarded to a nonresident of this state for conduct by the defendant that occurred outside this state.”).

<sup>186</sup> See Hubbard, *supra* note 118, at 446 (suggesting the prevention provides an incentive to avoid wrongful conduct and, even where no wrongdoing is involved, imposing liability is an incentive to reduce injuries not currently preventable by due care by lowering the level of activity, or by seeking innovations that result in new, more cost-effective safety measures); see also John Pankauski et. al., *Punitive Damages Against Fiduciaries: Leaving Hoppe Behind and Allowing Punitive Damages Where Equitable Relief Is Sought, Part II*, FLA. B.J., December 2010, at 40, 42 (borrowing a concept from economics—the deterrent effect—which makes the ‘marginal cost’ of misconduct unprofitable).

<sup>187</sup> Hubbard, *supra* note 118, at 446; Jay Sterling Silver, Torts I Damages Lecture at St. Thomas University School of Law, Miami Gardens, Miami (Mar. 19, 2014) (lecturing that damages can act as a specific deterrent against the wrongdoer-defendant or as a general deterrent for the public which is furthered by awarding punitive damages).

<sup>188</sup> See *supra* note 187 and accompanying text.

<sup>189</sup> Goldman, *supra* note **Error! Bookmark not defined.** (“The truth is that there are many bullying situations in which the victim cannot simply beat up the bully and end the problem.”).

<sup>190</sup> *Id.* (quoting Barbara Coloroso, international speaker on education).

As severe bullying continues, an element of terror is created. The bullied child is rendered so powerless that she is unlikely to fight back and she will not even tell someone that she needs help. The bully, who can act without fear of retaliation, counts on bystanders to either join in or at least do nothing to stop it.

<sup>191</sup> Dan Olweus, *Recognizing Bullying*, OLWEUS BULLY PREVENTION PROGRAM, (Oct. 12, 2014), [http://www.violencepreventionworks.org/public/recognizing\\_bullying\\_page](http://www.violencepreventionworks.org/public/recognizing_bullying_page) (defining bullying as repetitive—not a one-time event in the hall, but a regular ongoing problem).

<sup>192</sup> *Id.* (finding bullying not to include two-way teasing where both parties are “having fun,” but instead a situation where someone is on the receiving end of taunts and aggression).

students.<sup>193</sup> Without proper prevention or deterrence, the problem becomes perpetual.<sup>194</sup> School anti-bullying policies should be designed to target recidivist behavior and recognize the inability for children to stop the cycle alone.<sup>195</sup> Compensating a victim is a well-established goal of tort law,<sup>196</sup> and it is commonly agreed that tort compensation should carve out specific equitable treatment for some classes of people—such as women, the elderly, and children.<sup>197</sup>

Further, a greater societal interest may be curtailed by perpetual bullying because students who are repeat bullies by age eight have a one-in-four chance of having a criminal record by age twenty-six, and their ability to beneficially contribute to society exponentially decays.<sup>198</sup> Almost thirty percent, 5.7 million, of United States youth either bully, are bullied, or both.<sup>199</sup> Though, anti-bullying policies are proscribed in Florida student handbooks,<sup>200</sup> damages additionally serve to prevent recidivist<sup>201</sup> conduct at a young age.<sup>202</sup>

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<sup>193</sup> *Id.* (bullying takes place in the context of a power imbalance such as: a bigger kid against a smaller kid, multiple kids against a single kid, or a kid with more social capital against a kid with less social capital).

<sup>194</sup> See Anat Brunstein Klomek et al., *The Association of Suicide and Bullying in Childhood to Young Adulthood: A Review of Cross-Sectional and Longitudinal Research Findings*, 55 CAN. J. PSYCHIATRY 282, 283 (2010); see also Samantha Neiman et. al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 615 (2012) (finding repeated exposure to bullying is linked to psychological and social relationship problems which can result in feeling of isolation, self-inflicted injuries, or even suicide). School-based intervention and prevention programs frequently fail because schools cannot easily determine what types of conduct constitute bullying and unclear expectations are provided to parents and school personnel. *Id.* at 618.

<sup>195</sup> See Goldman, *supra* note **Error! Bookmark not defined.** (“The truth is that there are many bullying situations in which the victim cannot simply beat up the bully and end the problem.”).

<sup>196</sup> Goldberg, *supra* note 143, at 601 (finding tort law derived from the core idea of redress private wrongs because it empowers victims in particular ways, most importantly the decision to complain about an alleged wrong); Hubbard, *supra* note 118, at 452 (sharing the goals of tort law are pivotal to tort reform because many proposed reforms are supported or attacked in light of a particular goal or that particular goal would be achieved or ignored).

<sup>197</sup> Hubbard, *supra* note 118, at 494 (explaining that middle aged men are well protected to recover economic damages because as a class of people, they tend to have higher amounts of quantifiable, lost income than women and children). See generally Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004) (finding caps on non-economic damages have a significantly adverse impact on women, the elderly, and children).

<sup>198</sup> *Id.* (“It is a lot easier to inculcate kindness and acceptable social behavior into an 8-year-old than an 18-year-old, and the earlier our schools implement social emotional skills building and bullying prevention, the better.”).

<sup>199</sup> Christensen, *supra* note 74, at 546 (citing the National Youth Violence Prevention Resource Center’s Bully Facts and Statistics); Matthew D. Decker, *Comment, Unexcused Absence: A Review of the Needs, Costs, and (Lack of) State Support for Peer Mediation Programs in U.S. Schools*, 2009 J. DISP. RESOL. 485, 490 (citing a study showing that 70% of teachers believed they intervene almost always during bullying situations while only 25% of students concurred with this belief).

## VI: Conclusion

Bullying should not be viewed as an inevitable consequence of childhood, and Florida law should recognize the egregious harm that results from extensive implications of bullying conduct.<sup>203</sup> As a developed society, we cannot tolerate bullying as an inescapable part of childhood.<sup>204</sup> We must take an active, preventative role.<sup>205</sup> Legislation is not the sole weapon against the bullying endemic,<sup>206</sup> but it can be a formidable weapon in the battle against the bully.<sup>207</sup> Because current Florida statutes limit the amount of damages available to bullying victims,<sup>208</sup> the Florida Legislature must amend the statute to extend complete redress for claims against public schools to afford bullying victims the ability to be made whole.<sup>209</sup>

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<sup>200</sup> FLA. STAT. § 1006.147 (2014) (declaring that schools shall adopt a procedure for the prompt investigation of a report of bullying or harassment and the person responsible for the investigation). “The Jeffery Johnston Stand Up For All Kids Act” creates an affirmative duty for teachers, school administrators, counseling staff, and school volunteers to respond to bullying or they may be held liable for causes of action arising from their lack of action. *Id.*

<sup>201</sup> Recidivism Definition, Black’s Law Dictionary (9th ed. 2009), available at Westlaw Next (explaining recidivism to be any tendency to relapse into a criminal activity or behavior).

<sup>202</sup> See Gary Namie, *Results of the 2014 WBI U.S. Workplace Bullying Survey*, WORKPLACE BULLYING INSTITUTE, (Feb. 2014), <http://www.workplacebullying.org/wbiresearch/wbi-2014-us-survey/> (finding as many as a third of employees endure bullying in the workplace as adults); see also Hubbard, *supra* note 118, at 446 (finding the liability for payment of compensatory damages serves the purpose of deterrence and prevention). By creating a probability that school will be held fully liable for their harm, compensatory damages act to incentivize the implementation of school policies and to deter foreseeable bullying harm. *Id.*

<sup>203</sup> Kosse & Wright, *supra* note 59, and accompanying text (urging Congress and state legislatures to have the courage to protect the children and amend Title IX and pass anti-bullying statutes). Further, these authors strongly encouraged that courts have the wisdom to analyze new statutes using their common sense and attention to the level of harm arising from bullying. *Id.*

<sup>204</sup> Weddle, *supra* note 45 at 646 (finding the effects of bullying are well documented and disturbing because they are lasting and debilitating, not only for the victims but also for the bullies themselves and the bystanders).

<sup>205</sup> *Id.* at 652 (demonstrating that despite similarities in populations and surrounding communities, schools vary widely in their abilities to prevent bullying); Valerie E. Besag, *Bullies and Victims in Schools: A Guide to Understanding and Management* 5, 101–02 (1989).

<sup>206</sup> Weddle, *supra* note 45 at 653–54 (2004) (“Strong social control is critical because children who bully other children most often do so when adults who might stop them are either complacent about the behavior or are not around to intervene.”) In schools where rules are enforced, aggressive behavior is consistently confronted so the victims are protected while and the bullies are condemned and students are more likely to embrace values, which make schools’ climates more sensible. *Id.*

<sup>207</sup> Christensen, *supra* note 74, at 558 (saying anti-bullying legislation is necessary to prevent bullying and current and future anti-bullying statutes should be reformed to prevent the behavior and to compensate the victims).

<sup>208</sup> See *supra* note 15 and accompanying text.

<sup>209</sup> Bovbjerg, *supra* note 152, 909–10 (commenting that it is universally agreed that the compensatory goal of tort law is to make the plaintiff “whole”); Zipursky, *supra* note 16, at 695 (stating the theory of “corrective justice” is based on a simple and elegant idea: justice requires when one person has been wrongfully injured by another, the injurer must make the injured party whole).