

“LIKE MEAN GIRLS, BUT EVERYONE IS EIGHTY”: A SOLUTION FOR ELDER BULLYING

Brittany Wiegand

Bullying has long been an adolescent issue. With the elderly population ever-growing, however, so too does the incidence of elder bullying. Bullying behaviors often occur in small group settings with members who interact regularly, such as in schools. Senior living communities also fit this description. Bullies in senior communities may engage in verbal and even physical abuse; in the worst cases, bullying can be fatal. Instances of bullying among older adults are likely to increase in frequency as this population grows. This Note evaluates current federal and state laws that bullying victims might use to seek redress. It argues that current state laws should be amended to include seniors by aligning laws with research-based definitions of bullying. This Note also recommends providing a private right of action and implementing research-based programming in communal living centers.

I. Introduction

Flipped tables and false accusations: two unlikely scenes from a nursing home. Though one might expect something like this to occur at a middle school, each is only a minor component of one woman’s experience in an elderly living community where she faced a torrent of physical and verbal abuse from other residents due to her sexual orientation.¹

Brittany Wiegand is the Editor-in-Chief 2019–2020, Member 2018–2019, *The Elder Law Journal*; J.D. 2020, University of Illinois, Urbana-Champaign; M.A. 2011, Curriculum & Instruction, Louisiana State University; B.A. 2009, Political Science & Philosophy, University of Wisconsin-Madison. The author would like to thank Professor Jennifer Robbennolt for her guidance, feedback, and support.

1. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859–60 (7th Cir. 2018).

In late August 2018, the Seventh Circuit reinstated charges filed by Marsha Wetzel, an elderly lesbian woman living at Glen St. Andrew Living Community.² While living at St. Andrew, Wetzel was allegedly berated for being a “fucking dyke,” among other slurs.³ The abuse was not only verbal; at one point, a resident rammed his walker into Wetzel’s scooter forcefully enough to knock her off a ramp.⁴ Another resident ran her wheelchair into a dining table Wetzel occupied, flipping the table on top of her.⁵ While alone in the mailroom, Wetzel was struck in the back of the head hard enough to push her from her scooter, giving her a bump on the head and a black eye.⁶

In another case, a seventy-eight-year-old resident of an assisted living facility reported that another resident repeatedly called her “fatso.”⁷ She alleged, “He says, ‘Hey fatso.’ Then as he goes down the hall, he makes oinking noises like a pig as he goes to the elevator.”⁸ The repetitive negative remarks lowered her self-esteem and contributed to self-isolation; she became reluctant to leave her room for fear of encountering the individual.⁹

For Marsha Wetzel, the bullying she experienced at St. Andrew was not new—she had experienced bullying throughout her life.¹⁰ Wetzel dropped out of high school after other students learned she was a lesbian and she was bullied.¹¹ Her experience as a senior, however, felt more traumatic to her—the bullies were even more vicious.¹² Wetzel could view a cemetery from her window and would stare at it, imagining that she would only feel peace when she arrived there.¹³ “I felt like a person in a pool of piranhas,” she said.¹⁴

2. *Id.* at 868.

3. *Id.* at 860.

4. *Id.*

5. *Id.*

6. *Id.*

7. ROBIN P. BONIFAS, *BULLYING AMONG OLDER ADULTS: HOW TO RECOGNIZE AND ADDRESS AN UNSEEN EPIDEMIC 3* (Health Professions Press, Inc., 2016) [hereinafter BONIFAS].

8. *Id.*

9. *Id.*

10. Matt Sedensky, *Senior centers house a surprising number of bullies*, CHI. TRIB. (May 12, 2018, 8:54 PM), <http://www.chicagotribune.com/news/nationworld/ct-senior-centers-bullying-20180512-story.html> [hereinafter Sedensky].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Though perceived as an adolescent issue, bullying is a problem in many senior living homes.¹⁵ Existing remedies are inadequate. This Note analyzes elder bullying. It will compare elder bullying to adolescent bullying, illustrating the contours of both to show that definitional problems have persisted among psychologists and lawmakers for the past several decades. Legislation enacted in response to high-profile incidents has been largely piecemeal and ineffective.¹⁶

Part II shows that bullying is not just an adolescent issue. Bullying has a wide range of behaviors, from verbal assaults to physical violence. This section defines bullying as a type of elder abuse and explains the relevance and need for a consistent definition. Part III discusses the legal remedies already in existence, including federal and state laws. It argues that solely relying on legal remedies is problematic because federal laws are ineffective; federal laws are too narrow in scope. Many state laws are exclusively focused on school-age children and do not provide a private right of action.¹⁷ Part III also discusses current anti-bullying programming within schools to show how elder bullying might be addressed. Although piecemeal programming is ineffective, comprehensive approaches are shown to reduce bullying. Part IV argues for an expanded notion of bullying to account for bullying in the elderly population. The definitional problem informs the remedy because it accounts for solutions beyond elementary and secondary school settings.

This Note argues that current state laws should be amended to include seniors within statutory definitions of bullying by aligning state laws with research-based definitions of bullying. State laws must also be amended to include a private right of action. Finally, nursing homes and assisted living facilities should use school data regarding the effectiveness of bullying programs to implement programming and prevent elder bullying.

15. Angela Rogers, *Bullying Major Problem in Senior Care Centers*, ABC COLUMBIA (May 17, 2018, 6:14 PM), <https://www.abccolumbia.com/2018/05/17/bullying-major-problem-in-senior-care-centers/>.

16. *See infra* Part III.

17. *Id.*

II. Background

Our general understanding and awareness of bullying is growing, and as a result, bullying has many different definitions to the lay person.¹⁸ This section first explains how the American understanding of bullying changed throughout the 1900s. Next, it explains three criteria necessary for a situation to be labeled “bullying.” It illustrates the causes and effects of bullying among elders. The section concludes by showing how the problem will only continue to grow, reinforcing the need for appropriate solutions for elders.

A. Mere Media Hype?

Despite reports that bullying is becoming worse,¹⁹ individual instances of bullying are not necessarily on the rise.²⁰ Societal awareness of bullying and its implications, however, is increasing.²¹ This is due to changes in societal norms, the vast increase in the number of bullying laws, and the Internet.²²

First, societal norms around protections afforded to children has changed dramatically in the last several decades.²³ Even the concept that children deserve protection from serving as sources of cheap labor did not exist until the nineteenth century.²⁴ For many generations, “bullying” was accepted as a part of life, as reflected in fiction and common sayings like “sticks and stones may break my bones but words will never hurt me” or “boys will be boys.”²⁵

18. ELIZABETH KANDEL ENGLANDER, *BULLYING AND CYBERBULLYING: WHAT EVERY EDUCATOR NEEDS TO KNOW* 5 (2013) [hereinafter ENGLANDER].

19. Jennifer McClellan, *One third of middle- and high-schoolers were bullied last year, study shows*, USA TODAY (Sept. 24, 2018, 3:01 AM), <https://www.usatoday.com/story/life/allthemoms/2018/09/24/one-out-three-students-were-bullied-us-school-last-year/1374631002/>.

20. EMILY BAZELON, *STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY* 10 (Random House Trade Paperbacks 2014) [hereinafter BAZELON].

21. *Id.* at 6–11.

22. *See infra* Part II. A.

23. *See, e.g., Child Labor*, HISTORY, <https://www.history.com/topics/industrial-revolution/child-labor> (last visited Sept. 9, 2019).

24. *Id.*

25. BAZELON, *supra* note 20, at 7 (“[Fictional children in literature] suffered their cuts, burns, and hurt feelings while the adults stood by . . . Fiction reflected a cold underlying fact of life: bullying was a matter of course.”).

The psychology of school bullying arose in Europe in the late 1960s.²⁶ Dan Olweus became the first scholar to employ the term “bullying” for in-depth study.²⁷ Bullying was “originally operationalized as ‘mobbing,’ or ‘mobbing,’ a term that in ethology describes a group’s collective attack on an animal of another species.”²⁸ Olweus was skeptical of the theory of the “child mob,” and concluded that adolescent aggressors typically operated as lone alphas or with a few henchmen.²⁹

Olweus’s first study occurred over a period of three years and studied one thousand Swedish boys, ages twelve to sixteen, and documented verbal and physical harassment in their schools.³⁰ He has since done numerous large studies, including collecting data from approximately 2500 boys and girls in grades four through seven.³¹ Olweus and numerous other researchers have thoroughly documented the negative impact of bullying within elementary and secondary school settings.³² Despite extensive research beginning in the 1990s, “We just didn’t get it in the U.S. . . . [u]ntil Columbine.”³³

American awareness and discourse on bullying drastically changed in the late 1990s. In 1999, Eric Harris and Dylan Klebold opened fire at Columbine High School outside Denver, Colorado.³⁴ Harris and Klebold were not themselves targets of bullying (or known bullies), but the devastation caused by “normal-seeming” middle-class teenagers revealed that most kids who become school shooters previously felt persecuted, bullied, or threatened.³⁵ Legislatures and schools sprang into action, writing laws and instituting prevention programs.³⁶

26. Lisa C. Connolly, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 250 (2012) [hereinafter Connolly].

27. *Id.*

28. *Id.* at 250 n.10.

29. BAZELON, *supra* note 20, at 200.

30. *Id.*

31. Connolly, *supra* note 26, at 250 n.10; see also DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* 13 (1993).

32. Connolly, *supra* note 26, at 252 (“Studies have robustly documented the negative impact of bullying behavior on young people—both bullies and victims.”).

33. BAZELON, *supra* note 20, at 205.

34. *Columbine Shooting*, HISTORY, <https://www.history.com/topics/1990s/columbine-high-school-shootings> (last visited Sept. 9, 2019).

35. BAZELON, *supra* note 20, at 8.

36. *Id.*

Before 1999, no states had laws that clearly addressed bullying.³⁷ Now, every state has some form of bullying law.³⁸ Between 1990 and 2010, more than 120 bills were enacted by state legislatures to either introduce or amend statutes addressing bullying.³⁹ The laws vary significantly in terms of what they require, how much they require, and who is required to act. For example, the 2010 amendments to the New Jersey bullying law detailed specific requirements for the investigation, documentation, and review of each bullying incident.⁴⁰ Other state laws often require states to discipline individual students who bully or to institute prevention and support services.⁴¹

Since 1999, the increase in American awareness of bullying, the proliferation of various bullying laws, and the rise of the Internet and social media have only increased society's general awareness and understanding of the problems, particularly in schools.⁴² Cyberbullying, or online bullying, is now a common experience among adolescents and has received wide media attention.⁴³ Although teens' use of the Internet and cell phones may make bullying seem more pervasive, bullying has not been shown to be more pervasive than it was in the past—it only appears more pervasive because of the Internet and social media.⁴⁴

Society's understanding of bullying is changing, however. As societal norms around children have changed, so too have our notions about decency and fair treatment.⁴⁵ The concept of bullying is no longer

37. *Id.* at 11.

38. Deborah Temkin, *All 50 States Now Have a Bullying Law*, HUFFINGTON POST (June 27, 2015, 12:19 PM), https://www.huffingtonpost.com/deborah-temkin/all-50-states-now-have-a_b_7153114.html.

39. Dewey Cornell & Susan P. Limber, *Do U.S. Laws Go Far Enough to Prevent Bullying at School?*, AM. PSYCHOLOGIST, May–June 2015, at 333, available at <https://www.apa.org/pubs/journals/releases/amp-a0038558.pdf> [hereinafter Cornell & Limber].

40. *Id.*; see also N.J. STAT. ANN. § 18A:37–13 (West 2018).

41. Cornell & Limber, *supra* note 39, at 334.

42. See BAZELON, *supra* note 20, at 6–11.

43. Samantha Saltz, *New Research: Cyberbullying Linked with Depression, Emotional Abuse*, AM. PSYCHIATRIC ASS'N (May 20, 2017), available at <https://www.psychiatry.org/newsroom/news-releases/new-research-cyberbullying-linked-with-depression-emotional-abuse>.

44. BAZELON, *supra* note 20, at 10.

45. See generally Maryam Omari & Megan Paull, *"Shut Up and Bill": Workplace Bullying Challenges for the Legal Profession*, 20 INT'L J. LEGAL PROF. 141, 141 (2013) (explaining how "competition, work intensification and requirements for efficiency are some of the hallmarks of the modern work environment" and pressures in such settings can result in undue stress for employees, especially in the legal profession).

exclusively for the playground; the idea of “workplace bullying” acknowledges that adults can be bullies, too.⁴⁶ But despite an expanded notion of bullying, elders have been largely ignored from the discourse.

B. Bullying Defined

The public defines bullying in several different ways. To some, “[b]ullying is an age-old problem, [and it] seems so common that it does not even need to be defined.”⁴⁷ This view, however, is over-simplified. Bullying is such a broad concept that there is huge potential for confusion and controversy over its meaning, and even the use of the word “bully” or “bullying” can be inflammatory or emotional,⁴⁸ so it should be used with care. Using the word “bully” or “bullying” can elicit a quick response from teachers or parents,⁴⁹ and using it too frequently can render it meaningless. “If everyone’s a victim,” Elizabeth Englander, an expert on adolescent bullying and cyberbullying acknowledges, “then no one’s a victim.”⁵⁰

Bullying is “intentional repetitive aggressive behavior that involves an imbalance of power or strength.”⁵¹ Scholars generally agree on three key components of the definition of bullying: 1) aggressive behavior that involves unwanted, negative actions that are 2) repeated over time and 3) an imbalance of power or strength.⁵² These three characteristics are typically endorsed by scholars in addition to the U.S. Centers for Disease Control, the American Psychological Association, and the Association of School Psychologists.⁵³ Each characteristic will next be discussed in turn, followed by an explanation of how bullying characteristics manifest among elders in communal settings.

46. John W. Bencivenga & Linda Bond Edwards, *Beyond Harassment-Taming the Workplace Bully*, ACC DOCKET, at 80, 84 (2012).

47. Lindsay Nash, Comment, *New Jersey’s Anti-Bullying Fix: A Solution or the Creation of an Even Greater First Amendment Problem?*, 2012 BYU L. REV. 1039, 1042 (2012) [hereinafter Nash].

48. Jamie Gumbrecht, *Are we too quick to cry ‘bully’?*, CNN (Oct. 8, 2013, 9:47 AM), <https://www.cnn.com/2013/10/04/living/schools-bullying-definition-overuse/index.html>.

49. *Id.*

50. *Id.*

51. BONIFAS, *supra* note 7, at 5.

52. Nash, *supra* note 47, at 1043.

53. *Id.*

1. THE FIRST CRITERION: AGGRESSIVE, INTENTIONAL BEHAVIOR

The first characteristic of bullying, intentional aggressive behavior, is broad.⁵⁴ Bullying can include a variety of behaviors and be physical, verbal, or social.⁵⁵ Aggressive behaviors among older adults can look similar to bullying among younger age groups.⁵⁶ For example, verbal aggression across all ages can include behaviors like “name-calling, malicious teasing, hurling insults, taunting, threatening, or making sarcastic remarks or pointed jokes.”⁵⁷ Examples of physical aggression include pushing, hitting, kicking, or destroying property.⁵⁸ Therefore, bullying can coincide with other behaviors such as criminal assault, hate crimes, and sexual harassment.⁵⁹ In its less severe forms, bullying can be difficult to distinguish from teasing, horseplay, or conflict.⁶⁰

Bullying must also be intentional.⁶¹ This criterion is often viewed in context and in light of whether dynamics of power and control are also present.⁶² For example, an individual yelling and striking out at others in his immediate surroundings is not necessarily bullying others; he or she could be suffering from a mental illness.⁶³ Bullying is distinguishable from other behaviors, however, because of its two additional criteria.

2. THE SECOND CRITERION: REPETITION

The second criterion for bullying is that it is repetitive.⁶⁴ Although some experts,⁶⁵ and even some state legislatures,⁶⁶ recognize that a single incident can be sufficiently harmful to be regarded as bullying, most

54. Cornell & Limber, *supra* note 39, at 334.

55. *Id.*

56. BONIFAS, *supra* note 7, at 5.

57. *Id.*

58. *Id.* at 6.

59. Cornell & Limber, *supra* note 39, at 334.

60. *Id.*

61. BONIFAS, *supra* note 7, at 9–10 (noting, however, the “intentional nature of bullying may not be as relevant for older adults as it is for other age groups. In some older adults, particularly those with cognitive loss, merely the perception that a peer means to bully or interact negatively can contribute to a feeling of victimization.”).

62. *Id.*

63. *Id.* at 9.

64. Cornell & Limber, *supra* note 39, at 335.

65. See, e.g., BONIFAS, *supra* note 7, at 9.

66. ENGLANDER, *supra* note 18, at 177 n.21.

psychologists and researchers recognize that “repetitively cruel behavior is psychologically distinct from one-time events.”⁶⁷ Therefore, requiring repetition in the definition of bullying is generally accepted because it rules out less serious behaviors.⁶⁸ The final criterion, however, is the most challenging for policymakers and researchers because it is the most frequently overlooked.⁶⁹

3. THE THIRD CRITERION: POWER IMBALANCE

Bullying, by definition, requires some sort of power imbalance via the dominance of an aggressor over a victim.⁷⁰ “Power” is defined broadly and can include the power to post about someone else on a website (in the context of cyberbullying) or can be power over another as the result of one’s minority sexual orientation, disability, or membership in a particular racial or ethnic group.⁷¹ Power can also be physical strength, access to embarrassing information, or popularity.⁷²

This component of the definition distinguishes bullying from harassment, which can occur in the absence of a clear power difference.⁷³ The requirement of a power imbalance also differentiates bullying from other forms of peer aggression.⁷⁴ Notably, however, there is no requirement for a power imbalance if a criminal act occurs in the context of bullying.⁷⁵ For example, if a physical assault occurs, it is still an assault, even if the target was not obviously weaker or less powerful.⁷⁶

Although many scholars agree that bullying is, by definition, dominance of an aggressor over a victim, research shows that reports often disregard or overlook this power imbalance when reporting on bullying.⁷⁷ This impedes efforts to accurately measure bullying prevalence and the effectiveness of prevention efforts.⁷⁸

All three bullying behaviors—intentional, repetitive aggression involving an imbalance of power—must be present to label a situation

67. *Id.*

68. Cornell & Limber, *supra* note 39, at 335.

69. *Id.*

70. *Id.* at 334.

71. *Id.*

72. Christopher Park, Note, *Children and the Duty to Report: The Double Standard of Child Abuse and Anti-Bullying Laws*, 47 IND. L. REV. 843, 844 (2014).

73. Cornell & Limber, *supra* note 39, at 334.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

as bullying. Additionally, bullying behaviors and the context in which they occur differentiate bullying from elder abuse.

4. BULLYING IS A FORM OF ABUSE.

A distinguishing feature between bullying and other forms of elder abuse is that it occurs in the context of peer relationships. The target of elder abuse is a vulnerable adult and dependent on the other for personal care or assistance, including financial management.⁷⁹ On the other hand, bullying occurs between two peers and the target is not dependent on the bully for any type of care or assistance.⁸⁰ When Dan Olweus began studying bullying, he did so in the context of peer-to-peer relationships.⁸¹ This fourth prerequisite for the definition of bullying makes sense given the origin of the term,⁸² and is used by the National Center for Victims of Crime.⁸³

Elder bullying has largely been ignored. Bullying is “a well-established problem with a newly recognized population.”⁸⁴ Despite recent recognition, elder bullying has not been extensively studied.⁸⁵ But, the changing population means the problem will only increase in the future. Between 1950 and 2000, the total population of the United States increased by 87%.⁸⁶ The amount of the population eighty-five years and older increased by 635%.⁸⁷ One million people turn sixty every month.⁸⁸ Because the population is getting older, the number of elders living in nursing homes or assisted living facilities will only grow. This growth increases the chances of elders becoming either bullies or targets of bullies if appropriate action is not taken. Although no current data exists on the extent of cyberbullying among older adults, the growing use of

79. BONIFAS, *supra* note 7, at 14.

80. *Id.*

81. *See* Connolly, *supra* note 26, at 250.

82. *See id.*

83. 105 AM. JUR. *Proof of Facts 3d* § 93 (2009) (defining bullying as “when one person hurts or threatens someone in their peer group”).

84. Jennifer E. Rooney, *The Effect of Playback Theatre on Managing Elderly Bullying in Senior Communities*, https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1382&context=msw_papers (last visited Sept. 9, 2019) [hereinafter Rooney].

85. *But see* BONIFAS, *supra* note 7.

86. Joseph Snyder, *How Does Bullying Relate to Elder Abuse?* 22 TEMP. POL. & CIV. RTS. L. REV. 386, 387 (2013) [hereinafter Snyder].

87. *Id.*

88. *Id.*

the Internet and cell phones among the elderly population suggests that it could increasingly become a problem.⁸⁹

Elder abuse, however, *has* received significant attention.⁹⁰ Several recent court cases document examples of elder abuse.⁹¹ In one case, a woman was left lying in her own urine and feces by nursing home staff so often that the tissue on her ankles, feet, and buttocks decomposed to the point of exposing bone.⁹² In another case, a sixty-six-year-old nursing home patient died after fire ants swarmed her bed and bit her hundreds of times; she died four days later from heart failure brought on by physiological stress.⁹³

These two tragic examples could be considered elder *abuse*, since both involve acts within a relationship with an expectation of trust that resulted in harm to an older person.⁹⁴ Elder abuse is defined broadly and includes a variety of behaviors, including: physical abuse, psychological or verbal abuse, sexual abuse, financial exploitation, or neglect.⁹⁵ The second case falls outside of the definition of bullying since the incident occurred from a one-time occurrence and was purportedly unintentional.⁹⁶

Although bullying can be encompassed within broader notions of abuse, bullying differs from abuse. Abuse can occur in one instance; bullying happens over time and involves more than one instance of aggressive behavior.⁹⁷ According to the World Health Organization, elder abuse is “a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust

89. BAZELON, *supra* note 20, at 23.

90. *See, e.g.*, Delaney v. Baker, 971 P.2d 986 (Cal. 1999).

91. *Id.*

92. *Id.*

93. *Nursing Home Probed for Ant-Bite Death*, CHICAGO TRIBUNE (Sept. 26, 1998), <https://www.chicagotribune.com/news/ct-xpm-1998-09-26-9809260135-story.html>.

94. *See Elder abuse: What is elder abuse?* WHO, https://www.who.int/ageing/projects/elder_abuse/en/ (last visited Sept. 9, 2019) (defining elder abuse) [hereinafter WHO].

95. Mark Lachs et al., *Resident-to-Resident Aggression in Long-Term Care Facilities: An Understudied Problem*, 13 AGGRESSIVE VIOLENT BEHAV. 77, 78 (2008) [hereinafter Lachs].

96. BONIFAS, *supra* note 7, at 5.

97. Cornell & Limber, *supra* note 39, at 335.

which causes harm or distress to an older person.”⁹⁸ Bullying, by definition, is repeated over time.⁹⁹ Elder abuse can take various forms, including financial, physical, psychological, and sexual abuse, or could also be the result of intentional or unintentional neglect.¹⁰⁰ Bullying must be intentional.¹⁰¹

Therefore, bullying is a subset of elder abuse. Because elder abuse generally has been studied, analyzed, and discussed,¹⁰² some of the data about elder abuse can provide insight into bullying because of their shared characteristics. The two, however, are different, and precise definitions are important for two reasons. First, if bullying is solely understood as an adolescent problem, elders are ignored. Second, different demographic groups perceive abuse differently,¹⁰³ underscoring the need for clear, common definitions for both abuse and bullying specifically. Precision in the analytical framework supports adequate solutions.

C. Bullying Among Elders

Bullying involves intentional, repetitive aggression involving an imbalance of power in the context of a peer relationship.¹⁰⁴ Elder bullying can include many different behaviors.¹⁰⁵ This section explains the specifics of bullying behaviors. After categorizing bullying behaviors as either direct or indirect and verbal or physical, causes and effects of bullying on both the bully and the target are discussed.

1. BULLYING BEHAVIORS

Bullying can include a variety of different behaviors,¹⁰⁶ but all behaviors are likely to occur in small social groups composed of members who interact regularly.¹⁰⁷ This means “[s]enior centers, congregate meal

98. WHO, *supra* note 94.

99. Cornell & Limber, *supra* note 39, at 335.

100. *Id.*

101. *Id.* at 333.

102. *See, e.g.,* WHO, *supra* note 94.

103. *See* Ailee Moon & Oliver Williams, *Perceptions of Elder Abuse and Help-seeking Patterns Among African-American, Caucasian American, and Korean-American Elderly Women*, 33 *THE GERONTOLOGIST* 386, 386–95 (1993).

104. BONIFAS, *supra* note 7, at 5.

105. *Id.*

106. Rooney, *supra* note 84, at 3.

107. BONIFAS, *supra* note 7, at 17.

settings, and all forms of senior housing fit the definition of small social groups that have social interaction and are difficult to leave.”¹⁰⁸

Bullying behaviors can be direct or indirect.¹⁰⁹ Direct bullying is often physical and includes hitting, punching, and slapping.¹¹⁰ But, direct bullying is not necessarily physical; it can include name-calling, making threats, and stealing belongings from others.¹¹¹ Indirect bullying functions by means of exclusion and involves excluding another to increase one’s own feeling of power.¹¹²

Most senior bullying is verbal,¹¹³ but bullying can also include social ostracism, such as shunning, ignoring, spreading rumors, or refusing to allow access to common areas or participation in group activities.¹¹⁴ Instead of providing a source of joy or relaxation for some nursing home residents, communal activities can be where bullying occurs.¹¹⁵ If staff are not attentive, it can be hard to detect: verbal bullying does not necessarily mean a resident is yelling at another.¹¹⁶ Instead, the bully may “use mannerisms or words to run the roost or control certain aspect[s] of another elder’s day. It’s about the tone of their voice or what’s being said It’s not necessarily swearing—it may be as simple as one resident saying to another that he or she can’t sit at a certain table during bingo games.”¹¹⁷

Marsha Wetzel experienced verbal bullying while at St. Andrew.¹¹⁸ After speaking openly about her sexual orientation, Wetzel was called a “fucking dyke,” “fucking faggot,” and “homosexual bitch.”¹¹⁹ One resident told Wetzel that he “reveled” in the memory of the Orlando massacre at the Pulse nightclub, derided Wetzel’s son for

108. *Id.*

109. *Id.*

110. *See id.* at 6.

111. *Id.* at 5.

112. *See id.* at 6.

113. Sedensky, *supra* note 10.

114. *Preventing Senior Bullying*, CHURCH MUT. INS. CO., <https://www.churchmutual.com/5406/Senior-Bullying> (last visited Sept. 9, 2019).

115. *See id.*

116. *See id.*

117. Jessica Girdwain, *Can Elders Be Bullies?*, TODAY’S GERIATRIC MED., http://www.todaysgeriatricmedicine.com/news/ex_041013.shtml (last visited Sept. 9, 2019).

118. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

119. *Id.* at 860.

being a “homosexual-raised faggot,” and threatened to “rip [Wetzel’s] tits off.”¹²⁰ She was also told that “homosexuals will burn in hell.”¹²¹

In addition to verbal bullying, Wetzel experienced physical bullying.¹²² Wetzel uses a motorized scooter; at one point a resident rammed his walker into her scooter forcefully enough to knock her off a ramp.¹²³ Another resident ran her wheelchair into Wetzel’s dining table, flipping it on top of Wetzel.¹²⁴ In another incident, Wetzel was hit in the back of the head while alone in the mailroom.¹²⁵ The blow was hard enough to knock her off her scooter.¹²⁶

Wetzel reported the verbal and physical bullying to management, but was told not to worry, was informed that the other residents’ conduct was accidental, and was called a liar.¹²⁷ After she reported being trampled, she was relegated to a less desirable dining room.¹²⁸ When she reported other situations, she was barred from the lobby except to get coffee.¹²⁹ Her cleaning services were stopped.¹³⁰

In response, Wetzel changed her daily routine; she ate meals in her room, forgoing meals included as part of her Tenant Agreement.¹³¹ Wetzel’s Tenant Agreement guaranteed three meals served daily in a central location, access to a community room, and use of laundry facilities.¹³² Although the Agreement prohibits “activity that . . . unreasonably interferes with the peaceful use and enjoyment of the community by other tenants,” she stopped visiting the third floor, where one of her attackers lived.¹³³ She did not use the laundry room at times when she might be alone.¹³⁴ She did not visit the common spaces from which she had been barred.¹³⁵

120. *Id.*

121. *Id.*

122. *Id.* at 859.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 860.

129. *Id.*

130. *Id.*

131. *Id.* at 861.

132. *Id.* at 869.

133. *Id.*

134. *Id.* at 861.

135. *Id.* at 860.

Wetzel's case, though extreme, is not the worst. Like adolescent bullying, the worst cases of elder bullying involve death.¹³⁶ In September 2009, Elizabeth Barrow, a one-hundred-year-old nursing home resident, was killed by her ninety-eight-year-old roommate, Laura Lundquist.¹³⁷

Barrow worked at a high school cafeteria as a lunch lady for dozens of years, and was married to her husband, Raymond, a World War II veteran and convenience store owner, for sixty-five years.¹³⁸ Raymond became ill in his later years, and the two moved into a nursing home so he could receive skilled care.¹³⁹ The two had never been separated since their wedding day, and the couple shared a room at the nursing home.¹⁴⁰

After Raymond passed, Barrow was assigned a new roommate, Lundquist, so that she could continue to remain in the same room that she had shared with her husband.¹⁴¹ Initially, the two women appeared to get along, although there was episodic bickering and instances of Lundquist getting jealous because Barrow entertained more visitors, received more attention, and enjoyed the bed close to the window.¹⁴²

After ongoing problems and bickering, Barrow was found dead in her bed, suffocated in her sleep.¹⁴³ Barrow's attorney reported that during the weeks before her death, she complained that Lundquist "[made] her life a 'living hell.'"¹⁴⁴ Lundquist had previously remarked that she would outlive her roommate.¹⁴⁵

Barrow's son filed a wrongful death lawsuit against the nursing home, its management company, and the nursing home administrator

136. See generally Jim Goad, *15 Teen Bullying Cases With Tragic Ends*, THOUGHT CATALOG (Apr. 22, 2015), available at <https://thoughtcatalog.com/jim-goad/2015/04/15-teen-bullying-cases/> (documenting cases of teen bullying ending in death).

137. Jason Kessler, *Woman, 98, indicted in death of 100-year-old nursing-home roommate*, CNN (Dec. 14, 2009, 7:02 PM), <http://www.cnn.com/2009/CRIME/12/11/nursing.home.killing/index.html> [hereinafter Kessler].

138. *After 7 years, Elizabeth Barrow has had her day in court*, HOEYLAW (Oct. 11, 2016), <https://www.hoeylaw.com/after-7-years-elizabeth-barrow-had-her-day-in-court/> [hereinafter Barrow].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. BONIFAS, *supra* note 7, at 15.

145. Kessler, *supra* note 137.

and staff. Its main allegations were that the staff had inadequate training, the facility did not have enough qualified staff, and the staff did not follow or know how to follow the facility's safety policies and procedures.¹⁴⁶ After filing the lawsuit, the nursing home attempted to force the case into binding arbitration; after seven years, the case settled.¹⁴⁷ Although eventual redress was possible, the process was long and difficult, underscoring the need for broader recognition of elder bullying.¹⁴⁸

2. CAUSES OF BULLYING

Bullying is often caused by a loss of control or self-esteem associated with aging.¹⁴⁹ To compensate for an actual or perceived deficit, some elder bullies put others down to make themselves feel better.¹⁵⁰ For example, John, a member of an independent living community, intimidated peers with his power wheelchair while they walked in the hallway.¹⁵¹ He mainly targeted peers who walked slowly or used an assistive device.¹⁵² After discussing this with a social worker, he realized that the root of his behavior was feeling "less than" his fellow residents who could walk; he had been confined to a wheelchair for several years.¹⁵³ "Real men go on two legs," he said.¹⁵⁴ As John's example illustrates, low self-esteem can contribute to bullying others who have a desired attribute or skill.¹⁵⁵

A perceived feeling of inferiority due to changing life circumstances can lead to aggression toward peers in the form of bullying.¹⁵⁶ Many adults' circumstances change as they age.¹⁵⁷ Thus, they may experience a loss of independence, relationships, or income.¹⁵⁸ As a result, some exert power over others as a means to deal with their changing circumstances.¹⁵⁹

146. Barrow, *supra* note 138.

147. *Id.*

148. *Id.*

149. BONIFAS, *supra* note 7, at 29.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

Elders who bully tend not to have any cognitive impairments, have fewer social relationships generally, and report fewer incidents of lifetime trauma, suggesting that they experience less empathy for others.¹⁶⁰ Elderly bullies can also gain power over others through social relationships.¹⁶¹ Bullies themselves tend to have higher levels of cognitive and social acuity,¹⁶² thus suggesting that they can use this as a means to exercise power over others. The need or desire for power can also be the result of racism, the fear of limited resources, or the need for attention or status.¹⁶³

Elders can be particularly vulnerable to bullying due to a declining ability to read social cues.¹⁶⁴ Research suggests that older individuals do not respond as readily to facial cues to suggest that a person may be untrustworthy.¹⁶⁵ Another study found that normal age-related changes to the brain result in a reduction in skepticism and an increase in gullibility.¹⁶⁶ Both changes could contribute to an increase in bullying in nursing homes or assisted living centers because those impacted individuals are particularly susceptible to power imbalances.¹⁶⁷

3. EFFECTS OF BULLYING

The effects of elder bullying are similar to adolescent bullying, but elders often experience heightened effects. Victims of school-age bullying have been shown to be more likely than other students to be afraid at school or avoid certain areas or activities in the school.¹⁶⁸ But, if elders withdraw from certain areas, mental effects from bullying can quickly

160. *Id.* at 30–32.

161. *Id.*

162. Samantha Walker & Deborah Richardson, *Aggression Strategies Among Older Adults: Delivered but not Seen*, 3 *AGGRESSION & VIOLENT BEHAV.* 287, 287–94 (1998).

163. *Id.*

164. See generally Snyder, *supra* note 86.

165. Snyder, *supra* note 86, at 392, citing Elizabeth Castle et al., *Neural and Behavioral Bases of Age Differences in Perceptions of Trust*, *PROC. NAT'L ACAD. SCI.*, Aug. 2012, at 1 (finding that “older adults rated untrustworthy faces as significantly more trustworthy and approachable than younger adults did”).

166. Snyder, *supra* note 86, at 392, citing Erik Asp et al., *A Neuropsychological Test of Belief and Doubt: Damage to Ventromedial Prefrontal Cortex Increases Credulity for Misleading Advertising*, *FRONTIERS IN NEUROSCIENCE*, July 2012, at 1.

167. *Id.*

168. Anne M. Payne, *Public School District Liability for Injury or Damage to Student Resulting from Bullying or Other Nonsexual Harassment by Another Student*, 111 *AM. JURIS. TRIALS* 123, at 14 (2009).

become physical.¹⁶⁹ For example, if a resident withdraws from the dining room to avoid another resident around meal time, the effects on that resident's health can quickly become problematic.¹⁷⁰

For adolescents, victims of bullying report more loneliness and difficulty making friends.¹⁷¹ Routine exposure to bullying causes the student to show higher levels of depression and anxiety, or to experience suicidal thoughts.¹⁷² School-age victims are at a higher risk of skipping school, dropping out, and getting lower grades.¹⁷³ Adolescent targets often experience various forms of psychological, physical, and social suffering, such as sleep disturbances, enuresis, abdominal pain, headaches, self-destructive behavior, or feelings of sadness, social rejection, or isolation.¹⁷⁴

Effects on the target of elder bullying can also be both mental and physical.¹⁷⁵ Marsha Wetzel describes "just [feeling] like a slug, like I was nothing, like I wasn't even human."¹⁷⁶ Wetzel's experience is not unique; findings reveal that the residents who were most upset by being bullied had higher rates of depressive symptoms and lower self-esteem.¹⁷⁷

Many of the effects of elder bullying are potentially more serious due to the target's age. Because the elderly tend to be physically fragile, elders face more serious consequences than younger adults would.¹⁷⁸ For example, grabbing an elder or engaging in rough physical contact can more easily result in bone damage since bones become more fragile with age.¹⁷⁹

169. *See id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Elisa Cantone et al., *Interventions on Bullying and Cyberbullying in Schools: A Systematic Review*, 11 *CLINICAL PRAC. & EPIDEMIOLOGY IN MENTAL HEALTH* 58, 59 (2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4378064/pdf/CPEMH-11-58.pdf>.

175. BONIFAS, *supra* note 7, at 35.

176. Sedensky, *supra* note 10.

177. *Id.*

178. Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 *STAN. L. & POL'Y REV.* 175, 179 (2003) [hereinafter Kohn].

179. *Id.*

Depression symptoms increase with age, and older people are more vulnerable to depression.¹⁸⁰ Thus, the anxiety of avoiding bullying behavior or the stress of enduring it exacerbates any preexisting depressive symptoms.¹⁸¹ This may be due to age-related biochemical changes or the complication of loss and change that comes from living longer and experiencing more.¹⁸²

The effects of bullying can even reach beyond the direct target of bullying.¹⁸³ Bullying can also cause significant emotional distress for other residents and staff.¹⁸⁴ Bystanders can suffer depression, anxiety, and isolation from witnessing bullying behaviors.¹⁸⁵ They may also feel as if they are in an unsafe environment, scared, powerless to act, guilty if they do not act, or even tempted to participate.¹⁸⁶ As with school-age bullying, witnesses often do not act out of fear.¹⁸⁷ Worried that they may become the next target, witnesses may remain silent as a protective measure.¹⁸⁸

Studies suggest that as many as 20–24% of older adults in senior-living homes are bullied, compared to 20% of high-schoolers nationwide.¹⁸⁹ With people living longer and a corresponding increase of elderly housing, increased bullying among the elderly is a growing problem.¹⁹⁰

4. A GROWING PROBLEM

Bullying is prevalent in many senior living homes.¹⁹¹ One study estimated that more than 2800 senior citizens are bullied a year.¹⁹² Even this estimate is conservative, however, since senior care staff involved

180. *Id.*

181. Rooney, *supra* note 84, at 9.

182. *Id.*

183. *Senior Bullying*, TCB TRAINING & CONSULTING, <http://www.takecareofbullying.com/senior> (last visited Sept. 9, 2019).

184. *Id.*

185. BONIFAS, *supra* note 7, at 118.

186. Nash, *supra* note 47, at 1043.

187. Amanda Lubinski, *Bullying Knows No Age*, COURIERTRIBUNE (Mar. 12, 2015), http://www.mycouriertribune.com/news/bullying-knows-no-age/article_3f1628ac-1bfe-58c7-bc55-db435cfc5a79.html.

188. *Id.*

189. Debra Pressey, *Bullying Just As Prevalent in Senior-living Centers as in Schools*, THE NEWS-GAZETTE (Aug. 17, 2018), <http://www.news-gazette.com/news/local/2018-08-17/bullying-just-prevalent-senior-living-centers-schools.html>.

190. *Id.*

191. *Id.*

192. *Id.*

in the study stated that they knew the numbers were higher, but that seniors often do not or cannot communicate the problem.¹⁹³ In a 2014 report, Dr. Margaret Wylde reported that senior bullying occurs in every independent living community.¹⁹⁴

At the 30th Street Senior Center in San Francisco, a former assistant director described the clique system as being so pervasive that “[i]t’s like ‘Mean Girls,’ but everyone is eighty.”¹⁹⁵ Instances included residents being turned away from cafeteria tables, fistfights breaking out at karaoke, and dances becoming breeding grounds for cruel gossip.¹⁹⁶

Pamela Countouris, a long-time schoolteacher who now runs a Pittsburgh-based consultancy firm that offers training on bullying, initially opened her firm with a focus on school bullying but now focuses exclusively on seniors and visits many senior living communities.¹⁹⁷ At a senior high-rise, a woman who saw herself as “the queen of the parking garage” would key the cars of others who angered her.¹⁹⁸ At other living communities, bullies stole laundry detergent and threw victims’ clothing on the floor in the laundry room.¹⁹⁹ Countouris even began to call bingo “the devil’s game” because of the prevalence of newcomers being badgered and accused of cheating in many homes.²⁰⁰ “I didn’t realize it was an underground society where people could be mean to each other,” Countouris recounted.²⁰¹

Due to far less recognition of bullying as a problem among seniors as compared to young people, many are unaware that their behavior is problematic until it is labeled.²⁰² “In the life cycle, it doesn’t go away,” said Katherine Arnold of the St. Louis Park Human Rights Commission.²⁰³ Due to an increase in senior bullying in nursing homes, the Human Rights Commission created a public service announcement that

193. *Id.*

194. Eleanor Feldman Barbera, *Senior Bullying: How to Recognize it, How to Handle it*, MCKNIGHT’S LONG-TERM CARE NEWS (Mar. 4, 2015), <https://www.mcknights.com/the-world-according-to-dr-el/senior-bullying-how-to-recognize-it-how-to-handle-it/article/401679/>.

195. Sedensky, *supra* note 10.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

included a portrayal of a man who was excluded from a card game and became the subject of gossip by other seniors to raise public awareness on the issue.²⁰⁴

Reformers can and should look to approaches and laws designed to protect adolescents to address senior bullying. Children face risks of bullying when they enter the school setting and this problem does not disappear with age when seniors move into communal settings. Using systems for elders initially designed to address children's issues is not new.²⁰⁵ As Nina Kohn acknowledges, "Health care workers and policy makers have long considered elder mistreatment to be analogous to child maltreatment."²⁰⁶ Policies and systems for elders have been taken from and modeled after children's systems.²⁰⁷ For example, elder protective services are frequently patterned on child protective services.²⁰⁸ Approaches and laws aimed at adolescent bullying also provide data to evaluate a given approach's effectiveness.

III. Analysis

Several federal and state laws exist to provide potential recourse for victims of elder bullying. Federal laws may provide recourse if bullying is based on a protected category and considered harassment. By themselves, federal and state laws are inadequate because elders are often excluded from the statutory definition of bullying. This section first analyzes federal civil rights laws using the Federal Fair Housing Act as an example. It will then discuss two other federal laws, the Nursing Home Reform Act and the Elder Justice Act.

204. *Id.*

205. Kohn, *supra* note 178, at 176.

206. *Id.*, citing Patricia Schene & Sue F. Ward, *The Relevance of the Child Protection Experience*, PUB. WELFARE, Spring 1988, at 14 (discussing the lessons that elder protective service providers should learn from child protective services).

207. *Id.*

208. *Id.*

A. Federal Laws Against Bullying

No federal law directly addresses bullying, but in some cases bullying can be considered harassment when based on race, national origin, color, sex, age, disability, or religion.²⁰⁹ When bullying is considered harassment, federally-funded schools, including colleges and universities, have an obligation to resolve the harassment.²¹⁰

Discriminatory harassment is covered under federal civil rights laws enforced by the U.S. Department of Education and the U.S. Department of Justice.²¹¹ Schools are obligated by law to address conduct that is severe, pervasive, or persistent; creates a hostile environment; or based on a student's race, color, national origin, sex, disability, or religion.²¹² Examples of federal civil rights laws include Title IV and Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Titles II and III of the Americans with Disabilities Act, and the Individuals with Disabilities Education Act.²¹³ The federal Fair Housing Act also falls within this broad category of federal civil rights laws.

1. FEDERAL CIVIL RIGHTS LAWS: THE FAIR HOUSING ACT

The Federal Fair Housing Act ("FHA") covers residential care facilities, such as nursing homes and assisted living facilities, and protects against discrimination based on sex.²¹⁴ The Department of Housing and Urban Development issued guidance in 2010 stating that discrimination against a resident or applicant because he or she is transgender or fails to conform to gender stereotypes may violate the FHA.²¹⁵

One problem with relying on federal laws, like the FHA, to prevent elder bullying is that the elderly victim must be a member of the protected category (*e.g.*, race or gender) to be protected.²¹⁶ Furthermore, even if a member is of a protected class, the plaintiff must establish that

209. *Federal Laws*, STOPBULLYING.GOV, <https://www.stopbullying.gov/laws/federal/index.html> (last visited Sept. 9, 2019).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. 42 U.S.C. §§ 3601–3619 (2018).

215. Shantae Goodloe, *HUD Issues Guidance on LGBT Housing, Discrimination Complaints*, HUD (July 1, 2010), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-139.

216. Martha Weisel, *Bullying in the Workplace: Not Every Wrong Has a Legal Remedy*, LAB. L. J., Winter 2016, at 520.

the harassment was based on that protected class.²¹⁷ Although some people may be able to do this, it is difficult to do unless the bullying is extreme.²¹⁸

Marsha Wetzel's case is again illustrative. After experiencing a torrent of verbal and physical bullying, Wetzel brought a case against the management defendants and the entities that own and operate St. Andrew, her residential living facility.²¹⁹ Wetzel alleged that St. Andrew failed to ensure a non-discriminatory living environment and retaliated against her for complaining about sex-based harassment, each in violation of the FHA.²²⁰ Her claim was initially dismissed by the district court.²²¹ St. Andrew successfully argued that the FHA did not make a landlord accountable for failing to stop tenant-on-tenant harassment unless the landlord's inaction was animated by discriminatory animus and that Wetzel's harassment claim had to be dismissed as it relied on 42 U.S.C. § 3604(b) and that section does not cover post-acquisition harassment claims (harassment claims brought by a tenant already occupying her home).²²² St. Andrew further claimed that Wetzel's retaliation claim failed since it lacked an allegation that the defendants were motivated by discriminatory animus.²²³

On appeal, the Seventh Circuit reversed and remanded the case.²²⁴ The Court read the FHA more broadly and held that the FHA:

not only [creates] liability when a landlord intentionally discriminates against a tenant based on a protected characteristic; it also creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment.²²⁵

The Court reversed the district court's grant of the motion to dismiss and remanded the case for further proceedings.²²⁶

217. *Id.*

218. *See* Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 859 (7th Cir. 2018).

219. *Id.* at 861.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 859.

225. *Id.*

226. *Id.* at 868.

Although Wetzel won in the Seventh Circuit, her case is still pending in the district court.²²⁷ Wetzel's process was long and is still ongoing.²²⁸ The issue of whether the FHA included a duty not to discriminate in housing conditions encompasses a duty not to permit known harassment on protected grounds was a matter of first impression in the Seventh Circuit.²²⁹ Instead of easily seeking a legal solution to the bullying she experienced, Wetzel is still litigating her claim in an attempt to seek redress.²³⁰ If an aggrieved party is not a member of a protected class, a remedy would be unavailable under federal civil rights laws.²³¹ Moreover, any possible remedy will turn on a factual determination about whether the landlord had "actual notice."²³² In many cases, this will not be a simple or easy hurdle to overcome.

In addition to federal civil rights laws such as the FHA, elders in certain settings are theoretically protected under the Nursing Home Reform Act.²³³ Yet, it too presents problems for protecting elders against bullying.

2. NURSING HOME REFORM ACT

Nursing home residents are protected by the federal Nursing Home Reform Act ("NHRA").²³⁴ The NHRA creates a minimum set of standards of care and rights for people living in federally-certified nursing homes.²³⁵ The federal NHRA applies to any nursing home that accepts reimbursement from Medicare or Medicaid (or both).²³⁶ Thus, the NHRA applies to over 96% of the nursing homes in the country.²³⁷ The NHRA requires a nursing home to provide "services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."²³⁸

227. *Id.* at 856.

228. *Id.* at 860–61.

229. *Id.* at 856.

230. *Id.*

231. *See, e.g.*, 42 U.S.C. § 1983 (2018); *Wetzel*, 901 F.3d at 856.

232. *See, e.g.*, *Wetzel*, 901 F.3d at 859.

233. 42 U.S.C. § 1396r(c)(1)(A) (2018).

234. *Id.*

235. 42 U.S.C. § 1936r(a) (2018).

236. *LGBT Older Adults in Long-Term Care Facilities*, JUST. IN AGING ET AL., 1, 23 (2015), available at <http://www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf> (last visited Sept. 9, 2019) [hereinafter JUSTICE IN AGING].

237. *Id.*

238. *Id.* at 22.

The NHRA is broad.²³⁹ It includes the right to privacy regarding accommodations, the right to confidentiality of personal and clinical records, the right to voice grievances, and the right to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility, among other things.²⁴⁰ The NHRA requires that environments treat all elders with dignity and respect.²⁴¹ The federal regulations implementing the NHRA state that a nursing home “must promote care for residents in a manner and in an environment that maintains or enhances each resident’s dignity and respect in full recognition of his or her individuality.”²⁴² The NHRA requires nursing homes to provide minimum levels of care so that each resident can “reach the highest practicable level of functioning.”²⁴³

The NHRA requires nursing homes to provide residents with certain services and establishes the standards for these services.²⁴⁴ States must conduct unannounced surveys occurring at irregular intervals that include resident interviews.²⁴⁵ The NHRA also includes an enforcement process if a survey indicates noncompliance of a nursing home.²⁴⁶

The NHRA has two primary problems preventing it from being an effective remedy for elder bullying. First, its sole focus is on nursing homes.²⁴⁷ Thus, the focus is on behavior of the nursing home staff toward its residents.²⁴⁸ Although staff members could engage in behavior that qualifies as bullying or abuse, the NHRA ignores behavior between residents themselves.²⁴⁹ Second, the NHRA relies on state enforcement.²⁵⁰ If nursing home facilities violate guidelines within the NHRA, the state could impose remedies such as monitoring, temporary management, Medicare or Medicaid payment denial, civil monetary penalties, and termination of the agreement.²⁵¹ State enforcement, however,

239. 42 U.S.C. § 1396r (2018).

240. 42 U.S.C. § 1396r (c)(1)(A) (2018).

241. JUSTICE IN AGING, *supra* note 236, at 24.

242. *Id.* (quoting 42 C.F.R. § 483.15(a) (2018)).

243. *Id.* at 23.

244. *Nursing Home Reform Act*, NURSING HOME ABUSE GUIDE, <https://nursing-homeabuseguide.com/resources/nursing-home-reform-act/> (last visited Sept. 9, 2019) [hereinafter NURSING HOME ABUSE GUIDE].

245. *Id.*

246. *Id.*

247. *Id.*

248. 42 U.S.C. § 1396r (2018).

249. *See id.*

250. *See id.*

251. NURSING HOME ABUSE GUIDE, *supra* note 244.

has been sporadic.²⁵² Because the NHRA is focused on the nursing home as a larger unit, state enforcement is not focused on bullying between residents.²⁵³

While the FHA and other federal civil rights legislation are inadequate to prevent elder bullying, the NHRA, directed at nursing homes, ignores behavior between residents and is sporadically enforced. Although a third federal option exists, the Elder Justice Act, it too inadequately prevents elder bullying.

3. ELDER JUSTICE ACT

The Elder Justice Act (“EJA”) was passed in 2010 and is the first comprehensive legislation to address the abuse, neglect, and exploitation of older adults at the federal level.²⁵⁴ The law authorized a variety of programs and initiatives to better coordinate federal responses to elder abuse, to promote elder justice research and innovation, to support Adult Protective Services (“APS”) systems, and to provide additional protections for residents of long-term care facilities.²⁵⁵ The EJA also established the Elder Justice Coordinating Committee to coordinate activities related to elder abuse, neglect, and exploitation across the federal government.²⁵⁶

The largest authorization of funds under the EJA is for a new state formula grant to support activities of state and local Adult Protective Services programs.²⁵⁷ Each state has an APS authorized by state law, and state and local APS agencies are among the first responders to reports of abuse, neglect, or exploitation.²⁵⁸

Although the Elder Justice Act attempted to provide a coordinated federal response to elder abuse, most activities and programs authorized under the EJA have not received federal funding through the

252. JUSTICE IN AGING, *supra* note 236, at 26.

253. See generally *id.*

254. *The Elder Justice Act*, ADMIN. FOR COMMUNITY LIVING, <https://acl.gov/about-acl/elder-justice-act> (last visited Sept. 9, 2019).

255. *Id.*

256. *Id.*

257. *The Elder Justice Act: Addressing Elder Abuse, Neglect, and Exploitation*, NAT’L HEALTH POL’Y FORUM, https://www.nhpf.org/library/the-basics/Basics_ElderJustice_11-30-10.pdf (last visited Sept. 9, 2019).

258. *Id.*

appropriations process.²⁵⁹ When it was enacted in 2010, the EJA authorized \$777 million in funding for 2011–2014.²⁶⁰ It only received a total of \$8 million in actual funding.²⁶¹ The funding that was appropriated was transferred from the Prevention and Public Health Fund.²⁶²

The definitional problem magnifies funding problems with the EJA. Data collection on elder abuse under the EJA is difficult because of the vast variation in state statutory definitions in elder abuse.²⁶³ This initial failure to identify consistent definitions is further compounded by the absence of a uniform reporting system across states.²⁶⁴

Because the federal remedies are broad or largely aimed at nursing home operations at the institutional level, federal remedies are inadequate. Relying on the Fair Housing Act to prevent bullying is problematic since one must be within a protected category in order to seek relief.²⁶⁵ The NHRA may provide some remedies for *abuse*, since it is aimed at staff-resident relationships, but it does not adequately protect against peer-to-peer relationships to be an effective anti-bullying law. Despite the Elder Justice Act's attempt at providing a comprehensive coordinated response to elder abuse, it has failed to live up to its grand expectations because of funding issues and the recurring definitional problem. State laws offer more promise for an effective solution.

B. State Laws Against Bullying

State anti-bullying laws are often reactionary and enacted in response to tragedies. States vary widely in their approach to anti-bullying legislation. This section first explains the development of state anti-bullying laws, then evaluates the effectiveness of using state anti-bullying laws as a means of seeking redress for victims of elder bullying.

259. KIRSTEN COLELLO, CONG. RESEARCH SERV., R43707, THE ELDER JUSTICE ACT: BACKGROUND AND ISSUES FOR CONGRESS (2017) [hereinafter COLELLO].

260. Hadi Sedigh, *Analysis: Federal funding to fight elder abuse falls short*, NAT'L ASS'N OF CTYS (Jan. 11, 2016), <https://www.naco.org/articles/analysis-federal-funding-fight-elder-abuse-falls-short> [hereinafter Sedigh].

261. *Id.*

262. *Id.*

263. COLELLO, *supra* note 259, at 15.

264. *Id.*

265. *See* *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

1. DEVELOPMENT OF STATE ANTI-BULLYING LAWS

Prior to the Columbine High School shooting in 1999, no state had an anti-bullying law.²⁶⁶ In response to the Columbine shooting, legislators across the country began drafting policies to address student-perpetrated violence.²⁶⁷ Additional local tragedies also drove state legislatures to act. For example, in reaction to a local bullying-related suicide in the state, Georgia became the first state to pass bullying legislation requiring schools to implement character education programs to address bullying prevention programs.²⁶⁸

Georgia's legislation was directed at public-school students in grades six through twelve.²⁶⁹ Since then, all fifty states have enacted anti-bullying laws that require schools to address and prevent bullying by imposing duties on school administrators and employees.²⁷⁰ Some anti-bullying legislation was enacted specifically in response to a particularly violent event or culmination of bullying, and other states adopted general legislation with added protections against discrimination on the basis of sexual orientation and gender.²⁷¹ Others have introduced bullying provisions into their criminal and juvenile justice codes.²⁷²

State anti-bullying statutes vary greatly. Some statutes are comprehensive and specific, mirroring a list of sixteen recommendations from the Department of Education ("DOE").²⁷³ The recommendations, put forth in a 2011 DOE Report, name key state bullying legislation and policy components identified by the U.S. Department of Education and include elements like statement of scope, enumeration of groups, definitions, review of policy, training and prevention, and monitoring.²⁷⁴

266. VICTORIA STUART-CASSEL ET AL., ANALYSIS OF STATE BULLYING LAWS AND POLICIES (U.S. Dep't of Educ. 2011), <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> [hereinafter DOE Report].

267. *Id.* at 15.

268. *Id.*

269. DOUGLAS DANNER ET AL., PATTERN DISCOVERY TORT ACTIONS § 45:3 (4th ed. 2019).

270. *Id.*

271. *Id.*

272. DENA T. SACCO ET AL., *An Overview of State Anti-Bullying Legislation and Other Related Laws*, Born this Way Foundation 1, 9 (2012), https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview.pdf [hereinafter SACCO ET AL.].

273. DOE Report, *supra* note 266, at 21.

274. *Id.*

Other state laws are open-ended and allow individual state districts to craft plans.²⁷⁵ Some common provisions include: “investigation and reporting of bullying, disciplinary actions for students involved in bullying, training of staff, and prevention efforts.”²⁷⁶ Typically, state anti-bullying statutes defining “bullying” or “harassment” mandate that individual school districts adopt policies to create a school climate that does not tolerate bullying and impose reporting requirements on school districts to disclose the number of incidents of bullying in schools.²⁷⁷

The definitions across jurisdictions varies greatly.²⁷⁸ According to the DOE,

Some state laws focus on specific actions (*e.g.*, physical, verbal, or written), some focus on the intent or motivation of the aggressor, others focus on the degree and nature of harms that are inflicted on the victim, and many address multiple factors. In many instances, minor language, omitted or inserted into laws, can significantly alter the way in which the behavior and circumstances are legally defined (*e.g.*, inclusion of the terms “physical,” “overt,” or “repeated.”).²⁷⁹

Many state laws do not follow research-based definitions of bullying.²⁸⁰ This is likely because the legislative language used to draft bullying laws often borrows directly from harassment statutes.²⁸¹ Harassment, however, is distinguishable from bullying because it must be “motivated by characteristics of the targeted victim,” and, “[i]t is generally viewed as a subset of more broadly defined bullying behavior.”²⁸² The result is that many current state laws are narrowly defined, since the laws conflate bullying and harassment.²⁸³ Harassment is distinguishable from bullying since it must be motivated by characteristics of the targeted victim.²⁸⁴ Bullying is “intentional repetitive aggressive behavior that involves an imbalance of power or strength.”²⁸⁵

275. Ari Ezra Waldman, *Are Anti-Bullying Laws Effective?*, 103 CORNELL L. REV. 135, 136 (2018) [hereinafter Waldman].

276. Cornell & Limber, *supra* note 39, at 338.

277. *Id.*

278. SACCO ET AL., *supra* note 272, at 4.

279. DOE Report, *supra* note 266, at 25.

280. SACCO ET AL., *supra* note 272, at 4.

281. DOE Report, *supra* note 266, at 17.

282. *Id.*

283. *Id.*

284. *Id.*

285. BONIFAS, *supra* note 7, at 5.

In addition to differences in the definitions themselves, *who* defines bullying within jurisdictions varies greatly across states. For example, Hawaii, Maine, New Mexico, Virginia, and Wisconsin allow the state Department of Education the discretion to define bullying so long as the definition is included in the state's model bullying policy.²⁸⁶ Arizona and Minnesota leave the definition of bullying entirely up to local school districts.²⁸⁷ Alabama, Colorado, Florida, Indiana, Massachusetts, Nebraska, Ohio, and Vermont define bullying as including only behaviors that are repetitive, systematic, or continuous.²⁸⁸ California, Illinois, Kansas, Louisiana, and Pennsylvania require the conduct to be "severe or pervasive" in order to be classified as bullying.²⁸⁹ The variation in who defines bullying and how bullying is defined presents significant problems for resolving elder bullying.

2. PROBLEMS WITH STATE LAW REMEDIES

Relying on state law as the sole remedy for bullying presents several major problems. First, state definitions of bullying are simultaneously over-inclusive (colloquially and in schools) and under-inclusive (statutorily). Second, laws by themselves have not been proven to be effective as a remedy. Third, individuals often lack the ability to make a legal claim via a private right of action. Finally, the funding problem plaguing federal remedies haunts state remedies as well.

The first problem is definitional. Overly broad definitions of bullying can mean that situations are labeled bullying, "even though we know that bullying isn't the same as garden-variety teasing or a two-way conflict."²⁹⁰ Jaana Juvonen, a UCLA education professor, has studied adolescent bullying extensively.²⁹¹ Juvonen notes, "It is important to distinguish between victims of prolonged bullying and those getting called names once or twice. Students who experience continual bullying are at risk for much more severe symptoms."²⁹² States that allow the

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. Emily Bazelon, Opinion, *Defining Bullying Down*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/opinion/defining-bullying-down.html>.

291. Christopher Bergland, *What Tactics Motivate Bullies to Stop Bullying? University of California researchers identify new strategies to reduce bullying*, PSYCHOL. TODAY (Apr. 3, 2014), <https://www.psychologytoday.com/us/blog/the-athletes-way/2014/04/what-tactics-motivate-bullies-stop-bullying> [hereinafter Bergland].

292. *Id.*

state Department of Education to define bullying without parameters risk definitions that are over-inclusive or not research-based. Additionally, if the Department of Education is defining bullying, it is likely ignoring elders in its definition since the focus is on students in schools.

As a result of states borrowing language for bullying statutes from harassment law, some states' bullying laws are also under-inclusive. Under federal law, it is a violation of civil rights to partake in harassment on the basis of race, color, national origin, sex, or disability.²⁹³ Bullying, however, requires a power imbalance—not a protected category.²⁹⁴ Despite the legal distinction between bullying and harassment, twenty-two states use the term harassment, intimidation, and bullying interchangeably.²⁹⁵ Conflating the terms denies remedies to some bullying victims because harassment, by definition, must be a protected category.²⁹⁶

Next, legislation by itself does not necessarily prevent or end the behavior. For example, Montana recently enacted statewide anti-bullying laws.²⁹⁷ Montana law makes it illegal to harass or bully someone for any reason and defines bullying as repeated events involving an imbalance of power.²⁹⁸ Individual school districts within Montana are required to set and follow their own bullying prevention and correctional procedures.²⁹⁹ Despite the law's recent enactment, educators report that bullying is still a major concern and that the laws are too weak.³⁰⁰ One parent reported a bully urinated into a fellow student's shampoo bottle; another report indicated that a bully burned another student's hair.³⁰¹

Montana may be criticized because it has one of the highest rates of reported bullying, but its law is one of the least restrictive.³⁰² Other state laws, however, that have been in existence for longer have also

293. Cornell & Limber, *supra* note 39, at 339.

294. *Id.*

295. *Id.*

296. *See id.*

297. MONT. CODE ANN. § 20-5-207 (2018).

298. *Id.*

299. Heidi Meili, *Bullying reports continue at Montana schools, despite antibullying laws*, NBC MONTANA (May 21, 2018), <https://nbcmontana.com/news/local/bullying-reports-continue-at-schools-despite-montana-passing-anti-bullying-laws>.

300. *Id.*

301. *Id.*

302. Virginia Pelley, *Do Anti-Bullying Laws Work?*, CITYLAB (Oct. 28, 2015), <https://www.citylab.com/life/2015/10/do-anti-bullying-laws-work/412285/> [hereinafter Pelley].

been critiqued.³⁰³ New Jersey's amended anti-bullying law was signed into law in early 2011, revising its previous 2002 law.³⁰⁴ The bill was passed as a result of Tyler Clementi's suicide.³⁰⁵ Clementi was a Rutgers student who jumped to his death from the George Washington Bridge after his roommate videotaped and broadcast his encounter with another male student.³⁰⁶ The first full year of New Jersey's 2011 law saw an incredible surge in cases, with more than 35,000 reported incidents and 12,000 confirmed incidents.³⁰⁷ The numbers since then have "settled down" and suggest that school districts may be much more hesitant to report, fearing scrutiny.³⁰⁸ Critics argue that New Jersey's law, one of the nation's "toughest," is still not tough enough.³⁰⁹

Even with statutory provisions mandating that public schools adopt policies addressing bullying in schools, this does not always provide a private cause of action against the district by a student, or his or her parent or guardian, for failing to protect the student from bullying.³¹⁰ At the federal level, at least one court has declined to extend a state's anti-bullying legislation to impose liability on a school district.³¹¹ The court found that the legislation's primary purpose was to provide funding for school safety, it had not been previously construed to impose liability, and it therefore did not recognize a private right of action.³¹²

Although states have adopted anti-bullying laws in recent years, few claim rulings have been based on a state anti-bullying law due to a lack of a private right of action.³¹³ Holben and Zirkel, both education law specialists, note:

Unless and until state legislatures provide for such a bridge to litigation, it appears that the only theories available to

303. *Id.*

304. John Mooney, *Explainer: Tough Anti-Bullying Law Guides Schools in Dealing with Harassment*, NJSPOTLIGHT (Feb. 2, 2016), <https://www.njspotlight.com/stories/16/02/01/explainer-tough-anti-bullying-law-guides-schools-in-dealing-with-harassment-intimidation/>.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. Pelley, *supra* note 302.

311. Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299, 326 n.151 (2014) [hereinafter Holben & Zirkel].

312. *Id.*

313. *Id.*

plaintiffs would be to argue that the statute provides the basis for the legal duty element of negligence, whether the breach is accepted as negligence per se or is proven as one of the additional elements.³¹⁴

Finally, the funding problem plaguing federal programs exists for many states as well. For example, New Jersey's anti-bullying law mandates detailed requirements regarding the investigation, documentation, and review of each incident of bullying.³¹⁵ Investigation is certainly important, but the burden placed on school districts is high, and few states actually provide funding to support the mandates, limiting the potential for a successful anti-bullying scheme.³¹⁶

Some states have provisions encouraging preventive approaches to bullying, as well as counseling or other support services to students involved in bullying.³¹⁷ Approximately half of states require or encourage school districts to train school personnel on bullying prevention.³¹⁸ Most require or encourage bullying prevention, education, or awareness programs for students.³¹⁹ But, only one-third of state laws guide districts to include in their policies the provision of counseling or other support services for bullied students or (in a few states) witnesses to bullying.³²⁰ Despite some state funding pitfalls, certain school-level programs supplementing legislation can be effective in creating cultures that can prevent bullying.³²¹ Analyzing empirically supported programs in school settings can provide insight into an appropriate remedy for elders in communal settings.

314. *Id.*

315. Cornell & Limber, *supra* note 39, at 338.

316. *Id.*

317. Dewey G. Cornell & Susan P. Limber, *Do U.S. laws go far enough to prevent bullying at school?* 47 AM. PSYCHOL. ASS'N. no. 2 at 64, (2016) [hereinafter Cornell & Limber 2].

318. *Id.*

319. *Id.*

320. *Id.*

321. Key Policy Letters from the Education Secretary and Deputy Secretary, U.S. DEP'T OF EDUC. (Dec. 16, 2010), <https://www2.ed.gov/policy/gen/guid/secletter/101215.html> ("State laws, and their related district- and school-level policies, cannot work in isolation, however.") [hereinafter *Key Policy Letters from the Education Secretary and Deputy Secretary*].

C. Supplemental Programming in Schools

Studies related to the efforts to prevent school-age bullying provide insight into the success of programs supplementing legislation. A 2014 study analyzing more than 140 bullying studies worldwide found that traditional efforts in elementary and secondary schools are often unsuccessful.³²²

Piecemeal strategies are ineffective in combating bullying in schools.³²³ Many school programs consist of “Band-Aid solutions, such as holding one assembly a year that discourages bullying.”³²⁴ Repeated discussions over time are shown to be more effective than a single, formal conversation with a child regarding bullying.³²⁵ Comprehensive programs that require staff training are significantly more effective.³²⁶

Second, many schools use zero-tolerance approaches, sometimes mandated by states.³²⁷ To some, zero-tolerance means that a behavior will not be ignored.³²⁸ More often, zero-tolerance includes a specific punishment, usually a long-term suspension or expulsion regardless of the seriousness of the infraction.³²⁹ Its distinguishing features are that it is automatic and severe.³³⁰

Zero-tolerance approaches have been shown to be ineffective at preventing bullying.³³¹ Zero-tolerance policies generally have been criticized as failed disciplinary policies,³³² but are specifically ineffective in the context of bullying because they can reinforce a bully’s intrinsic belief that “power and aggression are the essential and controlling values in a society.”³³³

322. Bergland, *supra* note 291.

323. DAVID DUPPER, SCHOOL BULLYING: NEW PERSPECTIVES ON A GROWING PROBLEM 73 (2013) [hereinafter DUPPER] (“Two decades of research have produced general agreement among researchers that narrowly conceived piecemeal, add-on strategies have not been shown to be effective in combating bullying in schools.”).

324. Bergland, *supra* note 291.

325. DUPPER, *supra* note 323.

326. *Id.*

327. SACCO ET AL., *supra* note 272, at 22.

328. Cornell & Limber, *supra* note 39, at 338.

329. *Id.*

330. *Id.*

331. DUPPER, *supra* note 323, at 73.

332. Cornell & Limber, *supra* note 39, at 338.

333. DUPPER, *supra* note 323, at 73 (quoting LES PARSONS, BULLIED TEACHER: BULLIED STUDENT—HOW TO RECOGNIZE THE BULLYING CULTURE IN YOUR SCHOOL AND WHAT TO DO ABOUT IT (2005)).

The past two decades of research into school bullying have produced wide agreement among researchers that “bullying can be reduced substantially by implementing a comprehensive, whole-school approach that modifies all levels of the social ecology of the school (*i.e.*, individual, classroom, school, and community levels).”³³⁴ Although the context of elder bullying differs, empirically supported bullying prevention programs at the school level can provide insight into how to combat elder bullying in communal settings.

Empirically supported bullying prevention programs can be conceptualized as occurring at three levels: the school level, the classroom level, and the student level.³³⁵ School-level components include strategies for changing the culture and climate of the school, and include steps such as: assessing the extent and nature of bullying; obtaining the support, buy-in, and commitment of all key stakeholders; providing in-service trainings for teachers and other school staff; establishing policies that include expectations for behavior; and increasing adult supervision in areas where bullying occurs most frequently.³³⁶

Classroom-level components include steps like holding meetings to discuss issues related to bullying and modeling positive interpersonal skills.³³⁷ Student-level components are strategies designed to support victims, bullies, and bystanders.³³⁸ Strategies include learning skills to intervene; providing assistance to bullying victims; intervening consistently and appropriately in all bullying situations; and following up with children who are bullied and (separately) with children who bully.

The broader components have been broken down further into checklists for school personnel for ease of use and implementation.³³⁹ Although piecemeal strategies are ineffective, research-based strategies aimed at changing school culture have demonstrated success.

334. *Id.*

335. *Id.* at 74.

336. *Id.*

337. *Id.*

338. *Id.*

339. Mary A. Lentz, § 4:3. *Student bullying warning signs: Checklist*, Chapter 4. *Student Harassment and Bullying in LENTZ SCHOOL SEC.* (Thompson Reuters ed., 2018).

IV. Recommendation

A comprehensive system to address bullying across all walks of life is needed as opposed to piecemeal legislation drafted in response to tragic national events. Though state legislation was an important first step, bullying is not solely an adolescent problem. Many current anti-bullying laws fail to recognize elders. Waiting for another tragic event to modify legislation is too late; state laws need to be modified to account for bullying in the elderly population.

Although legislation cannot be the only remedy, it provides an important first step: acknowledgement. By adopting, publicizing, and enforcing clear and effective policy, lawmakers acknowledge that a behavior will not be tolerated.³⁴⁰ In addition to legal solutions, a comprehensive approach should be taken in order to ensure that adolescents, adults, and elders are all safe and able to seek legal recourse if necessary.

This section proposes three solutions. First, statutory definitions should be revised to reflect bullying's three characteristics and to include elders. Second, a private right of action should be provided in anti-bullying laws. Finally, nursing homes and assisted living centers should implement research-based programming aimed at creating a positive culture.

1. REVISED STATUTORY DEFINITIONS

Because elders are often excluded from public discourse related to family or societal violence,³⁴¹ the definitional problem is especially important. If bullying is merely defined as an adolescent problem, remedies will be targeted toward significantly younger populations and ignore seniors' needs. Naming the problem and articulating various behaviors associated with bullying is important to increase awareness and provide effective remedies for elderly targets.

340. *Key Policy Letters from the Education Secretary and Deputy Secretary, supra* note 321 ("Though laws are only a part of the cure for bullying, the adoption, publication, and enforcement of a clear and effective anti-bullying policy sends a message that all incidents of bullying must be addressed immediately and effectively, and that such behavior will not be tolerated.").

341. Snyder, *supra* note 86, at 386; *see also* WHO, *supra* note 94 (stating that elder abuse is too often "hidden from the public view" and "continues to be a taboo, mostly underestimated and ignored by societies across the world.").

A synthesis across disciplines is needed, and using common language is an important place to start. Medicine has already begun to recognize and discuss the problem of abuse of older residents by other residents in the field of long-term care.³⁴² Since Columbine, educators and lawmakers have begun to recognize that bullying is a problem in many schools and adolescent relationships.³⁴³ Workplace bullying is increasingly analyzed and discussed.³⁴⁴ Meticulously crafting the definition is the first step to creating a solution. Only from here can disciplines work together to craft meaningful solutions.

Despite general agreement on the characteristics of bullying among psychologists, the definition of bullying is not consistent among lawmakers. Scholars acknowledge, "There is a distinct gap between state legislative definitions of bullying and the criteria agreed upon by scholars."³⁴⁵ Because many states leave out the power imbalance criterion from the definition of bullying in the law,³⁴⁶ laws may not accurately define bullying and thus create enforcement problems.

"Bullying" has three components: (1) intentional, aggressive behavior that is (2) repeated over time, involving an (3) imbalance of power.³⁴⁷ These three criteria occur in the context of a peer relationship, differentiating it from abuse generally.³⁴⁸ Bullying includes cyberbullying.³⁴⁹ It does not include ordinary teasing, horseplay, or an argument.³⁵⁰

As a first step, statutory definitions should be revised. Although most states already define bullying in terms of its intent to harm and severity of impact, only four states include a power imbalance in their criteria.³⁵¹ Only eight states define bullying as a repetitive behavior.³⁵² Statutory definitions in accord with bullying's three criteria would not

342. Lachs, *supra* note 95, at 79.

343. DOE Report, *supra* note 266, at 15.

344. See, e.g., Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35 (2009).

345. Cornell & Limber 2, *supra* note 317, at 339.

346. *Id.* at 335.

347. BONIFAS, *supra* note 7, at 5.

348. *Id.*

349. Cornell & Limber 2, *supra* note 317, at 339.

350. *Id.*

351. *Id.*

352. *Id.*

only better align law with psychology, but include elders in the definition of bullying. Furthermore, this definition does not conflate bullying with harassment as many current definitions do.

A comprehensive understanding of the definition is important to furthering the imposition of civil liability for bullying, because a cause of action cannot be maintained without a clear working definition of the offense. Especially in jurisdictions where bullying is defined strictly by the local school district, bullying in nursing homes would, by definition, not meet the requirement. The definition, therefore, must be adequate to appropriately respond to the needs of elders in problematic situations. The focus of current regulation related to bullying is mainly geared toward school-aged children.³⁵³ For elderly residents to have an adequate legal remedy, state laws need to include elderly populations in their definition of bullying.

2. PRIVATE RIGHT OF ACTION

The legal solution must provide for a private right of action. Research has demonstrated that in childhood bullying cases brought under a state anti-bullying law, very few claim rulings resulted.³⁵⁴ The only avenue for plaintiffs was to argue that the anti-bullying statute provided the basis for the legal duty element of negligence.³⁵⁵ Notably, however, none of the 166 cases in a major study tested this avenue for liability.³⁵⁶ Instead of forcing elders to try creative litigation techniques and new theories given the pre-existing difficulties to litigating,³⁵⁷ a private right of action should be created so that elders have an adequate remedy to seek redress if needed.

A remedy for elders must be appropriate for elders. Elders' unique needs must be considered when crafting remedies in order to prevent paternalistic policies. Children may need certain protections that elders do not require merely because their bodies and brains are not fully developed; elders' autonomy must be considered in the development of a solution so that the solution is not taking away their right

353. *Research Summary: Anti-Bullying Laws and Policies*, STOPBULLYING.GOV (Aug. 2017), <https://www.stopbullying.gov/sites/default/files/2017-10/anti-bullying-laws-and-policies-research-summary.pdf>.

354. Holben & Zirkel, *supra* note 311, at 322.

355. *Id.* at 326.

356. *Id.*

357. See, e.g., *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

to self-determination. Currently, the pendulum swings too far in the opposite direction, and elders have little recourse if they are victims of bullying, especially if they are not members of a protected class.

Including the elderly within the definition of bullying helps both reconceptualize the problem and provide a means for redress, if necessary. But, it is important to acknowledge elders' unique needs and position in life. Otherwise, a law by itself could be even less helpful for elders than for children. For example, although states like California have enacted legislation to protect elders from abuse, many claims are never litigated.³⁵⁸

Abuse or bullying claims in particular are especially challenging by their nature. First, elder abuse claims are often underreported.³⁵⁹ In addition to broad definitional problems, victims may be fearful of retaliation, be too proud to admit that they were vulnerable, or be too ashamed to report the incident.³⁶⁰ Second, litigation is stressful and time-consuming. Especially if the victim has any health, cognitive, or emotional concerns, he or she may not want to add to those concerns by commencing litigation. For older clients, many of the frail elderly do not survive long enough for a lawsuit to come to judgment.³⁶¹

Even though passing a law by itself is insufficient to solving a problem, it is a necessary step as part of a comprehensive solution. A law would provide elders with a legal remedy should they choose to seek it. Acknowledging the reality that many elders may not pursue a legal remedy because of their life expectancy, financial resources, or distrust of the legal system, the availability of a legal cause of action is important because it at least provides a mechanism to seek recourse if needed.

Take Marsha Wetzel, for example. If she could have brought her claim under an anti-bullying statute as opposed to the FHA claim, her process would likely have been much faster. Instead, her claim was in-

358. Daniel L. Madow, *Why Many Meritorious Elder Abuse Cases in California Are Not Litigated*, 47 U. S.F. L. REV. 619, 620 (2013) [hereinafter Madow].

359. *Id.*

360. *Id.*

361. Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, PROB. & PROP. 52, 56 (1998).

initially dismissed by the district court, and she had to appeal to the Seventh Circuit.³⁶² The Seventh Circuit reinstated her claim, and she is still pursuing her action.³⁶³

Laws, generally, and anti-bullying laws specifically, demonstrate a commitment to prevent a type of behavior. By passing laws protecting elders from bullying, states demonstrate a general commitment to equality that could likely result in protecting elders from bullying.³⁶⁴ But alone, laws are not enough, institutions must also take action.

3. CLIMATE AND EDUCATION

Even though some suggest that anti-bullying programs have the opposite effect,³⁶⁵ characteristics of effective systems are determinable. By using data from schools, programs can be crafted for nursing homes that supplement legislation and help support the elderly.³⁶⁶ This section recommends that institutions focus on creating a positive culture using research-based strategies, providing education for staff, and providing education and support for residents.

Researchers on adolescent bullying consistently argue that laws alone are ineffective.³⁶⁷ Instead, schools should focus on climate and preventative efforts.³⁶⁸ As opposed to only legal liability, the degree to which an institution implements best practices to create a climate that promotes respect for individual differences and dignity among students matters.³⁶⁹ Institutions that focus on climate and preventative efforts have been shown to be effective in preventing bullying in schools.³⁷⁰

362. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

363. *Wetzel v. Glen St. Andrew Living Community*, LAMDA LEGAL, https://www.lambdalegal.org/in-court/cases/il_wetzel-v-glen-st-andrew (last visited Sept. 9, 2019).

364. Waldman, *supra* note 275, at 138 (noting that states that have demonstrated a general commitment to LGBTQ equality by enacting laws protecting people from discrimination are far more likely to report lower rates of bullying, cyberbullying, and suicidal thoughts than states that have passed laws that permit discrimination against the LGBTQ community).

365. Allie Bidwell, *Study: Anti-Bullying Programs May Have Opposite Effect*, U.S. NEWS & WORLD REP. (Sept. 13, 2013, 12:34 PM), <https://www.usnews.com/news/articles/2013/09/13/study-anti-bullying-programs-may-have-opposite-effect>.

366. SACCO ET AL., *supra* note 272, at 22.

367. *Id.*

368. *Id.*

369. Holben & Zirkel, *supra* note 311, at 328.

370. *Id.*

Institutions such as nursing homes and assisted living centers should focus on climate and preventative efforts to prevent aggression between residents. Although some nursing homes have procedures in place to handle “bad behavior” or conflicts between residents,³⁷¹ proactive measures that have been shown to be effective in schools can and should be adopted by institutions.

Research related to empirically supported bullying prevention programs at the school level is similarly useful in settings with elders.³⁷² Even though the age and developmental needs of the individuals are different, many of the strategies are the same to change an institution’s culture. These strategies include: assessing the extent and nature of bullying, obtaining the support, buy-in, and commitment of all key stakeholders, providing in-service trainings for teachers and other school staff, establishing policies that include expectations for behavior, and increasing adult supervision in areas where bullying occurs most frequently.³⁷³

Although “adult supervision” will look different for elders, staff in nursing homes or assisted living communities should be trained in order to create cultures that effectively prevent bullying. Staff should know how to identify potential aggressors and victims of bullying. Staff should also know how to respond if and when incidents are reported. Here again, research from schools is insightful.³⁷⁴ Research from school settings can translate to communal settings as many indicators of bullying are similar.³⁷⁵

Finally, residents of assisted living facilities and nursing homes should have greater awareness of elder bullying. Because communal settings may involve a wide variety of older adults, challenging social interactions can and will likely occur.³⁷⁶ Some negative interactions may

371. See, e.g., *Protect Your Loved One From Nursing Home Bullying*, ROCHESTER ELDER LAW (July 10, 2018), <https://rochesterelderlaw.com/protect-loved-one-nursing-home-bullying/> (advocating that caregivers ask nursing homes or assisted living facilities a list of questions related to handling “bad behavior,” conflict resolution, and staff training related to conflicts and bullying among residents).

372. See generally DUPPER, *supra* note 323.

373. *Id.* at 74.

374. See generally *id.*

375. See MARY A. LENTZ, LENTZ SCHOOL SECURITY, STUDENT BULLYING WARNING SIGNS CHECKLIST (2018); see also BONIFAS, *supra* note 7, at 13–14 (detailing checklists for elderly in communal settings).

376. BONIFAS, *supra* note 7, at 18.

arise from people interacting with the “diversity of values, perspectives, and lifestyles that exist among individuals living or participating in these settings.”³⁷⁷ If an individual is also experiencing loss, declining physical health, financial insecurity, reduced productivity, or greater dependence on others, that person may respond by taking out their negative emotions on those around them.³⁷⁸

If the culture is monitored and staff know to watch for behaviors, potential bullies could be provided services to cope with loss before reacting in a negative way. Because “engaging in bullying and relationally aggressive behaviors requires a certain level of cognitive and social acuity,”³⁷⁹ such individuals should instead be treated for any loss he or she may be suffering. Moreover, “Senior living environments with higher functioning residents tend to have more problems with bullying because such individuals possess the necessary memory and organizational skills to engage in planned behaviors.”³⁸⁰

V. Conclusion

Research suggests that at least as many elders are bullied as high-schoolers nationwide.³⁸¹ Current bullying estimates misjudge the problem, since staff acknowledge higher rates of bullying but also acknowledge an inability or unwillingness to acknowledge a problem.³⁸² As the population ages and the number of elderly residents living together in communal settings increases, bullying among residents will likely only continue to rise.

Current federal solutions are inadequate. Federal civil rights laws, such as the Fair Housing Act, require one to be within a protected category in order to seek relief.³⁸³ National legislation such as the Nursing

377. *Id.*

378. *Id.* at 19.

379. *Id.*

380. *Id.*

381. Debra Pressey, *Bullying just as prevalent in senior-living centers as in schools*, THE NEWS-GAZETTE (Aug. 17, 2018), <https://www.news-gazette.com/news/local/2018-08-17/bullying-just-prevalent-senior-living-centers-schools.html>.

382. *Id.*

383. See *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018).

Home Reform Act is too narrow in scope since it is aimed at staff-resident relationships.³⁸⁴ Despite the Elder Justice Act's attempt at providing a comprehensive response to elder abuse broadly, it has failed to receive sufficient funding.³⁸⁵

Although state laws offer more promising solutions, reform of existing law is necessary to create effective anti-bullying laws appropriate for elders. Many state laws are piecemeal as a result of being created in response to tragic events.³⁸⁶ Most state laws do not reflect research-based definitions of bullying and instead conflate bullying and harassment.³⁸⁷

Effective remedies for elders are threefold: amending legislation to align with bullying's three characteristics (and therefore, including elders); providing a private right of action in state legislation; and implementing research-based programming in communal living centers.

Just as our American understanding of bullying developed throughout the 1900s, so too must our current understanding change. Bullying is no longer an issue that solely impacts adolescents. Adopting these remedies provides elders and their families proactive and reactive solutions so that elders are no longer ignored.

384. 42 U.S.C. § 1396r(b) (2018).

385. Sedigh, *supra* note 260.

386. Pelley, *supra* note 302.

387. *See generally* Cornell & Limber 2, *supra* note 317.

