

# **BULLYING OR SEXUAL HARASSMENT? THE MISSING DISCOURSE OF RIGHTS IN AN ERA OF ZERO TOLERANCE**

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## **I. INTRODUCTION**

In April 2002, at opposite sides of the country, two events were taking place that illustrate, on the one hand, the amount of regulation and control that youth are subjected to in their school lives, and on the other hand, the ways in which these new regulations and laws are supposed to serve as a savior for children's safety in schools.

At Rancho Bernardo High School in San Diego County, in order to gain admission to a Friday evening school dance, girls were told that they needed to lift their skirts to prove they were wearing underwear.<sup>1</sup> This directive was given by a female assistant principal, with no advance warning to the girls, and the girls were required to do this lifting in public and in mixed company. Those girls who refused to lift their skirts were denied admission to the dance.

Meanwhile, at the opposite side of the country, in a small Vermont state courtroom in St. Johnsbury, a middle school boy and his parents were in the midst of a week long jury trial. Using the state's new anti-bullying law, the boy's parents had filed complaints against the school district alleging that over the course of several years, his classmates had harassed him on the school bus and in his homeroom, and had accused him of being gay because he was not like other boys.<sup>2</sup> After initially complaining to school administrators, who had dismissed the charges as typical boy behavior, the parents filed a complaint with the Vermont Human Rights Commission. They then sued the school district requesting relief in state court under the new

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1. Darcia Harris Bowman, *California Vice Principal on Leave for Student Underwear Check*, EDUC. WK., May 8, 2002, at 4.

2. Ellen Cronin, *School Bullying Trial Under Way*, CALEDONIAN REC., Apr. 9, 2002, available at [http://www.caledonianrecord.com/pages/local\\_news/story/13e44f05b](http://www.caledonianrecord.com/pages/local_news/story/13e44f05b).

Vermont anti-bullying state law.<sup>3</sup> However, in the end, the jury sided with the school district.<sup>4</sup>

These two incidents offer a revealing glimpse into the lives of youth in schools today, and the ways in which laws are locally interpreted, applied, misapplied or ignored, be they old federal laws<sup>5</sup> or new state laws.<sup>6</sup> In the case of the girls at Rancho Bernardo High School, the female assistant principal seemed not to know about Title IX or she did not think that it applied to her behavior. At the very least, she seemed unaware of the liability that her conduct might bring upon the school district. She felt that her administrative decisions to have (1) singled out only the girls (sex discrimination) for this underwear check, and (2) directed them to lift their skirts in public (sexual harassment) were justified by experiences from previous years when girls had lifted their skirts and flashed their naked undersides (a/k/a “moonning”).<sup>7</sup> No doubt she was motivated by a popular notion of “school safety” and all that the era of zero tolerance had given her—the justification to commit gross violations of students’ rights to privacy, expression, due process and more, all in the name of creating a safe, authoritarian school.

It is easy to ridicule her. Any reasonable person is left to wonder about administrators, like her, who think their authority extends to monitoring the underwear worn by their students, especially when the underwear is not visible. It is also stunning that this assistant principal remained unaware that her conduct was in violation of federal Civil Rights in Education Law (Title IX) and could bring liability upon her employer, the school district.

But, in an age of zero tolerance, the public performance of body checks may not be such an anomaly. The assistant principal at Rancho Bernardo High School is hardly alone in her inflated sense of the power that school officials have over students. In March 2002, for example, two teachers in Kansas City strip-searched twenty-three third grade students in search of five dollars in missing lunch money.<sup>8</sup>

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3. Telephone Interview with Eileen Blackwood, Attorney, representing the Vermont middle school boy and his family (Sept. 17, 2002).

4. Ellen Cronin, *Jury Favors School District in Bully Case*, CALEDONIAN REC., Apr. 13, 2002, available at [http://www.caledonianrecord.com/pages/top\\_news/story/ae7865ecc](http://www.caledonianrecord.com/pages/top_news/story/ae7865ecc); *Solid District Defense in Bully Case*, CALEDONIAN REC., Apr. 18, 2002, available at <http://www.caledonianrecord.com/pages/editorials/story/b4ad5bfc1>.

5. Federal Law Title IX of the Education Amendments, passed in 1972, 20 U.S.C. § 1681(1) (1999).

6. VT. STAT. ANN. tit.16, § 565 (2000).

7. Eleanor Yang, *School Dance Incident Sparks Furor*, SAN DIEGO UNION-TRIB., May 1, 2002, at N1; Eleanor Yang, *Rancho Bernardo High Official Suspended Over Underwear Inspection*, SAN DIEGO UNION-TRIB., May 1, 2002, available at <http://www.signonsandiego.com/news/northcountry/20020430--n57037.html>; Eleanor Yang, *Assistant Principal on Leave*, SAN DIEGO UNION-TRIB., May 2, 2002, at N1; Eleanor Yang, *Freak-Dance Fever Really Has Schools Freaking Out*, SAN DIEGO UNION-TRIB., May 12, 2002, at N1. See Chris Moran, *Assistant Principals Are Enforcers*, SAN DIEGO UNION-TRIB., May 5, 2002, available at [http://www.signonsandiego.com/news/metro/20020505-9999\\_1m5sklvice.html](http://www.signonsandiego.com/news/metro/20020505-9999_1m5sklvice.html).

8. John Gehring, *K.C. Students Strip-Searches Over Missing Lunch Money*, EDUC. WK., Apr. 3, 2002, at 4.

Although it can be extremely dangerous for students to challenge authority, there were young women at the school dance who said *no*—they refused to lift their skirts, and were denied admission to the school dance.<sup>9</sup> Whether they said *no* out of embarrassment or out of a sense that the request violated their legal rights, they nonetheless defied an administrator who held enormous power over them. During an era when such defiance of authority could have resulted in suspension or expulsion and have permanently derailed their educational careers, they acted upon some inner guide that told them what was being demanded was unreasonable, intrusive, and wrong. Luckily, in their case, there were others who shared in their indignation and the assistant principal was suspended (“put on administrative leave”).<sup>10</sup> In the end, she was demoted from the rank of administrator to that of a teacher,<sup>11</sup> which could be construed as an insult to the teaching profession.

On the other hand, laws are often a source of hope for justice, and have been used by students to address, and sometimes successfully rectify, their grievances.<sup>12</sup> The case of the middle school boy in Vermont exemplifies this faith that a new state law would come to his aid. Sadly, though, because his case was litigated in state court, federal civil rights laws, which would have been accessible had the case been tried in federal court, were not invoked.<sup>13</sup> As well-intentioned as this Vermont law may be, in addition to other laws in that state’s human rights/civil rights repertoire, it fell short of his family’s hopes, and the hopes that had swirled around the new law.

The Vermont case, relying on a new state anti-bullying law, also demonstrates the way in which the bullying discourse has replaced the rights

9. Barbara Whitaker, *Parents Outraged at Official Who Checked Girls’ Underwear*, N.Y. TIMES, May 1, 2002, at A21; Dan Whitcomb, *Girls Made to Show Panties at High School Dance*, SAN DIEGO UNION-TRIBUNE, Apr. 30, 2002, available at <http://www.signonsandiego.com/news/northcounty/20020430-1321-life-panties.html>; Dan Whitcomb, *Vice Principal Placed on Leave for Checking Girls’ Underwear*, BOSTON GLOBE, May 2, 2002 at A4; Yang, *School Dance Incident Sparks Furor*, *supra* note 7; Yang, *Assistant Principal on Leave*, *supra* note 7; Yang, *Freak-Dance Fever Really Has Schools Freaking Out*, *supra* note 7; Eleanor Yang, *Girls Made to Show Underwear at High School Dance*, SAN DIEGO UNION-TRIB., Apr. 30, 2002, available at <http://www.signonsandiego.com/news/northcounty/20020430--n57037.html>; Yang, *Rancho Bernardo High Official Suspended Over Underwear Inspection*, *supra* note 7.

10. Whitcomb, *Girls Made to Show Panties at High School Dance*, *supra* note 9; Whitcomb, *Vice Principal Placed on Leave for Checking Girls’ Underwear*, *supra* note 9; Yang, *School Dance Incident Sparks Furor*, *supra* note 7; Yang, *Assistant Principal on Leave*, *supra* note 7; Yang, *Freak-Dance Fever Really Has Schools Freaking Out*, *supra* note 7; Yang, *Girls Made to Show Underwear at High School Dance*, *supra* note 9; Yang, *Rancho Bernardo High Official Suspended Over Underwear Inspection*, *supra* note 7.

11. *Administrator Demoted For Underwear-Check at Dance*, EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT, Aug. 2002, at 9.

12. *E.g.*, *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

13. *See Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37 (1999); Telephone Interview with Eileen Blackwood, Attorney, *supra* note 3.

discourse. And this transformation to an emphasis on bullying may dilute the discourse of rights by minimizing or obscuring harassment.<sup>14</sup>

Since the shootings at Columbine High School in April 1999, state legislators across the United States have furiously reinserted themselves into educational policy by passing a variety of new state laws meant to enhance school safety.<sup>15</sup> These state laws include requirements for schools to implement and strengthen zero-tolerance policies (for weapons, drugs, threats, and a wide variety of rule violations, etc.) as the panacea for school safety, relying upon punitive and mandatory suspensions and expulsions as the primary means to achieve safe schools. Recently, as an additional strategy to create safe schools, state legislatures have borrowed a term from the psychological literature and have passed new laws against “bullying.”<sup>16</sup>

Analysis of the state laws on bullying or anti-harassment that were passed as of summer 2002 shows three different discourses and approaches to school safety: (1) anti-bullying alone;<sup>17</sup> (2) anti-harassment which typically mentions sexual harassment;<sup>18</sup> or (3) expansive anti-harassment measures with explicit protections for gay and lesbian students.<sup>19</sup> The details of these laws vary widely. Some offer financial incentives, and impose curricular mandates while providing a working definition. Others require teacher training for the staff or counseling services for the students.<sup>20</sup> On the other hand, some state laws only suggest minor changes with little state oversight, such as the voluntary adoption of a model policy or the addition of the term bullying to the school discipline code or into character education classes.<sup>21</sup> Some of these new state laws read like Hate Crime legislation,<sup>22</sup> while others attach themselves to the zero tolerance bandwagon and are thus very punitive,<sup>23</sup> while others laws offer

14. *Vt. School Cleared in Harass Case*, BOSTON GLOBE, Apr. 15, 2002, at B2.

15. Nat'l Conference of State Legislators, *Select School Safety Enactments (1994–2001)*, at <http://www.ncsl.org/programs/cyf/safetyenac.htm> (last visited Sept. 6, 2003).

16. Rosa Garza, Summary of Anti-Bullying and Anti-Harassment in Schools Legislation (May 9, 2003) (unpublished manuscript, on file with author); Memorandum from Danielle Brandstetter, to Howard Davidson, Am. Bar Ass'n. Ctr. on Children & the Law (Aug. 10, 2001); *State Legislative Proposals to Control Bullying and Harassment in Schools*, EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT, June 2001, at 3; *State Anti-Bullying and Anti-Harassment Laws Enacted*, EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT, June 2001, at 5.

17. *E.g.*, COLO. REV. STAT. § 22-32-109.1 (2001); N.H. REV. STAT. ANN. § 193-F:1–4 (2000); 105 ILL. COMP. ANN. STAT. § 5/10-20.14 (2001); H.B. 7502, 2001 Gen. Assem., Spec. Sess. (Conn. 2001); S.H.B. 5425, 2002 Gen. Assem., Reg. Sess. (Conn. 2002).

18. *E.g.*, VT. STAT. ANN. tit. 16, § 565 (2000); NEV. REV. STAT. 388.121 to 388.139 (2001); OR. REV. STAT. §§ 339.351–339.364 (2001); W. VA. CODE § 18-2C (2001).

19. *E.g.*, H.B. 257, 22d Leg., 1st Sess. (Alaska 2001); 2002 Cal. Legis. Serv. 506 (S.B. 1667) (West); 2002 Me. Legis. Serv. 1734 (West); 2002 N. J. Sess. Law Serv. 1874, 1526 (West); MINN. STAT. ANN. § 120B.22 (2000), H.B. 1444, 57th Leg., 2d Sess. (Wash. 2001) (enacted); Assemb. 2634, 224th Leg. Sess. (N.Y. 2001).

20. MINN. STAT. ANN. § 120B.22 (2000).

21. Garza, *supra* note 16; Brandstetter, *supra* note 16.

22. CAL. EDUC. CODE § 32228.1 (West 1999).

23. Required by the statute in H.R. 63, 185th Gen. Assem., Reg. Sess. (Pa. 2001); encouraged in the statutes 105 ILL. COMP. ANN. STAT. § 5/10-20.14 (2001) and LA. REV. STAT. ANN. § 17:416.13 (West 2001).

comprehensive protections of marginalized student populations;<sup>24</sup> while other states' statutes mention protections for disabled students.<sup>25</sup>

The focus of this Article is to critique these anti-bullying laws and the larger framework of school safety in which these laws sit. Irrespective of the various formulations of these laws (as bullying, as anti-harassment, or as anti-harassment-plus), the ways in which school personnel interpret, selectively apply, ignore, or reinvent them has even greater consequences for the children than the mere fact that these topics have been addressed by state legislatures.

There are two broad consequences of these anti-bullying laws. The first is to further de-gender school safety by the use of the gender-neutral term, bullying. While sometimes employing psychotherapeutic language (as bullying is a term that has been transplanted from thirty years in the psychological literature<sup>26</sup>), anti-bullying legislation may serve to undermine the legal rights and protections offered by anti-harassment laws. A second consequence is to shift the discussion of school safety away from a larger civil rights framework (racial and sexual harassment) to one that focuses on, pathologizes, and in some cases, demonizes individual behavior—a/k/a the bully.<sup>27</sup>

## II. BULLYING DISCOURSE AND BACKGROUND

In the United States, the discourse around bullying is a relatively new phenomenon, in large part imported from the Europeans and the research conducted there since the 1970s.<sup>28</sup> Prior to the emphasis on bullying as a new trend for United States educators and researchers, redress of injustices and wrongs were addressed through civil and constitutional rights.<sup>29</sup> Sexual harassment and sex discrimination laws grew out of the larger civil rights movement of the 1960s, and the equal employment rights movement of the 1960s and 1970s.<sup>30</sup> However, those linkages and

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24. For sexual orientation in statutes, see H.B. 257, 22d Leg., 1st Sess. (Alaska 2001); CAL. EDUC. CODE § 32228.1 (West 1999); LA. REV. STAT. ANN. § 17:416.13 (West 2001); 2002 N. J. Sess. Law Serv. 1874, 1526 (West); Assemb. 2634, 224th Leg. Sess. (N.Y. 2001).

25. CAL. EDUC. CODE § 32228.1 (West 1999); Assemb. 2634, 224th Leg. Sess. (N.Y. 2001).

26. See DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (1993); Yvette Ahmad & Peter K. Smith, *Bullying in Schools and the Issue of Sex Differences*, in MALE VIOLENCE 70 (John Archer ed., 1994).

27. Nan Stein, *What a Difference a Discipline Makes: Bullying Research and Future Directions*, 2 J. EMOTIONAL ABUSE 1 (2001).

28. E.g., OLWEUS, BULLYING AT SCHOOL, *supra* note 26; Ahmad & Smith, *supra* note 26.

29. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

30. LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB (1978); JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (1991); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); CATHARINE A. MACKINNON, SEX EQUALITY (2001); KAREN O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS (1980); Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970's*, FEMINIST STUDIES (forthcoming 2003).

legacies are now in jeopardy: the discourse of bullying may ellipse the rights discourse.

Research on peer-to-peer sexual harassment in K–12 education has been underway since the late 1970s<sup>31</sup> and more formally undertaken in the 1990s through survey research.<sup>32</sup> Sexual harassment in schools ranges from jokes, comments, graffiti, sexually degrading skits, bra snapping, pulling pants down, and skirt flipping, to attempted sexual assault and rape.<sup>33</sup> These behaviors are often conducted in public, sometimes in front of adults and school personnel who do not intervene, or who respond with a wink and a nod.<sup>34</sup> Such reactions from the adults give the students, be they the witnesses, the targets or the perpetrators, the sense that sexual harassment conduct is considered normal and appropriate.<sup>35</sup> The take-home lesson then becomes that if such conduct is permitted in public, with adults watching, then what is to stop the students from thinking these sorts of behaviors are appropriate in private. Permission to proceed with harassing, violent, and battering behaviors in private becomes normalized and appropriate in part because it is tolerated in public.<sup>36</sup> Schools may serve as the training grounds for domestic violence and sexual assault through the public performance of sexual harassment and gendered violence.<sup>37</sup>

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31. Nan Stein, *Sexual Harassment of High School Students: Preliminary Research Results* (Apr. 28, 1981) (unpublished manuscript, on file with author); Susan Strauss, *Sexual Harassment in the School: Legal Implications for Principals*, 72 NAT'L ASS'N SECONDARY SCH. PRINCIPALS BULL. 93 (1988); Karen Bogart & Nan Stein, *Breaking the Silence: Sexual Harassment in Education*, 64 PEABODY J. EDUC. 146 (1987); NAN STEIN, *CLASSROOMS AND COURTROOMS: FACING SEXUAL HARASSMENT IN K–12 SCHOOLS* (1999); Susan Fineran & Larry Bennett, *Gender Issues of Peer Sexual Harassment Among Teenagers*, 14 J. INTERPERSONAL VIOLENCE 626 (1999). See Susan Fineran & Larry Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 SOC. WORK 55 (1998).

32. AM. ASS'N. OF UNIV. WOMEN, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS*, (1993); AM. ASS'N. OF UNIV. WOMEN & HARRIS INTERACTIVE, *HOSTILE HALLWAYS: BULLYING, TEASING AND SEXUAL HARASSMENT IN SCHOOL* (2001); NAN STEIN ET AL., *SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS* (1993); STEIN, *CLASSROOMS AND COURTROOMS*, *supra* note 31.

33. Nan Stein, *No Laughing Matter: Sexual Harassment in K–12 Schools*, in *TRANSFORMING A RAPE CULTURE* 311 (Emile Buchwald et al. eds., 1993); Nan D. Stein, *It Happens Here, Too: Sexual Harassment and Child Sexual Abuse in Elementary and Secondary Schools*, in *GENDER AND EDUCATION: 92ND YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION PART I* 191 (Sari K. Biklen & Diane Pollard eds., 1993); STEIN, *CLASSROOMS AND COURTROOMS*, *supra* note 31; AM. ASS'N. OF UNIV. WOMEN, *HOSTILE HALLWAYS*, *supra* note 32; AM. ASS'N. OF UNIV. WOMEN & HARRIS INTERACTIVE, *supra* note 32.

34. Nan Stein, *Secrets in Public: Sexual Harassment in Public (and Private) Schools* (Ctr. for Res. on Women, Working Papers Series No. 256, 1993); Stein, *No Laughing Matter*, *supra* note 33; Stein, *It Happens Here*, *supra* note 33; Nan Stein, *Sexual Harassment in School: The Public Performance of Gendered Violence*, 65 HARV. EDUC. REV. 145 (1995); STEIN, *CLASSROOMS AND COURTROOMS*, *supra* note 31.

35. Stein, *Secrets in Public*, *supra* note 34; Stein, *Sexual Harassment in School*, *supra* note 34; STEIN, *CLASSROOMS AND COURTROOMS*, *supra* note 31.

36. Stein, *Secrets in Public*, *supra* note 34; Stein, *Sexual Harassment in School*, *supra* note 34; STEIN, *CLASSROOMS AND COURTROOMS*, *supra* note 31.

37. Stein, *Sexual Harassment in School*, *supra* note 34.

Unfortunately, anti-bullying laws may serve to dilute the discourse of rights by minimizing or obscuring harassment. When schools put these new anti-bullying laws and policies into practice, the policies are often overly broad and arbitrary, resulting in students being suspended or expelled from schools for a variety of minor infractions.<sup>38</sup> On the other hand, sometimes egregious behaviors are framed by school personnel as bullying, when in fact they may constitute illegal sexual or gender harassment or even criminal hazing or assault.<sup>39</sup> In an era when school administrators are afraid of being sued for civil rights and harassment violations as a consequence of the May 1999 decision of the Supreme Court in the *Davis* case,<sup>40</sup> naming the illegal behaviors as “bullying” serves to deflect the school’s legal responsibility for the creation of a safe and equitable learning environment onto an individual or group of individuals as the culprit(s) liable for the illegal conduct.<sup>41</sup>

The details behind the *Davis* case demonstrate the implications of the bully versus harassment distinction. LaShonda Davis, a fifth grader, was touched, grabbed, and verbally harassed by a male classmate. The boy, who is only known by his initials, G.F., repeatedly attempted to touch LaShonda’s breasts and genital area, rubbed against her in a sexual manner, constantly asked her for sex, and in one instance, put a doorstop in his pants to simulate an erection and acted in a sexually suggestive manner.<sup>42</sup> By no stretch of the imagination was this boy subtle or was his behavior ambiguous; rather, it was persistent and unrelenting. Should these behaviors have been called bullying or sexual harassment? The answer to this question has a lot of consequences for LaShonda, for her assailant, and for the teachers and school administrators.

LaShonda did not respond passively to the boy’s behavior. Besides telling G.F. to stop, she also told her teachers. Her parents also complained to her teachers, and asked to have LaShonda’s seat moved. But her teachers and school officials did nothing, not even separate the two students, who sat next to each other. G.F.’s behavior was clearly having both psychological and academic consequences. After several months of this harassment, LaShonda’s grades fell and she wrote a suicide note. LaShonda’s parents filed a criminal complaint against the boy and also a federal civil rights lawsuit against the school district for permitting a sexually hostile environment to exist. In the criminal action, the boy pled guilty to sexual battery. Finally, after five years of legal battles and appeals, the U.S. Supreme Court, in a five-to-four decision, ruled that schools are liable for student-to-student sexual harassment if the school officials knew about the sexual harassment and failed to take action.

Moreover, the context and timing of the *Davis* decision proved to be crucial. It came one month after the shootings at Columbine High School in April 1999, putting the subject of sexual harassment in schools into the midst of the national conversation about school safety. The *Davis* decision was susceptible to being

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38. Nan Stein, *Sexual Harassment Meets Zero Tolerance: Life in K–12 Schools*, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* (William Ayers et al. eds., 2001).

39. Stein, *It Happens Here, Too*, *supra* note 33.

40. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

41. Stein, *supra* note 27.

42. Brake, *supra* note 13.

hijacked by the decidedly non-feminist, law and order crowd in the name of school safety, in the service of surveillance and control of children and the diminishment of their rights. The school violence prevention movement was dominated by zero tolerance—the rigid, punitive, “one-strike, you are out” notion of school safety.<sup>43</sup>

### III. IMPACT OF SCHOOL VIOLENCE MOVEMENT SINCE COLUMBINE HIGH SCHOOL SHOOTINGS

Prior to the shootings at Columbine High School, anti-bullying language, such as it was, resided in state laws on school safety, as opposed to being in separate self-standing laws on bullying. One example is the Georgia state law on school safety and violence<sup>44</sup> that used an amendment<sup>45</sup> to require a comprehensive character education program developed by the State Board of Education to discourage bullying. The following characteristics were singled out as those to be included in the character education program for students in grades K–12: “Courage, patriotism, citizenship, honesty, fairness, respect for others, kindness, cooperation, self-respect, self-control, courtesy, compassion, tolerance, diligence, generosity, punctuality, cleanliness, cheerfulness, school pride, respect for the environment, respect for the creator, patience, creativity, sportsmanship, loyalty, perseverance and virtue.”<sup>46</sup>

My hunch is that, after Columbine and the ensuing panic and distress (and lawsuits) that those shootings caused, the anti-bullying dimension of character education was not strong enough to satisfy the general public and state legislators. States responded by formulating new anti-bullying laws. New Hampshire<sup>47</sup> and Colorado<sup>48</sup> were the first states to pass anti-bullying laws in 2000–2001. A slew of other states passed their own separate anti-bullying or anti-harassment laws in rapid sequence.<sup>49</sup>

In some cases, these new laws further diminished the rights discourse because only anti-bullying terms were used, and the gendered dimension of bullying, let alone that of harassment, became extinct. It is as if “bullying” became the euphemism for other behaviors that school officials did not want to name, like racism, homophobia, sexism, or hate crimes. In a matter of years, the twenty plus years of a discourse of rights was moving to the personal and more psychological discourse of bullying.

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43. U.S. DEP’T. OF EDUC. & U.S. DEP’T. OF JUST., ANNUAL REPORT ON SCHOOL SAFETY, available at <http://www.ed.gov/pubs/AnnSchoolRept98> (Oct. 1998); U.S. DEP’T. OF EDUC. & DEP’T. OF JUSTICE, ANNUAL REPORT ON SCHOOL SAFETY, at <http://www.ed.gov/PDFDocs/InterimAR.pdf> (1999).

44. 1999 Ga. Laws 282.

45. GA. CODE ANN. § 20-2-145 (2003).

46. *Id.* at lines 2–30 through 2–37.

47. N.H. REV. STAT. ANN. § 193-F:3 (2000).

48. COLO. REV. STAT. § 22-32-109.1 (2001).

49. *E.g.*, VT. STAT. ANN. tit. 16, § 565 (2000); W. VA. CODE § 18-2C (2001); 105 ILL. COMP. ANN. STAT. § 5/10-20.14 (2001); H.B. 1444, 57th Leg. 2d Sess. (Wash. 2001) (enacted); H.B. 7502, 2001 Gen. Assem., Spec. Sess. (Conn. 2001); S.H.B. 5425, 2002 Gen. Assem., Reg. Sess. (Conn. 2002).



Equally troubling was that some of these anti-bullying laws often aspired to, and embraced, zero tolerance, with its punitive, vague, and elastic language. For example, under the Colorado law that forbids “behavior causing distress,” might not almost any behavior qualify as “distressing?”<sup>50</sup> Bullying was now aligned with those laws and people who promoted suspensions and expulsions from school under the rubric of zero tolerance. The West Virginia law serves as an example of this thinking: although the law is called “harassment, intimidation or bullying prohibition,” and offers detailed steps for compliance by school officials, it nonetheless requires only disciplinary measures against the bully, and not counseling or behavior control measures. It also mentions by name an alignment with a “zero tolerance” approach.<sup>51</sup>

A conundrum emerges: there may be an urge by school administrators to name harassing behaviors as bullying in an attempt to exempt, deflect or diminish their legal liability. Yet, on the other hand, *Davis* plus Columbine placed sexual harassment into the zero tolerance arena—it was added to the long list of suspendable offenses.<sup>52</sup> Additionally, school administrators are able to self-righteously proclaim that they are taking action, with the suspension of a student, when they become aware of sexual harassment and thereby reduce their legal liability under *Davis*. The common features in this emerging, contradictory, messy paradox is the ever-expanding, elastic nature of the term bullying, as well as the ever-expanding list of behaviors for which there are zero tolerance mandates, coupled with the ever-expanding powers given to school administrators by these new laws on school safety. The only feature not expanding is children’s rights.

This punitive ideology of zero tolerance, which grew out of the manufacturing industry, and then the drug interdiction efforts of the late 1980s, framed first by the United States Attorney of San Diego, is predicated on removing children, not reforming children.<sup>53</sup> It has gone from zero tolerance for firearms to also include drugs, symbolic representations of drugs (a drawing of a marijuana leaf), alcohol, knives, skateboarding, threats, and all sorts of misbehaviors.<sup>54</sup> This framework both demonizes children and removes their entitlement to rights—that of free expression, association, and freedom from unreasonable search and seizure.

Children’s right to safety is also diminished by an expanded notion of zero tolerance. School reform efforts that address school safety have focused on the prevention of physical violence, particularly related to the presence and use of weapons in school, and relied on the development and enforcement of stricter

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50. COLO. REV. STAT. § 22-32-109.1.

51. W. VA. CODE § 18-2C.

52. Stein, *Sexual Harassment Meets Zero Tolerance*, *supra* note 38.

53. Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J. L. & POL. 747–779 (1999).

54. RUSSELL SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE (Ind. Educ. Policy Ctr., Policy Research Report No. SRS2, 2000), available at <http://www.indiana.edu/~safeschl/ztze> (Aug. 2000); ZERO TOLERANCE, *supra* note 38; Wasser, *supra* note 53; Ronnie Casella, *ZeroTolerance Policy in School: Rationale, Consequences, and Alternatives*, 105 TCHRS. C. REC. 872 (2003).

regulation and policing of students to make schools safer.<sup>55</sup> Development and implementation of policies within this framing of school safety tends to draw attention to the most extreme, least pervasive threat to school safety—violent crime. This construction of school safety eclipses other more pervasive aspects of school safety, including daily threats to psychological and social safety.<sup>56</sup>

Welcome to the post-Columbine world of schools. Students are controlled in ways that shred the U.S. Constitution and the Bill of Rights: they have been suspended retroactively for papers they have written, thoughts they have had, and for drawings.<sup>57</sup> In other cases, young elementary-aged school children have been suspended for comments they made in the heat of a touch football game or when the teacher would not permit them to go to the bathroom, which the administrators decided to take as death threats.<sup>58</sup> In a case from Jonesboro, Arkansas, an eight-year-old boy was suspended for pointing a chicken strip toward a teacher and saying “pow, pow.”<sup>59</sup> And, not surprisingly, zero tolerance has racial implications: disproportionate numbers of students of color have been suspended and expelled under zero tolerance policies.<sup>60</sup>

In a world like this, there is no need for teachers to use graduated interventions or progressive discipline. Zero tolerance is “one strike—you are out,” and it allows for no “teachable moments” or for the interjection of the professional assessment by teachers. In fact, it is an ideology that is insulting to teachers and their professional judgments.

This school safety mania/zero tolerance mantra is part of the larger punitive ideology and social policy that also includes trying minors as adults,<sup>61</sup> deterrence theories, mandatory sentencing, drug interdiction policy, capital punishment, and an overall general reduction of civil liberties of citizens.

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55. Ctr. Juv. & Crim. Just., *School House Hype: Two Years Later*, at <http://www.cjcj.org/pubs/schoolhouse/shh2.html> (last visited Sept. 6, 2003).

56. Nan Stein et al., *Gender Safety: A New Concept for Safer and More Equitable Schools*, 1 J. SCH. VIOLENCE 35 (2002).

57. *Mass. v. Milo M.*, 760 N.E.2d 967 (2001).

58. Kate Zernike, *Crackdown on Threats in School Fails a Test*, N.Y. TIMES, May 17, 2001, at 1, 21.

59. *Boy Suspended for Pointing Chicken Finger*, ASSOC. PRESS, Jan. 31, 2001, available at <http://archive.nandotimes.com/inoframes/story>.

60. SKIBA, *supra* note 54; Russell Skiba, *When Is Disproportionality Discrimination? The Overrepresentation of Black Students in School Suspension*, in ZERO TOLERANCE, *supra* note 38; TAMMY JOHNSON ET AL., RACIAL PROFILING AND PUNISHMENT IN U.S. PUBLIC SCHOOLS: HOW ZERO TOLERANCE POLICIES AND HIGH STAKES TESTING SUBVERT ACADEMIC EXCELLENCE AND RACIAL EQUITY (Applied Research Ctr. ed., 2001), at <http://www.arc.org/erase/downloads/profiling/pdf> (last modified Oct. 30, 2001); ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (2000), at [http://www.civilrightsproject.harvard.edu/research/discipline/call\\_opport.php](http://www.civilrightsproject.harvard.edu/research/discipline/call_opport.php) (June 2000).

61. Gang Violence and Juvenile Crime Prevention Act of 1998, 2000 Cal. Legis. Serv. Prop. 21 (West) (approved by voters Mar. 2000).

Bullying has become another behavior that is now covered by the realm of zero tolerance. Schools proudly state that they will not tolerate bullies; there are bully-buster posters around school buildings, new rules to cover bullying, and eradicating bullies is all the rage with state legislators. The larger unspoken trend, however, is to regulate groups of children—to predict and manage them as sites of potential danger. The rights discourse has been shifted to one of “dangerousness” and risk management—to exclude (as in zero tolerance—with its suspensions and expulsions) rather than to punish appropriately.<sup>62</sup>

#### IV. BULLYING RESEARCH

It is also illustrative to look at the world of research on bullying and harassment. It is my contention that the research studies on bullying that have been conducted in the United States have obscured or diluted gender/sexual harassment conduct by framing behaviors as bullying.<sup>63</sup> Only recently do we have access to a series of research studies conducted in the United States, meaning that we no longer have to rely solely on studies from other countries (predominately Norway, Sweden, Britain, Spain, Netherlands, Australia, Canada, and Japan). As groundbreaking and inspiring as those studies from other countries have been, their findings always posed lurking dangers and limitations for us in the United States. First of all, many of those countries have populations (northern Europe, in particular) that are much more homogenous than ours in the United States and any attempt to extrapolate their conclusions to our context was problematic. Secondly, all of those countries have much less overt public violence than the United States, so the meaning (and forms) of bullying varied greatly. These differences meant that we always had to approach the findings from other countries cautiously, because many of those countries do not provide us with a viable comparison sample or context.<sup>64</sup>

Moreover, the strategies that have been developed in other countries (all the European countries, Britain, Australia, Canada, Japan, etc.) to reduce and prevent bullying generally rely on the existence of a nationalized curriculum for elementary and secondary schools, thus permitting a coordinated, nationwide effort, something that is lacking in the United States context.<sup>65</sup> In the United States, not only is curriculum often uncoordinated state-by-state, but even building-by-building (and some would argue, classroom-by-classroom) within the same school district.<sup>66</sup>

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62. Malcolm M. Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* (David Nelken ed., 1994).

63. Stein, *What a Difference a Discipline Makes*, *supra* note 27.

64. *Id.*

65. *Id.*

66. Ellen Sanchez et al., *Preventing Bullying and Sexual Harrassment in Elementary Schools: The Expect Respect Model*, 2 J. EMOTIONAL ABUSE 157 (2001) (discussing a three-year coordinated effort of curriculum intervention on bullying with fifth graders); Natasha Howard et al., *Self-Efficacy in a New Training Model for the Prevention of Bullying in Schools*, 2 J. EMOTIONAL ABUSE 181(2001) (evaluating a much smaller study of the effectiveness of an intervention program that several of the authors had developed); Susan M. Swearer & Beth Doll, *Bullying in Schools: An Ecological Framework*, 2 J. EMOTIONAL ABUSE

However original and uniquely American the research has become, a very elastic definition of bullying seems to be in vogue, and is utilized by many researchers. Under the prevailing definition of bullying, almost anything has the potential to be called bullying, from raising one's eyebrow, giving "the evil eye," making faces (all very culturally constructed activities), to verbal expressions of preference towards particular people over others. A tyranny of sameness may be implicitly proposed in this pursuit to eradicate bullying behaviors. Yet, on the other hand, sometimes very egregious behaviors are named as bullying, when in fact they may constitute criminal hazing or sexual/gender harassment.<sup>67</sup>

A recent example of this bullying vs. harassment distortion was in the April 24, 2001 issue of *Journal of the American Medical Association*.<sup>68</sup> This study of nearly 16,000 6<sup>th</sup>–10<sup>th</sup> graders came from a World Health Organization instrument

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7 (2001) (arguing for an ecological framework within which to approach interventions to reduce bullying).

67. This expansionist trend among researchers to call all sorts of behaviors "bullying" may in fact be due to a lack of familiarity with other disciplines—in particular educational research, sociology, anthropology, and feminist legal scholarship. A wealth of studies and articles from researchers who have employed widely different methodologies have long argued for a gendered critique of children's behaviors, and in some cases, have named these behaviors as sexual harassment. Included among these scholars are Barrie Thorne [Barrie Thorne, *Girls and Boys Together...But Mostly Apart: Gender Arrangements in Elementary School*, in *MEN'S LIVES* 87 (Michael S. Kimmel & Michael A. Messner eds., 1989); BARRIE THORNE, *GENDER PLAY: GIRLS AND BOYS IN SCHOOL* (1993)]; Donna Eder [Donna Eder, *Sexual Aggression Within the School Culture*, in *GENDER, EQUITY, AND SCHOOLING: POLICY AND PRACTICE* 93 (Barbara Bank & Peter Hall eds., 1997); DONNA EDER ET AL., *SCHOOL TALK: GENDER AND ADOLESCENT CULTURE* (1995).]; Susan Fineran and Larry Bennett [Fineran & Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, *supra* note 31; Fineran & Bennett, *Gender Issues of Peer Sexual Harassment Among Teenagers*, *supra* note 31]; Janet Lever [Janet Lever, *Sex Differences in the Games Children Play*, 23 *SOC. PROBLEMS* 478 (1976)]; Valerie Lee and colleagues [Valerie E Lee et al., *The Culture of Sexual Harassment in Secondary Schools*, 33 *AM. EDUC. RES. J.* 383 (1996)]; Charol Shakeshaft [Charol Shakeshaft et al., *Peer Harassment in Schools*, 1 *J. JUST & CARING EDUC.* 30 (1995); Charol Shakeshaft et al., *Boys Call Me Cow*, 55 *EDUC. LEADERSHIP* 22–25 (Oct. 1, 1997); Charol Shakeshaft & Laurie Mandel, *Heterosexism in Middle Schools*, in *MASCULINITIES AT SCHOOL* 75 (Nancy Lesko ed., 2000).]; and Nan Stein [Bogart & Stein, *Breaking the Silence*, *supra* note 31; Stein, *Secrets in Public*, *supra* note 34; Stein, *No Laughing Matter*, *supra* note 33; Stein, *It Happens Here, Too*, *supra* note 33; Stein, *Sexual Harassment in School*, *supra* note 34; STEIN, *CLASSROOMS AND COURTROOMS*, *supra* note 31; Stein, *Sexual Harassment Meets Zero Tolerance*, *supra* note 38; Nan Stein, *Resisting Abuse: When Female Students Refuse to 'Lift Their Skirts' for Permission to Dance*, 21 *EDUC. WK.* 41 (June 12, 2002); Heather A. Meyer & Nan Stein, *School Policies on Sexual Harassment in an Era of Zero Tolerance*, Presented at the Am. Educ. Res. Ass'n Conf. (Apr. 2002)]. To a large extent, most bullying researchers are unfamiliar with disciplines outside of their own (psychology), and very few cite scholarship from other fields. While most of the researchers may acknowledge the existence of sexual harassment in schools as documented through survey research and recent legal developments in the U.S. Supreme Court, the field of bullying research will be greatly enhanced once it builds upon researchers from other fields who have long studied the arena of gender violence and sexual harassment in schools.

68. Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 *JAMA* 2094 (2001).

administered in 1998 in thirty countries. To cover so many countries, the original instrument had to develop questions and definitions that would make sense in all of the thirty participating countries. Thus, behaviors that legally could be sexual harassment or assault in the United States were framed as bullying for purposes of this survey—for example: being hit, slapped or pushed, spreading rumors or making sexual comments. Terms had to conform to definitions in thirty countries—from France to Indonesia.<sup>69</sup>

But the term “sexual harassment” was never raised—not by the researchers or in the accompanying article in JAMA written by public health researchers, Drs. Spivak and Prothrow-Stith.<sup>70</sup> What a missed opportunity, and what a distortion, in my mind. To engage 6<sup>th</sup>–10<sup>th</sup> graders in this discourse of bullying is to infantilize them and mislead them because some of the behaviors described as bullying are in fact criminal conduct, or could be covered by sexual harassment or other civil rights in education laws. I remain stunned as to why researchers, scholars and public health officials would avoid naming these behaviors as such.

Compare this JAMA article to the release two months later in June 2001 of two other studies which received very little publicity: one by Human Rights Watch about the harassment of gay and lesbian kids in United States schools,<sup>71</sup> and the second by the American Association of University Women Foundation and Harris poll<sup>72</sup> on sexual harassment in schools, where students of the same ages as those studied in the JAMA article were surveyed about their experiences with sexual harassment and gender harassment. In these studies, euphemisms were not used when describing behaviors that constitute sexual harassment.

In no way am I proposing that the word “bullying” be purged from the language, but rather that the word be utilized in an age appropriate way, with young children, rather than with teenagers. Young children, unlike teenagers, might be hard pressed to understand the concepts of sexual harassment or sexual violence. But, even if we use the term “bullying” instead of “harassment” with young children, schools cannot dismiss their legal liability, as much as some administrators and school boards might like, from having to abide by sexual harassment laws and to create schools that do not discriminate on the basis of sex.

The omission or denial of gender from the dominant construction of school safety and violence contributes to the disproportionate focus on the most extreme, rare forms of violence while the more insidious threats to safety are largely ignored.<sup>73</sup> An example of this failure to factor in the saliency of gender in school violence is reflected in the many reports and analyses of the spate of school shootings—the form

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69. Joel Best, *Monster Hype*, EDUC. NEXT, Summer 2002, at 50.

70. Howard Spivak & Deborah Prothrow-Stith, *The Need to Address Bullying—An Important Component of Violence Prevention*, 285 JAMA 2131 (2001).

71. HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001), at <http://www.hrw.org/reports/2001/uslgbt> (May 2001).

72. AM. ASS'N. OF UNIV. WOMEN & HARRIS INTERACTIVE, *supra* note 32.

73. Stein, *Sexual Harassment in School*, *supra* note 34; STEIN, CLASSROOMS AND COURTROOMS, *supra* note 31; MASCULINITIES AT SCHOOL, *supra* note 67; Stein et al., *Gender Safety*, *supra* note 56.

of school violence that has attracted the most national attention and incited the most panic.<sup>74</sup> In general, the school shootings have been widely reported in a gender-neutral way, when in fact the majority of these tragedies were perpetrated by White middle-class boys who were upset either about a break-up or rejection by a girl<sup>75</sup> or who did not meet traditional expectations and norms of masculinity<sup>76</sup> and were thus persecuted by their peers.<sup>77</sup>

This failure to consider the role of gender is also endemic to much of the bullying research studies. Researchers of bullying, for the most part, have unfortunately failed to consider the ways in which adolescent boys (and adult men) unmercifully police each other with rigid and conventional notions of masculinity and the imposition of compulsive heterosexuality. Not to factor in or even recognize these potent elements is to deny a central and operating feature in boy culture, namely the maniacally driven, tireless efforts to define oneself as “not gay.” Researchers such as Michael Kimmel,<sup>78</sup> R.W. Connell,<sup>79</sup> Michael Messner,<sup>80</sup> Joe Pleck,<sup>81</sup> and others have written about this phenomenon and its consequences for several decades, yet bullying researchers have failed to draw upon these findings.

Another example of this distortion or denial of gender has come with the publication of two new popular trade books that consider the phenomenon of meanness among girls. These two books: *Odd Girl Out: The Hidden Culture of Aggression in Girls*, by Rachel Simmons,<sup>82</sup> and *Queen Bees and Wannabes: Helping Your Daughter Survive Cliques, Gossip, Boyfriends, and Other Realities of Adolescence*, by Rosalind Wiseman,<sup>83</sup> are methodologically disturbing for several reasons. Neither author offers precise information on the number of girls that she interviewed nor any specific demographic information. Both books are highly anecdotal. They utilize personal, albeit painful stories, from which both authors then

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74. Michael S. Kimmel, *Snips and Snails . . . and Violent Urges*, NEWSDAY, Mar. 8, 2001 at A41, A44.

75. *E.g.*, Jonesboro, Arkansas; Pearl, Mississippi.

76. *E.g.*, Columbine, Colorado.

77. Kimmel, *supra* note 74; Daniel Perlstein, *Saying the Unsaid: Girl Killing and the Curriculum*, 14 J. CURRICULUM & SUPERVISION 88 (1998); DEADLY LESSONS: UNDERSTANDING LETHAL SCHOOL VIOLENCE (Mark H. Moore et al., eds. 2003), available at <http://www.nap.edu/books/0309084121/html>; BRYAN VOSSEKUILE ET AL., U.S. SECRET SERV. & U.S. DEP'T. OF EDUC., FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 2002, at [http://www.secretservice.gov/ntac/ssi\\_final\\_report.pdf](http://www.secretservice.gov/ntac/ssi_final_report.pdf) (May 2002).

78. MICHAEL S. KIMMEL, CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY (1987); MICHAEL S. KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY (1996); MICHAEL S. KIMMEL, THE GENDERED SOCIETY (2000).

79. R.W. CONNELL, GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS (1987); R.W. CONNELL, MASCULINITIES (1995).

80. Michael Messner, *Boyhood, Organized Sports and the Construction of Masculinities*, 18 J. CONTEMP. ETHNOGRAPHY 416 (1990).

81. JOSEPH H. PLECK, THE MYTH OF MASCULINITY (1981).

82. RACHEL SIMMONS, ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS (2002).

83. ROSALIND WISEMAN, QUEEN BEES AND WANNABES: HELPING YOUR DAUGHTER SURVIVE CLIQUES, GOSSIP, BOYFRIENDS, AND OTHER REALITIES OF ADOLESCENCE (2002).

attempt to generalize to the world of girls—as if girlhood were a monolithic entity, and as if girls somehow existed in a world comprised of only girls.

Criticisms of these books, despite the popularity of both, are emerging from common sense and from several academic disciplines, including criminology and social psychology. From the world of common sense (as opposed to an academic field) comes the question posed by the syndicated feminist columnist, Ellen Goodman, in one of her columns, “Wasn’t Columbine worse than a cruel instant message?”<sup>84</sup> It is important to keep in mind that it is male violence, not girl gossip, which makes the United States a violent place.

In a review of both books, criminologist and Professor Meda Chesney-Lind, captures the shortcomings evident in these books:

The myopic focus of these books blurs the fact that girls exist in a world that ignores and marginalizes them, all the while empowering young boys (whose physical and relational aggression against girls is virtually unmentioned by Simmons . . .). . . . The degree of harm is important. Some aggression makes us depressed and sad for a day or six, and some aggression we do not survive. Yet, the media hype surrounding the discovery of girls’ meanness seems to imply that this ‘new’ attribute makes girls about as violent as boys or worse. That is not the case: virtually all girls’ aggression is non-violent.<sup>85</sup>

From the field of social psychology, Carol Tarvis has identified additional limitations of these books.<sup>86</sup> The most obvious point that Tarvis makes is that these two authors conveniently overlook the fact that boys also engage in verbal name-calling.

As for the lack of male relational aggression, does Simmons think that boys do not resort to name-calling? Boys have always had an armamentarium of offensive names: racist slurs, homophobic aspersions, cruel names for boys who are fat, slow or ‘too smart.’ Boys do not exclude other boys of different ethnicities, or who are not as ‘masculine,’ cool, straight, athletic? Boys and men do not humiliate or ‘inflict psychological pain’ on their victims? Boys and men do not have cliques that exclude outsiders? Simmons needs to take an academic position for a year.<sup>87</sup>

Tarvis also offers a more rights-based criticism of Wiseman and Simmons insofar as their suggestions would reduce or eliminate students’ First Amendment rights. Tarvis writes about the restrictions that the authors would have schools impose:

Schools, she [Simmons] suggests, should prohibit not only ‘male’ forms of bullying and aggression, such as physical assault, but also

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84. Ellen Goodman, *Giving In to the Really Mean Girls*, BOSTON GLOBE, May 26, 2002, at D7.

85. Meda Chesney-Lind, *The Meaning of Mean*, WOMEN’S REV. OF BOOKS, Nov. 1, 2002, at 22.

86. Carol Tarvis, *Are Girls Really as Mean as Books Say They Are?*, CHRON. OF HIGHER EDUC., July 5, 2002, at B7–9.

87. *Id.*

'female' forms, such as 'rumor spreading, alliance building, secret telling, and severe episodes of nonverbal aggression.' She is blissfully unaware of the chilling effect such prohibitions would have on freedom of speech and assembly, let alone of how those stupid zero-tolerance rules have already been misused and directed at everyone from kindergartners to college professors. Now we are to regulate friendships and 'alliances'? Ban secrets?<sup>88</sup>

In summary, as a social psychologist, Tarvis knows well the seduction of psychologizing social problems—that approach points people to look inward for personal solutions, instead of looking at institutional, structural changes that need to be made.

## V. CONCLUSION

Anti-bullying laws take attention away from a larger discourse of collective, civil rights by focusing on individual peoples' feelings, on interpersonal relations, and on the individual bully and victim. In order to reduce the scope and impact of anti-bullying laws, which diminish children's rights as well as dilute the larger discourse of rights, researchers, lawyers and activists need to link anti-bullying laws to its older, bigger (and more dangerous) cousin, zero tolerance laws.

Momentum is growing against zero tolerance laws from the left, right and the middle.<sup>89</sup> Pressure for legal reform has come from juvenile rights lawyers;<sup>90</sup> parent, student and community activists;<sup>91</sup> academic researchers;<sup>92</sup> the American Bar Association House of Delegates;<sup>93</sup> and sometimes from a rare state legislator.<sup>94</sup>

While the larger challenge remains to dismantle zero tolerance laws, we also need to work to halt the passage of additional anti-bullying laws that may simply be a kinder, gentler and more seductive version of zero tolerance laws. The ideology of these anti-bullying laws punishes and excludes the bully; no one is reformed, only demonized. Rather than wake up one day to notice that our civil rights and anti-

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88. *Id.*

89. See the web sites of the Juvenile Law Center of Philadelphia ([www.jlc.org/ezt](http://www.jlc.org/ezt)), the Rutherford Institute, a Virginia-based conservative think tank ([www.rutherford.org](http://www.rutherford.org)), Justice Matters Institute of San Francisco ([www.justicematters.org](http://www.justicematters.org)), and a community group, [www.ztnightmares.com](http://www.ztnightmares.com), for more information.

90. *E.g.*, Juvenile Law Center of Philadelphia; Advancement Project in Washington, DC; Civil Rights Project at Harvard University; and The Children & Family Justice Center at Northwestern University Law School.

91. Examples are Catalyst in Milwaukee, Padres Unidos in Denver, FAIRCARE in San Francisco, Books not Bars in California, and Generation Y in Chicago.

92. A loosely affiliated group funded by the Open Society Institute of the Soros Foundation, which includes this author; see Stein, *Resisting Abuse*, *supra* note 67; SKIBA, *supra* note 54; Casella, *supra* note 54; ZERO TOLERANCE, *supra* note 38.

93. Am. Bar. Ass'n, Res. 103B, *available at* <http://www.abanet.org/crimjust/juvjus/zerotolres.html> (Feb. 19, 2001) ("[T]he ABA opposes in principle 'zero tolerance' policies . . .").

94. E-mails from Rep. Brad Marrs (Va.), to Catherine Krebs, Am. Bar Ass'n (July 2002) (on file with author).



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harassment laws have been eroded in the name of controlling meanness, we need to work towards restoring a discourse and framework of rights.