

BULLIES BEHIND BARS: HOW CHANGES TO STATEWIDE CYBERBULLYING POLICY MAY DO MORE HARM THAN GOOD

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I. INTRODUCTION: THE DAVID MOLAK STORY

To outsiders, it may have seemed like David Molak was a typical high school student: he had a girlfriend, a love for the San Antonio Spurs, and aspired to become a CrossFit coach.¹ David, once an outgoing, happy student

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1. Candace Amos, *Brothers' Emotional Letter to Stop Bullying Goes Viral Following Youngest Sibling's Suicide*, N.Y. DAILY NEWS (Jan. 8, 2016, 3:47 PM), <http://www.nydailynews.com/news/>

who had recently achieved the rank of Eagle Scout, was like most other students his age who constantly used smartphones to connect and communicate with others.² At first glance, it may have been difficult to tell he was hurting.³ The technological tools—smartphones, computers, and social-networking sites—thought by parents to foster interpersonal, friendly relationships and provide a sense of connectedness with other students while away from school had the opposite effect on David.⁴ This technology tore him apart.⁵ David suffered an emotional downward spiral sparked by months of relentless cyberbullying at the hands of some of his classmates at Alamo Heights High School in San Antonio, Texas.⁶ In the months preceding his death, David was often ridiculed about his appearance by male classmates, which his brothers say stemmed from jealousy of David's girlfriend.⁷ The tormenting took place away from school grounds.⁸ His family said the constant ridicule changed him and caused them to fear for his safety.⁹ "Molak's an Ape," read one comment left on his Instagram account after the cyberbullies edited photos of David, superimposing the face of a monkey over his own.¹⁰ "Put him in a body bag," read another.¹¹ School officials and administrators at Alamo Heights did not provide much recourse for David and his family, even though they were equipped with knowledge of the cyber abuse and the emotional weight David carried with him at school.¹² Because the bullies ridiculed David while off campus, the school contended there was little they could do aside from moving David to an alternative school.¹³ After the move, however, and due to the borderless nature of text message and Internet communication, the cyberbullying continued.¹⁴ At just sixteen, David Molak ended his life in the backyard of his family's home following an off-campus cyberbullying incident during which he was added to a group

national/brothers-write-letter-bullying-sibling-suicide-article-1.2490355.

2. Justin Warren, *Sticks and Stones: When Names and Words Can Hurt You*, BETA THETA PI MAG., Summer 2017, at 22–31, https://issuu.com/betathetapiao/docs/the_beta_theta_pi_summer_2017.

3. Amos, *supra* note 1.

4. Warren, *supra* note 2, at 25.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 24. David's brother, Cliff, addressed the physiological burden that these messages forced his brother to carry. *Id.* He contemplated this burden by asking hard questions: "How would you feel if hundreds of people you went to school with said they wanted to see you dead or hurt?" *Id.*

12. *Id.*

13. *Id.*

14. Alexandra Zaslow, *After Suicide of Teen David Molak, Texas Family Petitions Against Cyberbullying*, TODAY (Jan. 13, 2016, 11:49 AM), <https://www.today.com/parents/cliff-molak-petitions-against-cyberbullies-after-teen-brother-s-suicide-t66591> (noting that the move to another school also forced David, a basketball super fan, to give up his spot on the school basketball team). Cliff Molak pointed out that David moved "schools to escape the bullies," but because the ridicule by the Alamo Heights students continued, "he only lasted a couple days there." *Id.*

text message, ridiculed, and deleted from the group just minutes later.¹⁵ He had also been publicly ridiculed on social media platforms earlier that day.¹⁶ “He stared off into the distance for what seemed like an hour. I could feel his pain. It was a tangible pain,” said David’s brother, Cliff, who spoke to him shortly after David was deleted from the group message.¹⁷ It was mere hours after Cliff Molak returned to his apartment for the night when he received the heartbreaking phone call from his parents: “[We] found David.”¹⁸

In September 2017, Senate Bill 179 became effective in Texas.¹⁹ This bill—called David’s Law in remembrance of David Molak—makes changes to the Texas Education, Penal, and Civil Practice and Remedies Codes.²⁰ Some of these changes give Texas public schools the ability not only to investigate off-campus bullying but also to collaborate with law enforcement to identify and punish alleged bullies.²¹ This potentially streamlines an avenue of misdemeanor harassment convictions against public school students.²² This Comment discusses the potential difficulties and consequences that may arise in future Texas cyberbullying cases following the passage of David’s Law. This Comment is intended neither to serve as a defense to those who bully or send cyberbullying communication nor to excuse the irresponsible use of technology by students or adults. Instead, this Comment first analyzes the appropriateness of the passage of David’s Law as a response to school bullying and later offers alternative responses. Part II serves as background information, first discussing bullying and cyberbullying generally, and includes statistics explaining the relationship between this behavior and the school environment.²³ Part II also explains how victims and perpetrators suffer in school from the bullying and cyberbullying problems under mental-health and school-culture perspectives.²⁴ Part III analyzes how other states have responded to the bullying and cyberbullying issues and notes possible motivations behind the increase in legislation.²⁵ Part IV gives a brief history of Texas bullying legislation and analyzes some of the changes to the Texas Education and Penal Codes with David’s Law now in effect, using facts from other high-profile cases to illustrate those

15. Warren, *supra* note 2.

16. *Id.*

17. *Id.* Cliff Molak was present and with David when this last incident occurred. *Id.*

18. Warren, *supra* note 2.

19. See Tex. S.B. 179, 85th Leg., R.S. (2017) (stating that the bill’s effective date is September 1, 2017).

20. *Id.*

21. *Id.*

22. See *infra* Section IV.C (discussing the criminalization of certain conduct under David’s Law).

23. See *infra* Section II.A (providing background for analysis).

24. See *infra* Section II.C.2 (referencing pertinent research and statistical data to support this contention).

25. See *infra* Part III (referencing pertinent laws from other states).

changes.²⁶ Finally, Part V asks whether Texas went too far in passing Senate Bill 179 and offers recommendations to address language and overbreadth concerns.²⁷

II. ONLINE HARASSMENT HAS AN OFF-LINE IMPACT

When introducing David's Law, Senators Menéndez and Zaffirini opened the discussion on the senate floor by describing cyberbullying as a state- and country-wide epidemic, citing statistical data from the Center for Disease Control (CDC) to support the conclusion.²⁸ These data, however, when compared with other relevant statistics, do not necessarily support their contention.²⁹ This Part describes how David's story sparked change in Texas and later provides the most widely recognized definition for cyberbullying before explaining the relationship between bullying and child suicide.

*A. Maybe Now They'll Listen*³⁰

In the days following David's suicide, Cliff Molak posted an emotional status update to his Facebook page as a plea to the community to further David's legacy by sharing a message of personal accountability.³¹ Cliff, through his call to the San Antonio community, urged others to share his message and hoped the tragedy his family faced would serve as a catalyst for change in school cyberbullying policy.³² To the disappointment of David's

26. See *infra* Part IV (using slightly altered facts from Michigan's high-profile Michelle Carter case to illustrate how Texas courts could now interpret a similar situation involving public school students).

27. See *infra* Part V (discussing the disadvantages of David's Law).

28. S. Comm. on State Affairs, Bill Analysis, Tex. S.B. 179, 85th Leg., R.S. (2017); see *Epidemic*, MERRIAM-WEBSTER ONLINE DICTIONARY (online ed.), <https://www.merriam-webster.com/dictionary/epidemic> (defining epidemic as "affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time").

29. See *infra* Section II.C (referencing studies discussing the bullying-suicide relationship and citing a CDC study finding cyberbullying less common than traditional forms of bullying in school).

30. Amos, *supra* note 1 (referring to the sentiment of David Molak's two surviving brothers who spearheaded a cyberbullying-awareness campaign).

31. *Id.*; see Cliff Molak, FACEBOOK (Jan. 6, 2016), <https://www.facebook.com/cliff.molak/> ("In today's age, bullies don't push you into lockers, they don't tell their victims to meet them behind the school's dumpster after class, they cower behind user names and fake profiles from miles away constantly berating and abusing good, innocent people. The recent advances in social media have given our generation a freedom of which has never been seen before. Freedom is a beautiful thing, however as freedom and personal liberties expand (and they rapidly are), there needs to be an equal expansion of personal accountability. Right now there is no expansion of personal accountability. The households and the school systems are failing. The only way to end the suffering in this nation whether it be from bullying or discrimination is not to highlight differences between groups of people, but to focus on the importance of accountability and ultimately character. The only way to heal this country and our communities is to accept and embrace the notion that we have to begin character building from the ground up before the elementary level or our society will never recover. The healing needs to start now before we fall even further down into the pits of evil. It is my dream for the healing of this nation to be David's legacy. Please help me share this message.").

32. Amos, *supra* note 1.

family, no charges were filed against anyone who ridiculed him, including the “ringleader” of the cyberbullying, who was apparently identified on social media.³³ The Bexar County District Attorney said that without proof of physical violence, the only criminal recourse at the time in Texas was a potential charge for harassment.³⁴ He declined to indict the students for harassment, however, determining there was simply not enough evidence to file charges under the circumstances when considering the then-existing elements of the statute under the Texas Penal Code.³⁵ In response, David’s family—now determined to prevent other families from experiencing similar situations—created David’s Legacy Foundation.³⁶ The Foundation, a non-profit organization, is “dedicated to ending cyber-assisted bullying by educating communities about the harmful effects of cyber abuse, providing support for bullying victims, promoting kindness, and supporting legislation that prohibits the cyberbullying of minors.”³⁷ The Molak family, in generating awareness for the newly created foundation, specified that they did not intend for any subsequently proposed legislation on cyberbullying to flood Texas courts with frivolous lawsuits or with criminal prosecution for non-targeted, one-time instances or for name-calling.³⁸ Instead, they sought to call attention to and eradicate *repetitive* behaviors exhibited by *chronic* bullies.³⁹

B. Texas Is All Ears

Within mere months following its creation, the Molak family’s efforts with David’s Legacy Foundation were beginning to pay off.⁴⁰ Through the inclusion of a legislative toolkit on the Foundation’s website, David’s family demonstrated the power of social media in initiating positive change.⁴¹ The

33. Mark D. Wilson, *No Charges Will Be Filed in the Suicide of David Molak*, Bexar County District Attorney Says, MY SAN ANTONIO (May 11, 2016, 11:07 PM), <http://www.mysanantonio.com/news/local/crime/article/DA-No-charges-will-be-filed-in-the-death-of-7462019.php>.

34. See TEX. PENAL CODE ANN. § 42.07 (West 2017); Wilson, *supra* note 33.

35. See PENAL § 42.07 (failing to specifically include Internet, text, or photo-based communications within the definition of electronic communication through which the offense of harassment could be committed); Wilson, *supra* note 33 (quoting the district attorney explaining the lack of evidence).

36. DAVID’S LEGACY FOUND., <http://www.davidlegacy.org> (last visited Dec. 29, 2018).

37. *Id.*

38. Warren, *supra* note 2, at 27 (“[T]he legislation . . . is meant to discourage repetitive, almost sociopathic abuse.”); see also Zaslow, *supra* note 14 (“‘David’s Law is not made to get people in trouble for calling someone stupid,’ Molak said. ‘There’s a group of people who chronically and relentlessly bullied my brother and they need to be held accountable.’”).

39. Zaslow, *supra* note 14.

40. *Texans Continue Push to Pass David’s Law Anti-Cyberbullying Bill*, KATY NEWS (Apr. 28, 2017), <http://thekatynews.com/2017/04/28/texans-continue-push-to-pass-davids-law-anti-cyberbullying-bill/> (“David’s Law has been backed by citizens and organizations across the state of Texas, including child psychology experts, multiple public school administrations, family violence protection organizations, and esteemed members of Texas communities.”).

41. *Id.*

toolkit included instructions with direct links, which encouraged more than 1,150 citizens to contact their legislators to voice their support.⁴² David's story gained the attention of Texas Senator José Menéndez,⁴³ who agreed to file Senate Bill 179, known as David's Law.⁴⁴ As Senate Bill 179 traversed through the beginning stages of the legislative process, the moving stories of tragedy sparked by repeated peer cyberbullying drew sympathy from Texans and, in turn, furnished further support for the bill.⁴⁵ The testimony given in support of Senate Bill 179 by David's family, parents of other cyberbullied children, and another young cyberbullying victim during the initial Senate Committee Hearing on State Affairs elicited similar sympathies from the legislators in attendance.⁴⁶ During the hearing, Senator Joan Huffman—who serves as chair of the committee—expressed her views in accordance with the testifying witnesses when reacting to their recollections.⁴⁷ The emotional testimony detailing the cruel content of the messages sent, oftentimes anonymously, to the now-deceased children of the testifying parents moved Senator Huffman to tears and seemed to create a sense of urgency on the senate floor.⁴⁸ The high-profile and tragic cyberbullying cases surrounding Senate Bill 179's creation, in combination with the emotional nature of the bill, may have caused the legislature to overlook potential flaws in the bill they might have otherwise considered.⁴⁹

C. Cell Phones and Social Media: The 21st-Century School Yard?

Generally speaking, traditional bullying is *unwanted, aggressive* behavior that typically occurs at school amongst school-aged children.⁵⁰ For behavior to actually rise to the level of bullying under most definitions—including the most common definition used by the CDC—such behavior

42. *Id.*

43. Peggy Fikac, *San Antonio Legislators File Bill That Would Create David's Law to Combat Online Bullying*, MY SAN ANTONIO (Nov. 14, 2016, 10:04 PM), <https://www.mysanantonio.com/news/local/article/San-Antonio-legislators-file-bill-to-create-10613599.php>.

44. Jackie Wang, *"David's Law" Would Criminalize Cyberbullying, Mandate School Policies*, TEX. TRIB. (Apr. 11, 2017, 12:00 AM), <https://www.texastribune.org/2017/04/11/davids-law-criminalizes-cyberbullying-mandates-public-schools-create-p/>.

45. *Texans Continue Push to Pass David's Law Anti-Cyberbullying Bill*, *supra* note 40 (discussing the growing support behind the bill).

46. *Hearing on Tex. S.B. 197 Before the Senate Comm. on State Affairs*, 85th Leg., R.S. (Apr. 6, 2017) (testimony of witnesses in support of Senate Bill 179) (video available from the Senate Video/Audio Archives of Senate Committee on State Affairs).

47. *Id.*

48. *Id.*

49. *See infra* Part III (discussing the pattern of legislative action following school-tragedy cases with high media coverage); *see also* Matthew Fenn, Note, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 *FORDHAM L. REV.* 2729, 2736–40 (2013) (explaining the correlation between the shift in national consciousness to the bullying problem and the increase of highly-publicized, violent acts by victims as a response to the bullying).

50. *What Is Bullying*, STOPBULLYING.GOV, <https://www.stopbullying.gov/what-is-bullying/definition/index.html> (last reviewed July 26, 2018).

generally must be *repeated* and involve an imbalance of power.⁵¹ Traditional forms of bullying typically occur in the context of the school environment; cyberbullying, however, through the use of electronic technology, brings this unwanted and aggressive behavior to a newer and potentially more far-reaching environment: the Internet.⁵² The rise in popularity of smartphones and social media gives would-be bullies the ability to threaten, ridicule, or otherwise exhibit the behaviors associated with traditional bullying, both online and away from school.⁵³

1. Why Is Cyberbullying a Unique Problem?

Social networking sites changed the way students communicate while both at school and in other settings.⁵⁴ Over 90% of teenagers have used social media, and most teenagers also own a smartphone on which they can access social media to communicate with others using Wi-Fi or cellular data.⁵⁵ The increase in the low-cost availability of smartphones and other forms of Wi-Fi-enabled technology to the public has changed American culture by fostering an ever-present sense of connectedness to others.⁵⁶ With a smart device, a lone individual locked in a room, for example, now may have more social interactions with others than an individual physically interacting with the community by attending work or school.⁵⁷ Smart devices continue to

51. *See id.* (“Bullying is unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time.”); *see also* SAMEER HINDUJA & JUSTIN W. PATCHIN, *BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING* 11 (2d ed. 2014) (defining cyberbullying as “*willful and repeated* harm inflicted through the use of computers, cell phones, and other electronic devices”) (emphasis added); David P. Farrington, *Understanding and Preventing Bullying*, 17 *CRIME & JUST.* 381, 384 (1993) (noting the widespread agreement among researchers that bullying includes “*repeated incidents* in the same children over a prolonged period” as a key element) (emphasis added).

52. *See 11 Facts About Bullying*, DOSOMETHING.ORG, <https://www.dosomething.org/us/facts/11-facts-about-bullying> (last visited Dec. 29, 2018); *see also What Is Cyberbullying*, STOPBULLYING.GOV, <https://www.stopbullying.gov/cyberbullying/what-is-it/index.html> (last reviewed July 26, 2018) (discussing the difference between traditional bullying and cyberbullying).

53. *What Is Cyberbullying*, *supra* note 52.

54. *See Social Media, Social Life: How Teens View Their Digital Lives*, COMMON SENSE MEDIA 11 (June 26, 2012), <https://www.commonsensemedia.org/research/social-media-social-life-how-teens-view-their-digital-lives/key-finding-1%3A-teens-are-avid%2C-daily-users-of-social-media>. “Two-thirds (68%) of teens text every day, half (51%) visit social networking sites daily, and 11% send or receive tweets at least once every day. . . . [M]ore than a third (34%) of teens visit their main social networking site several times a day. One in four (23%) teens is a ‘heavy’ social media user, meaning they use at least two different types of social media each and every day.”)

55. *Id.* at 9, 22.

56. *See id.*

57. *See* Amanda Lenhart, *A Majority of American Teens Report Access to a Computer, Game Console, Smartphone and a Tablet*, PEW RES. CTR. (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/a-majority-of-american-teens-report-access-to-a-computer-game-console-smartphone-and-a-tablet> (“The majority of youth have access to three or four of the five items asked about on the survey — desktop or laptop computer, smartphone, basic phone, tablet and game console. Fully seven-in-ten teens have or have access to three or four of those items; about 1% of teens own no devices and just 4% say they only

become entwined in even the most marginal aspects of a typical American's daily life.⁵⁸ Naturally, this ever-present ability to communicate with others has come with an increased impatience and an expectation of prompt response time.⁵⁹ The growing culture of instant information and gratification eventually led to the normalization of parents allowing increasingly younger children to own smartphones and take them to school, even when school policy prohibited their use on campus.⁶⁰ School-aged bullies, victims, and bystanders, typically being more emotional, naïve, or ignorant to the long-term consequences of their actions, could now carry the schoolyard in their pockets.⁶¹ The near-constant access by youth to the Internet, smartphones, and social media, combined with the ability to post anonymously from any location, subjects vulnerable or disliked students to offensive, bullying-type behavior around the clock and away from the schoolyard.⁶² This poses a problem for the victim, parents, and school administrators because the location and identity of the cyberbully may be difficult to ascertain.⁶³

The question remains whether the continued emergence of social media increases the inevitability of cyberbullying by some students.⁶⁴ The prevalence of fake social media profiles creates the ideal environment for a would-be cyberbully on the Internet, and some commentators have suggested that the ease in masking one's identity on Facebook emboldens cyberbullies

have or have access to one.”).

58. See IDC, ALWAYS CONNECTED: HOW SMARTPHONES AND SOCIAL KEEP US ENGAGED 8 (2013), <https://www.nu.nl/files/IDC-Facebook%20Always%20Connected%20%281%29.pdf>. Smart devices and the age of instant information have made an impact on human behavior. See *id.* Studies indicate 4 out of 5 smartphone owners check it within fifteen minutes of waking up. *Id.* This study also revealed that 25% of smart phone owners cannot recall the last time they did not have their phone in close proximity. *Id.* at 14.

59. See *id.* at 4. Because of this expectation of constant connectivity and availability, parents may feel the need to provide their children with a channel of communication while they are at school despite many school policies prohibiting cell phone use in class or during school hours. See *id.* at 4–5. It is likely that many parents would attribute this to convenience when picking up children from school or the ability to quickly communicate with their child in the event of illness or an emergency. See *id.*

60. See generally Jesse D.H. Snyder, *Attention Boys and Girls: The Tinker Schoolhouse Gates May Extend to Your Cell Phones, Macs, and PCs—How the Internet Is Redefining Public School Discipline*, 4 FAULKNER L. REV. 179, 208 (2012) (explaining that phones continue to be used in schools despite rules to the contrary).

61. See *id.* at 209 (“Bullies no longer need to wait for recess; technology fully enables them to launch attacks from the privacy of their homes.”).

62. *Cyber Civility Curriculum, A Teachers' Manual to Guide Students on Using Social Media and Other Digital Tools in a Safe, Responsible, and Respectful Manner*, WORLD ORG. FOR RES. DEV. & EDUC. 37 (pdf on file with author) [hereinafter *Cyber Civility Curriculum*].

63. See Snyder, *supra* note 60, at 209–10.

64. See Romeo Vitelli, *Does Technology Make Bullying Easier?*, PSYCHOL. TODAY (Apr. 6, 2016), <https://www.psychologytoday.com/us/blog/media-spotlight/201604/does-technology-make-bullying-easier> (“Despite the easy availability of social media platforms such as Facebook and Twitter, in-person bullying is still far more common than cyberbullying. . . . Research studies of young people who report experiencing verbal, physical, or emotional harassment have shown that 18 percent had also reported being cyber-bullied.”).

with increasingly obnoxious behavior.⁶⁵ Additionally, due to bully-identification problems, the perception of a lack of consequences for a student-cyberbully could also encourage the cyberbully to repeat the behavior, further tormenting the targeted student.⁶⁶ The permanence of content posted by cyberbullies is also concerning, as recipients can reread messages or comments posted to the Internet many times, sent to other students via the Internet or text message, or “screenshot” their smartphones for storage and further distribution.⁶⁷ Users of social media can also share comments or pictures posted by bullies—whether students or strangers—or sent in messages to specific recipients or to the public at large.⁶⁸ The key problem with this rapid-type dissemination of information is the near impossibility in determining who has seen the message or to which social media platforms it has been posted.⁶⁹ Reputation-damaging or hurtful information can then “go viral,” which means it is shared or disseminated by a large number of people, further lending to the content’s permanence on the Internet.⁷⁰ In this way, a victim of bullying cannot escape the harmful behavior by returning home, as is possible with traditional bullying.⁷¹ It can be said that, notwithstanding traditional bullying occurring more frequently, cyberbullying presents a larger problem to the school environment than traditional bullying does because there are no longer clearly foreseeable windows of time to which the bullying is confined.⁷²

Despite the elimination of this time frame, research conducted by the National Center for Education Statistics suggests that traditional bullying is more commonly reported than cyberbullying among children aged twelve to

65. See Benjamin A. Holden, *Unmasking the Teen Cyberbully: A First Amendment-Compliant Approach to Protecting Child Victims of Anonymous, School-Related Internet Harassment*, 51 AKRON L. REV. 1, 19 (2017) (noting it is unlikely that child “meanness” has changed over time, instead attributing the perceived increase in bullying to the revolutionizing of social media as a means of communication among school-aged children).

66. See *Cyber Civility Curriculum*, *supra* note 62 (pointing out that upwards of 80% of youth think cyberbullying is both easier to get away with and easier to hide from parents than traditional in-person bullying).

67. See *id.* at 18. When a person “screenshots” on a cell phone or computer, they save an exact copy of the content displayed on a screen to a smartphone or computer’s photo storage. *Id.* Fortunately, there is an ironic benefit in having access to the screenshot function on a cell phone. See Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: Taking Screenshots to Preserve Evidence of Cyberbullying*, CYBERBULLYING.ORG, <https://cyberbullying.org/making-cyberbullying-screenshots.pdf> (last visited Dec. 29, 2018). Because a screenshot essentially takes a time-stamped snapshot of the viewable contents of a computer or phone screen, it is useful for victims and parents of victims as a tool for preserving evidence of cyberbullying. *Id.* According to the Cyberbullying Research Center, it “is valuable for visually recording harassing content to document cyberbullying victimization.” *Id.*

68. *Cyber Civility Curriculum*, *supra* note 62, at 1.

69. *Id.* at 37.

70. *Id.*

71. *What Is Cyberbullying*, *supra* note 52.

72. See Lenhart, *supra* note 57 (explaining that most teenage students are able communicate at any time because they have widespread access to various smart devices).

eighteen.⁷³ However, high-profile cyberbullying cases in recent years may cause a misconception that cyberbullying is more common than traditional bullying, in turn causing an increasing number of state legislators to push for its criminalization.⁷⁴ Although cyberbullying is a problem in Texas and at the national level, it is hard to rationalize the concept that it is an epidemic in Texas when it poses only a small fraction of the reported bullying scenarios in Texas schools.⁷⁵

2. *The Relationship Between Bullying and Suicide*

The media often associate school bullying victims and child suicide; however, most bullying or cyberbullying victims will never exhibit suicidal behaviors or even have suicidal thoughts.⁷⁶ Interestingly, among children who report involvement in bullying—whether as the aggressor, victim, or bystander—those who both bully *and* get bullied (bully-victims) are at the highest risk of suicidal behavior.⁷⁷ In most cases, involvement in bullying is not the sole or determining factor in a student's decision to end his life, but this involvement may add to an already unhealthy situation.⁷⁸ Youth who are more likely to commit, attempt, or contemplate suicide are oftentimes dealing with an array of multifaceted stressors in and away from school.⁷⁹ These other stressors, which increase a student's vulnerability to both suicide and bullying behavior, are called risk factors and include unrelated situations causing emotional distress, alcohol and drug use, a history of family conflict, the existence of learning disabilities, and a lack of familial support.⁸⁰

Collectively, statistical data from studies conducted on the topic suggest a strong association between bullying and suicide; however, this inference

73. U.S. DEP'T OF EDUC., NCES2017-015, STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2015 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY (2016), <https://nces.ed.gov/pubs2017/2017015.pdf>.

74. See David L. Hudson Jr., *Is Cyberbullying Free Speech?*, 102 A.B.A. J. 18, 19 (2016) (quoting Eugene Volokh, a UCLA law professor) (“[T]he law could cover ‘a girlfriend’s excoriating her cheating ex-boyfriend on a Facebook post or people emailing each other about some high school cheating scandal.’ ‘Such restrictions on people’s ordinary self-expression and discussion can’t be proper.’ . . . ‘Indeed, it seems quite likely that giving a teenager a criminal record for such speech would itself be extremely distressing and in rare cases can itself lead to suicide.’”).

75. U.S. DEP'T OF EDUC., *supra* note 73.

76. *Effects of Bullying*, STOPBULLYING.GOV, <https://www.stopbullying.gov/at-risk/effects/index.html> (last visited Dec. 29, 2018).

77. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, THE RELATIONSHIP BETWEEN BULLYING AND SUICIDE: WHAT WE KNOW AND WHAT IT MEANS FOR SCHOOLS 2 (Apr. 2014), <https://www.cdc.gov/violenceprevention/pdf/bullying-suicide-translation-final-a.pdf>.

78. *Effects of Bullying*, *supra* note 76.

79. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 77, at 3 (naming other stressors that increase a youth's risk for suicide-related behavior aside from peer bullying, such as mental health issues, school anxiety, and stress related to family or romantic relationships).

80. *Id.*

may be misplaced.⁸¹ Several researchers have studied the relationship between bullying and suicide by focusing specifically on those *other* risk factors shared by youth involved in bullying, suicidal behavior, or both.⁸² These other risk factors increase a youth's risk of bullying involvement—whether as a perpetrator, victim, or bully-victim—and suicidal behavior alike.⁸³ Because of this correlative relationship, when the probability of either bullying or suicidal behavior (but not both) changes through manipulation or control of one of the other risk factors, the strength of the relationship between bullying and suicide appears weakened.⁸⁴ To illustrate this analysis of the bullying-suicide relationship, Dr. Debra L. Karch used one variation of this approach and found that one in four students who committed suicide had “[p]roblems at school”; however, just 12.4% of students attributed their school problems to bullying.⁸⁵ Additionally, much like a chicken-or-the-egg scenario, researchers are uncertain as to which direction the relationship between bullying and suicidal behavior travels.⁸⁶ In one study, researchers tried to answer the question: Do bullied students become depressed, or do depressed students get bullied?⁸⁷ After the study, the researchers concluded “both,” further muddying the waters.⁸⁸

Just as the risk factors may increase a student's susceptibility to bullying involvement and suicidal behavior, the converse holds true as well.⁸⁹ Factors tending to undermine one of these risk factors (such as high involvement in school or lack of substance abuse) may reduce a student's susceptibility to either bullying involvement or suicidal behavior even if the student is already a bullying victim.⁹⁰ These mitigating circumstances are “protective factors.”⁹¹

81. Marci Feldman Hertz et al., *Bullying and Suicide: A Public Health Approach*, 53 J. ADOLESCENT HEALTH S2 (2013), [http://www.jahonline.org/article/S1054-139X\(13\)00270-X/pdf](http://www.jahonline.org/article/S1054-139X(13)00270-X/pdf).

82. See Anat Brunstein Klomek et al., *Suicidal Adolescents' Experiences with Bullying Perpetration and Victimization During High School as Risk Factors for Later Depression and Suicidality*, 53 J. ADOLESCENT HEALTH S37 (2013), [http://www.jahonline.org/article/S1054-139X\(12\)00802-6/pdf](http://www.jahonline.org/article/S1054-139X(12)00802-6/pdf); see also Debra L. Karch et al., *Precipitating Circumstances of Suicide Among Youth Aged 10–17 Years by Sex: Data from the National Violent Death Reporting System, 16 States, 2005–2008*, 53 J. ADOLESCENT HEALTH S53 (2013), [http://www.jahonline.org/article/S1054-139X\(12\)00286-8/pdf](http://www.jahonline.org/article/S1054-139X(12)00286-8/pdf) (analyzing data on factors motivating teen suicide).

83. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 77 at 3.

84. Hertz et al., *supra* note 81.

85. Karch et al., *supra* note 82. Meanwhile, more than 30% of the students who committed suicide and had problems at school attributed these problems to a drop in grades. *Id.* at S52.

86. See Hertz et al., *supra* note 81 (“Researchers found that victims of bullying had significantly higher chances of developing new psychosomatic and psychosocial problems over the course of a school year compared with children who were not bullied. However, children with preexisting depressive symptoms or anxiety were also significantly more likely to be newly victimized . . .”) (footnote omitted).

87. *Id.*

88. *Id.*

89. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* note 77 (noting that reducing risk factors may decrease a student's susceptibility to bullying involvement and suicidal behaviors).

90. *Id.*

91. *Id.*

The National Center for Injury Prevention and Control (Center) emphasizes that the goal in preventing the consequences arising from the bullying-suicide relationship should focus on decreasing the risk factors and increasing the protective factors a child may experience.⁹² Emphasizing punishment to combat bullying, instead of addressing any present risk factors, may do more harm than good in attempting to eradicate bullying completely.⁹³ One thing is clear: while involvement in bullying, along with other stressors, may increase the chance that a child will contemplate or possibly attempt suicide, there is no clearly established causal link between the two.⁹⁴

The bottom-line of the most current research findings is that being involved in bullying in any way—as a person who bullies, a person who is bullied, or a person who both bullies and is bullied (bully-victim)—is ONE of several important risk factors that appears to increase the risk of suicide among youth.⁹⁵

Publications from the Center also suggest that the high level of attention given to the (at-most attenuated) relationship between bullying and youth suicide in recent years may also prove counterproductive in combatting instances of student suicide.⁹⁶ The Center reported that the improper categorization of bullying as a direct cause or effect of suicide suggests that any proposed change would emphasize punishing bullies instead of tackling the motivating factors.⁹⁷ Instead, the CDC maintains “[the] response to [bullying and suicide-related behavior] must reflect a balanced understanding of the issues informed by the best available research,” notwithstanding the observation that “a young person’s death by suicide is a tragedy and both bullying and suicide-related behavior are serious public health problems”⁹⁸

92. *Id.*

93. *Id.*

94. *Id.* (noting that bullying and suicide-related behavior share a close relationship; however, researchers do not know if bullying directly causes suicide-related behavior).

95. *Id.*

96. *See id.* (noting that sensationalized reporting attributing suicide directly to school bullying may normalize suicide in response to bullying, encourage copycat behavior, misdirect attention to blame and discipline instead of treatment and support, and draw attention away from the other contributing stressors which also need to be addressed).

97. *Id.*

98. *Id.*

III. OTHER STATES RESPOND TO BULLYING AND CYBERBULLYING

Until the late 1990s, courts at the federal and state level paid little attention to the bullying problem.⁹⁹ This all changed in 1999 when two high school students opened fire on their classmates at Columbine High School in Littleton, Colorado.¹⁰⁰ The tragedy, and the revelations which followed, categorized the massacre in part as retaliation for the exclusion and maltreatment experienced by the shooters at school before the attack.¹⁰¹ The heavy media coverage of the shooting, in combination with heightened public interest in exploring the consequences of bullying on the emotional well-being of the victim, led to increased demands for legislative action.¹⁰² This Part explains and analyzes how other select states have attempted to eradicate school bullying.

A. State Response Varies Greatly

With the intention to prevent Columbine-type tragedies, and in the interest of protecting schoolchildren, the State of Georgia became the first state to attempt to legislatively eradicate the supposed source of the bullying problem by requiring schools to construct anti-bullying education programs.¹⁰³ The continued public interest and media coverage of student victims retaliating or committing suicide in response to continued abuse inspired other states to follow suit.¹⁰⁴

As with the call for traditional bullying legislation, the public demand for state legislation for cyberbullying followed another high profile case.¹⁰⁵ Thirteen-year-old Meagan Meier of Missouri hanged herself due to the hurtful words of someone she knew as Josh Evans.¹⁰⁶ “Josh” contacted Meagan over MySpace, and the two formed an online relationship.¹⁰⁷ The last words sent to Meagan by “Josh,” who was actually the

99. U.S. DEP’T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 7 (2011), <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>.

100. See David L. Hudson Jr., *Student Expression in the Age of Columbine: Securing Safety and Protecting First Amendment Rights*, 6 FREEDOM F. INST. 1, 11 (Sept. 2005), <https://www.freedomforuminstitute.org/wp-content/uploads/2016/10/First.Report.student.speech.pdf>. Ken Trump, President of the National School Safety and Security Services at the time, expressed his view of the school’s role, stating that “[s]chool officials should . . . investigate further [the warning signs exhibited by students] with an emphasis on providing support to students determined to be legitimately troubled prior to an incident occurring.” *Id.*

101. See U.S. DEP’T OF EDUC., *supra* note 99 (analyzing the policy response to the Columbine shooting).

102. See *id.*

103. See *id.*

104. See *id.*

105. See Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 847 (2010).

106. *Id.* at 846.

107. *Id.* at 846–47.

forty-seven-year-old mother of one of Meagan's friends, read "[t]he world would be a better place without you."¹⁰⁸ Lori Drew, also known as Josh Evans, created the fictitious relationship with the middle schooler in order to assess Meagan's opinion of her own daughter.¹⁰⁹ Meagan's story made national headlines due to public outcry surrounding the notion that Drew's conduct leading to Meagan's death fell short of criminal behavior.¹¹⁰ Ultimately, Meagan's suicide demonstrated to the legal community and the public that the cyberbullying problem could not simply be brushed under the rug because the consequences of ignorance are too great.¹¹¹

Today, all fifty states have passed some law pertaining to bullying, typically falling under an education statute or sometimes as part of a criminal statute.¹¹² Most states address cyberbullying specifically as well; however, some do not define the specific conduct that is prohibited.¹¹³ Currently, no uniform federal statute exists to aid schools in tackling the bullying and cyberbullying problem.¹¹⁴ Consequently, state and local lawmakers offer varying approaches to resolve the issue, resulting in disparate school policies and legal consequences for bullies and cyberbullies from state to state.¹¹⁵ Additionally, because of the varying definitions of bullying and cyberbullying within the state statutes, conduct prohibited or punishable in one state may be permissible in another.¹¹⁶

Typically, state legislation seeks to address cyberbullying by amending a state's education code, criminal code, or both.¹¹⁷ Some states address cyberbullying without imposing criminal penalties against offenders.¹¹⁸ For example, the provisions that speak to student discipline and the prohibition of bullying in Indiana fall under the state's Education Code.¹¹⁹ While the Indiana provision does not provide a criminal cause of action as justice for

108. *Id.* at 847.

109. *Id.*

110. *See id.* at 856. Drew was, however, charged with a federal computer fraud offense for violating the terms and conditions of the MySpace site. *See id.* at 856–57.

111. *See id.* at 847.

112. *See Laws & Policies*, STOPBULLYING.GOV, <https://www.stopbullying.gov/laws/index.html> (last reviewed Sept. 8, 2017) (listing redundant bullying and cyberbullying laws by state and type of policy).

113. *See* U.S. DEP'T OF EDUC., *supra* note 99. *Compare* GA. CODE ANN. § 20-2-751 (West 2018) (defining cyberbullying specifically and providing examples), *with* NEV. REV. STAT. ANN. § 388.122(1) (West 2017) (stating generally that bullying may be accomplished through electronic means).

114. *See Laws & Policies*, *supra* note 112.

115. *See id.*

116. *See id.* (listing bullying and cyberbullying laws by state and type of policy). *Compare* CONN. GEN. STAT. ANN. § 10-222d (West 2017) (“‘Bullying’ means . . . the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district”) (emphasis added), *with* COLO. REV. STAT. ANN. § 22-32-109.1 (West 2018) (“‘Bullying’ means any written or verbal expression, or physical or *electronic act or gesture, or a pattern thereof*, that is intended to coerce, intimidate, or cause any physical, mental, or emotional harm to any student.”) (emphasis added).

117. *See Laws & Policies*, *supra* note 112.

118. *See* IND. CODE ANN. § 20-33-8-13.5(b) (West 2018).

119. *See id.*; TEX. EDUC. CODE ANN. § 37.0832 (West 2017).

cyberbullying victims, it does provide a statement of scope that is worth noting because it is much narrower than the scope of conduct addressed by David's Law.¹²⁰ The school-disciplinary laws in the Indiana Education Code pertaining to cyberbullying limit its applicability to students who are "using property or equipment provided by the school."¹²¹ This type of law allows schools to regulate cyberbullying when a student is away from school property but only if the cyberbullying student is using the school's equipment while off campus, drawing a clear line between student conduct for which schools can intervene and conduct requiring the victim to seek some other recourse.¹²²

Among states that have criminalized cyberbullying directly or indirectly, those states may classify the offense differently.¹²³ In some of these states, they add cyberbullying provisions to existing harassment statutes; the amended statute either defines bullying or cyberbullying, or omits the terms completely, simply incorporating electronic devices as a means of committing either offense.¹²⁴ Other states rope bullying into the provisions of existing stalking and cyber-stalking statutes.¹²⁵ Still, in other states, cyberbullying is classified as a wholly new and named offense.¹²⁶ Louisiana, for example, specifically defines cyberbullying as a criminal offense, which could impose a maximum fine of \$500, include six months in jail, or both to student offenders.¹²⁷ North Carolina also categorizes cyberbullying as a separate offense.¹²⁸ The North Carolina law is interesting because it affords differing consequences for cyberbullies who are minors versus adult offenders.¹²⁹ The statute seems to account for a main concern of those opposing the criminalization of cyberbullying: that subjecting students

120. IND. CODE ANN. § 20-33-8-13.5(b) ("[The section] must apply when a student is: (1) on school grounds immediately before or during school hours, immediately after school hours, or at any other time when the school is being used by a school group; (2) off school grounds at a school activity, function, or event; (3) traveling to or from school or a school activity, function, or event; or (4) *using property or equipment provided by the school.*") (emphasis added).

121. *Id.* ("[This section] must apply when a student is . . . *using property or equipment provided by the school.*") (emphasis added). The scope of David's Law, on the other hand, is so broad that it seems that the kind of authority schools and law enforcement now have to enforce bullying policy off campus is ultimately left up to interpretation by Texas courts. *See* EDUC. § 37.0832.

122. *See* IND. CODE ANN. § 20-33-8-13.5(b).

123. *See* U.S. DEP'T OF EDUC., *supra* note 99. David's Law adds to both the Texas Education Code and the Texas Penal Code, but specifically, the criminal changes expand the harassment statute. *See supra* Part IV (analyzing changes to the statute).

124. *See* U.S. DEP'T OF EDUC., *supra* note 99.

125. *See id.*

126. *See, e.g.*, LA. STAT. ANN. § 14:40.7 (2018).

127. *Id.* ("Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.")

128. *See* N.C. GEN. STAT. ANN. § 14-458.1 (West 2018).

129. *Id.* § 14-458.1(b).

to criminal records will severely impact the students' later success.¹³⁰ The statute does this by allowing a court to furnish a probationary period under which cyberbullies under the age of eighteen must comply, the length and requirements of which appear largely discretionary.¹³¹ Upon successful completion of the probation the court deems appropriate, "the court shall discharge the defendant and dismiss the proceedings against the defendant."¹³² Adults who plea or are found guilty, on the other hand, are not afforded this option under the statute.¹³³ This seems to draw a line between student misconduct (which is more properly characterized as true cyberbullying) and adult cyber-harassment of a minor, conduct for which an adult could otherwise be held criminally responsible.¹³⁴

IV. WHAT CHANGES IN TEXAS UNDER DAVID'S LAW?

Texas Governor Greg Abbott signed Senate Bill 179 into law after a bipartisan effort during the 85th Regular Session, and it went into effect on September 1, 2017.¹³⁵ Prior to the passage of Senate Bill 179, cyberbullying was not specifically included within the definition of bullying under the Texas Education Code.¹³⁶ Additionally, the sections pertaining to school bullying under prior Texas law did not apply to behavior meeting the Code's definition of bullying unless it occurred on school grounds, at a school event, or while traveling to school or a school event.¹³⁷ Under the new law, the legislature expanded the legal meaning of bullying to include a wider range of conduct and specified that the definition includes cyberbullying.¹³⁸ The new law also mandates school officials to promptly notify parents of both bullies and victims about reports concerning their children and to implement an anonymous reporting system upon which students can report bullying and cyberbullying as well.¹³⁹ Further, the new law broadens the range of conduct punishable under the criminal harassment statute by amending the language

130. See Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 697–98 (2012) (inferring that, because criminal cyberbullying statutes often overlap with existing crimes within a state, overzealous prosecutors could, at their discretion, disproportionately punish adolescents in relation to the conduct).

131. See N.C. GEN. STAT. ANN. § 14-458.1(c).

132. *Id.*

133. See *id.*

134. See *supra* note 51 and accompanying text (providing the CDC definition of cyberbullying).

135. See *supra* note 19 and accompanying text (stating the effective date of David's Law).

136. See TEX. EDUC. CODE § 37.0832 (West 2017) (incorporating cyberbullying into the traditional definition of bullying and giving examples of technological mediums through which cyberbullying is often effectuated).

137. See EDUC. § 37.0832 (West 2014), *amended by* EDUC. § 37.0832 (2017) (encompassing within the bullying definition behavior that, although occurring away from school, interferes with a student's (presumably the victim's) educational opportunities or behavior that causes a substantial disruption to the educational environment).

138. Compare EDUC. § 37.0832 (2014), *with* EDUC. § 37.0832 (2017).

139. *Id.* § 37.0832 (2017).

of the offense under the Texas Penal Code.¹⁴⁰ Now, certain bullying that is embarrassing, offensive, alarming, or merely annoying constitutes criminal harassment, while other, potentially more dangerous conduct—such as manipulative coercion—still falls outside the scope of the law.¹⁴¹ Because David’s Law also gives schools the authority to collaborate with law enforcement for the investigation and identification of cyberbullies, the law carves too wide of a path for students from the classroom to the jailhouse.¹⁴²

A. Texas Redefines Bullying

David’s Law amended § 37.0832 of the Texas Education Code to encompass traditional bullying and cyberbullying under a single definition.¹⁴³ Bullying under the Code is now defined as “a *single significant act or a pattern of acts* by one or more students directed at another student that exploits an imbalance of power and involves engaging in written or verbal expression, expression through electronic means, or physical conduct”¹⁴⁴ Such conduct is considered bullying under the new definition in four enumerated circumstances: (1) the conduct “has the effect or will have the effect of physically harming a student, damaging a student’s property, or placing a student in reasonable fear of harm to the student’s person or of damage to the student’s property”;¹⁴⁵ (2) the conduct “is sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening or abusive educational environment for a student”;¹⁴⁶ (3) the conduct “materially and substantially disrupts the educational process or the orderly operation of a classroom or a school”; or (4) the conduct “infringes on the rights of the victim at school”¹⁴⁷ For the first time in Texas, the new definition of bullying includes “single significant act[s],” and therefore strays away from the general requirement

140. See *id.* § 37.0151(a) (2017) (“The principal . . . may make a report to any school district police department, . . . the police department of the municipality in which the school is located[,] . . . or the sheriff of the county in which the school is located if . . . the principal has reasonable grounds to believe that a student engaged in conduct that constitutes an offense under Section 22.01 or 42.07(a)(7), Penal Code.”); see also TEX. PENAL CODE ANN. § 42.07(c) (West 2017) (providing the elements of harassment and includes changes made by Senate Bill 179, which allows for the criminalization of cyberbullying under that charge).

141. See *infra* Section IV.C.1 (using a hypothetical based on facts from the relatively recent Michelle Carter case to attempt to define the scope of punishable conduct under David’s Law).

142. See PENAL § 42.07(a)(7) (“A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.”).

143. See EDUC. § 37.0832 (2017) (specifying that the Code applies to cyberbullying and traditional bullying).

144. *Id.* (emphasis added).

145. *Id.*

146. *Id.*

147. *Id.*

that the unwanted behavior be repeated.¹⁴⁸ This divergence means that the law crafted by the legislature to eradicate cyberbullying, and catapulted into the limelight by rare (albeit highly publicized) cyberbullying cases, punishes behavior that most researchers agree does not rise to the level of bullying.¹⁴⁹ This over-categorization of conduct qualifying as bullying is especially ironic when recalling the intentions of the family that promoted the legislation.¹⁵⁰ This change greatly expands the regulatory power of schools to discipline children or report behavior to law enforcement authorities because now a student need only engage in a wide range of conduct to expose himself to disciplinary action (including expulsion), civil liability, criminal harassment charges, or, perhaps, all three.

The law, for the first time in Texas, expands the authority of a school to regulate off-campus cyberbullying acts under the school's anti-bullying policies if the act or acts interfere with a student's educational opportunities or cause a substantial disruption to the classroom, a school-sponsored event, or the orderly operation of the school.¹⁵¹

B. Reporting Requirements

David's Law includes reporting requirements, mandating schools to inform the parents of bullying victims about reported incidents within one school day of the behavior being reported.¹⁵² Schools must also inform the parent of a bully within a reasonable time.¹⁵³ These requirements are part of a comprehensive policy obligating schools to implement a system allowing students to anonymously report bullying and cyberbullying incidents, even if the cyberbullying occurred over the Internet or away from school grounds.¹⁵⁴ Interestingly, while the anonymous reporting system is mandated to be made available to students, such a system is not required to be provided to parents

148. *Id.*; *What Is Bullying*, *supra* note 50.

149. *See supra* note 51 and accompanying text (providing various definitions, which all require that the conduct be repeated).

150. *See* Zaslow, *supra* note 14 (“‘David’s Law is not made to get people in trouble for calling someone stupid,’ Molak said. ‘There’s a group of people who chronically and relentlessly bullied my brother and they need to be held accountable.’”).

151. EDUC. §§ 37.0832(a-1)(3)(A)–(B).

152. *Id.* § 37.0832(c)(3)(A).

153. *Id.* § 37.0832(c)(3)(B).

154. *Id.* § 37.0832(a-1)(3). The off-campus behavior can be either regulated by or reported to law enforcement by a school if the content substantially disrupts the educational environment, or interferes with the rights of the victim at school. *Id.* § 37.0832(a)(1)(A). The route recommended by David's Legacy Foundation to meet the reporting requirement integrates an anonymous reporting system into a mobile application, accessible by students on their cell phones, or on the school's website. *See Resources*, DAVID'S LEGACY FOUND., <http://www.davidslegacy.org/resources/> (last visited Dec. 29, 2018) (providing a link to P3 Campus, the developer of the application).

(who may be in a position to witness the behavior); nevertheless, schools may choose to provide parents with this tool.¹⁵⁵

C. Criminalization of Certain Conduct

Texas public school students who engage in conduct rising to meet the updated definition of cyberbullying could face a harassment charge, a Class B misdemeanor under David's Law.¹⁵⁶ The degree of the offense increases to a Class A misdemeanor in situations where a student-bully has previous convictions under the law and repeats the behavior.¹⁵⁷ The offense is also a Class A misdemeanor when a student cyberbullies another student—who is under the age of eighteen—while intending for the other student to attempt or to commit suicide (or to otherwise seriously harm himself).¹⁵⁸ The changes subject students to serious criminal penalties for a wide range of expressive conduct.¹⁵⁹ Students' acts of expression, while seriously distasteful, carry consequences that impose too large of a legal burden upon minors, which could expose students to the influences of the penal system during critical adolescent years.¹⁶⁰

1. Harmful Conduct Still Falls Short of Criminal

Before the passage of David's Law, as cyberbullying cases began to garner national attention, other irresponsible communicative behaviors involving electronic technology, such as manipulation and coercion, became problematic as well, although such behaviors do not fall squarely within the conventional definition of cyberbullying.¹⁶¹ In Michigan, the high-profile Michelle Carter case involved a situation where a young woman encouraged

155. *SB 179 - David's Law 85th Texas Legislative Session*, DAVID'S LEGACY FOUNDATION, <https://locker.txssc.txstate.edu/3942be0c6bbe569ed1417377e6c1d2a9/Davids-Law-Overview.pdf> (last visited Dec. 29, 2018); see *infra* Section V.A (recommending that Texas extend the reporting requirement to include parents, teachers, and students).

156. See TEX. PENAL CODE ANN. § 42.07(c) (West 2017) ("An offense under this section is a Class B misdemeanor . . ."). In Texas, Class B misdemeanors are punishable by a maximum fine of \$2,000, 180 days in jail, or both. *Id.* § 12.22.

157. *Id.* § 42.07(c)(1).

158. *Id.* §§ 42.07(c), (a)(7) ("[An] offense is a Class A misdemeanor if . . . the actor has previously been convicted under this section; or . . . [if the actor] sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another [and] . . . the offense was committed against a child under 18 years of age with the intent that the child: (i) commit suicide; or (ii) engage in conduct causing serious bodily injury to the child . . ."). In Texas, a Class A misdemeanor is punishable with a maximum \$4,000 fine, a maximum one year in jail, or both. *Id.* § 12.21.

159. See *id.* § 42.07(c).

160. See *supra* note 130 and accompanying text (explaining the likelihood of adolescents being disproportionately punished under criminal cyberbullying laws in response to their newly unlawful behavior).

161. See *What Is Bullying*, *supra* note 50 (providing the most widely-used definition of bullying).

her boyfriend to commit suicide via a series of phone conversations and text messages.¹⁶² As in the David Molak case, following the suicide, the public demanded justice for Carter's actions; this led to her indictment and eventual conviction for involuntary manslaughter.¹⁶³ Some legal analysts and law professors were concerned by Carter's guilty verdict, which demonstrated the court's willingness to hold a third-party responsible for a suicide—an act previously considered a wholly independent choice.¹⁶⁴

Although Carter and her boyfriend, Roy, were no longer students or minors when the events immediately preceding Roy's death transpired, the factual scenario presents an opportunity to analyze ambiguities in the language of David's Law, as applied to a similar situation wherein one person is encouraging another person to commit suicide.¹⁶⁵ Unlike David Molak's bullies, who used negative behaviors and emotions to influence David's behavior, Michelle Carter used positive emotions, such as concern for Roy's wellbeing, to influence him.¹⁶⁶ The Michelle Carter case is especially interesting because it presents a situation in which the bullying conduct itself was neither conclusively "unwanted" by the victim nor "aggressive" towards him, as contemplated by the CDC definition.¹⁶⁷

2. How Would Texas Handle a Similar Situation?

For the purposes of analyzing the applicability of David's Law to a similar factual scenario, consider a hypothetical situation wherein Michelle Carter and Conrad Roy had been high school students in Texas at the time of Roy's suicide and that David's Law had been in effect.¹⁶⁸ Texas harassment statutes would seem to have provided no recourse to Roy's loved ones for

162. Ray Sanchez & Natisha Lance, *Judge Finds Michelle Carter Guilty of Manslaughter in Texting Suicide Case*, CNN (June 17, 2017, 5:22 AM), <http://www.cnn.com/2017/06/16/us/michelle-carter-texting-case/index.html>. In July 2014 in Michigan, police discovered the body of eighteen-year-old Conrad Roy in the back seat of his truck, which was parked at a K-Mart located approximately forty miles from his home. *Id.* Following Roy's death, his girlfriend, Michelle Carter, was charged with involuntary manslaughter when it was discovered that she persistently urged Roy to end his own life and listened over the phone as he died. *Id.* Although Carter heard him take his last breaths over the phone, she failed to notify anyone of his death or the conversations, which the court determined led to his suicide. *Id.* Her actions were considered morally reprehensible and caused public outcry. *Id.* Considered especially egregious were specific text messages from Carter to Roy, instructing him to return to his vehicle when he expressed hesitancy and tried to exit. *Id.* Carter, armed with just her cell phone, used words to convince her boyfriend that ending his life was in his best interest. *Id.*

163. *Id.*

164. *Id.*

165. See Tex. S.B. 179, 85th Leg., R.S. (2017) (David's Law); Sanchez & Lance, *supra* note 162 (describing Roy's death).

166. See Warren, *supra* note 2 (describing the circumstances surrounding Molak's death); Sanchez & Lance, *supra* note 162 (describing the circumstances surrounding Roy's death).

167. *What Is Bullying*, *supra* note 50.

168. See Tex. S.B. 179; Sanchez & Lance, *supra* note 162 (describing the Michelle Carter case).

Carter's conduct.¹⁶⁹ One could interpret the language of Senate Bill 179 to encompass behavior like Carter's; however, it still does not appear to fit within the confines of the amended Texas harassment statute.¹⁷⁰

a. Is This Behavior Bullying?

Whether this type of behavior would now be legally considered cyberbullying, or something else, in Texas begins with an inquiry as to whether the act constitutes “a single significant act or a pattern of acts.”¹⁷¹ Courts would clearly find Carter's conduct as a “pattern of acts” because she messaged Roy multiple times, encouraging him to end his life.¹⁷² Under the new law, the conduct must also involve an “imbalance of power.”¹⁷³ While requiring an imbalance of power would seem to significantly distinguish bullying-type conduct between friends (i.e. rough housing) from similar conduct being directed toward strangers or enemies, the line may be blurred due to the various interpretations of the statutory language.¹⁷⁴ It is conceivable that a fact finder could determine that the nature of a romantic relationship between students would allow for such an actual or perceived imbalance of power.¹⁷⁵ If a fact finder determines that there was an imbalance of power, categorization of Carter's acts—accomplished by verbal, written, or electronic means¹⁷⁶—requires an analysis of the effects of her actions, as provided by the new bullying definition in the Education Code.¹⁷⁷ An act (or pattern of acts) is bullying under the new definition if it has one of four specified outcomes, one of which arises when an act “*has the effect or will have the effect* of physically harming a student”¹⁷⁸ Including the emphasized language may function to encompass more conduct within the definition of bullying than the legislature intended when crafting the bill.¹⁷⁹

169. See TEX. EDUC. CODE ANN. § 37.0832 (West 2017) (lacking any indication that bullying encompasses nonaggressive behavior).

170. See TEX. PENAL CODE ANN. § 42.07(a)(7) (West 2017) (stating if harassment is committed through electronic means, it must be done with the *intent* “to harass, annoy, alarm, abuse, torment, embarrass, or offend another”).

171. EDUC. § 37.0832(a)(1)(A).

172. *Id.*

173. *Id.*

174. See *What Is Bullying*, *supra* note 50 (“Kids who bully use their power—such as physical strength, access to embarrassing information, or popularity—to control or harm others. Power imbalances can change over time and in different situations, even if they involve the same people.”). This real or perceived imbalance of power could be physical, economic, academic, or social; however, these categories are non-exhaustive. See *id.*

175. See *id.*

176. EDUC. § 37.0832. Here, because Carter texted and called Roy on an electronic device, it appears she has done all three. See Sanchez & Lance, *supra* note 162.

177. EDUC. §§ 37.0832(a)(1)(A)(i)–(iv).

178. *Id.* § 37.0832(a)(1)(A)(i) (emphasis added).

179. See Zaslów, *supra* note 14 (referring to the intent of David's family when pushing legislators to consider the bill); see also S. Comm. on State Affairs, Bill Analysis, Tex. S.B. 179, 85th Leg., R.S. (2017)

A Texas court could determine that Michelle Carter's conduct in the posed hypothetical had "the effect of physically harming" Roy, even though she did not physically harm him.¹⁸⁰ Instead, by way of suicide, he inflicted the physical harm upon himself.¹⁸¹ Nevertheless, under this language, it is plausible that a court could find that Carter's conduct so closely aligns with the new language of the Education Code that the conduct would need to be further analyzed, even if the court found that Carter's acts of communication to Roy, encouraging him to harm himself, were not necessarily "unwanted."¹⁸²

The final inquiry necessary to categorize the act as bullying pertains to the location where it took place.¹⁸³ Conduct that meets the above criteria and occurs either on school property, at a school-sponsored event, or while traveling to school or a school-sponsored event, falls within the new definition of bullying.¹⁸⁴ If Carter's communicative acts had occurred while either of them were at school, for instance, her acts could be properly categorized as bullying to which David's Law applies.¹⁸⁵ Alternatively, if Carter's acts had occurred while both students were off campus, David's Law would still apply if the acts "interfere[d] with [Roy's] educational opportunities; or . . . substantially disrupt[ed] the orderly operation of [the] classroom, school, or school-sponsored or school-related activity."¹⁸⁶ Considering the facts of the hypothetical, it is entirely possible that a Texas court could rationalize, using this rather vague language, that Carter's communication to Roy, whereby she encouraged him to commit suicide, falls under the scope of David's Law because a student's suicide would certainly interfere with that student's educational opportunities.¹⁸⁷

b. Is This Behavior Criminal?

Even in the event that acts similar to Michelle Carter's would be considered bullying in Texas under the circumstances hypothesized, a criminal harassment charge would be unlikely due to the nature of Carter's relationship with Roy. An act deemed bullying under David's Law is not automatically criminal unless it meets the other necessary elements of the harassment statute.¹⁸⁸ Criminal harassment requires an actor to send

(giving a summary of the bill, including a statement of purpose, that helps to assess the kinds of problems the legislature sought to dispel with the bill).

180. EDUC. § 37.0832(a)(1)(A)(i).

181. See *supra* note 162 and accompanying text (describing the facts of the case).

182. See *What Is Cyberbullying*, *supra* note 52.

183. See EDUC. § 37.0832(a-1).

184. *Id.*

185. *Id.* § 37.0832(a-1).

186. *Id.* § 37.0832(a-1)(3).

187. *Id.*

188. TEX. PENAL CODE ANN. § 42.07 (West 2017).

electronic communications “in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.”¹⁸⁹ Additionally, the harassment statute in Texas only accounts for bullying-type conduct done *with the intent* to cause the victim to experience annoyance, alarm, abuse, torment, embarrassment, or otherwise feel offended.¹⁹⁰ Because Carter’s communication in the hypothetical arose from her romantic relationship with Roy, and there is no indication she caused him to feel any of the enumerated effects within the harassment statute, she would likely avoid criminal prosecution under David’s Law even if she intended that he commit suicide.¹⁹¹ While the additions to the Texas Penal Code imposing a Class A misdemeanor seem to provide punishment for the encouragement of a minor’s suicide, a closer reading of the statute suggests that Michelle Carter-type situations would be excluded.¹⁹² The Texas Legislature’s decision to attempt to criminalize this behavior under the harassment statute means a court would first have to determine that the communication itself was intended to harass the victim into committing suicide rather than to reassure or support the victim’s decision to commit suicide.¹⁹³ Despite the defendant’s harmful conduct, a prosecutor handed this set of facts would likely find herself in a similar position to that of the district attorney handling David Molak’s case; there is simply not enough evidence to support a harassment conviction, considering the elements of the offense, in such a scenario.¹⁹⁴ It seems, therefore, that Texas is back to square one in a situation such as this. In extreme cases of student behavior, wherein one student encourages another student’s suicide—and most student-suicide cases involve extreme scenarios—the victim’s family is likely without recourse.

3. David Molak’s Bullies Likely Would Have Faced Criminal Charges Under David’s Law

Using the same line of analysis, the students who cyberbullied David Molak would have faced consequences of differing degrees under David’s Law depending on each student’s respective involvement in the bullying.

189. *Id.* § 42.07(a)(7).

190. *Id.* § 42.07(a).

191. *See id.* § 42.07(c) (providing a list of the intended effects that deem the conduct criminal harassment).

192. *Id.* §§ 42.07(c), (c)(2)(A)(i) (“An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if . . . the offense was committed under Subsection (a)(7) and . . . the offense was committed against a child under 18 years of age with the intent that the child . . . commit suicide . . .”) (emphasis added); *id.* §§ 42.07(a), (a)(7) (“A person commits an offense if, *with intent* to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.”) (emphasis added).

193. *See generally id.* §§ 42.07(a)(7), (c)(2)(A)(i).

194. *See Wilson, supra* note 33 (referring to the decision of the district attorney who decided not to prosecute David Molak’s cyberbullies).

Each student who participated in the harmful communication directed at David, even if just once, would clearly be categorized as a bully under the new definition because the off-campus communication had the effect not only of physically harming David (as considered in the Michelle Carter hypothetical) but the cyberbullying also interfered with David's educational opportunities.¹⁹⁵ Had David's Law been in effect, students, teachers, administrators, or even David himself would have had an avenue available to anonymously report the abuse.¹⁹⁶ Under the new law, David's school would have been authorized to conduct an investigation to ascertain the truthfulness of any reports and the identity of his alleged cyberbullies.¹⁹⁷ Other provisions of David's Law would have allowed for disciplinary action, expulsion, or, in some circumstances, civil liability against David's bullies.¹⁹⁸ After an investigation, the school also would have had the latitude to bring in law enforcement to further punish the cyberbullies.¹⁹⁹

While it is unlikely that any of David's bullies would have been charged with a Class A misdemeanor under the amended harassment statute, some of them would have likely faced Class B misdemeanor charges. A Class A criminal-harassment conviction requires a Texas court to determine that a bully directed electronic communications toward a minor student while *specifically intending* that the communication, in accordance with the requirements of § 42.07(a)(7), cause the student to commit suicide or otherwise inflict serious harm upon himself.²⁰⁰ Although David's bullies posted comments on his social media profile, such as “[p]ut him in a body bag,” there is no clear way to prove beyond a reasonable doubt that this comment, or any others, were posted with the intent that David read them and commit suicide as a result.²⁰¹

All of David's bullies, however, would likely face Class B misdemeanor charges, as long as they directed the harmful communication toward David more than once.²⁰² This is due to the low bar set by the amended harassment statute in combination with the new provision allowing schools to collaborate with law enforcement as long as there are “reasonable grounds to believe” an

195. TEX. EDUC. CODE ANN. § 37.0832 (West 2017). The analysis as to whether the acts interfered with David's educational opportunities is simple here because David, as a result of the bullying, changed schools and gave up his position on his basketball team. *See supra* text accompanying note 14 (stating that David switched schools to “escape the bullies”).

196. EDUC. § 37.0832(c)(6).

197. *Id.*

198. *See id.* § 37.0052 (regarding policies for alternative placement or expulsion of bullies); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 129A.002 (West 2017) (providing a civil cause of action against the parents of a cyberbully).

199. *See* EDUC. § 37.0151 (allowing public schools to collaborate with law enforcement when there are reasonable grounds to believe the student-bully has engaged in criminal harassment).

200. *See* TEX. PENAL CODE ANN. § 42.07(a)(7) (West 2017).

201. *See* Warren, *supra* note 2, at 24 (describing some of the treatment David Molak received from his peers).

202. *See* PENAL § 42.07(c) (providing the new portion of the harassment statute).

offense has been committed by a student.²⁰³ Student conduct amounts to Class B criminal harassment as long as the conduct, as is clear here, was intended to and did cause the recipient to feel offended, annoyed, tormented, embarrassed, etc.²⁰⁴

V. DAVID'S LAW OFFERS SOME BENEFIT, BUT TEXAS HAS GONE TOO FAR

The Texas Legislature amended the law to adopt many of the different approaches taken by redefining circumstances now considered bullying and cyberbullying, mandating reporting requirements, creating a civil cause of action against parents, and fashioning criminal penalties for cyberbullies under the harassment statute.²⁰⁵ While the law seems to emphasize an anti-bullying culture by requiring schools to adopt a comprehensive bullying policy, the scope of the law is too large.²⁰⁶ The wide breadth of conduct covered by the four vague sets of circumstances now amounting to bullying or cyberbullying in Texas allows for overlap, and certain conduct may fall into more than one of the four categories of conduct, which may cause confusion in future Texas cyberbullying cases.²⁰⁷ Some portions of the law, however, offer Texas schools a much-needed head start in eradicating cyberbullying.²⁰⁸

A. *The Good*

The Texas Legislature was on the right track with the inclusion of a mandatory, anonymous reporting system in the text of the law, which requires schools to provide such a system to students.²⁰⁹ This section of the law may be the area in which Texas least overstepped into territory of unworkability. In fact, when it comes to the anonymous reporting system, Texas may not have gone far enough. Texas should expand this provision to require schools to provide a reporting system to both parents and children, instead of providing this technology to students alone.²¹⁰ This would be a minor, easy-to-implement change because schools are already required to have an anonymous system in place.²¹¹ Additionally, this small change may go a long way in combatting the cyberbullying problem in schools because attentive parents of a student-bully or victim could anonymously report

203. See EDUC. § 37.0151 (allowing public schools to collaborate with law enforcement where there are reasonable grounds to believe criminal harassment has been committed by the student-bully).

204. PENAL § 42.07(c).

205. TEX. CIV. PRAC. & REM. CODE ANN. § 129A.002 (West 2017); EDUC. § 37.0832; PENAL § 2.07.

206. See CIV. PRAC. & REM. § 129A.002; EDUC. § 37.0832; PENAL § 42.07.

207. See CIV. PRAC. & REM. § 129A.002; EDUC. § 37.0832; PENAL § 42.07.

208. See CIV. PRAC. & REM. § 129A.002; EDUC. § 37.0832; PENAL § 42.07.

209. See EDUC. § 37.0832(c)(6) (providing text pertaining to the new reporting requirements).

210. See *id.*

211. *Id.*

behavior (whether they report their own child's behavior or the behavior of another student) that they see when the child is at home or away from school. Information on this type of behavior away from the school grounds would likely be easier for the bully to conceal from other students, who *do* have the ability to anonymously report under the law.²¹² Parents who monitor their child's social media would have the greatest advantage in identifying both perpetrators and victims of cyberbullies but may not be incentivized to report the things they see for a variety of reasons, or simply because they do not have a way to anonymously do so.²¹³ With a hypothetical requirement that parents be given access to an anonymous reporting system as well, parents of bullies or victims who may not have experience in cyber education or discipline may even report the behavior of their own children. This is something a parent may not otherwise consider due to the fear of possibly adversely impacting the parent-child relationship or because the parent simply does not understand the seriousness of a given situation.²¹⁴ A parent may be more inclined to report incidents to those better equipped to handle bullying situations if her identity were anonymous.

B. The Bad

The new definition of bullying in Texas is over inclusive. To ensure David's Law retains its intended purposes of identifying cyberbullies to address problematic behaviors, educating parents and students, and addressing the underlying risk factors, instead of for the purpose of merely punishing students for their conduct, the language classifying a "single act" as bullying should be eliminated.²¹⁵ While including this language allows for schools to address a wider range of behavior, conduct which is not bullying may fall within the broad confines of this law.²¹⁶ As the law stands, a broad variety of conduct is punishable (criminally, civilly, or under a school disciplinary policy) no matter where it takes place if it has any one of four effects.²¹⁷ Further, because of the use of the word "or" in the new bullying definition when referencing the four enumerated outcomes of a student's act or acts, the new law classifies too much conduct as bullying or cyberbullying.²¹⁸ This seems too broad to be workable and would lead to the regulation of much more student speech than intended. Texas schools should require intentional, repetitive behavior on the part of a bully before

212. See *supra* Section II.C (discussing the danger posed by cyberbullying because of its anonymity).

213. See *supra* notes 209–10 and accompanying text (describing the lack of a reporting system for parents).

214. See *supra* Section IV.B (briefly discussing the reporting requirements under David's Law).

215. Tex. S.B. 179, 85th Leg., R.S. (2017); see *supra* Section II.C (discussing the risk factors and protective factors).

216. See *supra* Section IV.A (discussing the changes to the definition of bullying).

217. See *supra* Section IV.A (outlining the four effects that can deem conduct punishable).

218. See *supra* Section IV.A (explaining the interpretation of statutory language).

off-campus cyberbullying becomes actionable under David's Law. Tailoring back this language should not pose a problem, as single *significant* acts by a cyberbully likely fall under an already-existing criminal statute for harassment, disruptive behavior, stalking, or false impersonation.²¹⁹

Further, a narrowly tailored statement of scope, with similar latitude to the statement found in the Indiana cyberbullying statute, should also be incorporated into David's Law.²²⁰ The language in the Indiana law provides that the statute only applies when a student is:

(1) on school grounds immediately before or during school hours, immediately after school hours, or at any other time when the school is being used by a school group; (2) off school grounds at a school activity, function, or event; (3) traveling to or from school or a school activity, function, or event; or (4) *using property or equipment provided by the school*.²²¹

Refashioning a similar statement of purpose to accompany David's Law before allowing schools to investigate students and report the findings to law enforcement protects students from the potential of unnecessary encroachment into their private lives away from school.²²²

C. The Ugly

Bullying and cyberbullying under David's Law is now nearly effortless for students to report, easier for school officials to identify, and made punishable by a wide range of consequences within school disciplinary policies.²²³ The law also provides for a civil cause of action against the parents of bullies in some scenarios.²²⁴ By including these provisions within David's Law, Texas has taken giant steps toward combating school cyberbullying; however, by using the law to expose public school students to the penal system, Texas has taken a giant step over the line.

By criminalizing cyberbullying, Texas seems to have ignored pertinent research conducted by the CDC and has allowed itself to be swayed by the influence of emotional cases with high media coverage.²²⁵ Instead of focusing on addressing the risk factors a bully may be experiencing and surrounding students with protective factors to strike a proper balance, Texas has

219. See *supra* Section IV.A (discussing problems with the inclusion of single significant acts within the bullying definition).

220. See *supra* Part III (discussing the North Carolina and Indiana statutes).

221. IND. CODE ANN. § 20-33-8-13.5(b) (West 2011) (emphasis added).

222. See *supra* Part III (discussing the North Carolina and Indiana statutes).

223. See *supra* Part III (explaining the responses to bullying legislation).

224. TEX. CIV. PRAC. & REM. CODE ANN. § 129A.002 (West 2017); Tex. S.B. 179, 85th Leg., R.S. (2017).

225. See *supra* Part III (noting the media's ability to sway state legislation in this area).

apparently chosen to emphasize the punishment of students who bully.²²⁶ This misplaced emphasis, as research has suggested, may do more harm than good because it does nothing to decrease a child-bully's risk factors.²²⁷ In fact, the stress caused to an alleged bully by a scholastic investigation leading to criminal charges is likely to increase the student's risk factors further.²²⁸ This potentially presents a vicious cycle where an increase in a student's risk factors causes a child to continue to lash out against other students, subjecting the child to even more charges with increased penalties.

Additionally, because the imposition of a criminal charge in part depends on the reaction of a given victim, two bullies engaging in identical conduct may face differing consequences.²²⁹ In this way, conduct itself has not necessarily been criminalized, just certain communications that cause a victim to feel a certain way.²³⁰ Texas should, therefore, do away with the new provisions of the Penal Code that indirectly criminalize cyberbullying under the harassment statute and should instead emphasize education under new school-bullying policies, which the other portions of David's Law mandate.²³¹

VI. CONCLUSION

David's Law, while offering some benefit to the Texas public school bullying policy, has gone too far by expanding a school's regulatory authority to encroach into a student's private life away from school. Texas made so many changes to this area of law during the last legislative session that identifying which changes will have the most positive (or negative) impact may prove difficult in future cyberbullying cases.²³² The imposition of policy requirements, civil liability, and criminal penalties against students (or their parents) for instances of bullying and cyberbullying overly punishes students for this behavior.²³³ In the interest of protecting *all* public-school children, Texas, therefore, should repeal portions of David's Law relating to the criminalization of cyberbullying.²³⁴ This would allow schools to focus on education, not intimidation, and would go much further in actually eradicating the cyberbullying problem instead of merely punishing someone for its occurrence.

226. See *supra* Part II (discussing the risk factors and protective factors as outlined by the CDC).

227. See *supra* Part II (explaining research on risk factors and misplaced emphasis).

228. See *supra* Part II (articulating the actual impact of that emphasis).

229. See Tex. S.B. 179 (providing the language of David's Law).

230. See *supra* Part III (discussing how conduct itself is interpreted and the varying approaches to determine if conduct is criminal).

231. See *supra* Part IV (discussing the changes under David's Law).

232. See *supra* Part IV (discussing the changes under David's Law).

233. See *supra* notes 74, 96 and accompanying text (pointing out problems with emphasizing punishment instead of addressing the risk factors).

234. See *supra* Section V.C (discussing the problems with criminalization of cyberbullying).