

**... AFTER FURTHER REVIEW: THE
FUTURE OF BULLYING & HAZING LAWS
AND INTERSCHOLASTIC ATHLETICS**

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Introduction	124
I. Interscholastic Athletics: In a League of Their Own..	127
A. Absence of Authority & Rites of Passage	127
B. Where Do Courts Draw the Line?	130
II. State Anti-Bullying & Hazing Laws: A Broken System?	132
A. Problems with State Bullying Laws.....	133
1. 50 Different States, 50 Different Views	133
2. Legislative Intent.....	134
B. Problems with State Hazing Laws	137
1. Consistently Inconsistent	138
3. Laws Without Teeth.....	139
III. The Solution: One Law	141
A. Enter: The Federal Government	141
B. What Would The Ideal Law Include?	142
IV. Becoming a Reality.....	143
A. The Spending Clause	143

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B. First Amendment & Free Speech Issues.....	145
V. Roadblocks & Counterarguments	146
A. Other Roads to Recovery.....	146
1. Title IX: The Less Than Ideal Solution	147
B. Alternative Solution: Uniform Act	149
Conclusion	151

INTRODUCTION

Though they are distinctly different behaviors, “bullying and hazing” unfortunately play a large role in the modern day school experience.¹ Across the nation, incidents of bullying and hazing plague our schools in the hallways, classrooms, and even online.² Many people might think of bullying and hazing in school as something similar to the traditional image of the hulking thug taking lunch money or stuffing kids in lockers. Unfortunately, practices of bullying and hazing are not limited to a specific type of person or school organization. In fact, bullying and hazing can happen anywhere in school. This article will focus on bullying and hazing in interscholastic athletics, which unfortunately is also becoming more common.³

Two recent, high profile events introduced the nation to how bullying and hazing in sports work.⁴ The first occurred in April of 2013, when a video surfaced of then-Rutgers University basketball coach Mike Rice throwing basketballs at his players while

¹ Sherri Gordon, *Bullying and Hazing - Is There a Difference?*, ABOUT.COM (Mar. 26, 2014), <http://bullying.about.com/od/Basics/fl/Bullying-and-Hazing-ndash-Is-There-a-Difference.htm>.

² Linda Starr, *Hazing: Not Just a College Problem Anymore*, EDUC. WORLD (last updated Nov. 4, 2011), http://www.educationworld.com/a_issues/issues123.shtml.

³ Susan P. Stuart, *Warriors, Machismo, and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room*, 35 W. NEW ENG. L. REV. 377, 383 (2013).

⁴ David Wiegand, *'20/20' Puts Mike Rice in Spotlight*, S.F. GATE BLOG (Nov. 8, 2013, 10:26 AM), <http://blog.sfgate.com/dwiegand/2013/11/08/tv-2020-puts-mike-rice-in-spotlight/>.

berating them with insults and homophobic slurs during practice.⁵ The second began when NFL Offensive Lineman Jonathan Martin removed himself from the Miami Dolphins roster for the remainder of the 2013 season because of the harassment he was receiving from his own teammates, specifically Richie Incognito. This resulted in a media firestorm of speculation and investigation.⁶ In the following weeks, it was discovered that Martin was the recipient of constant name-calling, racial slurs, and threats of violence from his Dolphin teammates.⁷ These incidents ignited a public debate over the prevalence of bullying and hazing in sports.⁸ The NFL itself even conducted an internal investigation of locker room culture following the Martin-Incognito fallout.⁹

Although these incidents might have shocked the general public, athletes of all types were already familiar with these types of stories. Bullying and hazing acts similar to what occurred at Rutgers and Miami are a prevalent part of athletics, especially in junior-high and high school.¹⁰

Interscholastic athletics are team-based organized sports activities sponsored by the school district that occur outside the school day and do not count for academic credit towards promotion

⁵ Steve Eder & Kate Zernikem, *Rutgers Leaders Are Faulted on Abusive Coach*, N.Y. TIMES (April 3, 2013), <http://www.nytimes.com/2013/04/04/sports/ncaabasketball/rutgers-fires-basketball-coach-after-video-surfaces.html?pagewanted=all>.

⁶ Chris Mortensen, *Jonathan Martin Went to Hospital*, ESPN (Nov. 8, 2013, 9:35 AM), http://espn.go.com/nfl/story/_/id/9936309/jonathan-martin-checked-hospital-leaving-miami-dolphins.

⁷ Barry Petchesky, *Investigation Finds "Patterns of Harassment" in Miami*, DEADSPIN (Feb. 14, 2014, 10:38 AM), <http://deadspin.com/investigation-finds-pattern-of-harassment-in-miami-1522833437>.

⁸ Tara Sullivan, *Sullivan: Fired Rutgers Coach Mike Rice Resurfaces As Sports Bullies Return to Spotlight*, NORTH JERSEY (Nov. 7, 2013, 10:05 AM), <http://www.northjersey.com/sports/college-sports/rutgers-sports/sullivan-fired-rutgers-coach-mike-rice-resurfaces-as-sports-bullies-debate-returns-to-spotlight-1.688547>.

⁹ Chris Burke, *Dolphins Suspend Richie Incognito as NFL Investigates Jonathan Martin Case*, SPORTS ILLUSTRATED (NOV. 4, 2013, 2:35 PM), <http://www.si.com/nfl/audibles/2013/11/04/richie-incognito-suspended-miami-dolphins-jonathan-martin>.

¹⁰ Nadine C. Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams*, ALFRED UNIVERSITY (1999), http://www.alfred.edu/sports_hazing/docs/hazing.pdf.

or graduation.¹¹ While athletics is among many of the opportunities provided by schools, it is truly unique when bullying and hazing become involved. When incidents of bullying and hazing go too far, student-athletes looking to the courts for remedy can often be left empty-handed.

The current legal methods available to students who are victims of bullying and hazing are largely inadequate to grant them the remedy they rightfully deserve. This problem is compounded for athletes who are victims of bullying or hazing. Due to the culture and social structure of athletics, instances of bullying and hazing are common. When incidents occur in athletics, it is often difficult to assign blame. Should the blame rest on the bully? Is it the coaches' fault for not stopping it from happening? What about the school district itself, is it to blame for allowing a student to be injured on its property?

State laws greatly differ on what constitutes bullying and hazing, and courts are often reluctant to place any blame on schools or employees for failing to stop this behavior. This is not to suggest that bullying and hazing laws are ineffective *per se*, the problem usually lies with the language, intent, and punishments of the laws. Even federal avenues available to victims are rife with problems. The victim might not be part of a protected class and the burden of proof for Title IX claims can be daunting.

This Article advocates for the need to pass a federal anti-bullying and hazing legislation for schools, which should include a provision for instances of bullying and hazing that occur during interscholastic athletics. Instead of waiting around for every state to adopt a proper anti-bullying and hazing law, the federal government should step in and enact one nationwide law. A singular law with a concise definition of bullying and hazing could prevent endless litigation over anti-bullying and hazing laws in other states. A single federal law could also lead to the Supreme Court setting a national anti-bullying and hazing standard once

¹¹ See, e.g., *Richmond School District Policy Statement: Student Participation in Interscholastic Athletics - Policy # 377*, RICHMOND SCHOOL DISTRICT (2009), <http://www.richmond.k12.wi.us/Portals/RichmondSchool/377%20Student%20Participation%20in%20Interscholastic%20Athletics.pdf>.

and for all.¹² This proposed legislation could stop 50 different states from fighting 50 different battles and turn the focus to 50 states fighting one battle. More importantly, it could make significant strides and change the culture of bullying and hazing that currently pervades athletics.

This Article will begin by explaining how the world of interscholastic athletics differs from that of other school activities and why those differences make bullying and hazing more likely to occur in an athletic environment. The Article will then cover various criticisms of state anti-bullying and hazing laws, and how they inadequately serve the victims. Lastly, the Article will demonstrate why a federal law is the best method to resolve this problem and how it is within Congress's power to pass such a law.

I. INTERSCHOLASTIC ATHLETICS: IN A LEAGUE OF THEIR OWN

Statistically, athletes are the most at risk group in schools to encounter bullying and hazing. According to a national survey conducted by Alfred University, the greatest numbers of high school students hazed are athletes.¹³ Among the high school students surveyed, 67 percent of them reported being involved in athletics and 35 percent of those students reported being subjected to some form of hazing; this constitutes 24 percent of all students or approximately 800,672 high school athletes per year.¹⁴

A. Absence of Authority & Rites of Passage

The main reason that athletes are at a greater risk for bullying and hazing is because the culture of athletics differs significantly from that of the classroom and other extra-curricular activities traditionally offered by schools. One of these key differences is the structure of athletics, which can consist of a constant absence of authority figures, such as a coach.

Classrooms, hallways, and student clubs usually always have some authority figure present to monitor student behavior and

¹² Farley Andersen, *Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying*, 64 MERCER L. REV. 753, 780-81 (2013).

¹³ See Hoover, *supra* note 10.

¹⁴ Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 404 (2002).

deter incidents from occurring. This is not always true for athletics. While the coach will be with his team during practices and games, there are also multiple instances where a coach will not be present. These situations include, but are not limited to dressing in the locker-room, warming up before practice, team bus-rides, and off-campus team hangouts. During these routine events where there is a lull in supervised activity, bullying and hazing are most likely to occur.¹⁵ Authority figures that are willing to intervene are possibly the greatest deterrent to bullying and hazing in athletics.¹⁶ Without their presence, bullying and hazing can go on virtually unchecked, and the victimizers can operate without fear of disciplinary action.

Perhaps the scariest aspect of athletic culture is bullying and hazing's established and entrenched place as a rite of passage for young men and women.¹⁷ In her article on the epidemic of athletic hazing rituals, Susan P. Stewart lists four values that are inherent with sports teams:

1. Making sacrifices for the game,
2. Striving for distinction,
3. Playing through pain, and
4. Refusing to accept limitation(s) in pursuit of winning.¹⁸

In pursuit of these values, athletes often justify practices of bullying and hazing as a test to determine who's worthy of being part of the team.¹⁹ Athletics centers on the idea of teamwork, where multiple individuals come together to each do their part in pursuit of victory. Teamwork is perhaps the most essential key to victory in sports. Many athletic teams excuse practices of bullying and hazing under the false pretense that it will supplement their team's level of unity and cohesiveness.²⁰

¹⁵ 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, 546 (2009).

¹⁶ Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 656-57 (2004).

¹⁷ Stuart, *supra* note 3 at 394.

¹⁸ *Id.* at 388

¹⁹ *Id.*

²⁰ *Id.*

In effect, this practice fails to determine who should be included, which is a logical and practical contradiction considering that a recent study demonstrated that bullying and hazing have no positive correlation to improved teamwork.²¹

Teams might have rituals that are physically and emotionally damaging but are perceived by the victims as a necessity to become part of the team. The victimizers might also see these rituals in a similar light, especially if they once had to do the same thing to “prove their worth.”²² Coaches might be aware of these rituals but rarely take part in them or look the other way when they occur.²³

This cycle of behavior creates a culture where the extreme behaviors of bullying and hazing are seen as the norm. Furthermore, their use often remains unhindered because hazing incidents in sports are rarely reported to authority figures.²⁴ Studies show that victims of hazing are ashamed and afraid that adults will not know how to handle the situation.²⁵ Many do not even know that hazing is against the law.²⁶

Perhaps the case that best demonstrates how bullying and hazing are treated in the athletic environment is *Seamons v. Snow*.²⁷ Brian Seamons was the back-up quarterback on his high-school football team.²⁸ One day, when Brian came out of the shower, he was grabbed by teammates and forcibly taped to a towel rack.²⁹ After he had been bound naked to the towel rack, his teammates taped his genitals and then brought a girl Brian used to date into the locker room to witness what had been done to him.³⁰ After Brian complained to his coach, the coach called a team meeting where he had Brian apologize and accused him of

²¹ *Id.*

²² Lentz School Sec. § 4:3 (2013).

²³ In most of the cases discussed in this article regarding bullying and hazing, the plaintiffs claim that coaches were aware of bullying and hazing occurring in the athletic environment.

²⁴ Starr, *supra* note 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 206 F.3d 1021 (10th Cir. 2000).

²⁸ *Id.* at 1023.

²⁹ *Id.* at 1023.

³⁰ *Id.*

betraying the team.³¹ During the ensuing controversy, school officials canceled the rest of the football season, causing further harassment against Brian. Even certain school officials blamed Brian for the cancellation of the football season, stating that Brian “should have taken it like a man.”³²

Although Brian eventually prevailed when a federal jury awarded Brian \$250,000 in damages, this result came eight years after the fact and only happened because Brian’s coach had attempted to force Brian to apologize to school officials for reporting the incident.³³ The state attorney for the trial, Dan Larsen, informed the jury during his closing argument that this case was solely about free speech and not about what was actually done to Brian in the locker room.³⁴

This might seem like an extreme case to an outsider, but this sort of behavior in interscholastic athletics is not as uncommon as one would think. When Brian was in the process of taking his case to trial, both he and his attorney received hundreds of letters of encouragement from former high-school athletes who claimed they had endured similar hazing.³⁵ It is hard to imagine another area, be it the classroom or student-organization, where a student would be subjected to additional harassment for reporting an incident in which he himself was the victim. Like it or not, interscholastic athletics is simply a different world compared to any other school environment.

B. Where Do Courts Draw the Line?

The structure and culture surrounding athletics do not deserve all of the blame. When the athletic culture where incidents of bullying and hazing clearly occur is coupled with the laws’ and the courts’ definition of bullying and hazing, compatibility problems arise. Especially when bullying and hazing

³¹ *Id.* at 1024.

³² *Seamons v. Snow*, 84 F.3d 1226, 1230 (10th Cir. 1996).

³³ Angie Welling, *Ex-Gridder Scores a Win in Courtroom*, DESERET NEWS (Mar. 23, 2001, 12:08 PM), <http://www.deseretnews.com/article/832756/Ex-gridder-scores-a-win-in-courtroom.html?pg=all>.

³⁴ *Id.*

³⁵ Vaughn Roche, *Football Hazing Penalty Splits Tiny Utah Town: Student Is Threatened After His Complaint Ends His Team’s Season*, L.A. TIMES (Nov. 22, 1993), http://articles.latimes.com/1993-11-22/news/mn-59668_1_football-hazing.

in athletics are held to a lower standard than the classroom or other school environments.

In *T.K. v. New York City Department of Education*, parents claimed that their child was incessantly bullied in the classroom and that the school's administration failed to stop it.³⁶ In their holding, the court determined that the test for bullying is whether or not the conduct is "sufficiently severe, persistent or pervasive that it creates a hostile environment," and deprives a student of substantial educational opportunities.³⁷ The victim need only show that the bullying is likely to affect the student's opportunity for an appropriate education.³⁸

Contrast *T.K.*'s outcome with the Superior Court of Connecticut's holding in *Dornfried v. Berlin Board of Education*.³⁹ In *Dornfried*, the parents of a child who had been subjected to multiple instances of bullying and harassment from his football teammates brought suit against the school's board of education, administrators, athletic director, and football coach for a violation of Connecticut's anti-hazing law.⁴⁰ The court labeled football as a non-state-required activity and held that Connecticut's anti-bullying statute did not provide a private right of action for bullying victims against those who failed to stop the bullying from occurring.⁴¹

Comparing these two rulings shows the courts' tendency to favor cases where any interference to education is evident. Although athletics is a part of the school, it is an extracurricular activity and not part of a student's academic education. Theoretically, this practice gives a student operating in the confines of athletics less protection than the same student would receive if he or she were sitting in the classroom or walking the halls. The blame does not fall entirely on the courts, however;

³⁶ *T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011). The court held that teachers were aware of the way plaintiff was being treated, and refused to act. *Id.* at 318.

³⁷ *Id.* at 317.

³⁸ *Id.*

³⁹ *Dornfried v. Berlin Bd. of Educ.*, No. CV064011497S, 2008 WL 5220639 (Conn. Super. Ct. Sept. 26, 2008).

⁴⁰ *Id.* at *1-2.

⁴¹ *Id.* at *4. The court also held that supervision of school children is a discretionary matter. *Id.* at *5.

state anti-bullying and hazing laws have their own set of problems.

II. STATE ANTI-BULLYING & HAZING LAWS: A BROKEN SYSTEM?

Bullying and hazing are common in athletics, but the true problem occurs when the victim brings suit under their respective state law(s). State legislatures have acknowledged the problems that both bullying and hazing cause in schools by enacting multiple laws and policies. Currently, 49 out of 50 states now have anti-bullying laws or policies in place.⁴² Forty-four states have anti-hazing laws.⁴³ Despite the staggering amount of laws that

⁴² At the time of this Article, every state except Montana has adopted anti-bullying laws. Maggie Clark, *49 States Now Have Anti-Bullying Laws. How's that Working Out?*, GOVERNING (Nov. 4, 2013), <http://www.governing.com/news/headlines/49-States-Now-Have-Anti-Bullying-Laws-How's-that-Working-Out.html>. See, e.g., ALASKA STAT. § 14.33.200 (2006), ARIZ. REV. STAT. ANN. § 15-341(37) (2013), ARK. CODE ANN. § 6-18-514(a) (2013), CAL. EDUC. CODE § 32261 (West 2011), COLO. REV. STAT. § 22-32-109.1(2)(a)(I)(K) (2014), CONN. GEN. STAT. § 10-222d (2008), DEL. CODE ANN. tit. 14, § 4112D(b) (2012), GA. CODE ANN. § 20-2-751.4(b) (2011), IDAHO CODE ANN. § 33-512(6) (2014), 105 ILL. COMP. STAT. 5 / 27-23.7(d) (2008), IND. CODE § 20-33-8-13.5 (2008), IOWA CODE § 280.28(3) (2008), LA. REV. STAT. ANN. § 17:416.13(B)(1) (2012), ME. REV. STAT. tit. 20-A, § 1001(15)(H) (2014), MINN. STAT. § 121A.0695 (2008), MO. REV. STAT. § 160.775(1) (2008), N.H. REV. STAT. ANN. § 193-F:4(II)(2007), N.J. STAT. ANN. § 18A:37-13 (West 2008), N.Y. EDUC. LAW § 2801-a(2)(j) (McKinney 2001), OHIO REV. CODE ANN. § 3313.666(B) (West 2008), OKLA. STAT. tit. 70, § 24-100.3(B) (2008), OR. REV. STAT. § 339.356(1) (2008), R.I. GEN. LAWS § 16-21-34(a) (2011), S.C. CODE ANN. § 59-63-140(A) (2008), TENN. CODE ANN. § 49-6-4503(a) (2009), TEX. EDUC. CODE ANN. § 37.083(a) (West 2011), VA. CODE ANN. § 22.1-279.6(B) (2009), WASH. REV. CODE § 28A.300.285(1) (2008), W. VA. CODE § 18-2C-3 (2008).

⁴³ The following is a list of the adopted state anti-hazing statutes: ALA. CODE § 16-1-23(b) (2014), ARIZ. REV. STAT. ANN. § 15-2301 (2014), ARK. CODE ANN. § 6-5-202 (2014), CAL. EDUC. CODE § 48900-48927 (West 2014), COLO. REV. STAT. § 18-9-124 (2014), CONN. GEN. STAT. § 53-23a (2008), DEL. CODE ANN. tit. 93, § 9301-9304 (2012), GA. CODE ANN. § 16-5-61 (2011), IDAHO CODE ANN. § 18-917 (2014), 105 ILL. COMP. STAT. §§ 720 ILCS 120 / 0.01, / 5, / 10 (2013), IND. CODE § 35-42-2-2.5 (2008), IOWA CODE § 708.10 (2008), KAN. CODE ANN § 21-5418 (2011), KEN. CODE ANN § 164.375 (2014), LA. REV. STAT. ANN. §§ 17:183, 1801 (2012), ME. REV. STAT. ANN. §§ 6553, 10004 (2014), MINN. STAT. § 121A.69 (2008), MICH. COMP. LAWS §750.411t (2008), MISS. CODE ANN. § 97-3-105 (2008), MO. REV. STAT. §§ 578.363, .365 (2008), N.H. REV. STAT. ANN. § 631:7 (2007), NEB. REV. ANN. §§ 28-311.06-.07 (2014), NEV. REV. STAT. 200.605 (2014), N.J. STAT. ANN. § 2c:40-3, § 18A:3-25, § 18A:62-5 (West 2008), N.Y. EDUC. LAW §§ 120.16-.17 (McKinney 2001), OHIO REV. CODE ANN. §§ 2903.31, .44 (West 2008), OKLA. STAT. tit. 70, § 21-1190 (2008), OR. REV. STAT. § 163.197 (2008), R.I. GEN. LAWS §§ 11-21-1, 11-21-2 (2011), S.C. CODE ANN. §§ 59-101-200, 59-63-275, 16-3-510, 16-3-520 (2008), TENN. CODE ANN. §§ 49-7-123, 49-2-120 (2009), TEX. EDUC. CODE ANN. §§ 37.151-.157, .165, .936, (West 2011), VA. CODE ANN. §§ 18.2-55.1, 18.2-56 (2009),

states have enacted, their effect on deterring these behaviors remain in doubt.

Bullying rates have remained largely the same since the first anti-bullying laws took effect.⁴⁴ Every year since 2005, about 28 percent of students say they have been bullied in one way or another, and that number remains constant as the years go by.⁴⁵ Hazing laws have been equally as ineffective, as hazing rates are still unnecessarily large in high schools.⁴⁶

A. Problems with State Bullying Laws

1. 50 Different States, 50 Different Views

State anti-bullying legislation is widely criticized for the variation of laws and policies from state-to-state. In fact, only a few states explicitly define what behaviors constitute bullying in their respective laws.⁴⁷ Some states, such as Arkansas and New Hampshire, define bullying simply as anything rising to the level of pupil harassment.⁴⁸ More often than not, the laws leave the job of defining “bullying” to the school boards, who can punish the bully but are unable to do anything else for the victim.⁴⁹

The difference between each law and policy can be significant, if not staggering.⁵⁰ Where a specific act might be illegal in the eyes of one state’s law, it might not even be mentioned in another’s law. For example, eight states define bullying as including behaviors that are repetitive, systematic, or continuous, but five states’ laws only encompass severe or

WASH. REV. CODE § 28B.10.900-902 (2008), W. VA. CODE §§ 18-16-2, 18-6-3 (2008), WIS. CODE ANN. § 948.51 (2014). *See also States with Anti-Hazing Laws*, STOP HAZING (OCT. 22, 2014 1:45 PM), <http://www.stophazing.org/hazing-information/>.

⁴⁴ Clark, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ R. Brian Crow & Scott R. Rosner, *Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports*, 76 ST. JOHN’S L. REV. 87, 88 (2002).

⁴⁷ 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, 62-63 (2005).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Kathleen Conn, *Best Practices in Bullying Prevention: One Size Does Not Fit All*, 22 TEMP. POL. & CIV. RTS. L. REV. 393, 419-20 (2012-2013).

pervasive conduct.⁵¹ Sixteen states require that the intent to harm another person is present.⁵² Thirty-eight states include some references to electronic bullying or cyber-bullying in their statutory language.⁵³ Two states explicitly allow students to engage in reasonable self-defense when they are bullied.⁵⁴ Mandatory reporting of bullying incidents by staff or students is found in fewer than half the state statutes, and only nine states require reporting to law enforcement in certain cases.⁵⁵ Most state statutes require or encourage schools to take disciplinary action against bullies, but few detail specific methods on how it should be done.⁵⁶

Due to soft penalties and overly broad or narrow definitions of bullying, the law is often inadequate to sufficiently serve the victim and punish the wrongdoer.⁵⁷

2. Legislative Intent

Detractors of anti-bullying laws have labeled them as “feel-good” legislation, made more for the benefit of elected-officials than for students at risk of bullying.⁵⁸ The laws have been labeled as political fads that are only good for keeping school attorneys up at night in fear of a wave of litigation.⁵⁹ The laws have also been criticized for requiring schools to do more to prevent bullying but by not giving them the financial means or resources to do so.⁶⁰ The state of Massachusetts provides a practical example of this problem. The Massachusetts bullying law, when originally passed in 2010, was labeled as “model legislation.”⁶¹ The law introduced

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Marc Edelman, *How to Prevent High School Hazing: A Legal, Ethical and Social Primer*, 81 N.D. L. Rev. 309, 315 (2005).

⁵⁸ *Bullying and Anti-Bullying Legislation*, SCHOOL SECURITY, <http://www.schoolsecurity.org/trends/bullying-and-anti-bullying-legislation/>.

⁵⁹ Andrew Brownstein, *The Bully Pulpit: Post-Columbine, Harassment Victims Take Schools to Court*, TRIAL, Dec. 1, 2002, at 12, 17-62.

⁶⁰ *Id.*

⁶¹ Daniel Adams & Sarah Black, *Massachusetts Anti-Bullying Law Seen as Unfunded, Ineffective*, MASSLIVE (July 21, 2013, 5:00 AM),

programs for schools to track individual incidents of bullying in hopes that keeping a record of reported incidents would allow schools to better monitor student behavior.⁶² On paper, this seemed like a good idea; however, with no method of enforcement and no financial aid to help schools institute the new programs, the law is now considered “toothless and . . . ineffective.”⁶³

Perhaps the biggest flaw of anti-bullying laws is that state legislatures are often a few steps behind the bullies when it comes to outlawing harassing behavior. According to Judge Gail Garinger, Child Advocate for the Commonwealth of Massachusetts, the moral panic that follows a controversial bullying incident often leads to hastily enacted laws by state legislatures.⁶⁴ Garinger voices concern that attempting to outlaw every new instance of bullying that occurs often fails to consider the “best outcome for [the] kids.” She reasons that rushing to enact laws to fight every conceivable type of bullying can, and has, lead to ineffective anti-bullying laws.⁶⁵

Daniel B. Weddle, law professor and expert in the field of educational law, echoes Judge Garinger’s opinion. According to Weddle, “[c]urrent legal theories and approaches to bullying suffer from a common flaw: they view bullying from an incident-based perspective rather than from a school culture perspective.”⁶⁶ Weddle goes on to discuss the disconnect between current law and bullying:

[I]t provides little or no incentive for substantive change in the way school officials address bullying. Statutory attempts to address bullying directly fail, for the most part, to require the processes that are critical to effective prevention, leaving schools the option of creating anti-bullying policies, but not anti-bullying cultures. Zero-tolerance approaches to violence in schools, whatever their attractiveness at first blush, are

http://www.masslive.com/news/index.ssf/2013/07/massachusetts_anti-bullying_la_1.html.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Leonard Witt, *A Q&A With Child Advocate Judge Gail Garinger About Bullying*, JUVENILE JUSTICE INFORMATION EXCHANGE (May 16, 2012), <http://jjie.org/qa-child-advocate-judge-gail-garinger-about-bullying/85979/>.

⁶⁵ *Id.*

⁶⁶ Weddle, *supra* note 16, at 658-59.

often too misguided and draconian to be sustained or to be effective. Tort actions for negligent supervision face a variety of obstacles: immunity for school officials, flawed and unrealistic definitions of negligent supervision, and theoretical problems with foreseeability and causation. Therefore, little fear of liability exists to inspire serious reform and thereby reduce the prevalence of victimization.⁶⁷

The hasty enactment of laws following a novel incident is not a new behavior. In fact, anti-bullying laws were first enacted largely through such behavior. In April of 1999, two students entered Columbine High School in Littleton, Colorado; armed with guns and home-made bombs, they began a shooting spree that left thirteen dead and twenty-three injured.⁶⁸ In the following weeks, many rushed to say that the driving force behind the violence was that their classmates had mercilessly bullied the two students.⁶⁹ This belief brought the issue of bullying into the national spotlight and forever changed the way lawmakers looked at bullying and its ultimate effect in schools.⁷⁰

Legislators and lawmakers were quick to respond to the Columbine tragedy.⁷¹ In an effort to prevent the carnage that occurred at the Colorado high school from ever happening again, states began to construct legislation in an effort to eliminate bullying in schools, which, in turn, would prevent victims of bullying from lashing out.⁷² The state legislature of Georgia

⁶⁷ *Id.* at 673-74.

⁶⁸ See *Columbine High School Shootings Fast Facts*, CNN, <http://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/> (last updated May, 5, 2015).

⁶⁹ Dave Cullen, *The Depressive and the Psychopath*, SLATE (Apr. 20, 2004, 11:59 AM), http://www.slate.com/articles/news_and_politics/assessment/2004/04/the_depressive_and_the_psychopath.html.

⁷⁰ Greg Toppo, *Lessons from Columbine: More Security, Outreach in Schools*, USA TODAY, (Apr. 13, 2009, 6:51 PM), http://usatoday30.usatoday.com/news/education/2009-04-13-columbine-lessons_N.htm.

⁷¹ *Id.*

⁷² Adam J. Speraw, *No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools*, 44 VAL. U. L. REV. 1151, 1151-52 (2010).

passed the first anti-bullying statute in 1999.⁷³ Other states were quick to follow suit. As of 2011, more than 120 laws and policies have been enacted by legislatures across America.⁷⁴

The problems begin when bullying cases reach the courts. When victims try to hold schools accountable for failing to prevent or protect them from bullying behavior, these claims will likely fail because courts often hold that the events were unforeseeable and could not have been prevented by the school's staff.⁷⁵

Courts that are unwilling to hold schools responsible are allowing schools and their employees to keep turning a blind eye towards bullying. These courts' inaction creates a critical flaw with state anti-bullying laws where the bully is punished but the adults, who fostered the atmosphere where this behavior was acceptable, are blameless in the eyes of the law.⁷⁶

B. Problems with State Hazing Laws

The first anti-hazing law in the United States was passed in New York in 1894.⁷⁷ The law was passed following a national furor over the death of a banquet staff member and the injury of several freshmen at Cornell University after some older students released large quantities of chlorine gas during a banquet dinner.⁷⁸ Although this was the first known U.S. law to deal directly with hazing, the activity was well known before then and has continued to be a problem.⁷⁹

⁷³ GA. CODE ANN. § 20-2-751.4-.5 (2014) (1999), H.B. 84, Chap. 282 "Requires the implementation of a character education program at all grade levels that is to include methods of discouraging bullying and violent acts against fellow students."

⁷⁴ *School Bullying Laws Exist In Most States*, U.S. Department of Education Reports Analysis of Policies, HUFFINGTON POST (Aug. 10, 2012 4:57 PM), http://www.huffingtonpost.com/2011/12/06/school-bullying-laws-exis_n_1132634.html.

⁷⁵ Weddle, *supra* note 16, at 643. See *supra* note 41 and accompanying text (despite the fact that the coaches and administrators knew about bullying behavior, the *Dornfried* court allowed them to escape liability).

⁷⁶ *Id.*

⁷⁷ Doug Fierberg, *The Sordid History of Hazing*, HAZING LAW (Mar. 16, 2012), <http://www.hazinglaw.com/the-sordid-history-of-hazing/>.

⁷⁸ *Id.* (citing *People ex rel. Taylor v. Forbes*, 38 N.E. 303 (N.Y. 1894)).

⁷⁹ NADINE C. HOOVER & NORMAN J. POLLARD, INITIATION RITES IN AMERICAN HIGH SCHOOLS: A NATIONAL SURVEY 13 (2000), <http://files.eric.ed.gov/fulltext/ED445809.pdf>. According to Dr. Nadine Hoover, the designer of and principal investigator for the survey, merely "having a hazing law in place doesn't stop [high school hazing]." *Id.* Although the college hazing survey found that states with anti-hazing laws had

1. Consistently Inconsistent

Currently, forty-four states have anti-hazing laws in place.⁸⁰ Statistically speaking, the laws have failed to make significant strides in eradicating hazing from schools.⁸¹ A national study conducted in 2000 revealed that 48% of high school students reported having experienced some form of hazing.⁸² The 2008 National Study on Student Hazing reported similar results, with 47% of students reporting “hazing experiences.”⁸³

Anti-hazing activists claim the problem stems from a lack of uniformity and consistency among state hazing laws.⁸⁴ Hazing is admittedly difficult to define, and courts have acknowledged this difficulty.⁸⁵ The difficulty of defining hazing has resulted in state legislators applying widely different and vague terms for the act.⁸⁶

For example, Georgia’s anti-hazing statute only provides a vague prohibition of any conduct encompassing “a student activity which endangers or is likely to endanger the physical health of a student, regardless of a student’s willingness to participate in such activity.”⁸⁷ Anti-hazing laws in other states, which prohibit hazing in initiations, apply only to colleges or universities, and they “allow consent of the victim to be used as a defense.”⁸⁸

Michigan law offers a good example of clarity in an anti-hazing law. It identifies specific acts in connection with different activities such as pledging a fraternal organization, initiating, or

significantly lower rates of college hazing, Hoover, *supra* note 10, at 6, the high school survey revealed that “anti-hazing law[s] made no significant difference in the level of high school hazing behavior.” HOOVER & POLLARD, *supra* note 79.

⁸⁰ See *supra* note 43.

⁸¹ Stuart, *supra* note 3, at 383 (citing Elizabeth J. Meyer, *Hazing and High School – Gendered Rites of Group Membership*, PSYCHOLOGY TODAY (Jan. 15, 2010), <http://www.psychologytoday.com/blog/gender-and-schooling/201001/hazing-and-high-school-gendered-rites-group-membership>).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Crow & Rosner, *supra* note 46, at 88-89.

⁸⁵ Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey’s Anti-Hazing Act*, 26 QUINNIPIAC L. REV. 305, 309 (2008).

⁸⁶ Melissa Dixon, *Hazing in High Schools: Ending the Hidden Tradition*, 30 J.L. & EDUC. 357, 359 (2001).

⁸⁷ Nelda Cambron-McCabe & Ellen V. Bueschel, *Where Does Tradition End and Hazing Begin? Implications for School District Policy*, 196 ED. LAW REP. 19, 21 (2005).

⁸⁸ *Id.* at 22.

affiliating with a group.⁸⁹ This is the type of clarity needed for both bullying and hazing laws. Instead of applying broad definitions to hazing, a single federal law could specifically itemize types of hazing behaviors that are likely to occur within different organizations. This could potentially decrease the endless litigation regarding the application of a loosely defined hazing term.

3. Laws Without Teeth

Another criticism of anti-hazing laws is that they lack teeth. In fact, most states do not even consider hazing a felony.⁹⁰ Only thirteen states “require educational institutions to adopt [anti-hazing] policies and [only] three of those [states] require public school districts to implement a [anti-hazing] policy.”⁹¹ A state that has enacted an anti-hazing statute to punish hazing is often limited to educational penalties, such as expulsion or suspension.⁹² Trusting the educational system to punish every instance of hazing is a dangerous practice. It takes the impact out of laws and serves as a weak deterrent for future hazers, while leaving the victim without a remedy. This is highlighted by the events at Trumbull High School.

Trumbull High School was a small public school in Connecticut. It was there that a 15-year old sophomore was assaulted by teammates on his wrestling team.⁹³ These teammates hogtied the 15-year old, “hurl[ed] him against a wall, and . . . forced a plastic knife into his rectum.”⁹⁴ This was not an isolated incident on the team, as reports later surfaced detailing chokings, beatings, and bindings occurring throughout the

⁸⁹ *See id.* at 21.

⁹⁰ *See id.* at 22.

⁹¹ *Id.*

⁹² *See Pelletier, supra* note 14, at 383.

⁹³ *See Judge Allows School Wrestlers to Avoid Trial in Hazing Case*, N.Y. TIMES, (July 25, 2000), <http://www.nytimes.com/2000/07/25/nyregion/judge-allows-school-wrestlers-to-avoid-trial-in-hazing-case.html> (scenario perfectly illustrates a state’s complete inability to properly serve the victim through an anti-hazing law).

⁹⁴ *Id.*

season.⁹⁵ It was also reported that activities such as hogtying and slapping underclassmen were known traditions for the Trumbull High wrestling team.⁹⁶ Eight members were eventually charged, three of which were tried as adults.⁹⁷ The judge ultimately punished the three main perpetrators with two years' probation and mandatory psychological-evaluations.⁹⁸ Even if the three had been charged and convicted under Connecticut's anti-hazing statute, the maximum penalty they would have faced would be "a fine of not more than one thousand dollars."⁹⁹ Although the wrestlers were ordered to reimburse the medical fees of the victim, the overall result of the case was a decision that amounted to a toothless response on the part of the court for a violent criminal offense.¹⁰⁰

As stated earlier, most hazing incidents against victims in high school go unreported.¹⁰¹ The ones that do get reported are usually civil instead of criminal cases.¹⁰² This is largely "due to the limited punishments incorporated into most state anti-hazing statutes."¹⁰³

The goal of listing these complaints is not to assert that the entirety of state anti-bullying and hazing laws are inadequate. Nevertheless, they are certainly complex and rife with criticism. Think how this plays out for athletes who are statistically the most likely to encounter bullying and hazing.

As it stands, victims' chances in court heavily rely upon whether or not their state has properly defined bullying. A bullying or hazing victim's chances should not be dependent upon winning the geographical lottery. State bullying laws are failing to deter bullying and are unable to provide any remedy for a victim's

⁹⁵ See Rick Green & Tom Puleo, *A Hazing Turned Hateful in Trumbull?*, HARTFORD COURANT, (Mar. 2, 2000), http://articles.courant.com/2000-03-02/news/0003020021_1_trumbull-high-school-hazing-hogtying.

⁹⁶ See *id.*

⁹⁷ See *Judge Allows School Wrestlers to Avoid Trial in Hazing Case*, *supra* note 93.

⁹⁸ Pelletier, *supra* note 14, at 381.

⁹⁹ *Id.*

¹⁰⁰ See *Judge Allows School Wrestlers to Avoid Trial in Hazing Case*, *supra* note 93.

¹⁰¹ See Starr, *supra* note 2.

¹⁰² See Pelletier, *supra* note 14, at 409.

¹⁰³ *Id.*

physical or psychological injuries.¹⁰⁴ Drastic changes are necessary in the way bullying and hazing laws are enforced.

III. THE SOLUTION: ONE LAW

A. Enter: The Federal Government

The idea of a federal anti-bullying statute has been loosely discussed for about a decade, with the first proposal occurring in 2003.¹⁰⁵ The idea has gone through several variations and has been introduced by many different politicians.¹⁰⁶ It has steadily gained bipartisan support and has even been endorsed by President Barack Obama.¹⁰⁷

The most common complaint about bullying and hazing laws is that their definition is largely inconsistent from state to state. A federal law with a clear and concise definition would remove the “need for extended litigation over various anti-bullying issues in other states”¹⁰⁸ and would allow the Supreme Court “to establish a national anti-bullying standard once and for all.”¹⁰⁹ Aside from alleviating the disparity between state laws, a federal law could also ensure that bullying and hazing will not go unpunished in states that have weak laws or no laws at all. It could even resolve conflicts that arise between victimizers and victims that are domiciled in separate states.¹¹⁰

A clear definition would also allow schools to know what behaviors they are supposed to monitor and, ultimately, stop. This would lead to safer school environments, especially for those in athletics. Coaches and authority figures would have a clear idea of where, when, and how they should be monitoring team activity.

¹⁰⁴ 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).

¹⁰⁵ See Kerry Kennedy & Deborah Temkin, *The Time is Now for a Federal Anti-Bullying Law*, HUFFINGTON POST, (Mar. 3 2013), http://www.huffingtonpost.com/kerry-kennedy/the-time-is-now-for-a-fed_b_2813122.html.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ Andersen, *supra* note 12, at 780.

¹⁰⁹ *Id.*

¹¹⁰ See Edelman, *supra* note 57, at 327.

B. What Would The Ideal Law Include?

The U.S. Department of Education lists key elements that a model state anti-bullying law should include.¹¹¹ Among these elements are:

1. Definitions of bullying, along with the purposes of the statutes and specific behaviors defined as bullying;
2. Mandates for school districts to develop, implement, and review policies;
3. Components in policies for investigating, reporting, disciplining, and counseling students involved, and;
4. Other components such as training staff and students and monitoring incidents of bullying.¹¹²

In regards to hazing, legal scholar Darryll M. Halcomb Lewis has suggested an ideal provision for a national anti-hazing law:

A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he or she intentionally or recklessly engages in conduct or knowingly permits another person under said person's direction or control to engage in conduct which creates a substantial risk of serious physical or mental injury to such other person or a third person, with or without the consent of said other person or third person, and thereby causes such injury.¹¹³

An ideal federal law would include both of these provisions. Explicitly defining what behaviors constitute both bullying and hazing as well as including an incentive for authority figures to more closely monitor behavior would be a huge step in making schools, especially interscholastic athletics, a much safer environment. A federal law that specifically addresses what constitutes bullying and hazing, and how authority figures should monitor it, would help close the loopholes in state laws that allow the victimizers to escape liability.

¹¹¹ See Conn, *supra* note 50, at 419.

¹¹² *Id.*

¹¹³ Pelletier, *supra* note 14, at 412 (quoting Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 Miss. L.J. 111, 145-46 (1991)).

The passing of a federal law is ultimately the most effective way to end peer-to-peer harassment. Until a uniform system is enacted, hazing and bullying will continue to be a problem in our schools.¹¹⁴

IV. BECOMING A REALITY

A. The Spending Clause

The Constitution does not specifically mention education in the Tenth Amendment; educational issues have traditionally been left to the state and local governments.¹¹⁵ Congress, however, has slowly been entering the education arena by enacting several laws with the overarching mission to ensure the right of a quality education to children across America.¹¹⁶ In the past, Congress has intervened in education when they felt that states had not done enough in a certain area. It is time for Congress to intervene and remedy the mishandling of bullying and hazing laws by multiple state legislatures.

The biggest question presented is whether passing a federal anti-bullying and hazing law is within Congress's power. Many legal experts believe that it certainly is.¹¹⁷ The best method for Congress to enact an anti-bullying and hazing statute is to make adoption of the federal law a mandatory condition if a state is to continue receiving federal funding. Properly drafted legislation can help accomplish this goal.¹¹⁸

Article I, Section 8 of the U.S. Constitution states, "Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."¹¹⁹ In interpreting Article 1, Section 8, the Supreme Court has stated when related to spending

¹¹⁴ See Pelletier, *supra* note 14 at 413.

¹¹⁵ U.S. CONST. amend. X.

¹¹⁶ See U.S. DEP'T OF EDUC., *The Federal Role in Education*, <http://www2.ed.gov/about/overview/fed/role.html>.

¹¹⁷ See Andersen, *supra* note 12 at 773; Christensen, *supra* note 15 at 279; Stuart, *supra* note 3 at 421; Jason A. Wallace, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 755 (2011).

¹¹⁸ Edelman, *supra* note 57, at 333.

¹¹⁹ U.S. CONST. art. VII, § 1.

power, “Congress may attach conditions on the receipt of federal funds” to further broad policy objectives.¹²⁰

In *South Dakota v. Dole*, the Supreme Court upheld the National Drinking Age Minimum Act, a federal law passed by Congress. The Act withheld 10% of federal highway funding from states that did not maintain a minimum legal drinking age of twenty-one.¹²¹ South Dakota, which allowed persons nineteen years of age or older to purchase certain alcoholic beverages, sued in federal district court, claiming the act violated the limits of the spending power. In a 7-to-2 decision, the Supreme Court upheld that, if a state refused to adopt a federal law, the government’s refusal to grant a percentage of federal funding was appropriate if certain conditions were met.¹²² The conditions are as follows: 1) The spending must promote “the general welfare;” 2) The condition must be unambiguous; 3) The condition should relate to “the federal interest in particular national projects or programs; 4) The condition imposed on the States must not in itself be unconstitutional; and 5) The condition must not be coercive.¹²³ When the Supreme Court applied these standards to the intent and constitutionality of the National Drinking Age Minimum Act, they found that it was an appropriate use of power.¹²⁴ Judge Rehnquist, writing for the majority, noted that Congress also did not violate the Tenth Amendment because it was only using its power to control spending. He also found that the refusal of 10% of federal funding was coercive, but was not unconscionable.¹²⁵ This was found to be a valid use of congressional authority.¹²⁶

According to the test laid out in *Dole*, Congress should be able to pass a federal anti-bullying and hazing statute.¹²⁷ First, federal funds given to schools in order to facilitate the education of American children without a doubt serve the public interest. The condition is unambiguous because, in order to receive federal funding, a state must adopt the federal act. The condition relates

¹²⁰ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 207.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Edelman, *supra* note 57, at 333.

to the federal interest in the school systems, and promoting a safe school environment is a high priority for our government. The federal law will likely not be unconstitutional; the authors will ensure that through due diligence in constructing the language of the act. Lastly, conditioning a percentage of federal educational funds, pursuant to states that adopt the act, will not be coercive. The Federal Government comprises less than 10% of school education budgets.¹²⁸ Making the allocation of that budget contingent upon adoption of the “Federal Safe Schools Act” would not be a commandeering of the states, for the purposes of the Tenth Amendment, and would allow the states to reject the proposal without being coerced, satisfying the final Rehnquist criteria.

Congress’s use of the Spending Clause to enact legislation aimed at schools is not a novel idea. Both Title IX and “No Child Left Behind” have been enacted under the same power and have not been struck down by the Supreme Court. An effort to enact a federal law that covers bullying and hazing would likely be treated in the same way.

B. First Amendment & Free Speech Issues

Another issue that brings the Congress’ scope of power into the conversation is the potential impact a federal law would have on students’ First Amendment rights. The subject of speech regulation in schools would deserve an article in its own right, so this Article will present a limited justification as to how an anti-bullying and hazing law would not violate the First Amendment.

A federal law would likely be found to be constitutional under the First Amendment.¹²⁹ In *Tinker v. Des Moines Independent Community School District*, the landmark case that covers students and free speech, the Supreme Court held that speech that “intrudes upon . . . the rights of other students” may be

¹²⁸ *The Role of the Federal Government In Public Education: Equity and Funding*, LEAGUE OF WOMEN VOTERS, <http://www.lwv.org/content/role-federal-government-public-education-equity-and-funding> (last visited June 6, 2015).

¹²⁹ Kathleen Hart, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation As A Response to School Violence*, 39 GA. L. REV. 1109, 1136 (2005).

regulated.¹³⁰ The Third Circuit's decision in *Sypniewski v. Warren Hills Regional Board of Education* even suggests that the law may regulate student speech whether or not there is a likelihood of an actual disturbance.¹³¹ Further, in *Sypniewski*, the Supreme Court held that:

Intimidation of one student by another, including intimidation by name-calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully. . . . Students cannot hide behind the First Amendment to protect their "right" to abuse and intimidate other students at school.¹³²

Even in the absence of an actual physical disturbance, the restriction on speech that constitutes bullying and hazing would not likely violate the First Amendment.¹³³ Based on the link between bullying and its likelihood to lead to violence, preventative measures on verbal and psychological bullying are justifiable, even without an actual physical disturbance.¹³⁴

V. ROADBLOCKS & COUNTERARGUMENTS

A. *Other Roads to Recovery*

Opponents to the proposal of a single national law will likely point out that state anti-bullying and hazing laws are not the only method for recovery available. Victims and their families may also sue for recovery under the following methods, which is non-exhaustive:

- Negligence, including negligent hiring (of staff members) and negligent supervision (of a staff member or of students)
 - Federal and state constitutional provisions, including due process and equal protection clauses
 - Federal and state civil rights statutes
 - 42 U.S.C. § 1983
- No Child Left Behind

¹³⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

¹³¹ *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

¹³² *Id.* at 264.

¹³³ Hart, *supra* note 129, at 1148.

¹³⁴ *Id.*

- The Federal Individuals with Disabilities in Education Act (IDEA), including the free appropriate public education provision
- Civil assault or battery
- Title IX and similar state statutes¹³⁵

There is no shortage of methods of recovery for the victims, but the effectiveness of these pursuits is dubious and can be even less effective than state anti-bullying and hazing laws. For example, the No Child Left Behind Act only allows a child to escape the bullying by transferring schools if the harassment turns into an assault.¹³⁶ In addition, most bullying and hazing victims are targeted for reasons that do not fit into any protected classes.¹³⁷

1. Title IX: The Less Than Ideal Solution

Right now, if a victim of bullying or hazing wants to bring suit at the federal level, the best bet would be to claim infringement under Title IX.¹³⁸ In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Supreme Court held that a student may sue his or her school district for damages under Title IX if 1) The school districts were recipients of federal funds; 2) The districts had “actual knowledge” of the harassment but remained “deliberately indifferent” to it; and (3) The harassment was “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹³⁹ Basically, the only way a victim could hope for remedy is if he could prove that his or her school had actual knowledge of their egregious mistreatment. It is notoriously difficult to prove “actual knowledge.”¹⁴⁰ Both of these routes ultimately fail to adequately

¹³⁵ Anne M. Payne, *Particular Issues in Proving Damages Owed to Public School Student by School District or Individual School District Employee Arising From Harassment or Bullying*, 118 AM. JURIS. TRIALS 387 (2010).

¹³⁶ *Id.*

¹³⁷ Sacks & Salem, *supra* note 104, at 149-50.

¹³⁸ *Title IX Protections from Bullying & Harassment in School: FAQs for Students*, NATIONAL WOMEN’S LAW CENTER (Dec. 12, 2011), <http://www.nwlc.org/resource/title-ix-protections-bullying-harassment-school-faqs-students>.

¹³⁹ *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). *See also* Sacks & Salem, *supra* note 104, at 153.

¹⁴⁰ Weddle, *supra* note 16, at 676.

serve victims of peer-to-peer bullying, simply because that is not their intended purpose.¹⁴¹

This exact situation occurred in *Patterson v. Hudson Area Schools*.¹⁴² The plaintiff in this case, a freshman in high school, had been the recipient of constant harassment for a number of years. Out of fear of his tormentors, he often ate lunch alone in the band room. When the plaintiff was a freshman, his junior varsity basketball teammates assaulted him. The incident occurred in the locker room, where one teammate held plaintiff down while another rubbed his genitalia on the plaintiff's face. Plaintiff brought suit under Title IX, but the District Court for the Eastern District of Michigan, Southern Division, dismissed his case. While the court acknowledged that plaintiff had in fact been bullied, there was no evidence to suggest that the insults were based on plaintiff's gender, sexual orientation, or perceived sexual orientation.¹⁴³ Even if the plaintiff filed his suit under Massachusetts' anti-hazing law, his coach still would not be liable because, as mentioned earlier, the state law doesn't provide a punishment for non-players participating in the hazing.

Other complaints on the federal level are inadequate to properly deal with incidents of bullying and hazing, as is the case in *J.D. v. Picayune School District*. Wherein, J.D., a member of his high school's baseball team, brought suit after he claimed he was the victim of repeated hazing incidents from older members of the team.¹⁴⁴ The incidents included repeated incidents of assault and harassment, many of which occurred during an event known as "whistle day," during which coaches left the field, and upperclassmen would assault freshman members of the team.¹⁴⁵ "Whistle day" was apparently a yearly tradition, and the coaches all had "actual knowledge" of the event (all of the coaching staff at the time had previously been players and been part of previous "whistle days" when they played).¹⁴⁶

¹⁴¹ *Id.*

¹⁴² *Patterson v. Hudson Area Sch.*, 724 F. Supp. 2d 682 (E.D. Mich. 2010).

¹⁴³ *2010 Annual Survey: Recent Developments in Sports Law*, 21 MARQ. SPORTS L. REV. 667, 736 (2011).

¹⁴⁴ *J.D. v. Picayune Sch. Dist.*, 1:11CV514-LG-JMR, 2013 WL 2145734 (S.D. Miss. May 15, 2013).

¹⁴⁵ *Id.* at *1.

¹⁴⁶ *Id.*

The final straw for J.D. took place prior to a varsity game, when an upperclassman punched him in the chest with a closed fist in a team huddle.¹⁴⁷ J.D.'s family claims that, as a result of being struck, J.D. suffered a seizure and fell to the ground, causing facial trauma and lacerations.¹⁴⁸ Following the incident, J.D. completed the school year in homeschool, and he transferred to another school the following year.¹⁴⁹

J.D. claimed the School Defendants adopted a policy or custom consisting of “tacit approval and passive participation over the past decade in the hazing of freshman baseball players,” and that this policy or custom led to a violation of J.D.'s Fourteenth Amendment right to bodily integrity.¹⁵⁰ J.D. also claimed that the school was deliberately indifferent to his rights, because they failed to stop the hazing.¹⁵¹ The Fifth Circuit, however, dismissed this claim. The court instead stuck with its long-held view that public schools generally do not have a constitutional duty to ensure students' safety from private violence—even if the violence is student-on-student on school grounds.¹⁵²

The court also dismissed J.D.'s claims that the athlete's custom of hazing was the moving force behind J.D.'s injury.¹⁵³ This claim required a constitutional violation of J.D.'s rights, which J.D. could not affirmatively prove.¹⁵⁴

B. Alternative Solution: Uniform Act

Federal intervention in state issues has the potential to be a controversial act. Those who favor a single standard for bullying and hazing, but do not wish for federal intervention, will likely note that a uniform act would also be capable of accomplishing virtually the same thing as a federal law. Both methods can provide a clear and concise standard for holding those who bully or haze liable; however, the effectiveness of the two methods

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *2.

¹⁵⁰ *Id.* at *4. *See also* U.S. CONST. amend. XIV.

¹⁵¹ *Picayune Sch. Dist.*, 2013 WL 2145734, at *4.

¹⁵² *Id.* at *5. *See also* *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995).

¹⁵³ *Picayune Sch. Dist.*, 2013 WL 2145734, at *8.

¹⁵⁴ *Id.*

varies. Uniform Acts are proposed state acts drafted by the Uniform Law Commission (“ULC”), and approved by its sponsor, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).¹⁵⁵ Over 350 commissioners, who serve as lawyers, judges, legislators, legislative staff, and law professors, compose the ULC. The purpose of the ULC is to research, draft, and propose legislation among states where uniformity is both lacking and desired. The ULC is best known for creating the Uniform Commercial Code, which has been a landmark act for harmonizing sales and commercial transactions within the 50 states of the United States.

The ULC is ideal for proposing uniformity, especially in areas where the federal government has let local and state governments dictate their own rules, which promotes the ideals of Federalism. There are some significant weaknesses, however, that result from the introduction of a uniform act.

One important aspect of an act introduced by the ULC is that there are limits to its power. There is a voting process before adoption where each state and territory sends one delegate to vote on the proposed act. Before the proposed act officially becomes a model or uniform act, twenty or more jurisdictions must approve it, as well as a majority of the states and territories present. There is no guarantee that anything proposed by the ULC will be adopted by the states.

The most important limit to the ULC’s power is its inability to force states and jurisdictions to adopt their proposed uniform acts. The ULC can merely propose an act, but the choice to adopt the proposed act lies with the states. Even if the states adopt the proposed act, they can, and often do, modify the act to how they see fit. This can range from slight to substantial changes.

Pursuing safer schools through a uniform act would be a risky avenue and would potentially result in similar problems currently existing within the various states’ system of laws and policies. The significant variation between states’ definitions of bullying and hazing is something that needs to be remedied by a uniform definition. A uniform act gives little incentive for states to

¹⁵⁵ *About the ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>.

stick with the uniform definition presented by the ULC, because one state might alter the definition of bullying or hazing significantly, which would in turn water down the effect of having a singular definition of bullying or hazing.

CONCLUSION

In conclusion, unless a federal anti-bullying and anti-hazing law is enacted, young athletes, coaches, and schools will continue to be unprotected. Legal scholars have also suggested that unless a national standard is developed, bullying and hazing will continue to remain unchecked.¹⁵⁶ The current system is not broken, but there are enough issues to warrant significant concern. State bullying and hazing laws are either too narrow or too broad, and too often the schools are not punishing the correct people. Letting states go further down this path of knee-jerk legislation or of empty rules without the ability to enforce them will only lead to more straw-man laws that fail to make our schools safer.

We know that both bullying and hazing are a significant problem in our nation's schools, especially in athletics. We know that, if left to their own devices, those who bully and those who haze can produce children with lower self-esteem, poor grades, and even suicidal tendencies. Our nation should strive to eradicate this unhealthy behavior for the betterment of our society. Sports have a way of teaching a bevy of life lessons: teamwork, discipline, and responsibility. If we do not act with proper safeguards to protect not only those in the hallways and classrooms, but the locker rooms as well, we risk missing the positive impact of team sports to bullies and thugs. This can be accomplished by changing states' ambiguous and vague legislation.

Implementing a "Federal Safe Schools Act," which includes a provision for bullying and hazing incidents arising out of interscholastic athletics, is the best way to accomplish these goals, and save school sports. The act will give a uniform definition of what bullying and hazing constitute, which will encourage courts

¹⁵⁶ Edelman, *supra* note 57, at 327-28.

to give more appropriate remedies and punishments. A uniform definition will also give a clear picture of what the act expects of schools and coaches in creating a safe environment, which could potentially save jobs. Lastly, it will allow sports to function as the ultimately should, as a positive and enriching experience for young athletes.