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# One Strike and You're Out: The Application of Labeling Theory to the New Jersey Anti-Bullying Bills of Rights Act

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Alex Kramer\*

## I. Introduction

How can a country with forty-nine anti-bullying statutes continue to have a significant bullying problem?<sup>1</sup> Though bullying is not a new issue in America,<sup>2</sup> over the past few years, the media has discussed bullying incidents with increased frequency.<sup>3</sup> From stories about students being bullied by students,<sup>4</sup> to stories about students being bullied by teachers,<sup>5</sup> it seems we can never do enough to stop the bullying problem. What are we doing wrong?

At some point, America decided that labeling children as bullies and punishing them was an appropriate response to the problem. But there is something discomfoting about labeling a child as a bully. Children change significantly as they develop and grow, so attaching a label with any permanency is inherently misguided.<sup>6</sup> A label that sticks can lead teachers, parents, and peers

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<sup>1</sup> JAMES C. HANKS, *SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW* 1 (Leslie Kerosa ed., 2012). Montana is the only state without anti-bullying laws. *Montana Anti-Bullying Laws and Policies*, STOPBULLING.GOV, <http://www.stopbullying.gov/laws/montana.html> (last visited Feb. 8, 2014).

<sup>2</sup> Samantha Neiman, Brandon Robers & Simone Robers, *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 604 (2012) (“Historically, school bullying has not received a great deal of attention from academic researchers, and policy-makers or the general public.”).

<sup>3</sup> See Jamie Gumbrecht, *Are We Too Quick to Cry ‘Bully’?*, CNN (Oct. 8, 2013), <http://www.cnn.com/2013/10/04/living/schools-bullying-definition-overuse> (arguing that the word “bully” has been overused in the past few years and applied to many different situations); see also Neiman, Robers & Robers, *supra* note 2, at 604 (“Recently however, the topic has seen a resurgence of attention from school personnel, researchers, policy-makers and the general public as several isolated cases of student suicide have garnered national media attention.”).

<sup>4</sup> See *N.J. School District to Pay \$60k to Former Bullied Student*, COURIER-POST (Sept. 19, 2013), <http://www.courierpostonline.com/article/20130920/NEWS02/309200028/> (discussing a \$60,000 reward to a former student from the Old Bridge Board of Education for not effectively handling the student’s allegations of being bullied by another student).

<sup>5</sup> See John Mooney, *State’s Tough New Anti-Bullying Legislation Isn’t Just For Kids*, NJ SPOTLIGHT (Aug. 7, 2013), <http://www.njspotlight.com/stories/13/08/06/state-s-tough-new-anti-bullying-law-isn-t-just-for-kids/> (describing an allegation that a teacher made a student eat food from the trash); see also *K.T. v. Bd. of Educ. of Deerfield, N.J. DEP’T OF EDUC.* (July 30, 2013), <http://www.state.nj.us/education/legal/commissioner/2013/jul/278-13.pdf> (stating that a teacher made a student eat a bagel out of the trash in front of other students in the classroom).

<sup>6</sup> Jill Vetstein, *Labeling Bullies is Like Labeling a Child as a Permanent Mistake Maker*, NURTURINGPARENTSANDTEACHERS.COM (Apr. 1, 2013), <http://www.nurturingparentsandteachers.com/labeling-bullies-is-like-labeling-a-child-as-a-permanent-mistake-maker/> (arguing that the bully label sets children up for failure).

to treat a child differently than his or her classmates—a practice which can have long-lasting effects on the psyche of the child.<sup>7</sup> Moreover, children who are labeled as bullies may start to behave in accordance with the label, and act out even more than before they were labeled.<sup>8</sup> Labeling theory, a sociological account about deviance, explores this series of events.<sup>9</sup>

No federal law explicitly deals with bullying,<sup>10</sup> but most states have enacted their own legislation to address the problem.<sup>11</sup> None of the forty-nine states that passed anti-bullying laws, however, cited labeling theory as a major consideration.<sup>12</sup> The failure to consider this theory is short-sighted because the labels imposed by anti-bullying laws can have long-term effects.<sup>13</sup> When legislatures consider passing or amending anti-bullying laws, the consequences of labeling theory should be considered and discussed.

In 2011, the New Jersey legislature passed the New Jersey Anti-Bullying Bill of Rights Act<sup>14</sup> (“the Act”) in response to several bullying incidents reported in the media,<sup>15</sup> including the suicide of Rutgers University student Tyler Clementi.<sup>16</sup> The Act is cited as the toughest anti-

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<sup>7</sup> Cf. HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 179 (1963) (describing how labeling makes it harder for the labeled person to “continue in routines of everyday life and thus provoke him to ‘abnormal actions’”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> The idea of federal anti-bullying legislation has come up before, but to no avail. See, e.g., H.R. 4776, 108th Cong. (2004), available at <http://www.govtrack.us/congress/bills/108/hr4776/text> (suggesting an amendment to the Safe and Drug-Free Schools and Communities Act to include bullying harassment prevention programs).

<sup>11</sup> See HANKS, *supra* note 1, at 1.

<sup>12</sup> Cf. *Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/key-components/index.html> (last visited Feb. 8, 2014) (citing eleven key components to anti-bullying laws throughout the states).

<sup>13</sup> See generally BECKER, *supra* note 7.

<sup>14</sup> N.J. STAT. ANN. § 18A:37-13.2 (West 2013).

<sup>15</sup> See Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, N.Y. TIMES (Aug. 30, 2011), <http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html?pagewanted=all> (attributing the passage of the New Jersey Anti-Bullying Bill of Rights Act to public outcry following Clementi’s suicide).

<sup>16</sup> Tyler Clementi was a victim of cyber-bullying. His roommate used a webcam to broadcast Clementi’s sexual acts with another man. Clementi committed suicide after hearing of his roommate’s second attempt to broadcast his acts and after much ridicule. TYLER CLEMENTI FOUNDATION, <http://www.tylerclementi.org/tylers-story/> (last visited Feb. 8, 2014).

bullying legislation<sup>17</sup> in the country.<sup>18</sup> Because of this unique status, the manner in which New Jersey implements its law will set a standard for the other forty-eight states that have anti-bullying legislation.<sup>19</sup> This Comment argues that legislators should consider the implications of labeling theory when they pass or amend anti-bullying legislation. In particular, this Comment examines the New Jersey Anti-Bullying Bill of Rights Act<sup>20</sup> from a socio-legal perspective, using labeling theory as the lens for analysis. The use of a socio-legal analysis is premised on the idea that bullying is not just a legal problem, but also a social problem.<sup>21</sup> Thus, insight from sociology—specifically, labeling theory—offers ways for the law to deal with the bullying problem.<sup>22</sup>

Part II of this Comment explores labeling theory and how it applies to the bullying context. Part III discusses the legislative history and structure of the New Jersey Anti-Bullying Bill of Rights Act. Part IV applies labeling theory to the Act, and Part V argues that we should change our approach to bullying. Finally, Part VI concludes.

## II. Labeling Theory

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<sup>17</sup> See Hu, *supra* note 15 (“The law . . . is considered the toughest legislation against bullying in the nation.”); see also HANKS, *supra* note 1, at 20–21 (“The toughness of the Anti-Bullying Bill of Rights Act . . . is derived in large part from its procedures.”); see also *id.* at 28 (“Other states’ laws vary in their stringency. The laws in Massachusetts, New Hampshire, Iowa, Florida, and Oregon have requirements that are also fairly extensive . . . . By contrast, Kansas, Georgia, and South Dakota do not require much more than the adoption of a policy.”).

<sup>18</sup> Bullypolice.org., a watch-dog organization devoted to reporting on state anti-bullying laws and advocating on behalf of bullied children, gave New Jersey’s Act a grade of “A++” in 2010. According to the grading criteria, to achieve an “A++,” a state’s statute must include a both cyberbullying clause and a bullying victim’s rights clause about getting free counsel (among other requirements). BULLYPOLICE.ORG, <http://www.bullypolice.org/grade.html> (last visited Feb. 8, 2014).

<sup>19</sup> See generally HANKS, *supra* note 1, at 21 (“Many antibullying [sic] statutes require local school districts to adopt a policy prohibiting bullying. New Jersey’s Anti-Bullying Bill of Rights Act does so as well, but the law does so much more comprehensively than most statutes.”).

<sup>20</sup> N.J. STAT. ANN. § 18A:37-13.2 (West 2013).

<sup>21</sup> See, e.g., 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, 562 (2009) (“If the legal system offers little support for victims of bullying, schools need to find alternative ways of preventing bullying and protecting their students from bullying behavior.”).

<sup>22</sup> Scholars have commented on a need for a different strategy for dealing with bullying. Cf. David P. Farrington & Maria M. Ttofi, *Reducing School Bullying: Evidence-Based Implications for Policy*, 38 CRIME & JUST. 281, 325 (2009) (“New antibullying initiatives should go beyond the scope of the school and target wider systemic factors such as the family.”).

Throughout the years, labeling theory has been through various iterations,<sup>23</sup> but the core foci have remained the same: the processes by which a person is labeled as deviant, and the effects of the deviant label on that person.<sup>24</sup> Howard Becker, an early proponent of labeling theory, illustrated the negative chain of events resulting from labeling in the criminal context:

To be labeled a criminal one need only commit a single criminal offense, and this is all the term formally refers to. Yet, the word carries a number of connotations specifying auxiliary traits characteristic of anyone bearing the label. A man who has been convicted of housebreaking and thereby labeled criminal is presumed to be a person likely to break into other houses; the police, in rounding up known offenders for investigation after a crime has been committed, operate on this premise. Further, he is considered likely to commit other kinds of crimes as well, because he has shown himself to be “without respect for the law.” Thus, *apprehension for one deviant act exposes a person to the likelihood that he will be regarded as deviant or undesirable in other respects.*<sup>25</sup>

Drs. Charles Thomas and Donna Bishop articulated the consequences of labeling in a similar way:

The attribution of stigmatizing labels, particularly when that attribution process involves formal agents of social control, initiates a social process that results in altered self-conceptions, a reduction in the availability of conventional opportunities, a restructuring of interpersonal relationships, and an elevated likelihood of involvement in the real or imagined conduct which stimulated initial intervention efforts.<sup>26</sup>

Labeling thus has significant internal and external effects. When individuals are labeled as deviant, other people treat them like deviants, and the individuals are therefore more likely to behave in accordance with the label.

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<sup>23</sup> *Id.* at 1225–26. There have been several versions of labeling theory throughout the years, including a conflict version, functionalist version, symbolic interactionist version, and learning theory version. *Id.*

<sup>24</sup> *Id.* at 1226.

<sup>25</sup> *Id.* at 33 (emphasis added) (analyzing Everett Hughes, *Dilemmas and Contradictions of Status*, 50 AM. J. SOC. 353, 353–59 (1945)).

<sup>26</sup> Charles W. Thomas & Donna M. Bishop, *The Effect of Formal and Informal Sanctions on Delinquency: A Longitudinal Comparison of Labeling and Deterrence Theories*, 75 J. CRIM. L. & CRIMINOLOGY 1222, 1226 (1984).

Though some scholars have criticized labeling theory throughout the years,<sup>27</sup> studies have continued to rely on it. Recently, labeling theory has been empirically tested in various contexts.<sup>28</sup> Dara Shifrer published a study in 2013 about how parents and teachers treated tenth grade students labeled as having learning disabilities.<sup>29</sup> Applying labeling theory, Shifrer hypothesized that teachers would have lower expectations for students who had learning disabilities than for those who otherwise performed equally but were not labeled with learning disabilities.<sup>30</sup> Shifrer also expected teachers to be “more likely to perceive disabilities” in students who were labeled as having learning disabilities.<sup>31</sup> The study used data from the Education Longitudinal Survey of 2002, which included 11,740 students, and concluded that “teachers and parents hold significantly lower educational expectations for adolescents labeled with [learning disabilities] than they do for similarly achieving and behaving adolescents not labeled with disability, and these lower expectations contribute to labeled adolescents’ lower educational expectations for themselves.”<sup>32</sup> Moreover, the study found that the label not only dictated the parents’ and teachers’ expectations of the students, but also negatively affected the students’ own expectations of themselves.<sup>33</sup> This

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<sup>27</sup> Howard Becker recognized that labeling theory did not have all of the answers. See BECKER, *supra* note 7, at 179. For example, Becker noted that labeling theory does not offer the sole answer to the etiological question of deviance. *Id.* Becker wrote, “[t]he degree to which labelling [sic] has such effects is, however, an empirical one, to be settled by research into specific cases rather than by theoretical fiat.” *Id.* Other sociologists have criticized labeling theory for its “problem of limited applicability,” for “its overemphasis upon official as opposed to unofficial reactions to deviance.” Joseph A. Scimecca, *Labeling Theory and Personal Construct Theory: Toward the Measurement of Individual Variation*, 68 J. CRIM. L. & CRIMINOLOGY 652, 652 (1977) (addressing the criticisms of labeling theory that have developed).

<sup>28</sup> See Dara Shifrer, *Stigma of a Label: Educational Expectations for High Schools Students Labeled with Learning Disabilities*, 54 J. OF HEALTH & SOC. BEHAV. 462, 464 (2013); see also Sarah Mustillo, Kristen Budd & Kimber Hendrix, *Obesity, Labeling, and Psychological Distress in Late-Childhood and Adolescent Black and White Girls: The Distal Effects of Stigma*, 76 SOC. PSYCHOL. Q. 268, 271 (2013).

<sup>29</sup> See Shifrer, *supra* note 28, at 464. The learning disability label was imposed by the school. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 462.

<sup>32</sup> *Id.* at 469. The study noted that the learning disability label had a much smaller effect on the parents’ expectations than it did on the teachers’, probably because the label manifested itself in the school context and teachers conducted the evaluations of students that led to the learning disability label. *Id.* at 474, 476.

<sup>33</sup> See Dara Shifrer, *Stigma of a Label: Educational Expectations for High Schools Students Labeled with Learning Disabilities*, 54 J. OF HEALTH & SOC. BEHAV. 462, 474 (2013).

result is consistent with labeling theory, which suggests that students will internalize the perceptions of those around them.<sup>34</sup>

Bullying and learning disabilities are not completely congruent concepts, since professionals rely upon objective measures to identify learning disabilities, while no similar measures exist in the bullying context.<sup>35</sup> Nevertheless, like learning disabilities, the bully label is often imposed in the school context, which illustrates why we should be concerned about teachers labeling students as bullies.<sup>36</sup> That label, like the label of “learning disabled,” can negatively affect teacher and parental expectations, as well as students’ perceptions of themselves.

Labeling theory has also been tested outside of the school context. Sarah Mustillo, Kristen Budd, and Kimber Hendrix published a study in 2013 that used modified labeling theory to analyze the short-term and long-term psychological effects of the “obese” label and accompanying stigma on white and black girls aged nine to twenty-one.<sup>37</sup> Modified labeling theory posits that “the prejudices of other people may be solely anticipated by the individual with the stigmatizing condition for identity to be susceptible to negative outcomes. No direct action by others is necessary to produce harm.”<sup>38</sup> The study used two methods to determine psychological distress:

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Though certain measures are relied upon to diagnose learning disabilities, there is a great deal of criticism in the psychology field regarding the accuracy and consistency of the diagnostic measures used. See Shifrer, *supra* note 28, at 464 (explaining the problems with learning disability diagnostic criteria).

<sup>36</sup> The potential negative consequences of labeling or categorizing children based upon learning problems have been addressed by other researchers as well. See generally Madeleine C. Will, *Educating Children with Learning Problems: A Shared Responsibility*, 52 *EXCEPTIONAL CHILDREN* 411 (1986), available at <http://eden.rutgers.edu/~nork/SNS/Educating%20Children%20with%20learning%20problems.pdf> (“[R]ather than emphasizing categorization or labeling . . . children and youth with special learning needs should be able to receive instruction that is tailored to their specific and individual needs, without suffering then negative effects of social stigma.”); see also Steve Graham & Ann Dwyer, *Effects of the Learning Disability Label, Quality of Writing Performance, and Examiner’s Level of Expertise on the Evaluation of Written Products*, 5 *J. OF LEARNING DISABILITIES* 317, 317–18 (1987) (exploring how the learning disability label could affect how examiners grade essays).

<sup>37</sup> See Mustillo, Budd & Hendrix, *supra* note 28, at 271, 273.

<sup>38</sup> *Id.*

one that measured depression symptoms<sup>39</sup> and one that measured stress.<sup>40</sup> The depression scale consisted of twenty questions that “assess[ed] how often during the previous week subjects experienced depressive symptoms, such as not being able to shake the blues, feeling depressed, feeling too tired to do things, [and] feeling sad.”<sup>41</sup> The components of the stress scale overlapped with the depression scale and also “assess[ed] the degree to which situations in one’s life [were] perceived as stressful.”<sup>42</sup>

Mustillo, Budd, and Hendrix found that labeling by both peers and parents had similar effects on the psychological distress of white girls.<sup>43</sup> They also found that the stigma of being overweight affected white girls more than black girls.<sup>44</sup> For white girls, “both obesity and mental health issues persisted through time . . . obesity at each wave was significantly associated with obesity at the next wave and psychological distress at each wave was significantly associated with psychological distress at the next wave.”<sup>45</sup> But for black girls, the study “found only short-term effects of obesity on distress through parent and friend labeling and only at ages 11 and 12 . . . [and] there were no long-term effects.”<sup>46</sup>

The Mustillo, Budd, and Hendrix study contributes to the labeling theory literature because it illustrates the short-term and long-term psychological impact of the obesity label imposed by peers and parents on female children and adolescents.<sup>47</sup> Applied to the bullying context, this study

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<sup>39</sup> This measure was called the Center for Epidemiological Studies Depression Scale or CES-D. *Id.* at 275.

<sup>40</sup> This measure was called the Perceived Stress Scale, or PSS. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Sarah Mustillo, Kristen Budd & Kimber Hendrix, *Obesity, Labeling, and Psychological Distress in Late Childhood and Adolescent Black and White Girls: The Distal Effects of Stigma*, 76 SOC. PSYCHOL. Q. 268, 283–84 (2013).

<sup>44</sup> *Id.* at 283. According to the study, one reason for the racial discrepancy may have been because of a difference in obesity or body image acceptance among different racial groups. Specifically, the authors cited studies finding that “black adolescents are not as affected by the Western thin ideal.” *Id.* at 284.

<sup>45</sup> *Id.* at 281.

<sup>46</sup> *Id.* at 283.

<sup>47</sup> *Id.*



illustrates that the bully label can have a substantial psychological impact on the labeled person over time, including symptoms of stress and depression. Like learning disabilities, bullying and obesity are not perfectly parallel concepts; this study is still significant, however, because it warns that labeling children and adolescents can have short-term and long-term consequences.<sup>48</sup> This study also demonstrates the impact that peer and parent labeling can have on a child, which is another factor to consider when addressing the bullying problem or anti-bullying legislation.

### III. The New Jersey Anti-Bullying Bill of Rights Act

The New Jersey Anti-Bullying Bill of Rights Act went into effect on September 1, 2011.<sup>49</sup> In passing the Act, the New Jersey legislature noted that 32 percent of students aged twelve through eighteen were bullied in the previous school year.<sup>50</sup> Furthermore, the legislature found that the percentage of students bullied in New Jersey was 1 percent higher than the national median.<sup>51</sup> Finally, the legislature noted that continuous school bullying led to student suicides across the country, including in New Jersey.<sup>52</sup> As a result of these findings, the New Jersey legislature passed “the toughest legislation against bullying in the nation.”<sup>53</sup>

These findings prompted the legislature to devise a comprehensive statute with a detailed definition of bullying. According to the Act, “harassment, intimidation or bullying” [hereinafter “bullying”] means:

[A]ny gesture, any written, verbal or physical act, or any electronic communication, *whether it be a single incident or a series of incidents*, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race,

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<sup>48</sup> *Id.*

<sup>49</sup> N.J. STAT. ANN. § 18A:37-13.1 (West 2013).

<sup>50</sup> § 18A:37-13.1(a) (West 2013) (citing a 2009 United States Department of Justice and Education report).

<sup>51</sup> § 18A:37-13.1(b) (West 2013).

<sup>52</sup> *Id.*

<sup>53</sup> Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, N.Y. TIMES, Aug. 30, 2011, available at [http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html?\\_r=1&pagewanted=all#](http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html?_r=1&pagewanted=all#).

color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . . .<sup>54</sup>

The scope of the Act thus includes a wide range of activities, despite being limited to the school context.

When analyzing any anti-bullying legislation, one primary concern is how the law defines bullying and, in particular, how many incidents are necessary before a child can be labeled a bully.<sup>55</sup> In New Jersey, the definition of bullying requires only a single incident to fall within the parameters of the statute.<sup>56</sup> Other states also label children as bullies after just a single incident.<sup>57</sup> For example, Iowa’s anti-bullying statute defines bullying to include “any electronic, verbal, or physical act or conduct.”<sup>58</sup> New Hampshire requires “a single significant incident or a pattern of incidents.”<sup>59</sup> Georgia’s statute refers to “an act,”<sup>60</sup> and Kansas’s statute reads “[any] intentional gesture or any intentional written, verbal, electronic, or physical act.”<sup>61</sup>

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<sup>54</sup> § 18A:37-14 (West 2013) (emphasis added). The Act contains additional requirements for an action to be considered bullying, including:

(a) a reasonable person should know, under the circumstances, [that the gesture/act/communication] will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property; (b) [the gesture/act/communication] has the effect of insulting or demeaning any student or group of students; or (c) [the gesture/act/communication] creates a hostile educational environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student. *Id.*

<sup>55</sup> *Cf. Bullying Definitions in State Anti-Bullying Statutes*, NSBA.ORG, (Feb. 2012),

<http://www.nsba.org/SchoolLaw/Issues/Safety/Definitions.pdf> (compiling state statute definitions of bullying).

<sup>56</sup> § 18A:37-14 (West 2013).

<sup>57</sup> *See infra* notes 58–61.

<sup>58</sup> IOWA CODE ANN. § 280.28(2)(b) (West 2013).

<sup>59</sup> N.H. REV. STAT. ANN. § 193-F:3(1)(a) (West 2013).

<sup>60</sup> GA CODE ANN. 20-2-751.4(a) (West 2013).

<sup>61</sup> KAN. STAT. ANN. 72-8256(a)(1) (West 2013).

Some states, however, require more than one incident before a student can be officially labeled a bully.<sup>62</sup> Massachusetts defines bullying as “the repeated use by one or more students of a written, verbal, or electronic expression or a physical act or gesture or any combination thereof.”<sup>63</sup> South Dakota refers to bullying in its statute as a “pattern of repeated conduct,”<sup>64</sup> and Florida’s statute defines bullying as “systematically and chronically inflicting hurt or psychological distress.”<sup>65</sup> The number of incidents required to constitute a bullying offense is important under labeling theory because it determines how readily children are saddled with the “bully” label.<sup>66</sup>

Another important aspect of the New Jersey Anti-Bullying Bill of Rights Act is its enforcement procedure.<sup>67</sup> The Act institutes a mandatory reporting structure, requiring:

[A] member of a board of education, school employee, contracted service provider, student or volunteer who has witnessed, or has reliable information that a student has been subject to, harassment, intimidation or bullying *shall* report the incident to the appropriate school official designated by the school district’s policy, or to any school administrator or safe schools resource officer, who *shall* immediately initiate the school district’s procedures concerning school bullying.<sup>68</sup>

This mandatory reporting provision describes who must report incidents of bullying and what procedures administrators should follow to address bullying incidents.<sup>69</sup> The Act also

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<sup>62</sup> See *infra* notes 63–65.

<sup>63</sup> MASS. GEN. LAWS ANN. ch.71 § 370(a) (2010), available at <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section370> (last visited Feb. 8, 2014).

<sup>64</sup> S. 130, Legis. Assemb., 87th Sess. § 2 (S.D. 2012), available at <http://legis.state.sd.us/sessions/2012/Bills/SB130ENR.pdf>.

<sup>65</sup> FLA. STAT. ANN. 1006.147(3)(a) (West 2013).

<sup>66</sup> See generally BECKER, *supra* note 7.

<sup>67</sup> N.J. STAT. ANN. § 18A:37-16(b) (West 2013).

<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Id.*

provides some protections,<sup>70</sup> such as immunity, for those who report an act of bullying,<sup>71</sup> and punishes individuals who do not report such acts.<sup>72</sup> But the mandatory reporting requirement,<sup>73</sup> coupled with the one incident requirement,<sup>74</sup> put teachers and administrators in a tough position. Under a zero-tolerance policy, teachers who witness an act that falls within the statutory definition of bullying in New Jersey must report it. Yet, if teachers know that a single act of bullying triggers the statute, they may be conflicted over whether to get the student in trouble. At the same time, teachers are likely to report incidents either because they feel duty-bound to do so or because they worry that they will be morally culpable if they decide not to report a non-serious incident and a serious bullying offense then occurs.

In states that require more than one act to constitute bullying, however, teachers will be more comfortable reporting the behavior and intervening to prevent the situation from snowballing into a full-blown bullying problem.<sup>75</sup> This low-level sort of intervention can occur without the use of any label. But mandatory reporting, especially when combined with the one incident requirement, means the bully label will be frequently invoked.<sup>76</sup>

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<sup>70</sup> § 18A:37-16(c) (West 2013) (“A member of a board of education or a school employee who promptly reports an incident of . . . bullying, to the appropriate school official . . . is immune from a cause of action for damages arising from any failure to remedy the reported incident.”).

<sup>71</sup> § 18A:37-16(d) (West 2013) (“A school administrator who receives a report of . . . bullying from a district employee, and fails to initiate or conduct an investigation, or who should have known of an incident of . . . bullying and fails to take sufficient action to minimize or eliminate the . . . bullying, may be subject to disciplinary action.”).

<sup>72</sup> § 18:37-16(d) (West 2013).

<sup>73</sup> N.J. STAT. ANN. § 18A:37-16(b) (West 2013).

<sup>74</sup> § 18A:37-14 (West 2013).

<sup>75</sup> This assumes that since the state defines bullying as requiring more than one incident, a single event has not risen to the level of a “bullying problem.”

<sup>76</sup> Interestingly, the New Jersey Anti-Bullying Bill of Rights Act changes information reported on School Report Cards, which now include the number and nature of all reports of harassment, intimidation or bullying. N.J. STAT. ANN. § 18A:7E-3(a)(10) (West 2013). At least one commentator has recommended this reporting mechanism, saying “anti-bullying legislation would also be more effective if each school were required to disclose to the public the number of reported acts of bullying within the previous school year.” Susan Hanley Kossee & 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, 74 (2005). It is unclear whether this incentivizes teachers and administrators to report (and thus look tough on bullying) or not report (because it could affect the reputation of the school and deter parents from sending their children to that school). Kossee and Wright posit that public reporting would be beneficial for creating a reputation for safety in a school. *Id.* “Doing so would help foster a safer school environment for students by

The ultimate result is that more students will be labeled as bullies, which is undesirable. For example, in early 2013, a fourth grade boy in Tenafly, New Jersey was labeled as a bully for truthfully pointing out that his classmate had lice.<sup>77</sup> The boy, L.L., told another student that a female classmate dyed her hair because she had lice.<sup>78</sup> As it turns out, the girl did have lice, and yet, the Commissioner of Education found that the boy engaged in behavior constituting bullying and punished him.<sup>79</sup> It is unlikely that the legislature had students like L.L. in mind when they passed the Act.<sup>80</sup> Instead, the Act was aimed at cracking down on bullying incidents that might result in “bullycides”—suicides resulting from bullying<sup>81</sup>—which had been reported by the media with great frequency at the time the Act was passed.<sup>82</sup> Though the legislature was trying to address a serious problem by passing the Act, the implications of labeling theory demonstrate the need for a different approach to the bullying problem.

#### IV. The Socio-legal Approach to the Act

The application of labeling theory to the New Jersey Anti-Bullying Bill of Rights Act is an interdisciplinary socio-legal approach and suggests at least two ways to significantly improve the Act. First, we must be careful about setting the initial threshold for determining if and when a

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forcing school officials to take reported acts of bullying seriously or else face the reputation of being characterized by members of the local community as an ‘unsafe’ school.” *Id.* They also hypothesize that, “If such a poor reputation were to persist for several years, surely many parents would either withdraw their child from enrollment in the school or otherwise enroll their child in another, safer school.” *Id.*

<sup>77</sup> See *W.C.L. v. Bd. of Educ. of Tenafly*, N.J. DEP’T OF EDUC. (Jan. 10, 2013), <http://www.state.nj.us/education/legal/commissioner/2013/jan/15-13.pdf>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The student’s punishment was to read a book; his parents still wanted the incident removed from his record. *Id.* Though the punishment appears lenient, the mere fact that the boy’s conduct fell within the confines of the statute and resulted in any punishment is the real issue.

<sup>80</sup> See *supra* notes 50–52.

<sup>81</sup> *Bullycide*, BULLYINGSTATISTICS.ORG, <http://www.bullyingstatistics.org/content/bullycide.html> (“[B]ullycide is suicide caused from the results of bullying.”) (last visited Feb. 8, 2014).

<sup>82</sup> *Id.* (“With so many recent cases of suicide being talked about in the media . . .”).

child should be labeled as a bully.<sup>83</sup> Thus, the definition of bullying in the statute is critical. If a single act is sufficient to trigger the statute, it must be truly significant. If it is not, then the definition of bullying should require more than one incident.<sup>84</sup> Second, and perhaps more importantly, we must determine how long the bully label should last, in light of the stigma that accompanies the label.<sup>85</sup> Since labeling theory recognizes the influence of labels on behavior, we must consider if or when the label should go away.<sup>86</sup>

#### A. One Strike and You're Out: The Single Incident Requirement

The single incident requirement<sup>87</sup> of the Act is problematic in light of labeling theory. Children change considerably while growing up, so it is misguided to label a child in a way that might steer him or her down a certain path.<sup>88</sup> Since the bully label can cause a great deal of harm—whether in the form of students treating the child differently, teachers treating the child differently, or the child taking on the role of a bully more prominently—it follows that labeling theory warns against imposing labels after a single event.<sup>89</sup>

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<sup>83</sup> One of the suggestions offered on [www.stopbullying.gov](http://www.stopbullying.gov) is not to label children as “bullies” or “victims.” *The Roles Kids Play*, STOPBULLYING.GOV, <http://www.stopbullying.gov/what-is-bullying/roles-kids-play/index.html#importance> (last visited Feb. 8, 2014). The author says that there may be unintended consequences to these labels, such as “send[ing] a message that the child’s behavior cannot change, fail[ing] to recognize the multiple roles children might play in different bullying situations, and disregard[ing] other factors contributing to the behavior such as peer influence or school climate.” *Id.* These suggestions are closely aligned with applying labeling theory to the problem of bullying, as the author recognizes the dangers of the “bully” label (and the “victim” label), and thus encourages readers to avoid these labels. *Id.*

<sup>84</sup> *Cf.* N.J. STAT. ANN. § 18A:37-14 (West 2013). The statute currently only requires a single incident, but does not require a “significant” event. *Id.*

<sup>85</sup> The New Jersey Anti-Bullying Bill of Rights Act offers no solution to this problem. There is no indication of what the New Jersey legislature would suggest regarding the length of time under which a label of “bully” or a bullying offense should last.

<sup>86</sup> *See generally* BECKER, *supra* note 7.

<sup>87</sup> N.J. STAT. ANN. § 18A:37-14 (West 2013).

<sup>88</sup> *See generally* Vetstein, *supra* note 6.

<sup>89</sup> *See* BECKER, *supra* note 7, at 186 (1963) (“The chief effect of [labeling] theory has been to focus on . . . those sufficiently powerful to make their imputations of deviance stick: police, courts, physicians, school officials, and parents.”). It is intriguing that these groups were mentioned by Becker, as they are the groups often implicated in instances of bullying. Since Becker is concerned about these groups being able to make a label stick more than other groups, it is logical that he would recommend against labeling after the first run-in with these groups.

Labeling a child at a young age is inappropriate because children change but the label does not.<sup>90</sup> To bring the Act in line with labeling theory, the Act should require multiple instances of bullying before a person can be labeled as a bully. Currently, the New Jersey statute contains the language “whether it be a single incident or a series of incidents,” which, as written, can be revised in at least two ways.<sup>91</sup> The New Jersey legislature should only require “a series of incidents,” given the harm that occurs when a child is labeled. Or, even if the legislature just amended the statute to require a “*significant* incident or series of incidents,” the statute would still be better than it is currently. This revision would give teachers and school officials at least some discretion to decide if an incident is serious enough to warrant intervention.

In some instances, a single *significant* bullying incident should be punishable under an anti-bullying statute, if the incident rises to a level that is worthy of punishment. The New Hampshire legislature addressed this in their anti-bullying statute, defining bullying to require “a single *significant* incident or a pattern of incidents.”<sup>92</sup> A statute including *at minimum* the requirement of a single *significant* incident would pass muster under labeling theory,<sup>93</sup> though it is more advisable to require multiple instances of bullying to be labeled a bully, given the stigma associated with the label.<sup>94</sup>

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<sup>90</sup> See Erin Reiney & Susan P. Limber, *Why We Don't Use the Word "Bully" to Label Kids*, STOPBULLING.GOV (Oct. 23, 2013), <http://www.stopbullying.gov/blog/2013/10/23/why-we-don%25E2%2580%2599t-use-word-%25E2%2580%259Cbully%25E2%2580%259D-label-kids> (“Using a label sends a message that the child’s behavior doesn’t change from one situation to the next.”).

<sup>91</sup> N.J. STAT. ANN. § 18A:37-14 (West 2013).

<sup>92</sup> N.H. REV. STAT. 193-F:3(I)(a) (West 2013) (emphasis added).

<sup>93</sup> Though statutes requiring more than one incident to constitute bullying are not formulaic in how many incidents are required, this idea can be conceptualized formulaically. If we compare two statutes, one which requires a single significant incident to be considered bullying, and another which requires a series of incidents, the single significant incident should be “equal” to the series of incidents. Thus, if the problem is looked at strictly formulaically, the significance of a significant event should have to be at least equal to multiple incidents in order to be labeled as a bullying offense.

<sup>94</sup> See BECKER, *supra* note 7, at 179.

How New Jersey decides to revise its “one strike” provision of the statute in accordance with labeling theory will have greater implications for other states as well. Several other states include language in their anti-bullying statutes that requires only a single incident to fall within their respective anti-bullying statutes.<sup>95</sup> Thus, if New Jersey revises its statute to require more than one incident, other states may follow suit.<sup>96</sup> Moreover, since Montana has yet to pass anti-bullying legislation, a revision to the New Jersey statute could impact whatever legislation eventually emerges in Montana.<sup>97</sup>

#### B. How Long Does the Bully Label Last?

Another issue with the Act is that there is no indication of how long the “bully” label remains on a student’s disciplinary record. If the event occurs before the age of majority, can a record of the incident be sealed like a juvenile record?<sup>98</sup> Several commentators have addressed this issue, including Julie O’Connor,<sup>99</sup> who wrote in *The Star-Ledger*, “That’s the real concern for parents. Not the one-day suspension, but how the incident is recorded. The black mark of being labeled a bully, and whether colleges might find out. It is not easy to get a record expunged, and not everyone can afford a costly legal battle.”<sup>100</sup> If we recognize that students will, for better or

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<sup>95</sup> See *supra* notes 58–61.

<sup>96</sup> See *supra* notes 63–65.

<sup>97</sup> See *Montana Anti-Bullying Laws and Policies*, STOPBULLYING.GOV, [http://www.bullypolice.org/mt\\_law.html](http://www.bullypolice.org/mt_law.html) (last visited Feb. 8, 2014). Montana is the only state with an “F” grade on the website because it has no anti-bullying law. *Id.*

<sup>98</sup> See *How to Seal Your Juvenile Records: What Every Juvenile Should Know*, YOUTHLAW.ORG (Apr. 7, 2004), [http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/seal\\_access\\_records/Sealing\\_of\\_JuvenileRecords\\_Handout\\_Alameda.pdf](http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/seal_access_records/Sealing_of_JuvenileRecords_Handout_Alameda.pdf) (providing information regarding sealing juvenile records); see also Sayre Quevedo, *Sealing Juvenile Records Has Benefits and Barriers*, HUFFINGTON POST (Apr. 19, 2012), [http://www.huffingtonpost.com/youth-radio/youth-media-international/sealing-a-juvenile-record\\_b\\_1439194.html](http://www.huffingtonpost.com/youth-radio/youth-media-international/sealing-a-juvenile-record_b_1439194.html) (articulating the costs and benefits of sealing a juvenile record).

<sup>99</sup> Julie O’Connor is an Editorial Member of *The Star-Ledger*. See generally Julie O’Connor, THE STAR-LEDGER, <http://connect.nj.com/user/joconnor/posts.html> (last visited Feb. 8, 2014).

<sup>100</sup> Julie O’Connor, *Are They Really Bullies? – Opinion*, THE STAR-LEDGER (Mar. 24, 2013), [http://www.nj.com/njvoices/index.ssf/2013/03/are\\_they\\_really\\_bullies.html](http://www.nj.com/njvoices/index.ssf/2013/03/are_they_really_bullies.html).



for worse, be labeled as bullies, the next inquiry must be into how long the label should last, and what it will take to make it go away for good. Even if removing an incident from a school record makes the label officially go away, it is not clear how the undocumented effects of the label can be removed. For instance, if the student's slate is wiped clean, students and teachers may nonetheless continue to treat that student differently because they know about the student's past bullying offense, or are aware of his or her reputation. Unfortunately, this issue was not addressed by the New Jersey legislature.

A recent administrative decision in New Jersey tangentially addressed the issue of how long a bullying offense remains on a student's record.<sup>101</sup> In *R.G.B. v. Village of Ridgewood Board of Education*, the father of a minor student challenged the Board of Education's determination that his son engaged in bullying when he called a girl names because of her weight.<sup>102</sup> The father wanted any reference of the incident removed from his child's student record, but the court declined to do so.<sup>103</sup> Because the school district at issue only sent transcripts to colleges and not disciplinary records, the court did not grant the specific remedy requested.<sup>104</sup> The court also did not address what to do if other school districts send disciplinary records to colleges along with the student's transcript, which leaves this area of the law open in New Jersey.<sup>105</sup>

Even if school districts do not send disciplinary records to colleges, Matt Middleton, an Associate Director of Admissions at The College of New Jersey, foresees a different problem.<sup>106</sup> At some point, Middleton thinks, student transcripts may include a separate box regarding bullying

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<sup>101</sup> See *R.G.B. v. Vill. of Ridgewood Bd. of Educ.*, (May 15, 2013),

[http://njlaw.rutgers.edu/collections/oal/html/initial/edu14213-12\\_1.html](http://njlaw.rutgers.edu/collections/oal/html/initial/edu14213-12_1.html).

<sup>102</sup> *Id.* The boy allegedly called the girl "fat," "fat ass," and "horse." *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See O'Connor, *supra* note 100.

issues.<sup>107</sup> If this “bully box” is added to student transcripts, then when schools send transcripts to colleges, they will essentially be sending a transcript *and* a disciplinary record. Though the court refused the requested remedy in *R.G.B.*,<sup>108</sup> the “bully box” addition to a student transcript will give courts a reason to intervene when a high school sends both a transcript and disciplinary record to colleges, in the form of a transcript with a “bully box” on it.<sup>109</sup>

In light of the problems of the single incident requirement and the lack of time in which a bullying offense may be removed from one’s record, there are several approaches that the New Jersey legislature can take to improve the Act. First, research should be conducted on the recidivism rate for bullying or similar behaviors.<sup>110</sup> The results of this empirical research could direct legislators on how to set a time period by which the bullying offense may be expunged.<sup>111</sup> Despite the possible utility of recidivism research for bullying, however, there are a few obstacles to obtaining bullying recidivism data. For instance, if a bullying offense is committed by a minor,

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<sup>107</sup> *Id.*

<sup>108</sup> See *R.G.B. v. Vill. of Ridgewood Bd. of Educ.*, (May 15, 2013), [http://njlaw.rutgers.edu/collections/oal/html/initial/edu14213-12\\_1.html](http://njlaw.rutgers.edu/collections/oal/html/initial/edu14213-12_1.html).

<sup>109</sup> Former criminals looking for employment after a period of incarceration often face an analogous “check the box” situation. See Suzy Khimm, *States Push to Provide Some Ex-felons a Second Chance*, MSNBC (July 21, 2013, 12:01 AM), <http://www.msnbc.com/all-in/states-push-provide-some-ex-felons-secon>. It used to be the case, and still may be the case, that people with criminal convictions were automatically, whether officially or unofficially, disqualified from certain jobs. *Id.* Because of this problem, people with prior convictions proposed that criminal background questions not be asked until the job interview, which would give a former convict an opportunity to talk about the incident from his or her perspective and explain the transgression. *Id.* The movement for the removal of the criminal background question and checkbox is called “ban the box.” *Id.* Rather than create a situation where former criminals or former bullies must forgo opportunities in life because of distant past offenses, we should consider the consequences of the label now, and figure out a way to help those who bully and those who have been bullied so they will not be constantly dragged down by their respective labels.

<sup>110</sup> See Neiman, Robers & Robers, *supra* note 2, at 647 (“There is a lack of public-available state-level data on bullying.”).

<sup>111</sup> See, e.g., Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, BUREAU OF JUSTICE STATISTICS (2002), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1134> available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf> (reporting that within three years of release the rearrest rates were the following: “robbers (70.2%), burglars (74.0%), larcenists (74.6%) motor vehicle thieves (78.8%), possessing/selling stolen property (77.4%), and possessing/using/selling illegal weapons (70.2%). [Also, w]ithin 3 years, 2.5% of released rapists were arrested for another rape, 1.2% of those who had served time for homicide were arrested for homicide.”). Though these crimes are not directly analogous to bullying, researchers can use a similar or analogous offense and look at the short and long term recidivism rates to decide how long the bullying offense, and its subsequent label, should last.

who then reaches the age of majority, that offense may disappear from the record, making the information unavailable to researchers looking to study recidivism rates. Another issue with gathering data on bullying is that there are forty-nine statutes that address bullying: which state's definition would be used? But carefully designed studies could likely overcome these problems.<sup>112</sup>

Even improved anti-bullying legislation will not eradicate the bullying problem, however. Twenty-eight percent of students in grades six through twelve and 20 percent of students in grades nine through twelve have been bullied.<sup>113</sup> Furthermore, 70.6 percent of students and 70.4 percent of school staff have witnessed bullying in their schools.<sup>114</sup> These numbers suggest that we need to think differently about how to solve the bullying problem.

## V. Changing Our Approach to Bullying

According to Dan Kahan, small, carefully crafted measures are often far more successful at effecting change than more draconian approaches.<sup>115</sup> To illustrate, Kahan examines the way American attitudes toward domestic violence changed over time.<sup>116</sup> Though it may be hard to imagine today, Americans used to believe that “occasional violence [was] a normal part of family

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<sup>112</sup> Another way to analyze bullying recidivism rates could be by comparing bullying offenses to similar offenses—take assault, for example—and observing the recidivism rate for *that* offense. By analogizing between similar offenses, we can reasonably predict whether or not a bully will recidivate, and if he or she will likely not recidivate within a period of time, we could eliminate the offense from the record and the accompanying stigma. The problem with this approach, however, is that a child who bullies once and never recidivates will be punished like other bullies who continue to bully; thus, it does not account for children who bully once and then learn from their mistake. It would be unfair to have legislation in place that labels and punishes children for bullying when there is the possibility that it was a one-time occurrence, given the multitude of negative consequences of the bully label. Comparing bullying with other offenses would not capture this distinction, and therefore would not adequately address bullying recidivism in a way that can be applied to expunging the records of one-time offenders.

<sup>113</sup> See *Facts About Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/news/media/facts/#listing> (last visited Feb. 8, 2014). Stopbullying.gov was created by the Secretary of Education and the Secretary of Health and Human Services and serves as a resource for facts and advice about bullying and bullying prevention. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000).

<sup>116</sup> *Id.* at 628.

life.”<sup>117</sup> In fact, a 1980 study found that “[a]lmost a third of American men and a quarter of American women perceive that it is normal for a husband or wife to slap the other ‘on occasion.’”<sup>118</sup> Kahan explains that strict laws that punished offenders simply did not work; police refused to enforce the laws,<sup>119</sup> prosecutors did not proceed with cases, and judges did not impose harsh punishments.<sup>120</sup>

Instead, attitudes toward domestic violence changed through a series of “gentle nudges.”<sup>121</sup> For instance, a publicity campaign that framed domestic violence as “cowardly or unmanly” was one gentle nudge that helped change America’s attitude towards domestic violence.<sup>122</sup> Another nudge was the court’s use of criminal and civil remedies for violating protective orders.<sup>123</sup> Though a judge may have been generally unwilling to enforce the strict domestic violence laws as they were at the time, the judge surely would enforce his or her own orders that were blatantly disregarded.<sup>124</sup> Thus, by approaching the problem of domestic violence with small, deliberate alterations (gentle nudges), rather than sweeping legal reform (hard shoves), America’s attitude toward domestic violence changed drastically over time.<sup>125</sup>

Kahan’s work is particularly relevant to the bullying context because it suggests that gentle nudges can effectively combat bullying.<sup>126</sup> Like domestic violence, there is a certain level of teasing or low-level bullying that people have accepted occurs in society (for better or for

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (citing ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 17, 27 (Dean D. Knudsen & JoAnn L. Miller, eds. 1991) (describing the 1980 study)).

<sup>119</sup> This is one way in which domestic violence and bullying differ. While many people refused to enforce domestic violence laws, there does not seem to be the same level of resistance towards enforcing anti-bullying laws.

<sup>120</sup> See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 628 (2000).

<sup>121</sup> *Id.* at 630.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

worse).<sup>127</sup> Even though most people agree on an acceptable level of conflict amongst children, the current anti-bullying laws do not reflect this understanding because they often implement zero-tolerance policies that do not account for different levels of bullying behavior.<sup>128</sup> By treating all bullying behaviors alike, anti-bullying laws act as hard shoves that exacerbate the bullying problem.<sup>129</sup>

Kahan argues that hard shoves often backfire because people are not willing to enforce laws that they view as too strict.<sup>130</sup> Non-enforcement is not an issue in the bullying context, however, since people are willing to enforce anti-bullying laws. Still, the current anti-bullying approach acts as a hard shove because anti-bullying laws label children as bullies and punish them, making the children more likely to take on the role of a bully and perpetuate the bullying problem.<sup>131</sup> Anti-bullying laws backfire not because people will not enforce them, but because enforcing the anti-bullying laws leads to more bullying by those who are labeled bullies. What we really need to do to combat the bullying problem is to replicate what was done in the domestic violence context: apply a series of gentle nudges.

The open question, however, is what sort of gentle nudges will prove most effective. One possibility is to implement a public information campaign like the one used to reduce the domestic violence problem. Though domestic violence and bullying are not identical issues, the message is the same: America will not stand for either. In the bullying context, campaigns like this are already

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<sup>127</sup> Cf. Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L. J. 827, 831–32 (“Almost all children are teased of course, but a somewhat smaller percentage is actually bullied.”).

<sup>128</sup> For example, the mandatory reporting aspect of the New Jersey Anti-Bullying Bill of Rights Act implements a zero-tolerance approach to bullying. N.J. STAT. ANN. § 18A:37-16(b) (West 2013).

<sup>129</sup> *Id.*

<sup>130</sup> See Kahan, *supra* note 115, at 610.

<sup>131</sup> See *supra* Part II.

being implemented.<sup>132</sup> Many of the anti-bullying campaigns that already exist address the issue from different angles, such as girl-against-girl bullying,<sup>133</sup> or the bullying of members of the LGBT community.<sup>134</sup> Some campaigns offer tips to parents, teachers, and students on how to stop bullying,<sup>135</sup> while others seek justice through the court system for those who have been bullied.<sup>136</sup> Celebrities and public icons have spoken out against bullying<sup>137</sup> in ad campaigns,<sup>138</sup> and people have created documentaries<sup>139</sup> to spread the anti-bullying message far and wide.<sup>140</sup> Since these public campaigns against bullying have only been introduced recently, statistics about their effectiveness are still unavailable.

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<sup>132</sup> See, e.g., *The Kind Campaign*, KINDCAMPAIGN.COM, <http://www.kindcampaign.com/about/> (last visited Mar. 10, 2014) (describing an anti-bullying campaign targeting girl-against-girl crime); see also *Anti-Bullying Campaign*, PUBLICJUSTICE.NET, <http://publicjustice.net/what-we-do/anti-bullying-campaign> (last visited Mar. 10, 2014) (detailing an anti-bullying campaign aiming to litigate against wrongdoers); see also *What You Can Do*, STOPBULLYING.GOV, <http://www.stopbullying.gov/what-you-can-do/index.html> (last visited Mar. 10, 2014) (describing an anti-bullying campaign by the federal government offering ways people can help stop bullying).

<sup>133</sup> See *The Kind Campaign*, *supra* note 132.

<sup>134</sup> See *It Gets Better*, ITGETSBETTER.ORG, <http://www.itgetsbetter.org/> (last visited Mar. 10, 2014) (detailing an anti-bullying campaign targeting lesbian, gay, bisexual, transgender, and other bullied teens). Public figures such as Vice President Biden have participated in the “It Gets Better” campaign. See *Vice President Biden: It Gets Better*, ITGETSBETTER.ORG, <http://www.itgetsbetter.org/video/entry/1831/> (last visited Mar. 10, 2014).

<sup>135</sup> See *What You Can Do*, *supra* note 132.

<sup>136</sup> See *Anti-Bullying Campaign*, PUBLICJUSTICE.NET, <http://publicjustice.net/what-we-do/anti-bullying-campaign> (last visited Mar. 10, 2014) (noting that Public Justice “seek[s] justice for bullying victims and their families” and “[s]erve[s] as a resource for plaintiffs’ attorneys handling bullying cases”).

<sup>137</sup> See *The Trevor Project – It Gets Better!*, YOUTUBE (Oct. 4, 2010),

[http://www.youtube.com/watch?v=r4LtB0dV\\_U0](http://www.youtube.com/watch?v=r4LtB0dV_U0) (featuring celebrities such as Anne Hathaway, Julie Benz, and Rex Lee in an ad for the Trevor Project, aimed at reducing bullying and bullying-related suicides).

<sup>138</sup> See, e.g., *‘Glee’ & ‘Modern Family’ Star Speaks Out on Bullying*, YOUTUBE (Oct. 5, 2010),

<http://www.youtube.com/watch?v=ww9gU7H6kVk> (addressing bullying-related suicides).

<sup>139</sup> See, e.g., *BULLY (The Bully Project & Where We Live Films 2011)*.

<sup>140</sup> Shane Koyczan, a poet and writer, performed a TED talk in 2013 about his experience with bullying. Shane Koyczan, *To This Day . . . For the Bullied and the Beautiful*, TED.COM (2013),

[http://www.ted.com/talks/shane\\_koyczan\\_to\\_this\\_day\\_for\\_the\\_bullied\\_and\\_beautiful#t-27737](http://www.ted.com/talks/shane_koyczan_to_this_day_for_the_bullied_and_beautiful#t-27737). TED is a non-profit organization “devoted to spreading ideas, usually in the form of short, powerful talks.” *Our Organization*,

TED.COM (2013), <https://www.ted.com/about/our-organization>. Shane Koyczan’s TED Talk video has over two million views on the TED website and over one million views on YouTube. Shane Koyczan, *To This Day . . . For the Bullied and the Beautiful*, TED.COM (2013),

[http://www.ted.com/talks/shane\\_koyczan\\_to\\_this\\_day\\_for\\_the\\_bullied\\_and\\_beautiful#t-27737](http://www.ted.com/talks/shane_koyczan_to_this_day_for_the_bullied_and_beautiful#t-27737); Shane Koyczan: “To This Day” . . . for the bullied and beautiful, YOUTUBE (Mar. 8, 2013),

<https://www.youtube.com/watch?v=saliS1MqUy4>. TED Talks Education also featured a clip of a student talking about his anxiety caused by bullying and how he deals with his situation. *Teens Talk: Bullying and Anxiety*,

NJTVONLINE.ORG, <http://www.njtvonline.org/programs/ted-talks-education/teens-talk-bullying-and-anxiety/>.

Perhaps surprisingly, bullying prevention programs in schools, which appear to be gentle nudges, have proven to be ineffective. Seokjin Jeong and Byung Hyun Lee published a study in 2013 regarding the effectiveness of school bullying prevention programs using data from the Health Behavior in School-Aged Children 2005–2006 study, which surveyed 195 schools and 7,001 students from sixth to tenth grade in public, private, and Catholic schools in America.<sup>141</sup> The study accounted for several individual-level and school-level variables<sup>142</sup> and concluded, “students attending schools with bullying prevention programs were more likely to have experienced peer victimization.”<sup>143</sup> Jeong and Lee noted that students may learn anti-bullying techniques from the prevention programs, but that knowledge did not translate into students actually using what they learned.<sup>144</sup> Jeong and Lee explained that the preventive strategies taught sometimes did not translate into action because of the bully’s social status in the particular school.<sup>145</sup> Further, the prevention programs were ineffective because the programs “g[a]ve bullies ideas for how to bully more effectively.”<sup>146</sup>

But widespread public information campaigns might prove more effective than school anti-bullying programs, both because the content is more general and thus less likely to act as a

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<sup>141</sup> See Seokjin Jeong & Byung Hyun Lee, *A Multilevel Examination of Peer Victimization and Bullying Prevention in Schools*, 2013 J. OF CRIMINOLOGY 1, 3–4 (2013).

<sup>142</sup> *Id.* at 5. The individual-level variables used were race, sex, age, parental support, peer support, and school pressure. *Id.* The school-level variables were security climate, and whether the school had a Safe Passage program, gang prevention program, or bullying prevention program. *Id.* The Safe Passage Program “is a model for reducing school problems by bringing together school staff members, parents, the local health department, the local social service agency, local youth organizations, and students.” *Id.* at 1. Finally, the study categorized victimization as physical victimization or emotional victimization. *Id.* at 5.

<sup>143</sup> *Id.* at 7.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See Alexander Trowbridge, *Are Anti-Bullying Efforts Making it Worse?*, CBSNEWS (Oct. 10, 2013), <http://www.cbsnews.com/news/are-anti-bullying-efforts-making-it-worse/> (reporting the Jeong and Lee study and stating that the study’s findings are consistent with another researcher’s findings). A video of the Jeong interview on the CBS website further expands on the paper, stating that “the videos may actually teach students different bullying techniques and even new ways to bully through social media and texting.” *Id.* Further, “some of the programs even teach students how to bully without leaving any evidence behind.” *Id.* The video concludes, “until the message delivered by anti-bullying programs improves, some programs may be doing more harm than good.” *Id.*

tutorial for bullies, and because students might be more receptive to the anti-bullying message when it is conveyed by a celebrity or public figure rather than a school official. At a minimum, the Jeong and Lee study illustrates the need for more research and experimentation to figure out which aspects of bullying prevention programs work and which aspects do not. As researchers determine what makes a bullying prevention program work, new techniques can be gradually implemented into existing bullying prevention programs until an ideal program is created.

Another way to develop gentle nudge approaches to the bullying problem is to test anti-bullying measures in the private school system in New Jersey.<sup>147</sup> Since the Act does not apply to private schools, these schools can come up with their own methods to combat bullying.<sup>148</sup> The general population of private schools is different from the population of public schools, and may require a different approach.<sup>149</sup> Nevertheless, in the same way that individual state statutes offer a way for the nation to experiment to find the best way to handle the bullying problem,<sup>150</sup> private schools can be used as laboratories for anti-bullying measures because they are not required by law to follow the Act.<sup>151</sup> Since “some [private] schools deal with [the bullying problem] more adequately than others,” we can learn from the successes and failures of the different anti-bullying measures taken by private schools, while determining what changes to make in the public school system.<sup>152</sup> The Jeong and Lee study included statistics from private and Catholic schools and

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<sup>147</sup> Private schools have already started addressing the bullying problem in their own way. *See generally* Abott Koloff, *N.J.’s Private Schools Set Their Own Rules on Bullying*, NORTHJERSEY.COM (Sept. 1, 2013), [http://www.northjersey.com/englewood/NJs\\_private\\_schools\\_set\\_their\\_own\\_rules\\_on\\_bullying.html](http://www.northjersey.com/englewood/NJs_private_schools_set_their_own_rules_on_bullying.html) (explaining what approaches private schools in New Jersey have taken to address the bullying problem).

<sup>148</sup> N.J. STAT. ANN. 18A:37-31(a) (West 2013) (“Nonpublic schools are *encouraged* to comply with the provisions of the Anti-Bullying Bill of Rights Act.”) (emphasis added).

<sup>149</sup> Since private schools are not required to follow this law, they would need some other incentive to be a part of experimenting with solutions to the bullying problem.

<sup>150</sup> *See* James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996) (discussing the metaphor of using states as laboratories to test laws and policies for larger use).

<sup>151</sup> § 18A:37-31(a) (West 2013). Though the New Jersey Anti-Bullying Bill of Rights of Act does not apply to private schools, if private schools set up anti-bullying policies and do not follow them, they can potentially be sued for breach of contract. *Id.*

<sup>152</sup> *See* Koloff, *supra* note 147.



would be an appropriate starting point for determining which factors make a bullying prevention program more or less effective.<sup>153</sup> By experimenting in the private school system where the Act is not binding, we can discover new and unique ways to combat bullying.

Researchers have already started conducting experiments in private schools that offer ways to improve our current approach to bullying. Vivian Gussin Paley of the University of Chicago Laboratory Schools used a gentle nudge of her own when she conducted an experiment to figure out what happens when a new rule is introduced into the classroom.<sup>154</sup> As a kindergarten teacher, Paley saw the same dynamic in her classroom year after year, with few students dominating interactions and deciding who would be a part of certain groups.<sup>155</sup> To change this, Paley introduced the rule “you can’t say you can’t play” into her classroom.<sup>156</sup> If a student wanted to play with another student, the student could not be rejected—one student could not tell another student, “You can’t play.”<sup>157</sup> Throughout the process of introducing this rule, Paley interviewed older students in the school about what they thought of the new rule.<sup>158</sup> The older students in Paley’s school doubted that the rule would work, even though they thought it was fair.<sup>159</sup> Despite the pessimism of the older students, Paley was surprised at how well her kindergarten students took to the new rule.<sup>160</sup> To the younger students who had limited experience in the classroom, “you can’t say you can’t play” was a gentle nudge that required them to make only a slight adjustment in their attitudes towards play. Through this experiment, Paley learned that a child’s

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<sup>153</sup> See Jeong & Lee, *supra* note 141.

<sup>154</sup> See generally VIVIAN GUSSIN PALEY, YOU CAN’T SAY YOU CAN’T PLAY (1993).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 3.

<sup>157</sup> *Id.* at 4.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See VIVIAN GUSSIN PALEY, YOU CAN’T SAY YOU CAN’T PLAY 93 (1993).

behavior can be positively influenced by cooperation of his or her peers in following a rule that encourages inclusiveness and fairness.<sup>161</sup>

Like Paley's approach in her classroom, we need to take small steps to change the attitudes of children and young adults and how they interact with one another. If Paley's findings are reproducible, then one way to prevent bullying is to intervene early and often, and encourage children to follow rules that emphasize cooperation. A gentle nudge approach to combatting bullying that focuses on young children is in line with the anti-bullying literature, which states that an individual's risk of peer victimization decreases as he or she gets older.<sup>162</sup> Jeong and Lee's study found that "older students were 15 percent less likely than younger students to be victims of school bullying," which illustrates the importance of focusing anti-bullying efforts on younger children.<sup>163</sup> Paley's work dealt with young children, and through careful and informed experimentation, as well as simple trial and error, we could also develop a series of gentle nudges that would help reduce bullying among older children.<sup>164</sup>

## VI. Conclusion

Labeling theory makes clear that the New Jersey Anti-Bullying Bill of Rights Act might actually compound the bullying problem. At a minimum, legislators should amend the definition of bullying to require more than one incident and require that the bullying offense is erased from a person's record once they are unlikely to recidivate. A well-crafted law could ensure that those who commit serious bullying offenses are punished for their behavior, but avoid saddling young

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<sup>161</sup> *Id.* at 118. ("[T]he children are learning that it is far easier to open the doors than to keep people out.").

<sup>162</sup> See Jeong & Lee, *supra* note 141, at 2 ("[H]igh-school students are less vulnerable to bullying victimization compared to elementary- and middle-school students.").

<sup>163</sup> *Id.* at 6.

<sup>164</sup> *Id.*

people with a stigmatizing—and often counter-productive—label. By applying a gentle nudge approach to the bullying problem, such as implementing a public campaign to change societal views about bullying, we can prevent bullying from occurring in the first instance, and gradually reduce the bullying problem in America.