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**BRANDEIS SCHOOL OF LAW**

**Legal Studies Research Paper Series  
Paper No. 2011-09**

**RESTORATIVE JUSTICE AND BULLYING:  
A MISSING SOLUTION IN THE ANTI-BULLYING LAWS**

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# Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws

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“Peace is not the absence of conflict but the presence of creative alternatives for responding to conflict—alternatives to passive or aggressive responses, alternatives to violence.”<sup>2</sup>

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1. Graphic from *Restorative Justice*, STATE OF ALASKA HEALTH & SOC. SERVS. DIV. OF JUVENILE JUSTICE, <http://hss.state.ak.us/djj/restorative.htm> (last visited Apr. 8, 2011).

2. *Dorothy Thompson Quotes*, THINKEXIST.COM, [http://thinkexist.com/quotation/peace\\_is\\_not\\_the\\_absence\\_of\\_conflict\\_but\\_the/203921.html](http://thinkexist.com/quotation/peace_is_not_the_absence_of_conflict_but_the/203921.html) (last visited Jan. 9, 2011).

## I. INTRODUCTION

On January 14, 2010, fifteen year-old Phoebe Prince committed suicide allegedly as a result of being bullied by her high school classmates.<sup>3</sup> Later that spring a Hampshire County Grand Jury charged six of her classmates with a variety of offenses stemming from her death including statutory rape, violation of civil rights with resulting bodily injury, criminal harassment, disturbance of a school assembly, and stalking.<sup>4</sup> Phoebe's death, and the resulting criminal charges, reignited the debate of how to handle bullying.<sup>5</sup> The United States as well as nations around the globe struggle with whether criminal sanctions, civil liability, or some other approach is the best solution. The Massachusetts Legislature responded by passing one of the nation's most comprehensive anti-bullying laws.<sup>6</sup>

In 2005, I co-authored an article exploring whether Title IX or anti-bullying statutes were the solution to bullying.<sup>7</sup> At that time, relatively few states had anti-bullying statutes.<sup>8</sup> The article concluded that both Title IX and anti-bullying statutes are necessary to protect our children because "Title IX does not require schools to adopt specific written policies prohibiting sexual harassment"; it applies only to the most severe and egregious forms of harassment, and it is debatable whether it applies to sexual orientation harassment.<sup>9</sup> Yet after analyzing the existing anti-bullying statutes, it was concluded many of the statutes were flawed because they were too deferential to local schools.<sup>10</sup> States are beginning to acknowledge these gaps and are passing new statutes to correct the inadequacies of the earlier statutes.<sup>11</sup>

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3. Marie Szaniszlo, *Parents Demand Action on Bullying*, BOS. HERALD, Jan. 28, 2010, at 6. Many other suicides have been reported this year as the result of alleged bullying. See George Stinson & John Jonson, *Kentucky's Bullying Laws Need to be Strengthened*, COURIER J., Nov. 30, 2010.

4. Erik Eckholm & Katie Zezima, *6 Teenagers are Charged After Classmate's Suicide*, N.Y. TIMES, Mar. 29, 2010, available at <http://www.nytimes.com/2010/03/30/us/30bully.html>.

5. *Id.*; see also Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, Jun. 27, 2010, available at [http://www.nytimes.com/2010/06/28/style/28bully.html?\\_r=1](http://www.nytimes.com/2010/06/28/style/28bully.html?_r=1).

6. MASS. GEN. LAWS ch. 92 (2010); see also Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law*, SLATE, Apr. 30, 2010, <http://www.slate.com/id/2252543/>.

7. 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, 53 (2005).

8. *Id.* at 62 n.87.

9. *Id.* at 69-70.

10. *Id.* at 71.

11. *E.g.*, Anti-Bullying Bill of Rights, N.J. STAT. ANN. § 18A:37-17 (West 2010) (requiring districts to adopt anti-bullying programs as opposed to encouraging them).

We suggested that anti-bullying statutes require school district policies to include the following components:

(1) a general statement of the policy that a school district values a learning and working environment that is free from any type of violence and harassment; (2) consistent statewide definitions of the types of violence and harassment prohibited; (3) specific reporting procedures; (4) specific investigation procedures; (5) consistent range of school district actions; (6) reprisal provision prohibiting retaliation; (7) a statement that policy does not prohibit other procedures available or required under law; (8) provisions describing how the policy will be disseminated and employees and students trained; (9) penalty provisions for schools that fail to adopt or enforce anti-bullying policies; (10) requirement that policies be submitted for review to the State's Department of Education.<sup>12</sup>

The article, however, did not reference restorative justice: the process of victims, perpetrators, and the broader school community, along with their supporters, coming together to discuss the bullying and its aftermath.<sup>13</sup> Five years later, I realize that was a mistake and that any solution which fails to include restorative justice principles lacks perhaps the most important and promising component for addressing the bullying problem.

Unfortunately, states passing anti-bullying statutes, including Massachusetts, have made the same mistake.<sup>14</sup> These statutes, although better than the ones examined in 2005, fail to incorporate restorative justice principles thus leaving a gap to be filled. The purpose of this article is to advocate that restorative principles be included in anti-bullying statutes because restorative justice practices offer a better long-term solution than criminal charges or civil actions for effectively addressing bullying.<sup>15</sup> Involving the victim, offender, and the community in a healing process rather than in a punitive procedure, whether that be civil or criminal, increases the chances that harm can be repaired, risks can be reduced, and community can be built.

Part II of this Article reviews the status of anti-bullying statutes and their lack of restorative justice language. Part III defines restorative justice and

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12. Kosse & Wright, *supra* note 7, at 71.

13. *See generally id.* at 53.

14. *See* MASS. GEN. LAWS ch. 92, § 5 (2010); *see also* An Act Relative to Bullying in Sch., ch. 92, 2010 Mass. Acts 175, *available at* <http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter92>.

15. *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, 552-62 (2009) (summarizing federal and state remedies available for victims of bullying addressing both their limited success for victims and failing to incentivize change within the schools).

describes the key values and components of the restorative justice practices. Part IV makes the case for why restorative justice practices are particularly suited to address the harm created by school bullying. Although preventative educational programs are also needed, this Article only addresses effective intervention programs after a bullying incident occurs.<sup>16</sup> Finally, Part V briefly discusses likely objections to using the restorative justice approach and possible responses to these objections.

For just a brief moment let us return to Phoebe and her alleged bullies. Imagine, instead of her suicide another option existed for her. Imagine, instead of a string of criminal charges or school punishments with potential harsh penalties associated with them, another option existed for her alleged bullies. Imagine an option that respected all the individuals, held individuals responsible for behavior, and repaired the harm done. Such an option is not wishful thinking, but exists in many schools today<sup>17</sup> and should be included in the anti-bullying statutes. This option, when appropriate, should be available to all children and not just to the ones lucky enough to go to forward-thinking schools.

## II. ANTI-BULLYING STATUTES TODAY

In the 2005 article, we lamented that “thirty-three states have failed to address [bullying] through the enactment of an anti-bullying statute.”<sup>18</sup> Of those thirty-three states, “nearly one-half have considered such legislation.”<sup>19</sup> Just five years later anti-bullying statutes are now the norm, not the exception. Forty-five states currently have an anti-bullying statute on the books.<sup>20</sup> In fall 2010, New York finally passed its long-awaited anti-

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16. Many good resources exist about what makes effective preventative programs. Preventative programs seek to change the campus culture by placing a major emphasis on developing a more positive climate. See, e.g., Olweus Bullying Prevention Program Overview, OLWEUS.org, [http://www.olweus.org/public/bullying\\_prevention\\_program\\_page](http://www.olweus.org/public/bullying_prevention_program_page).

17. MITZI B. HICKS, RESTORATIVE JUSTICE AS AN ALTERNATIVE DISCIPLINARY METHOD IN SCHOOLS 6 (2008), available at <http://www.conflictcenter.org/Aboutus/HicksSoc3050.pdf>; see also Kate Howard, *Jacksonville Students on Edge of Trouble to get Peer led Restorative Justice*, FLA. TIMES UNION, Sept. 3, 2010, <http://jacksonville.com/news/metro/2010-09-03/story/students-trouble-southside-get-peer-led-restorative-justice%E2%80%99> (illustrates use in Florida schools); Presentation Nancy Riestenberg, *Restorative Measures in Schools: Evaluation Results (2002)* (discussing the Minnesota schools) (on file with author); *Restorative Justice Introduction*, YOUTUBE.COM, (Sept. 8, 2008), <http://www.youtube.com/watch?v=lqaqrDnhzDw&feature=related> (discussing use in Michigan schools).

18. Kosse & Wright, *supra* note 7, at 74.

19. *Id.*

20. See BULLY POLICE USA, <http://www.bullypolice.org> (last visited Apr. 8, 2011) (describing the bullying legislation in all fifty states).

bullying bill into law.<sup>21</sup>

These anti-bullying statutes mainly focus on preventing bullying by training and educating, as well as punishing it when it occurs. Common components of these laws require or encourage school officials to develop a policy to prohibit bullying, implement a bullying prevention program, train employees on bullying and bullying prevention, report school bullying to authorities, and develop disciplinary actions for children who bully.

Massachusetts's newly enacted law is a good example of a comprehensive bullying law.<sup>22</sup> The legislature defined bullying very broadly to include cyberbullying; however, interestingly, it did not include any reference to the power imbalance which is contained in most bullying definitions.<sup>23</sup> It requires teachers and other school staff to report bullying to the principal or designated administrator picked to handle reports when they observe or become aware of the bullying.<sup>24</sup> The law mandates training for teachers and staff, every year, on prevention and intervention.<sup>25</sup> The law also requires that bullying be part of the curriculum for students in every grade.<sup>26</sup>

Other state laws are not as effective as Massachusetts because they still contain the problems we identified in 2005.<sup>27</sup> For example, some statutes

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21. *Id.*

22. MASS. GEN. LAWS ch. 92, § 5 (2010); *see also* Bazelon, *supra* note 6.

23. MASS. GEN. LAWS ch. 92, § 5. The new Massachusetts law defines bullying in section 5(a) as:

[T]he repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying.

*Id.*

24. MASS. GEN. LAWS ch. 92, § 5(g).

25. MASS. GEN. LAWS ch. 92, § 5(e)(2).

26. MASS. GEN. LAWS ch. 92, § 5(c).

27. Many commentators criticize anti-bullying statutes. *See* Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 149 (2009) ("Federal and state laws neither deter bullying nor provide most victims a remedy for psychological or physical injuries."); Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783, 789 (2003) ("Unfortunately, anti-bullying laws may serve to dilute the discourse of rights by minimizing or obscuring harassment. When schools put these new anti-bullying laws and policies into practice, the policies are often overly broad and arbitrary, resulting in students being suspended or expelled from schools for a variety of minor infractions."); Daniel B. Weddle, *Bullying in Schools: The*

fail to define bullying while others still leave too much deference to local school districts. However, laws requiring state Departments of Education to develop model anti-bullying policies that can be used by local school systems is a positive trend (and one my co-author, Robert Wright, and I recommended).

But what all the statutes are missing, including even the comprehensive Massachusetts statute, is an alternative to punishment or at least a step before punishment. In other words, none of them incorporate any type of restorative justice practices. Looking to our prior article we failed to flag this omission and only suggested counseling should be included in defining the range of penalties for bullying.<sup>28</sup> However, counseling is not the equivalent of restorative justice practices such as family conferences. Furthermore, even using counseling in connection with the word “penalties” explains our mindset at the time which focused on punishment as the sole solution if bullying occurred.

Focusing solely on punishment is a mistake because research confirms that “conventional discipline” such as detention and suspension is ineffective and exacerbates the problem.<sup>29</sup> Typical responses to bullying at school, such as reprimands, detentions, or expulsions within the school disciplinary system, are consequences that often leave the child who bullies feeling like a victim.<sup>30</sup> The bullies feel justified in retaliating against the school and also at the child they were initially bullying, and the bullying cycle continues.<sup>31</sup> Furthermore, the punishment model depends on a power

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*Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 673 (2004) (“State law typically contains the same theoretical flaw that makes federal law so ineffective with regard to on-going harassment: it is incident-specific; therefore, it provides little or no incentive for substantive change in the way school officials address bullying.”); David Ellis Ferster, Note, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191, 195 (2008) (“Most legislation has called for general anti-bullying policies and does not hold school administrators accountable for failing to prevent violence in the schools. Almost a decade since Columbine, few could claim that much progress has been made.”).

28. Kosse & Wright, *supra* note 7, at 72.

29. Abbey J. Porter, *Restorative Practices in Schools: Research Reveals Power of Restorative Approach, Part I*, INT’L INST. FOR RESTORATIVE PRAC., 1 (Apr. 27, 2007), <http://www.iirp.org/pdf/schoolresearch1.pdf>.

30. See Weddle, *supra* note 28, at 681-82 (noting that by initiating a policy of “zero tolerance” for bullying an institution becomes a bully itself).

31. See Susan L. Caulfield, *Creating Peaceable Schools*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 170, 176 (2000) (noting that the “dominator model” relationship between school administration and students found in modern schools both resembles and fosters a bullying culture). See generally Ira M. Schwartz et al., *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 16 (2000) (suggesting that more strict disciplinary measures may be counterproductive); John & Rita Sommers-Flanagan, *The*

imbalance much like that of the original bullying.<sup>32</sup>

In addition, the current anti-bullying laws could be improved by adding restorative justice principles because this may encourage schools to develop plans that help other members of the school community impacted by the bullying. Existing laws often focus on punishing the bully.<sup>33</sup> Not many of the laws strive to help the victim and engage the school community in discussing the incident. Merely punishing the bully does little to heal the unhealthy atmosphere that exists for other members of the school community. Restorative justice helps change behavior, creating a healthier environment for all members of a community.

### III. THE BASICS OF RESTORATIVE JUSTICE

#### A. Origins of Restorative Justice

Restorative justice roots can be traced to very early cultures in all parts of the world. For example, the Navajo Indians in North America utilized restorative justice practices as did the Maori, the indigenous Polynesian people of New Zealand, and many Aboriginal communities in Canada.<sup>34</sup> In Europe, early tribal laws reflect restorative justice principles as well as the Code of Hammurabi, the laws of Ethelbert of Kent, and Rome's Twelve Tables.<sup>35</sup> Still others tie restorative justice to principles found in many

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*Buzz on Bullying*, AMERICAN SCHOOL COUNSELOR ASSOCIATION, <http://www.schoolcounselor.org/content.asp?contentid=282> (last visited April 8, 2011) (suggesting that aggressive or violent intervention styles tend to encourage a bullying cycle).

32. See Caulfield, *supra* note 32, at 175-76 (noting that the "dominator model" depends on a dominant figure, inherently containing a power imbalance).

33. See, e.g., OR. REV. STAT. § 339.356(2)(d) (2009) ("A statement of consequences and appropriate remedial action for a person found to have committed an act of harassment intimidation or bullying."); TEX. EDUC. CODE § 37.001 (a)(4) (Supp. 2010); W. VA. CODE R. § 18-2C-3(b)(9) (2008) ("A disciplinary procedure for any student guilty of harassment, intimidation or bullying.").

34. Curt Taylor Griffiths & Roy Hamilton, *Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 175-92 (Burt Galaway & Joe Hudson eds., 1996); John Pratt, *Colonization, Power and Silence: A History of Indigenous Justice in New Zealand Society*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 137, 138-39 (Burt Galaway & Joe Hudson eds., 1996); DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 51 (2001); Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equality and Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 157, 160 (Burt Galaway & Joe Hudson eds., 1996); see also NATIONAL INSTITUTE OF JUSTICE, *Indigenous Justice Systems and Tribal Society* (Dec. 3, 2007), <http://www.nij.gov/topics/courts/restorative-justice/perspectives/indigenous-tribal.htm>.

35. See Howard Zehr, *Community Justice: The Historical Alternative*, in CHANGING

religions.<sup>36</sup> Scholars, however, warn that although early civilizations incorporated restorative justice principles, this was not to the exclusion of retributive methods.<sup>37</sup> In fact, some expressly criticize restorative justice proponents for romanticizing the past.<sup>38</sup> An accurate account is most likely that a broad range of strategies existed for addressing criminal justice issues just as they do today.

Recently, a renewed interest has reenergized the restorative justice movement. In 1989, New Zealand's Parliament took a bold step passing The Children, Young Person's Act of Parliament, which dramatically revamped the juvenile justice system, replacing the courtroom as the primary vehicle for addressing juvenile offenses.<sup>39</sup> During the next twenty years, family group conferencing quickly spread throughout the world.<sup>40</sup>

### B. Key Goals of Restorative Justice

Restorative justice is a broad term used to describe a way of thinking, a philosophy or a "social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights."<sup>41</sup> Because many articles and books already explore restorative justice in depth, this Article will only give a brief overview of what it is and how it works.<sup>42</sup> Restorative justice is not one procedure or a set curriculum that

LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 97, 99-113 (1990).

36. See Howard Zehr, *Covenant Justice: The Biblical Alternative*, in CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 126, 130-37 (1990); Samuel J. Levine, Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought, 27 FORDHAM URB. L.J. 1677 (2000); F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695 (2000).

37. Kelly Richards, *Exploring the History of the Restorative Justice Movement*, Paper presented at the 5th International Conference on Conferencing & Circles (2004), organized by the International Institute for Restorative Practices, August 5-7, Vancouver, Canada, [http://fp.enter.net/restorativepractices/bc04\\_richards.pdf](http://fp.enter.net/restorativepractices/bc04_richards.pdf).

38. GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 47-48 (2002) (discussing Kathleen Daly's criticisms of restorative justice being characterized as ancient and indigenous justice).

39. ALLAN MACRAE & HOWARD ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES: NEW ZEALAND STYLE 11 (2004) [hereinafter MACRAE & ZEHR, FAMILY GROUP CONFERENCES].

40. Laura Mirsky, *Family Group Conferencing Worldwide: Part One in a Series*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES (Feb. 20, 2003), available at [http://www.iirp.org/iirpWebsites/web/uploads/article\\_pdfs/fgcseries01.pdf](http://www.iirp.org/iirpWebsites/web/uploads/article_pdfs/fgcseries01.pdf).

41. *What is Restorative Justice?*, SUFFOLK UNIV., <http://www.suffolk.edu/research/6953.html> (last visited Apr. 8, 2011).

42. See INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES, [www.iirp.org](http://www.iirp.org) (last visited April 8, 2011) (providing information and restorative justice resources); see also RESTORATIVE JUSTICE ONLINE, <http://www.restorativejustice.org/research> (last visited Apr. 8, 2011) (providing a database to search restorative justice resources).

can be copied without adapting it to the specific needs and context of the communities and factual situations involved.<sup>43</sup> Restorative justice differs radically from criminal justice as it exists today because of its very different goals and focuses. With traditional criminal justice models crime is a violation of the law and the conflict is owned by the state, whereas from a restorative justice perspective the crime or wrong is a violation of people and relationships.<sup>44</sup> Therefore, the question shifts from what rule has been broken to who is hurt. The criminal justice system seeks to determine guilt by identifying who did the act and then impose punishment to make sure offenders get what they deserve.<sup>45</sup> In contrast, the central focus with restorative justice is an effort to find out what the needs are to make things right by encouraging the victims, offenders, and community to work together to determine who is responsible to repair the harm.<sup>46</sup>

Restorative justice can be used in a broad range of settings including criminal justice, education, domestic violence, and other areas.<sup>47</sup> The format varies and can include:

- Victim-Offender Dialogue (also called Victim-Offender Mediation, Victim-Offender Conferencing, and Restorative Justice Dialogue)<sup>48</sup>
- Family Group Conferencing<sup>49</sup>
- Community/School Conferencing
- Peacemaking Circles (sometimes called Sentencing Circles)<sup>50</sup>
- Reparative Boards
- Truth/Reconciliation Commissions
- Victim Impact Panels<sup>51</sup>

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43. See MACRAE & ZEHR, *FAMILY GROUP CONFERENCES*, *supra* note 40.

44. Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 254-55 (2005).

45. *Id.*

46. Jeffrie G. Murphy, *Keynote Address: Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 FORDHAM URB. L.J. 1353, 1374 (2000).

47. See Mirsky, *supra* note 41.

48. Nat'l Inst. of Justice, *Victim-Offender Mediation*, U.S. DEP'T OF JUSTICE <http://www.nij.gov/topics/courts/restorative-justice/promising-practices/victim-offender-mediation.htm> (last visited Apr. 8, 2011).

49. Nat'l Inst. of Justice, *Family Group Conferencing*, U.S. DEP'T OF JUSTICE <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/promising-practices/family-group-conferencing.htm> (last visited Apr. 8, 2011).

50. Nat'l Inst. of Justice, *Sentencing Circles*, U.S. DEP'T OF JUSTICE <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/promising-practices/sentencing-circles.htm> (last visited Jan. 9, 2011); Barry Stuart, *Circle Sentencing: Turning Swords into Ploughshares*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 193 (Burt Galaway & Joe Hudson eds., 1996).

51. *What is Restorative Justice?*, SUFFOLK UNIV., <http://www.suffolk.edu/research/6953.html> (last visited Apr. 8, 2011).

These restorative justice practices should not be viewed as exclusive of each other but can be combined. Strengths and weaknesses exist with each practice and thus sometimes combinations are best.<sup>52</sup>

Recognized restorative justice experts, Allan MacRae and Howard Zehr, identify specific goals for family group conferences—the restorative practice used by the New Zealand youth justice system.<sup>53</sup> Five of these seem to have particular relevance to this discussion and make clear that the values of empowerment, healing, collaboration and problem-solving underpin restorative justice practices.<sup>54</sup> These principles include: (1) diversion, (2) accountability, (3) involving the victim, (4) involving and strengthening the offender's family, and (5) consensus decision-making.<sup>55</sup>

### 1. Diversion

An overarching goal is to keep youth out of the criminal justice system. Underlying this goal is a belief that traditional punishment may increase rather than decrease bad behavior and that community sanctions will be more effective than court-ordered ones.<sup>56</sup> Additionally, research confirms that most child offenders are not pathological and will not continue to commit offenses later in life.<sup>57</sup>

### 2. Accountability

Proponents of restorative practices want offenders to be accountable but not necessarily be punished especially if doing so would make it impossible to reintegrate the individual into the community.<sup>58</sup> This contrasts with the retributive system of justice which equates accountability with suffering.<sup>59</sup> Punishment maximizes the suffering. Another difference between restorative justice and the retributive justice model is that the accountability is to the victim and not to the state.<sup>60</sup> Far from being easy, often facing a victim is one of the hardest things offenders have to do. Restorative

52. Umbreit, *supra* note 45.

53. See MACRAE & ZEHR, FAMILY GROUP CONFERENCES, *supra* note 40.

54. *Id.*

55. *Id.*

56. *See id.* at 18.

57. *Id.*

58. Paul McCold, *Restorative Justice and The Role of the Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 87 (Burt Galaway & Joe Hudson eds. 1996).

59. Kay Pranis, *A State Initiative Toward Restorative Justice: The Minnesota Experience*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 493, 495 (Burt Galaway & Joe Hudson eds. 1996).

60. Gordon Bazemore, *Three Paradigms for Juvenile Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 37, 51 (Burt Galaway & Joe Hudson eds. 1996).

practices provide the offender with the opportunity to take responsibility and help fashion a solution. Being part of the process increases the odds that an offender will be responsible. This reflects a fundamental principle that people will be happier and make positive change when people do things with them (restorative, participatory, engaging) rather than to them (punitive and authoritarian) or for them (permissive and paternalistic).<sup>61</sup>

### 3. Involving the victim

Allowing victims and community members who have a stake in a specific crime to participate in its resolution helps everyone. In traditional criminal justice settings, except for perhaps victim impact statements, the victim plays a very limited role. The victim never obtains closure when the primary focus is to mete out punishment to the offender.<sup>62</sup> In this system, the needs of the victim remain largely unknown and as a result unaddressed.

With restorative justice a forum is given for victims to express the impact of the crime on their lives and to ask questions of their offenders.<sup>63</sup> Often the offender does not fully appreciate the impact and effect his or her behavior has on the victim. By providing the victim with a central role in the process, the offender hears directly from the victim about the pain caused by the offender's actions.

Traditional punishment does not address the victim's dignitary harm for several reasons. First, although punishment signals society's disapproval of the act and attempts to take away the offender's status, this is ultimately unsatisfying because it "*falsely* ties the victim's value to the offender's punishment."<sup>64</sup> Victims of crime often perceive the justice system as inequitable because it focuses on simply returning concrete items of property rather than on compensating the victim for the emotional trauma.<sup>65</sup> This dilemma is even more acute in the bullying context since

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61. *What is Restorative Practices?*, INT'L INST. FOR RESTORATIVE PRACTICES, <http://www.iirp.org/whatisrp.php> (last visited Jan. 18, 2011); TED WACHTEL, TERRY O'CONNELL & BEN WACHTEL, RESTORATIVE JUSTICE CONFERENCING 154 (2010) (describing the social discipline window which looks at the effect of leadership styles on motivating behaviors).

62. Stacy Forster, *Opening the Door to Forgiveness*, ON WISCONSIN, Winter 2010, at 35-36, available at <http://onwisconsin.uwalumni.com/features/opening-the-door-to-forgiveness/> (emphasis added).

63. MINISTRY OF JUSTICE, RESTORATIVE JUSTICE FACILITATOR INDUCTION TRAINING: TRAINEE MODULE 1, at 6 (July 2009), available at [http://www.justice.govt.nz/policy/criminal-justice/restorative-justice-info-for-providers/copy\\_of\\_restorative-justice-facilitator-induction-training-and-accreditation](http://www.justice.govt.nz/policy/criminal-justice/restorative-justice-info-for-providers/copy_of_restorative-justice-facilitator-induction-training-and-accreditation).

64. Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1526-27 (2000) (emphasis added).

65. Everett L. Worthington, Jr., *Is There a Place for Forgiveness in the Justice*

stolen dignity and self-esteem are often primary injuries experienced by victims which can not be returned by punishing a bully.

Often “in the traditional litigative justice system, the victim’s emotional scales are ignored” because of the belief that emotions are private.<sup>66</sup> However, to fully respect victims we need to do more for them.<sup>67</sup> Victims’ needs include control and order, bringing meaning to the event, and having an opportunity to meet with their perpetrators to express their anger and have that anger validated.<sup>68</sup> Victims that engage in restorative practices report positive benefits; many saying—it helps them go on with their lives.<sup>69</sup>

#### 4. Involving and strengthening the offender’s family

Restorative justice advocates believe the family, not the state, should play a central role in resolving the conflict because the family is in a better position to assess which solutions will work best.<sup>70</sup> In addition, these solutions often will involve other family members and by solving their own problems it empowers and strengthens the family, which facilitates the healing process.<sup>71</sup>

#### 5. Consensus decision-making

A key concept in restorative justice is to reach a decision through consensus not by majority or force. The ultimate components of a good plan need to consist of measurable actions that can be monitored and include elements that:

- “Put[] things right for the victim (a priority);
- Return[] something to the community;
- Address[] the underlying causes of the offending[; and]
- Ensur[e] that the child/young person has the support s/he needs to meet his/her obligations.”<sup>72</sup>

Looking at this list, one is struck by how unlikely these elements would be included in a traditional criminal justice punishment. Particularly, by addressing the underlying causes of the offense and ensuring the child has

*System?*, 27 FORDHAM URB. L.J. 1721, 1726 (2000).

66. *Id.* at 1726, 1728.

67. See David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?*, 27 FORDHAM URB. L.J. 1663, 1670 (2000) (“Ninety-two percent of respondents in one survey wanted this service.”).

68. See McCold, *supra* note 59, at 87.

69. *Id.*

70. Mirsky, *supra* note 41, at 1.

71. *Id.*

72. See MACRAE & ZEHR, FAMILY GROUP CONFERENCES, *supra* note 40, at 48.

necessary support, the restorative justice process seeks to prevent future destructive conduct.<sup>73</sup> Although a traditional penalty arguably serves a deterrent effect, if the underlying cause of the behavior remains unaddressed the child is more likely to repeat the action.

### C. Benefits of Restorative Justice

Restorative justice proponents outline the many benefits that come to the victim, the offender, the community, and the justice system with use of these practices.<sup>74</sup> For victims, restorative justice offers an opportunity for them to tell the offender how they have been affected and get their questions answered. In addition, they are part of the process in deciding how to reduce the effects of wrongdoing.<sup>75</sup> The offender equally benefits from the process. By listening to the victim, the offender learns firsthand about the impact her actions had on the victim and it gives her the opportunity to apologize and make amends.<sup>76</sup> The societal and systemic benefits include reducing recidivism, cutting costs, increasing victim and citizen satisfaction, improving community safety, and developing competency in the offender.

Simply listing the benefits, however, fails to encapsulate the transforming power restorative justice can bring about for its participants. Only experiencing it firsthand can make believers. However, the words of those directly involved lend credibility to the proposition that restorative justice does work even for offenses as serious as murder. A recent article published in the University of Wisconsin-Madison's alumni magazine spotlighted the law school's Restorative Justice Project and one victim's annual visit to see her assailant in prison.<sup>77</sup> Although Jackie Millar was given only a two percent chance of living after her attack, her meetings with her offender, Craig Sussek, helped her heal. Millar tells Sussek during one of their meetings: "I can forgive you, but forget it, I won't . . . I am legally blind, I am paralyzed on my right side, but I am healed from my heart."<sup>78</sup>

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73. *Id.* at 52.

74. Several studies report favorable results on four outcome measures: victim satisfaction, offender satisfaction, restitution compliance, and recidivism. *See* JOHNSTONE, *supra* note 39, at 2; William R. Nugent, Mona Williams & Mark S. Umbreit, *Participation in Victim Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137 (2003); William Bradshaw, David Roseborough, & Mark S. Umbreit, *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A Meta-Analysis*, 24 CONFLICT RESOL. Q. 87, 89 (2006); MINISTRY OF JUSTICE, *supra* note 64, at 34.

75. MINISTRY OF JUSTICE, *supra* note 64, at 6.

76. *Id.*

77. Forster, *supra* note 63.

78. *Id.* at 35-36.

The fourteen and one half years of meetings also changed Sussek. He confides:

There are ways to make up for it by changing the person that I was . . . and, hopefully, be able to help people *not* do something like I did . . . . This whole process is part of that. I like sitting down and talking with Jackie . . . . For me, it's part of the continued healing process that I'm allowed to learn some things from her.<sup>79</sup>

Their relationship changed from victim and attacker to one of respect. The victim captures this transformation best: “We have grown for fourteen and one half years, and what we had to grow through is unbelievable—but we did it. We can say we came out as friends.”<sup>80</sup>

#### D. Restorative Justice Best Practices

This story, and many others like it, give hope that using restorative justice practices provides a better option than the one currently used in the context of bullying. However, to achieve these benefits careful training, planning, and stringent evaluation need to occur. New Zealand's Ministry of Justice lists eight principles of best practice for restorative justice to succeed. The first principle is that “restorative justice principles are underpinned by voluntariness.”<sup>81</sup> Secondly, “full participation of the offence victim and the offender should be encouraged,” however, the victim may send a representative.<sup>82</sup> Additionally, “[e]ffective participation requires that participants, particularly the offence victim and offender, are well informed.”<sup>83</sup> Furthermore, “[r]estorative justice processes must hold the offender accountable” and “[f]lexibility and responsiveness are inherent characteristics of restorative justice process.”<sup>84</sup> The “emotional and physical safety of participants” is an overriding concern, and “[r]estorative justice providers (and facilitators) must ensure the delivery of an effective process.”<sup>85</sup> “Restorative justice processes should only be undertaken in appropriate cases.”<sup>86</sup>

Keeping these principles in the forefront of all discussions helps address many of the misconceptions about the restorative justice process.

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79. *Id.* (emphasis added).

80. *Id.*

81. *See* MINISTRY OF JUSTICE, *supra* note 64, at 9-12.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

#### IV. RESTORATIVE JUSTICE IS APPROPRIATE TO USE WITH BULLYING

Although some connect restorative justice most closely with juvenile justice system matters, it has been used in many other areas including schools.<sup>87</sup> Its use with school bullying continues to garner much interest and for good reason. First, bullying continues to remain a problem for schools and may even be on the rise.<sup>88</sup> Second, “[b]ullying and restorative justice have a serendipitous fit; in that, bullying has been defined as the systematic abuse of power and restorative justice seeks to transform power imbalances that affect social relationships.”<sup>89</sup> In addition, several fundamental principles underlying restorative justice dovetail with schools’ efforts to educate students, form strong communities, and protect students. This section explores why the legislature should incorporate restorative justice into anti-bullying statutes and require schools to adopt restorative justice practices when appropriate in lieu of, or at least in addition to, their current punishment regimes.

##### A. Restorative Justice More Closely Aligns with the Primary Goal of Schools, to Educate, Than Does a Punishment Regime

Schools exist to “prepare pupils for citizenship in the Republic . . . . [They] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of

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87. Adapting the youth offending model of restorative justice to the school environment is not a new idea. Many schools in the United States and around the world engage in multiple restorative practices with positive results. Despite the encouraging results from schools using restorative practices no anti-bullying statute to date directly incorporates any reference to restorative justice principles or practice. The philosophy and practice needs to be memorialized in the legislation for it to have lasting effect. UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMS 26 (2006), available at [http://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf) (“In most jurisdictions, restorative justice processes are most extensively developed for use with youth in conflict with the law. . . . Furthermore, many programmes developed completely outside of the criminal justice system, in schools or in the community, can provide an opportunity for the community to provide an appropriate educational response to minor offences and other conflicts without formally criminalizing the behaviour or the individual.”).

88. *Largest Study Ever Shows Half of All High School Students Were Bullies and Nearly Half Were Victims of Bullying During Past Year*, JOSEPHSON INST.: CENT. FOR YOUTH ETHICS (Oct. 25, 2010), [http://charactercounts.org/pdf/reportcard/2010/press-release\\_bullying-violence.pdf](http://charactercounts.org/pdf/reportcard/2010/press-release_bullying-violence.pdf) (announcing findings that out of over 43,000 high school students surveyed, 47% reported being bullied in the past year and 50% reported bullying someone else).

89. Brenda Morrison, *School Bullying and Restorative Justice: Toward a Theoretical Understanding of the Role of Respect, Pride, and Shame*, 62 J. SOC. ISSUES 371, 372 (2006) (internal citations omitted).

self-government in the community and the nation.”<sup>90</sup> The Supreme Court acknowledges that schools do more than teach a doctrinal curriculum but also “schools must teach by example the shared values of a civilized social order.”<sup>91</sup> Developing the necessary social and emotional skills continues to be a very important objective of public education, equal to, if not more important than teaching course material.

Research confirms what teachers have long known: social skills are necessary to be successful in academics, as well as later in life.<sup>92</sup> In addition, research also confirms punishment may have little effect on changing behavior and at least for a number of students may actually reinforce bad behavior.<sup>93</sup> However, educators continue to use punishment primarily because “it is easy to administer, works for many students without challenging behaviors, and has been part of the Judeo-Christian history that dominates much of our society.”<sup>94</sup> Part of the problem is an inability of educators to differentiate between the terms discipline and punishment.<sup>95</sup> Discipline is defined as “training that is expected to produce a specific character or pattern of behavior, especially training that produces moral or mental improvement.”<sup>96</sup> Punishment, although it may effectively reduce bad behavior, does not necessarily result in improvement of behavior, whereas an alternative approach (e.g. positive reinforcement) is more likely to help students acquire knowledge and skills to positively change behavior.<sup>97</sup>

Much like positive reinforcement, restorative justice allows children to learn social knowledge and skills such as showing empathy and understanding the consequences of their actions. A punishment-only

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90. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

91. *Id.* at 683.

92. Joseph E. Zins et. al., *The Scientific Base Linking Social and Emotional Learning to School Success*, in BUILDING ACADEMIC SUCCESS ON SOCIAL AND EMOTIONAL LEARNING: WHAT DOES THE RESEARCH SAY? 3-4 (Joseph E. Zins et al., eds., 2004); Gwendolyn Cartledge & JoAnne F. Milburn, *The Case for Teaching Social Skills in the Classroom: A Review*, 48 REV. EDUC. RES. 133, 133-56 (1978); David Osher, George G. Bear, Jeffrey R. Sprague & Walter Doyle, *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 48, 48 (2010).

93. See John W. Maag, *Rewarding by Punishment: Reflections on the Disuse of Positive Reinforcements in Schools*, 67 EXCEPTIONAL CHILDREN 173, 177 (2001); RUSSELL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 15 (2000), available at <http://www.unl.edu/srs/pdfs/ztze.pdf>; Cara Suvall, *Restorative Justice in Schools: Learning From Jena High School*, 44 HARV. C.R.-C.L. L. REV. 547, 552-53 (2009) (discussing failures of punitive discipline).

94. See Maag, *supra* note 94, at 175.

95. *Id.* at 178.

96. *Id.*

97. *Id.*

regime denies a child the opportunity to grow developmentally by allowing third parties to decide the conflict. The conflict itself needs to be viewed as something of value, a commodity not to be wasted, and not dealt with as quickly as possible.<sup>98</sup> Handling conflict themselves in the presence of their supporters is one way for children to adapt the “norm-clarification and other arts of citizenship.”<sup>99</sup>

The ultimate goal for schools when dealing with bullying needs to be something more than maintaining control over bad behavior. It should also include helping students develop emotional and social skills that empower them. John W. Maags made an excellent point that teachers do not punish children for failing to master an academic concept such as division.<sup>100</sup> Accordingly, teachers and schools should implement procedures and practices that help children learn the correct way to manage behavior just as they would do to help children master math or science concepts.<sup>101</sup>

Providing multiple opportunities for children to learn skills becomes even more important because we know that a person’s brain is not fully developed until well into their twenties.<sup>102</sup> Developmental psychologists confirm that the part of the brain that involves impulse control remains under development throughout the teen years.<sup>103</sup> Understanding the complexities of the brain gives a glimpse into the reasons teens may not appreciate the impact of their actions. Involving them directly with solving the problem is one strategy to help them in their maturation process.<sup>104</sup>

Finally, to restore absolute balance we would need to demean the bully which perpetuates the very wrong the bully committed and does little to model ideal responses to conflict.<sup>105</sup> Bullying by its very nature involves a power imbalance and the solution cannot be to shift the scales so the victim now has the power advantage instead of trying to balance the scales. Punishing bullies by isolating them through suspensions, expulsions, or criminal sanctions is tempting to make sure the bullies receive their “just deserts”; however, it defies logic if the purpose is to bring a bully back to a

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98. Nils Christie, *Conflicts As Property*, 17 BRIT. J. CRIMINOLOGY 1, 7 (1977).

99. See JOHNSTONE, *supra* note 39, at 145.

100. See Maag, *supra* note 94, at 178.

101. See JOHNSTONE, *supra* note 39, at 145.

102. Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate: Risky Behavior Diminishes At Age 25, NIH Study Finds*, WASH. POST, Feb. 2005, at A01 (“A National Institutes of Health study suggests that the region of the brain that inhibits risky behavior is not fully formed until age 25, a finding with implications for a host of policies, including the nation’s driving laws.”).

103. Claudia Dreifus, *Development Psychologist Says Teenagers are Different*, N.Y. TIMES, Nov. 30, 2009, [http://www.nytimes.com/2009/12/01/science/01conv.html?\\_r=1](http://www.nytimes.com/2009/12/01/science/01conv.html?_r=1).

104. Judith Newman, *Inside the Teenage Brain*, PARADE, Nov. 28, 2010 <http://www.parade.com/news/2010/11/28-inside-the-teenage-brain.html>.

105. See Meyer, *supra* note 65, at 1527.

community which rejects dehumanizing actions of disrespect and humiliation.<sup>106</sup> The recent tragedies involving bullies make it easy to demonize bullies. This zero tolerance for bullies closely resembles our intolerance for criminals.<sup>107</sup> The process of restorative justice seeks to teach and treat all participants as humans.<sup>108</sup>

B. Restorative Justice Better Restores Healthy School Communities  
Which are Fundamentally Important to a Child's Well-Being

To be healthy, children need to be connected to a school community. Independent of race, ethnicity, family structure, and poverty status, adolescents who are connected to their parents, families, and school community are healthier than those who are not.<sup>109</sup> This finding in combination with the importance of good peer relations and the destructive effects of peer rejection makes it imperative for children's health to have strong school communities.<sup>110</sup>

The negative effect bullying has on the school community is no different than how crime tears apart communities by contributing to fear, distrust, and anger.<sup>111</sup> If not addressed, this ultimately can lead to isolation which destroys the social bonds needed for a strong community.<sup>112</sup> Restorative practices help restore the community because they allow the community, not an outsider, to help shape and control the response.<sup>113</sup> When the state stands in for the community and brings charges, it deprives the community of its needs and responsibility to resolve the conflict.<sup>114</sup>

Although punishment may remove an immediate risk of behavior that hurts the community, it does little to build community. When the punishment ends, the individuals involved in the bullying incident return to the same school community and back to the same classrooms without any steps to improve the climate. Suspending a bully does little to make the victim feel safe when the bully returns. In sharp contrast to punishment's

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106. *See id.* at 1529.

107. *See* JOHNSTONE, *supra* note 39, at 10.

108. *Id.* at 11.

109. ROBERT W. BLUM & PEGGY MANN RINEHART, REDUCING THE RISK: CONNECTIONS THAT MAKE A DIFFERENCE IN THE LIVES OF YOUTH 31-32 (1997), *available at* <http://www.eric.ed.gov/PDFS/ED412459.pdf>.

110. *See* Janis Kupersmidt, John Coie, & Kenneth Dodge, *Poor Peer Relationships and Later Disorder*, in PEER REJECTION IN CHILDHOOD 299 (Steven R. Asher & John D. Coie eds., 1990).

111. *See* Lerman, *supra* note 68, at 1664.

112. *Id.*

113. *See* McCold, *supra* note 59, at 91.

114. *Id.* at 92-96.

goals to ostracize, segregate, and exclude,<sup>115</sup> a fundamental premise underlying restorative justice is to reintegrate the offender.<sup>116</sup> Restorative justice helps restore community by discussing the issues underlying the conduct and creating agreed upon solutions to repair the harm and rebuild relationships.<sup>117</sup>

The unique role school community plays in children's lives make it an appropriate venue for restorative justice principles. Integrating into a well-defined community impacts children's academic success as well as their physical and mental health. School administrators and policymakers need to question why they continue to rely on a punishment regime that does not positively affect the building of community. Switching to restorative justice or at least some combination of restorative justice and punishment will strengthen the school community.

One of the most pressing needs in any crime situation, but especially with bullying, is to move beyond the specifics of the bullying incident which necessarily focuses on individual choices and responsibility to examine whether systemic changes need to be made to address the root causes of the conflict.<sup>118</sup> For example, why bullying is occurring and why bystanders do not intervene may be rooted in values and attitudes that need to be altered. By participating in the discussion, school communities are able to discover conditions which contribute to bullying which may fail to be uncovered if restorative practices are not utilized. Simply punishing offenders and returning them to the same environment with no changes to it will not reduce the likelihood that bullying will not occur again.

### C. Restorative Justice Will Be More Likely Than Punishment to Address Shame in a Positive and Productive Manner Ultimately Protecting the Safety of Students

Not only does restorative justice build community, but when compared to punishment, it is less likely to produce destructive results. Restorative justice principles are deeply rooted in theories about the impact shame plays in changing behavior.<sup>119</sup> Shame, if not properly managed, can be very

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115. Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1028 (2004).

116. Patricia Gray, *The Politics of Risk and Young Offenders' Experiences of Social Exclusion and Restorative Justice*, 45 BRIT. J. OF CRIMINOLOGY 938, 941 (2005).

117. *What is Restorative Justice?*, SUFFOLK UNIV., <http://www.suffolk.edu/research/6953.html> (last visited Jan. 9, 2011).

118. McCold, *supra* note 59, at 95.

119. Caroline G. Nicholl, *Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety*, WASHINGTON, DC: U.S. DEPT. OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS.,

destructive.<sup>120</sup> Braithwaite focused much of his research on this connection between shame and behavior concluding that two types of shame exist.<sup>121</sup> Stigmatizing shame, or bad shame, does little to change behavior in a positive way.<sup>122</sup> It can lead to destructive behavior and an impediment to belonging if left unresolved since it causes recipients to feel humiliated and alienated forcing them to join negative subcultures and become outsiders.<sup>123</sup>

Poorly managed, shame can result in retaliatory or displaced anger. Maladaptive shame weakens relationships and often leads to more wrongdoing, including more bullying.<sup>124</sup> Victims may also experience shame and a punitive regime does little to aid the victim in dealing with the shame.<sup>125</sup> If the victims' needs continue to be unmet, victims may strike out hurting themselves or others.<sup>126</sup> Research lends some support that school shooters many times are bullied or socially marginalized.<sup>127</sup>

In contrast, reintegrative shame separates the deed from the doer.<sup>128</sup> The shame centers upon the act and not the person.<sup>129</sup> By acknowledging the harm, accepting responsibility for the act, and making amends, the shame

138-48 (1999), available at [http://www.cops.usdoj.gov/files/ric/Publications/e09990014\\_web.pdf](http://www.cops.usdoj.gov/files/ric/Publications/e09990014_web.pdf).

120. See *id.* at 138.

121. Nicholl, *supra* note 120, at fig.19 (showing the differences between good shame (reintegrative shaming) and bad shaming (stigmatizing)).

122. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 67-68 (1989).

123. *Id.*

124. Eliza Ahmed & Valerie Braithwaite, *Forgiveness, Reconciliation, and Shame: Three Key Variables in Reducing School Bullying*, 62 J. SOC. ISSUES 347, 353 (2006); BULLYING IN SCHOOLS: HOW SUCCESSFUL CAN INTERVENTIONS BE? (Ken Rigby, Peter K. Smith & Debra Pepler eds., 2004).

125. Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, in 14 PSYCHOLOGY, PUBLIC POLICY, AND LAW 142 (2008).

126. Brenda Morrison, Ctr. for Restorative Justice, Simon Fraser Univ., Powerpoint Presentation, *The Power Dynamics of Bullying: Negotiating the Social & Emotional World of the School Community* (2009) (citing KATHERINE S. NEWMAN ET AL., RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS 241 (2004)) (discussing school shooters being bullied), available at <http://law.marquette.edu/rji/img/rji2009-brenda-morrison.ppt>; Yale Office of Pub. Affairs & Commc'ns, *Bullying-Suicide Link Explored in New Study by Researchers at Yale*, YALE BULLETIN, Jul. 16, 2008, available at <http://opac.yale.edu/news/article.aspx?id=5913>; Matt Dickinson, *Research Finds School Bullying Link to Child Suicides*, INDEPENDENT, Jun. 13, 2010, <http://www.independent.co.uk/news/uk/home-news/research-finds-bullying-link-to-child-suicides-1999349.html>.

127. Morrison, *supra* note 127.

128. INT'L INST. FOR RESTORATIVE PRACTICES, RESTORATIVE PRACTICES: WHOLE SCHOOL IMPLEMENTATION 20 (2010), available at [http://www.iirp.org/pdf/SSS\\_Implementation\\_Overview.pdf](http://www.iirp.org/pdf/SSS_Implementation_Overview.pdf).

129. *Id.*

can be discharged, allowing the individual to be reintegrated into the community.<sup>130</sup> Processing of shame in this manner helps restore social bonds.<sup>131</sup>

This reintegrative shame is best accomplished when received from respected members of a person's circle of care and not authority figures such as principals and teachers. Offenders will respond more readily to this disapproval if it comes from people with whom they have personal bonds.<sup>132</sup> In addition, hearing directly from victims impacts offenders to a much greater degree.<sup>133</sup> Hearing from the victim and their own supporters often forces the offender to abandon rationalizations concerning why their behavior is not wrong.<sup>134</sup>

#### V. POTENTIAL OBJECTIONS TO RESTORATIVE JUSTICE USED IN THE BULLYING CONTEXT AND POSSIBLE RESPONSES

Not everyone will support using restorative justice practices with bullying.<sup>135</sup> Legitimate concerns do exist about restorative justice practices generally, and need to be addressed directly for restorative practices to be implemented on a large scale basis in our schools. Some of these concerns include cost, the potential to re-victimize the victim, and the desire by parents to punish the bully.<sup>136</sup> In addition, critics of restorative justice generally question whether it is feasible or desirable to implement restorative justice for several reasons including how communities exist today, the conflicts that could arise with the law, and what the community may decide.<sup>137</sup> This section explores and responds to these concerns continuing the dialogue about whether restorative justice is appropriate to use in the bullying context.

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130. Brenda Morrison, *Bullying and Victimisation in Schools: A Restorative Justice Approach*, AUSTRALIAN INST. OF CRIMINOLOGY TRENDS AND ISSUES IN CRIME AND CRIM. JUST. 2 (Feb. 2002).

131. See JOHNSTONE, *supra* note 39, at 117.

132. *Id.* at 101.

133. *Id.* at 99.

134. *Id.* at 98-99.

135. At a recent meeting, the author got the impression that some school officials did not believe restorative justice could be a solution to bullying.

136. At a recent meeting, the speaker argued parents seeking results would not be interested in restorative justice and that schools do not have the resources for it. See Laura Clark, *Trendy "Restorative Justice" Schemes to Stamp Out Bullying at Schools "Do Not Work,"* MAILONLINE (Jul. 2, 2009), <http://www.dailymail.co.uk/news/article-1197102/Trendy-restorative-justice-schemes-stamp-bullying-schools-work.html#>

(addressing concerns with the restorative justice technique in light of this technique's "soft touch" approach to bullying and propensity for manipulation by bullies to avoid punishment).

137. See JOHNSTONE, *supra* note 39, at 49-59.

A. Today's Communities Differ From the Past Because They Are Not as Intertwined and Therefore Will Not Support Restorative Justice Practices

Critics of restorative justice question whether it can work in modern society because of the differences in how communities are structured today.<sup>138</sup> Unlike communities of the past, communities today no longer rely on geography to define themselves.<sup>139</sup> Critics argue that technological advances and mobility of people weaken the communities, resulting in a lack of attachment of individuals to their communities.<sup>140</sup> This connection to communities, whether geographical or belonging to a discrete group such as an Indian tribe, seems to be a fundamental prerequisite for successful restorative justice since it hinges on the offender wanting to maintain ties with the community.<sup>141</sup>

Proponents of restorative justice respond that although configured perhaps differently than in the past, individuals still belong to communities of care, and very few individuals are truly socially isolated.<sup>142</sup> One of the forefathers of restorative justice, Braithwaite, asserts people belong to even more communities than they once did and encourages participants to find support in groups other than their families if they influence the offender or victim.<sup>143</sup> Restorative justice can be used with the different configuration of modern communities but may require more creativity in finding the communities which "have a strong enough bond with offenders to be able to influence their attitudes and behaviour."<sup>144</sup>

This concern seems less relevant, however, when applying restorative justice practices to school bullying. The school setting differs dramatically from the ever changing neighborhoods which may lack the strong ties they once had over individuals. Students have daily contact with the same individuals for three-quarters of the year. Therefore, the school community remains more cohesive than other communities and an excellent place to for students to develop a sense of community.<sup>145</sup>

In addition, bullies generally do not exist in social isolation.<sup>146</sup> Research

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138. *Id.* at 49-55.

139. *See id.* at 50.

140. *Id.*

141. *Id.* at 49.

142. *Id.* at 50-52.

143. *Id.* at 51-52.

144. *Id.* at 54.

145. *See* Karen F. Osterman, *Students' Need for Belonging in the School Community*, 70 REV. EDUC. RES. 323 (Fall 2000) (addressing the importance of community with school achievement and noting a disconnect between theory and practice in schools' efforts to build community).

146. Jaana Juvonen, Sandra Graham & Mark A. Schuster, *Bullying Among Young*

indicates that “teenaged bullies do not feel depressed, anxious, or lonely because they have high social status within their peer collective.”<sup>147</sup> The bully’s strong support system may cut two ways: either that the people exist in their lives to exert pressure on the bully or that the bullies will find no need to conform to social norms or have a desire to return to the greater school community because of their strong counter-community.<sup>148</sup> However, research on the important role bystanders can play lends support that bullies will stop when people intervene. For example, “more than one-half the time, bullying stops within 10 seconds of a bystander stepping in to help.”<sup>149</sup>

This dynamic of the bully’s social status needs to be carefully evaluated when determining whether particular bullying incidents would be appropriate for restorative justice practices. Restorative justice is not a silver bullet or the appropriate response for every bullying incident. Carefully evaluating many factors including which communities bullies feel most closely connected to and thus open to their influence will require school administrators to evaluate on a case-by-case basis.

#### B. Restorative Justice Practices Take Too Much Time

One very legitimate concern focuses on the personnel cost of restorative justice practices. Schools contend they are understaffed already and have neither the infrastructure nor the staff needed to make engaging in restorative justice practices feasible.<sup>150</sup> Properly preparing for a conference and facilitating the conference involves a substantial investment of time for it to be successful. This presents very practical issues concerning who is to be responsible for these tasks when teachers and administrators already feel overworked.

In addition, a time pressure exists for schools when bullying incidents arise. Schools need to take swift action to protect students compared to the juvenile justice system which can take longer. Schools will need to establish protocols in order to effectively address the “time is of the essence” issue. It may be that schools will need to use traditional punishment responses initially and use restorative justice principles when

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*Adolescents: The Strong, the Weak, and the Troubled*, 112 PEDIATRICS 1231, 1236 (2003), available at <http://pediatrics.aappublications.org/cgi/reprint/112/6/1231>.

147. *Id.* at 1235.

148. Tjeert Olthof & Frits A. Goossens, *Bullying and the Need to Belong: Early Adolescents’ Bullying-Related Behavior and the Acceptance they Desire and Receive From Particular Classmates*, 17 SOC. DEV. 25 (2008).

149. W. M. Craig & D. Pepler, *Observations of Bullying and Victimization in the Schoolyard*, 13 CANADIAN J. SCH. PSYCHOL. 41 (1997).

150. Aimie Cronin, *Restorative Practice Struggles to Get Off the Ground*, TE WAHA NUI (Oct. 8, 2010), <http://www.tewahanui.info/wordpress2/?p=3791>.

the offender is returning to the community. Even that dual approach would be an improvement over current practices which often fail to (1) address any underlying issues, especially concerning the victims' needs for closure and assurances of safety, and (2) how the offender reintegrates into the community.<sup>151</sup>

Although these concerns are very real and challenging, they are not necessarily insurmountable. School personnel need to collaborate with academics, juvenile justice professionals and K-12 schools in the United States and around the world who understand these issues, and brainstorm together about possible solutions. Initial ideas may include providing teachers with compensatory hours for participating in the conferences. Another solution to overburdening the school personnel is to rely on community support. The best practices in the criminal justice setting limit the involvement of system players. The community has a strong role to play with both the court system and with schools.

When evaluating costs, educators must also remember that costs currently exist with the punishment regime. "Students fall behind, parents [and] communities must deal with students outside of school and schools lose financially."<sup>152</sup> Administrators may actually reclaim time if the restorative practices result in less bullying problems. As discussed earlier, the punishment regime often leads to a vicious cycle of reoffending which restorative justice hopes to break.<sup>153</sup>

Schools should also implement this slowly with discrete criteria. Not all cases will be appropriate for restorative justice because of the nature of the offense or the attitudes of the victims or offenders. Restorative justice can still bring the community benefits even if it starts small. Gaining experience and success, while working out the rough spots on a few cases, may make implementing restorative justice more palatable to schools.

### C. Restorative Justice Practices Have the Potential to Re-Victimize the Victim

The possibility of re-victimizing the victim always exists and must never be overlooked. One of the best ways to ensure this does not happen is to faithfully abide by the goals and principles of the best practices of

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151. YOUTH UNITED FOR CHANGE, PUSHED OUT: YOUTH VOICES ON THE DROPOUT CRISIS IN PHILADELPHIA 16 (2011), available at <http://youthunitedforchange.com/wp-content/uploads/2011/02/Pushed-Out.pdf> ("[T]hese disciplinary practices do not seem to impact the behaviors that they are supposed to improve. Instead of keeping students safe so as to improve the educational environment, the District's discipline policy is creating a negative climate and is pushing them out of school.").

152. James A. Termotto Sr., *An American Resolution: Restorative Approaches in School*, RESOLUTION (Autumn 2008), at 6.

153. See *supra* Part I.

restorative justice. This includes making sure restorative justice is used only with appropriate cases. If an offender will not accept responsibility, restorative justice should not be employed.<sup>154</sup> Likewise, victims must not be coerced into attending mediations or conferences but come to them voluntarily for the experience to be satisfying.

In addition, adequately preparing the offender and the victim before the conference is essential. The parties need thorough preparation and support guiding them through each step of the process for it to work.<sup>155</sup> Restorative justice can be very damaging to the participants without this. Facilitators must also be trained and monitored in the theory, methods, principles, and practices of restorative justice before attempting to lead others through the process.<sup>156</sup> The facilitator must balance the victim's needs with the rehabilitation of the offender.

Picking the appropriate restorative justice intervention must also be carefully considered to lessen the likelihood of re-victimizing the victim.<sup>157</sup> To that end, victim-offender mediation relied on by many schools today may not be the best process to pick in the bullying context. Because the nature of bullying involves intimidation and domination, victim offender mediation may be too threatening to a victim.<sup>158</sup> Peace circles or family group conferences provide more support for the victim and better balances the playing field.

Failing to engage in restorative justice practices often marginalizes the victims' needs to communicate their feelings and ask questions. Just as re-victimization can occur in failed restorative practices, so too can it occur when victims are not empowered and their needs go unmet.<sup>159</sup> Victims need the chance to repair the psychological harm and relational damage by participating in the process, and restorative justice provides more of an opportunity for that to occur than with a punishment regime.<sup>160</sup>

#### D. Parents of Victims Want to Punish the Bully and Protect the Victim and Will Not Engage in Restorative Justice Practices

Another common reason given for not using restorative practices is

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154. See Umbreit, *supra* note 45.

155. *Id.* at 298.

156. *Id.* at 298-99.

157. Administrators should compare the different approaches with the particular circumstances. For an excellent comparison of different approaches see KEN RIGBY, BULLYING INTERVENTIONS IN SCHOOLS: SIX MAJOR APPROACHES (2010), available at [http://www.bullyingawarenessweek.org/pdf/Bullying\\_Prevention\\_Strategies\\_in\\_Schools\\_Ken\\_Rigby.pdf](http://www.bullyingawarenessweek.org/pdf/Bullying_Prevention_Strategies_in_Schools_Ken_Rigby.pdf).

158. Christensen, *supra* note 15, at 564.

159. See *id.* at 68.

160. *Id.*

parents want their child protected, the bully to be punished, and these parents are not interested in engaging in a dialogue with the bully. School officials question whether the victim's family would ever choose to engage in such a process. First, many parents do decide to try restorative justice in the United States and around the world. Although this approach may be novel in certain school districts, officials should not refuse to try it based on an assumption that can be easily debunked.<sup>161</sup>

Second, the current punishment model does not necessarily accomplish the goal of keeping the victim safe. As with both crime and bullying, punishing the offender may make things worse for the victim. Bullies or their associates may try to get back at their victims by blaming them for the punishment.<sup>162</sup> A better approach is to resolve the underlying issues instead of reacting only to the act.

Third, the current punishment model does not necessarily accomplish the goal of punishing the bully. One commentator argues that because the consequences associated with punishment are so serious, punishment makes reconciliation and reparation less likely to occur because the offender will go to extreme lengths to avoid the consequences associated with the punishment.<sup>163</sup> This phenomena occurs in the bullying context. Parents are bringing lawsuits against school districts for disciplining their children for bullying incidents.<sup>164</sup> Instead of trying to resolve the issue, parents of bullies use their energy and resources to insulate their children from suspensions, expulsions, and other disciplinary actions.<sup>165</sup> When court decisions overturn the school punishment, the victim feels even more wronged.<sup>166</sup> Perhaps if punishment did not occur routinely but instead a more collaborative approach was used to hold bullies more accountable,

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161. Many schools currently use restorative justice practices. See LAURA MIRSKY, INT'L INST. FOR RESTORATIVE PRACTICES, SAFER SANER SCHOOLS: TRANSFORMING SCHOOL CULTURE WITH RESTORATIVE PRACTICES (2003), available at [http://www.iirp.org/iirpWebsites/web/uploads/article\\_pdfs/ssspilots.pdf](http://www.iirp.org/iirpWebsites/web/uploads/article_pdfs/ssspilots.pdf) (reporting on a pilot program of three school districts); ABBY PORTER, INT'L INST. FOR RESTORATIVE PRACTICES, RESTORATIVE PRACTICES IN SCHOOLS: RESEARCH REVEALS POWER OF RESTORATIVE APPROACH, PART II (2007), available at [http://www.safersanerschools.org/uploads/article\\_pdfs/schoolresearch2.pdf](http://www.safersanerschools.org/uploads/article_pdfs/schoolresearch2.pdf).

162. JOHNSTONE, *supra* note 39, at 69.

163. *Id.*

164. See generally Hoffman, *supra* note 5 (describing a 2008 case in which a parent of an alleged bully sued the school and won).

165. See, e.g., J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1097 (D. Cen. Cal. 2010) (granting plaintiff's motion for summary adjudication as to her first and second causes of action for violation of 42 U.S.C. §1983, and granting individual defendants' motion for summary judgment on the issue of qualified immunity as to the first cause of action).

166. *Id.*

school and family resources could be marshaled for solving the problem instead of being used to defend or contest punishments.

#### E. Tension Between State and Community Customs Make Restorative Justice Practices a Dangerous Option

One potential issue when utilizing restorative justice occurs when the community's support is weak for a criminal law.<sup>167</sup> For example, some laws such as banning smoking or drunk driving statutes, may conflict with widely acceptable community practices.<sup>168</sup> Critics contend restorative justice practices may not be effective in these cases without cultural reforms because it may possibly lead to an overly lenient outcome.<sup>169</sup>

With respect to bullying, this concern raises an interesting issue. Only recently is bullying being taken seriously as an issue of health and welfare.<sup>170</sup> Research makes it difficult to argue that bullying does not produce devastating short and long-term effects for the target, the offender, and the community.<sup>171</sup>

Victims of any crime or wrong, and especially bullying victims, suffer from not only tangible harms but dignitary harms as well.<sup>172</sup> These harms may produce physical manifestations such as headaches, stomach aches, weight loss, vomiting, and general poor health,<sup>173</sup> but victims also suffer

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167. See JOHNSTONE, *supra* note 39, at 55.

168. *Id.* at 56.

169. *Id.* at 57.

170. BRENDA MORRISON, INT'L INST. FOR RESTORATIVE PRACTICES, RESTORATIVE JUSTICE AND SCHOOL VIOLENCE: BUILDING THEORY AND PRACTICE 1 (2002), available at [http://www.iirp.org/pdf/morrison\\_bullying.pdf](http://www.iirp.org/pdf/morrison_bullying.pdf).

171. See Joseph A. Dake et al., *The Nature and Extent of Bullying at School*, 73 J. SCH. HEALTH 173, 176 (2003) (explaining that one study concluded that victims were 4.6 times more likely and bullies 5.1 times more likely to experience psychosomatic symptoms than students not involved in bullying, including lower back pain, neck and shoulder pain, stomach ache, nervousness, irritation or tantrums, difficulty sleeping or waking, fatigue, and head ache); Riittakerttu Kaltiala-Heino et al., *Bullying at School-An Indicator of Adolescents at Risk for Mental Disorders*, 23 J. ADOLESCENCE 661, 667-68 (2000) (illustrating that psychosomatic health issues, such as poor appetite and anxiety, are also more common among victims and bully-victims); Ken Rigby, *Peer Victimization at School and the Health of Secondary School Students*, 69 BRIT. J. EDUC. PSYCHOL. 95, 102 (1999); Katrina Williams et al., *Association of Common Health Symptoms with Bullying in Primary School Children*, 313 BRIT. MED. J. 17, 18 (1996) (finding that victimized children have been found to experience more frequent stomach aches and headaches, and to be more likely to have troubles with sleeping and bed wetting); D. Wolke et al., *Bullying Involvement in Primary School and Common Health Problems*, 85 ARCHIVES DISEASE IN CHILDHOOD 197, 199 (2001) (concluding that victims of bullying and bully/victims are most likely to present physical health symptoms such as sore throats, colds, and cough).

172. See Meyer, *supra* note 65, at 1526.

173. See Dake et al., *supra* note 171, at 176; Kaltiala-Heino et al., *supra* note 171, at

psychological effects such as depression, loss of concentration, anxiety, and insomnia.<sup>174</sup> These conditions impact both the academic achievement and mental health of the school bullying victim.<sup>175</sup> For example, some studies find that victims of bullying perform below average in school and below students who are not subjected to bullying.<sup>176</sup> Victims may also try to avoid contact with the bully by changing their everyday routines, avoiding the classroom or other school facilities, and in some extremes, even withdrawing from school.<sup>177</sup> In addition to withdrawal and social

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667-68 ; Rigby, *supra* note 171, at 102; Williams et al., *supra* note 171, at 18; D. Wolke et al., *supra* note 171, at 197.

174. See NELS ERICSON, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, ADDRESSING THE PROBLEM OF JUVENILE BULLYING (2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf> (describing that short-term psychological effects on victims include increased feelings of loneliness, loss of self-esteem, and difficulties making friends or maintaining relationships with classmates, and that victims may also suffer humiliation, insecurity, and fear of attending school); Dake et al., *supra* note 171 (finding that (1) "bullies are 2.8 to 4.3 times more likely, victims four times more likely, and bully/victims 6.3 to 8.8 times more likely to suffer from depressive symptoms" than children not involved in bullying; and (2) that "bullies [are] four times more likely, victims 2.1 times more likely, and bully/victims 2.5 times more likely to report" having serious thoughts of suicide); Kirsti Kumpulainen & Eila Räsänen, *Children Involved in Bullying at Elementary School Age: Their Psychiatric Symptoms and Deviance in Adolescence: An Epidemiological Sample*, 24 CHILD ABUSE & NEGLECT 1567, 1568, 1574-75 (2000) (finding that children involved in bullying at early age have been found to have more psychiatric symptoms in adolescence than youth not involved in bullying).

175. See Jaana Juvonen et al., *Peer Harassment, Psychological Adjustment, and School Functioning in Early Adolescence*, 92 J. EDUC. PSYCHOL. 349, 350-51, 356 (2000) (examining grade point averages of victimized students ages twelve to fifteen and finding them to be lower than those of middle school students not involved in bullying, and noting that bullying at school is also related to academic competence and school adjustment, although research findings in this area do not always agree); *Effects of Bullying*, STOP BULLYING.GOV, <http://www.stopbullying.gov/topics/effects/> (last visited Mar. 17, 2011) (discussing academic and mental health issues of victims).

176. See Helen Mynard & Stephen Joseph, *Bully/Victim Problems and Their Association with Eysenck's Personality Dimensions in 8 to 13 Year-Olds*, 67 BRIT. J. EDUC. PSYCHOL. 51, 52 (1997) (finding that both bullies and victims did worse in school than children not involved in bullying, and that victims were affected more than bullies); Stuart Wolpert, *Victims of Bullying Suffer Academically As Well*, UCLA Psychologists Report, UCLA NEWS (Aug. 19, 2011), <http://newsroom.ucla.edu/portal/ucla/victims-of-bullying-suffer-academically-168220.aspx>.

177. *Effects of Bullying*, *supra* note 175 (discussing how bullied kids are more likely to miss, skip, or drop out of school); *School Policies & Plans*, IRELAND DEP'T EDUC. & SKILLS, <http://www.education.ie/home/home.jsp?maincat=&pcategory=10815&ecategory=33803&sectionpage=12251&language=EN&link=link001&page=1&doc=32086> (last visited Mar. 17, 2011) (discussing the anxiety about travelling to and from school and therefore requesting parents to drive or collect them, changing route of travel, avoiding regular times for travelling to and from school, children's unwillingness to attend school, refusal to attend,

isolation, victims may engage in negative or harmful conduct such as acting more aggressively, turning to alcohol or drugs, or even committing suicide.<sup>178</sup>

Victims are not the only ones adversely affected by bullying. Hazing research illustrates that some bullies suffer guilt, shame, and discomfort after a bullying incident in which they act in a manner that is inconsistent with their values.<sup>179</sup> Moreover, bullies may also suffer depression and suicidal ideation, though the cause of these symptoms may be the result of having also been bullied.<sup>180</sup> Understanding the wrongdoer and his action then becomes essential to reintegrating him into society. “Making sense of the wrongdoer’s action means looking at him as more than his one act and filling out the picture of the past, as well as acknowledging the possibilities inherent in his future, and seeing him therefore once again inside the sphere of humanity.”<sup>181</sup>

Bullies are more likely to engage in unlawful and/or violent behavior as children and later as adults than their non-bullying peers.<sup>182</sup> For example, a National Institute for Child Health and Human Development survey found that “[a]pproximately 60 percent of boys who were classified by researchers as bullies in grades six through nine were convicted of at least one crime by the age of 24, compared to only 23 percent of the boys who

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missing school).

178. See Marcel F. van der Wal et al., *Psychosocial Health Among Young Victims and Offenders of Direct and Indirect Bullying*, 111 *PEDIATRICS* 1312, 1312, 1314 (2003) (indicating that depression and thoughts of suicide are much more common among boys and girls who have been bullied than among those who have not); see also Kaltiala-Heino et al., *supra* note 170, at 667-68, 670 (commenting that frequent consumption of alcohol and use of other controlled substances are more common among bullies and victims). *But see* Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 *JAMA* 2094, 2097 (2001) (finding that alcohol use was positively associated with bullying others, but negatively associated with being bullied, and finding that smoking was found to be more common among both bullies and victims).

179. See Florence L. Denmark et al., *Bullying and Hazing: A Form of Campus Harassment*, in *UNDERSTANDING AND PREVENTING CAMPUS VIOLENCE* 27, 35 (Michele A. Paludi ed., 2008).

180. See van der Wal et al., *supra* note 178, at 1316; Porter, *supra* note 30 (reporting that many children in expulsion program were victims of bullying for years).

181. See Meyer, *supra* note 65, at 1522.

182. See Nansel et al., *supra* note 178, at 348 (referencing significant quantity of research examining link between bullying and violent behavior). In particular, studies have found that bullying and being bullied are strongly associated with involvement in physical fights and carrying weapons to school. *See id.* at 348-49 (explaining connection between bullying and future violent behavior). Bullying can also be a marker for a variety of serious violent behaviors, including frequent fighting, fighting-related injury, and weapon carrying. *See id.* (concluding based on substantive research that bullying increases propensity for future violent activities and behaviors).

were not characterized as bullies or victims.”<sup>183</sup> Of those classified as bullies, forty percent had three or more convictions by age twenty-four, compared to ten percent of those who were neither victims nor bullies.<sup>184</sup> Several other studies also report frequent delinquent behavior among bullying offenders.<sup>185</sup>

In addition to the victims and offenders, bullying directly impacts bystanders and members of the community in tangible ways.<sup>186</sup> Bystanders witness the bullying and often, for various reasons, fail to intervene.<sup>187</sup> This failure causes different forms of distress for the individual who witnesses bullying, including guilt for not stopping it, fear of being a future victim or losing social influence, and anger and frustration towards the aggressor.<sup>188</sup> All of these tear at the fabric of the community.

Until now, countries outside the United States more readily accepted this evidence by taking bullying more seriously than Americans as a real issue of public health.<sup>189</sup> These countries’ greater recognition of the harms associated with bullying, mirrors their greater willingness to adopt restorative justice practices to manage conflict. Recent suicides and reports

183. See JAMES ALAN FOX ET AL., *BULLYING PREVENTION IS CRIME PREVENTION, FIGHT CRIME: INVEST IN KIDS 5* (2003), available at <http://www.fightcrime.org/sites/default/files/reports/BullyingReport.pdf> (citing research indicating correlation between youth bullying and later criminal activity or convictions); see also Ctr. for the Study and Prevention of Violence, Olweus Bullying Prevention Program, <http://colorado.edu/cspv/blueprints/modelprograms/BPP.html> (last visited Dec. 8, 2010) (noting that children who bully are 37% more likely to commit offenses as adults).

184. Fox, *supra* note 183, at 10.

185. See, e.g., van der Wal et al., *supra* note 178, at 1316 (providing statistics indicating that bullying offenders are more likely to engage in delinquent behavior).

186. See Julian Knight, *Bullied Workers Suffer “Battle Stress,”* BBC NEWS ONLINE (Aug. 17, 2004), <http://news.bbc.co.uk/1/hi/business/3563450.stm> (noting that witnesses of bullying often suffer similar mental problems to those bullied).

187. See Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 91 (2002).

188. See Jennifer L. Martin, *Gendered Violence on Campus: Unpacking Bullying, Harassment, and Stalking*, in UNDERSTANDING AND PREVENTING CAMPUS VIOLENCE 3, 5 (Michele A. Paludi ed., 2008); see also Jaana Juvonen, *School Violence: Prevalence, Fears, and Prevention*, RAND (2001), [http://www.rand.org/pubs/issue\\_papers/IP219/index2.html](http://www.rand.org/pubs/issue_papers/IP219/index2.html) (recognizing prevalence of bullying and suggesting school programs, counseling, and mediation, among other recommendations, to help alleviate bullying in schools).

189. *Bullying is a Public Health Issue: Researcher*, CBC NEWS, <http://www.cbc.ca/news/health/story/2009/11/20/consumer-anti-bullying-study.html> (last updated Nov. 21, 2009); Press Release, The White House, Office of the Press Sec’y, President and First Lady Call for a United Effort to Address Bullying (Mar. 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/10/president-and-first-lady-call-united-effort-address-bullying> (illustrating how the United States is starting to take bullying seriously); Lynette Feder, *Editorial: Bullying As a Public Health Issue*, 51 INT’L. J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 491, 491-94 (2007).

in the media of the prevalence of bullying and its detrimental effects are beginning to wake up the United States.<sup>190</sup> The huge increase in anti-bullying statutes in just a few short years reflects the growing concern surrounding bullying.<sup>191</sup>

Although some school administrators and members of the public remain uneducated or dismissive of the issue excusing bullying as a normal and necessary rite of passage in a child's life, less and less support exists for the propositions that "children are just mean" and targets of bullying need to just "suck it up."<sup>192</sup> This cultural shift from acceptance or overlooking abusive behavior to acknowledging its detrimental effects on the victim, the offender, and the community suggests a widespread consensus is developing that bullying can no longer be ignored or trivialized. As more research becomes available and more is written on bullying, community support for making bullies accountable will only grow. Although disagreement may always exist among some about whether the bullying incident was wrong and if so, what the most appropriate way to handle bullying incidents is, the social norms seem to be shifting towards more solid community support that bullying must be addressed. This shift will lessen the problem that restorative justice may not work with bullying based on tensions that exist sometimes between state law and community custom.

#### F. Unacceptable Reparations May Result from Restorative Justice Practices

Potential tension occurs if the restorative justice process results in reparations that requires conduct that would not be considered restorative in nature. For example, some communities advocate for ways to make amends that many others would view as unacceptable or perhaps illegal.<sup>193</sup> In his book, Gerry Johnstone describes the Australian Aboriginal people's custom of spearing the thigh of an offender.<sup>194</sup> A solution provided in the criminal contest is for all remedies to be approved by a judge.<sup>195</sup>

Since the judicial system will not be involved in the school bullying context some other regulating process must be devised. One possible solution is to allow the school administrators to have the final say much like the judge. This oversight potentially risks taking away the creativity that should be occurring within the process.<sup>196</sup> To avoid this unintended

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190. Feder, *supra* note 189, at 491-94; Press Release, *supra* note 188.

191. *See supra* Part II.

192. *See, e.g.*, Morrison, *supra* note 130, at 2.

193. JOHNSTONE, *supra* note 39, at 57-58.

194. *Id.* at 58.

195. *Id.*

196. *Id.*

consequence, specific standards should be developed to guide the administrator's review. These standards should focus on overturning decisions only when the recommendation violates a law or is utterly unconscionable. The administrator should refrain from second-guessing the process deferring to the creativity of the group when possible, unless the solution unequivocally violates the standards.

#### VI. CONCLUSION

Restorative justice practices provide an alternative approach for school districts to battle bullying. Its focus on repairing the harm and reintegrating the offender fit more closely than the punishment regime to schools' goals of educating students in social skills, establishing communities, and protecting students. Although several valid concerns exist regarding the implementation of restorative justice processes in a school setting, these can be addressed by collaborating with others to develop best practices that reflect the unique environment of a school. Legislatures should compel schools to implement restorative practices as appropriate. Administrators may want to begin with a small group of discrete fact patterns to gain a comfort level and achieve success. Schools cannot, however, afford to pass up an opportunity that promises to foster "greater development of community, inclusion and empathy" and drop suspension rates while increasing student engagement.<sup>197</sup> Although it may not be the silver bullet, state legislatures should make sure to include restorative justice in anti-bullying statutes.

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197. INT'L INST. FOR RESTORATIVE PRACTICES, IMPROVING SCHOOL CLIMATE: FINDINGS FROM SCHOOLS IMPLEMENTING RESTORATIVE PRACTICES 36 (2009), [http://www.iirp.org/iirpWebsites/web/uploads/article\\_pdfs/92115\\_IIRP-Improving-School-Climate.pdf](http://www.iirp.org/iirpWebsites/web/uploads/article_pdfs/92115_IIRP-Improving-School-Climate.pdf).