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Keeping Schools Out of Court: Legally Defensible Models of Leadership

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Abstract

This paper draws attention to a knowledge gap in leadership models regarding bullying, particularly cyberbullying, an emergent form of student harassment. Given that parents are suing schools for failing to protect victims of bullying, educators need guidance in addressing harassment and discriminatory discourse in popular youth culture.

The focus is on three important considerations: (1) the need to avoid criminalizing children and adolescents; (2) the need to clarify educators' legal obligations to protect students from psychological harm; and (3) the need to delimit educators' legal obligations to sustain school environments that reduce bullying and create equal opportunities for learning. Improved law-related courses, grounded in compatible theories on leadership, social justice, and ethics of care, are recommended for education students. Educators who take courses in these disciplines show great promise in helping schools navigate the unprecedented dilemmas of technology and pluralism through ethical and legally defensible alternatives.

Contemporary schools provide a milieu in which the exchange of differences in culture, morals, religion, and language has the potential to enrich students' lives. This setting also can produce an environment where competing rights, violence, discrimination, and exclusion of some students is a reality. As schools undergo changing demographics, numerous policies to promote equality and reduce discrimination, bullying, and violence have been introduced. These include multicultural, antiracism, and zero-tolerance

policies; critical incidence response strategies; and mission statements. The challenge is ensuring that the stated objectives of promoting “inclusive school climates” or “safe and caring school communities of learning” are implemented in actual practice (LaRocque and Shariff 2001, 5).

Research (Shariff 2003; LaRocque and Shariff 2001) has suggested that the plethora of initiatives schools currently employ are largely ineffective and counterproductive. Zero-tolerance policies that originate in military models of discipline (Skiba and Peterson 1999; Giroux 2003) and anti-bullying programs that tell victims to walk away from bullies ignore the realities that come with increased diversity, popular culture, and evolving technology. They also contradict mission and policy objectives to provide safe, caring, and inclusive school environments.

Cyberbullying is an emerging form of harassment that is the product of technological change. It poses a difficult challenge for educational leaders because it occurs in a virtual environment. Preliminary investigation has suggested that schools are reluctant to address this form of bullying despite its potential for long-term psychological harm to the students involved (Leishman 2002). While awareness of cyberbullying has increased, few have considered the extent of educators’ responsibilities to address it. This article addresses the knowledge gap in educational leadership related to harassment and bullying, specifically cyberbullying, discusses legal obligations, and outlines considerations for leadership models.

Bullying: Conditions, Forms, and Influences

Bullying typically adopts two forms: overt and covert. Overt bullying involves physical aggression, such as beating, kicking, shoving, and sexual touching. It can be accompanied by covert bullying, in which victims are excluded from peer groups, stalked, stared at, gossiped about, verbally threatened, and harassed (Olweus 2001; Pepler 1997). Covert bullying can be random or discriminatory—racial, sexual, homophobic, or based on social class, abilities, or disabilities (Shariff 2003). Victims can be selected based on their gender, manner of dress, accent, race, sexual orientation, abilities or disabilities, socioeconomic class, religious beliefs, or weight (Glover, Cartwright, and Gleeson 1998).

Cyberbullying is a form of covert bullying that involves the Internet. Perpetrators make anonymous hateful comments or threats, tease and engage in gossip through online chat rooms, and use e-mail to intimidate others. The consequences for victims can be psychologically devastating.

Teen Talk

An interesting irony is that teenagers often use insults and threats as terms of endearment. This makes it difficult for educators to recognize the line at which conversations move from friendly banter to bullying.

Teens often greet one another with statements like “Wass up daug?” They may chide a friend, “I’m going to kick your a—,” or tell a friend he’s “bad” (meaning he’s cool). They may challenge a friend to roughhouse, “Bring it on” (let’s fight). While important

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messages about social inequities, poverty, racism, drugs, and politics are embedded in some rap lyrics, stereotypic, homophobic, racist, sexist, and violent slurs are preponderate. Moreover, adolescent conversations increasingly are peppered with obscenities. Research confirms that much of this language, when directed at friends, is meant without harmful intent, and teachers often turn a blind eye because of its increasing prevalence in adolescent discourse (Shariff 2003; Devlin 1997).

Cultural studies scholars have suggested that because popular culture is so embedded in young people's discourse, it is better to work with it rather than resist it (Low 2001; Ibrahim 2003). They propose that rap music, poetry, and lyrics be included as part of the curriculum. Though this approach can give students opportunities to voice emotion and experiences and thus creatively empower student learning and expression, important questions need to be addressed in terms of bullying. For example, how can educators redirect students toward less racist, homophobic, and violent discourse when it is such an integral part of popular culture? Are teachers and school administrators equipped to recognize conditions of bullying if popular culture is brought into the curriculum? Will students use "official" versions in the classroom and revert to their original discriminatory meanings among themselves?

Recognizing Bullying

Six conditions generally are present in most bullying situations (Salmivalli 2001):

- a power imbalance;
- unwanted, deliberate, and relentless harassment;
- victim blame (e.g., being "gay" or being a "dork");
- the blame justifies exclusion;
- exclusion justifies the bullying; and
- approximately 30 percent of bystanders generally support the perpetrators.

All these conditions were present in a human rights claim filed by a Canadian student against his school (*Jubran v. North Vancouver School District et al.* 2002). Azmi Jubran's tormentors testified that taunts adults might interpret as homophobic are not always meant that way when directed toward friends. However, the same students testified that when directed at someone who is not a friend, the terms "dork," "geek," "gay," and "faggot" are used interchangeably as insults or put-downs.

Cyberbullying

Cyberbullying occurs when harassing school conversations continue through the Internet—an integral part of contemporary teenage culture and socialization. While the Internet has greatly facilitated communication and access to information, this medium allows covert verbal bullying to thrive. A recent survey found that 14 percent of young Canadian users had been threatened while using instant messaging and 16 percent admitted posting hateful comments (Leishman 2002). Disturbingly, Salmivalli (2001) discovered that the longer bullying continues, supporters increase in number and, concomitantly, the abuse intensifies. Students reported, "Over the Internet you don't really see their face or they don't see yours, and you don't have to look in their eyes and see they're hurt" (Leishman 2002, 1). In one instance, parents of an 11th-grade female came

home to find her pale, distraught, and frightened. She showed them an e-mail she had received, which stated, "You don't know me. But I know you. I've been watching you at school. If I were you, I'd be very scared. Sleep with one eye open. Down on your knees bitch!" (Shariff 2001, 1).

The reference to watching the girl at school brought the harassment into the realm of the school environment despite the fact that it was sent over the weekend from a home computer. School police liaison officers were unsuccessful in tracing the e-mail, but a male classmate eventually confessed that he and four others sent the e-mail from his home computer. Though school administrators were provided with the perpetrators' names, the boys were not disciplined because the e-mail was not sent from school. Consequently, the harassment continued at school, where the victim was stalked and verbally bullied by the boys, who called themselves "Raveger" (Shariff 2001, 1).

In the United States, another high school student, David Knight, lived a similar nightmare. David had been teased, taunted, kicked, threatened, and punched for most of his years in high school. In an interview with CBC National News (Leishman 2002), David explained that the most devastating aspect of the bullying was the humiliation he suffered every time he logged onto the Internet. Students from his school had set up a Web site about him where they continued the threats, insults, and gossip. David explained (Leishman 2002, 1):

Rather than just some people, say 30 in a cafeteria, hearing them all yell insults at you, it's up there for 6 billion people to see. Anyone with a computer can see it . . . and you can't get away from it. It doesn't go away when you come home from school. It made me feel even more trapped.

It took the threat of litigation against the Internet provider and David's school before the Web site was finally taken down—approximately six months after his family's initial request for removal (Leishman 2002).

A Wall of Defense

These examples illustrate the wall of defense victims encounter when they report a problem. Emerging litigation has suggested that schools often adopt a defensive stance when victims seek their support. Parents of the victims stated that when administrators and teachers were asked for help, they (1) assumed that victims invited the abuse; (2) said the problem was blown out of proportion by parents and accused them of harassing the school; and (3) assumed that written anti-bullying policies absolved the school from doing more to protect victims.

School officials' wall of defense stems from a fear of litigation, driven by insufficient knowledge and lack of clarity about the legal boundaries of their responsibilities to students. Research has suggested that schools have too much *information* on how to handle bullying, but insufficient *knowledge* about its complexities (LaRocque and Shariff 2001). Moreover, scholars explained that administrators often place a premium on management and control conflict through *reactive* responses.

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Herein lies the dilemma for schools. Clearly, school officials and teachers cannot supervise students outside school hours or constantly check their Internet discourses. Nonetheless, for students' protection, educators traditionally have been held to higher legal standards (Proudfoot and Hutchings 1988). These predicaments and attitudes suggest a critical need to clarify educators' legal obligations.

Criminalizing Children and Youth

Schools and courts increasingly are holding young people criminally accountable for bullying—a trend that also has implications for cyberbullying. Becoming more aware of the negative psychological consequences of verbal harassment, courts are discarding their traditional reluctance to rule in cases of mental suffering. Moreover, the judiciary increasingly is willing to hold adolescents criminally responsible, as confirmed in the British Columbia Supreme Court suicide case of teenager Dawn Marie Wesley (*R. v. D.W. and K.P.D.* 2002). Dawn hanged herself after receiving a threatening phone call. Her classmate testified that she had no intent to harm Dawn Marie when she yelled the words, "You're f——— dead!" Setting a precedent, the court ruled that verbal harassment is deemed criminal under the Canadian Criminal Code if it causes a victim to perceive a real threat of harm. Cyberbullying threats are likely to instill a deeper fear of harm because they are deliberate and persistent, as well as anonymous.

This ruling has implications for educators regarding their roles as teachers and protectors of the young. Though teachers and principals cannot supervise student activities all the time, they have a responsibility to ensure that students understand respectful, inclusive, and nondiscriminatory discourse, whether it is face-to-face, on the telephone, or over the Internet. If the courts and greater society are willing to hold immature adolescents criminally responsible for their actions, then mature, professional adults, who have the responsibility to protect and educate students should be held legally accountable if they fail.

As DiGiulio (2001) and Giroux (2003) observed, zero-tolerance allows schools to dispose of children and adolescents who do not conform to organizational goals or educators' conceptual frameworks about appropriate behavior through suspension, expulsions, and criminalization. The Ontario Education Act, for example, mandates blanket suspension of K–12 students for swearing. Compare the educational experience of a kindergarten student who might utter the "F" word thinking it means frow up (throw up). That child can be suspended on the same basis as a 17-year-old who knows full well what the word means. While not all schools have responded with such extreme measures, the reactive wave of zero-tolerance responses has underscored the need for ethical, educational, and legally defensible alternatives that would protect students and reduce bullying more effectively.

Educator Responsibilities: Law of Torts and Negligence

Most lawsuits regarding the obligations of educators to keep students physically and psychologically safe are brought under the law of torts and negligence because they are remedial, and compensation can be sought. A tort is a wrongful act by one person or institution against another. Unintentional torts, also referred to as negligence, result from a lack of attention, care, or foresight on the part of the defendant. When filing a negli-

gence claim, plaintiffs must address duty of care, tangible and foreseeable harm, and cause.

Because cyberbullying is a relatively new phenomenon, few cases have advanced to the courts. Therefore, specific rulings on cyberbullying are not cited. Rather, the judgments in more typical harassment cases are provided and extended to cyberbullying.

Duty of Care

American court decisions on school negligence have taken two diametrically opposed paths. At one end of the spectrum, judges have expressed increased concern about escalating litigation against schools in the areas of harassment and violence. Accordingly, judges generally have placed a lower standard of care on educators and the onus on plaintiffs to establish gross negligence or deliberate indifference. *Rudd v. Pulaski County Special School District* (2000) is one case in which the court held that schools do not have a duty to protect students from peer abuse in every circumstance, even if the harm is egregious. Paradoxically, and of particular significance to cyberbullying, U.S. courts have established an *elevated* standard of care for psychological harm. Hermann and Remley Jr. (2000) observed that American courts have provided clear direction regarding educators' responses to potential suicide. School administrators, counselors, teachers, and other school personnel must be equipped to assess quickly the psychological conditions of students who threaten suicide.

Psychological Harm as Tangible and Foreseeable

To establish whether psychological harm is tangible, victims must provide evidence of damage and injury to their mental condition. The word "tangible" in the context of psychology means something that is "real . . . substantial, noticeable, distinct, manifest, evident, unmistakable, perceptible, and discernible" (*Oxford Dictionary Thesaurus and Wordpower Guide* 2001, 1035). Covert forms of bullying such as exclusion, staring, and cyberbullying can have serious psychological consequences; yet victims often do not have tangible proof of their suffering.

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Covert bullying—especially cyberbullying—often occurs outside school grounds where teachers are not present. When the courts consider foreseeable events, they take into account: whether the actions that led to the injury were spontaneous or impulsive; whether they were planned and the teacher had specific knowledge that the actions would occur at a certain time and place; or whether the teacher had actual knowledge that the actions might take place at some point. Foreseeability is a complex notion; yet American courts expect educators to have the foresight to recognize psychological harm that may lead to suicide or ill health. Judgments were consistent in recent cases, includ-

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ing *Hamel et al. v. State of New Jersey et al.* (2001). Cecilia Hamel suffered extreme post-traumatic stress, including stomach pain and fainting, which a psychiatrist confirmed was the result of bullying. The court confirmed that these injuries were indeed tangible and foreseeable.

Cause

Legal assessment of what caused an injury, especially injury involving psychological harm, has been described as a “tangle and a jungle” (Parker 1992, 164). To convince a court that an educator’s conduct actually caused the injury, plaintiffs must show that “but for” the defendant’s careless conduct, the harm or loss suffered would not have taken place. In *Mirand v. City of New York* (1994), two sisters were threatened and beaten up by schoolmates. The court held that the complete absence of security or supervision caused the injuries. The foregoing case clearly indicates a duty on the part of educators to be knowledgeable and trained to prevent physical and psychological harm.

Fostering a Conducive Learning Environment

Can educators be held responsible for failing to foster safe learning environments that are free of bullying? Though claims for educational malpractice have been made, American courts categorically have denied that an actionable tort exists, maintaining that education is a matter of public policy and does not fall into the professional realm as do medical and legal malpractice.

Though Canadian courts generally support the American stance, the Supreme Court of Canada has, in a number of cases, emphasized the school’s obligation to provide a respectful and inclusive environment free of discrimination. In *Ross v. New Brunswick School District No. 15* (1996, 42), which involved suspension of a teacher for distributing anti-Semitic publications, it was stated:

[S]chools are an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the board of inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.

In another ruling, *R. v. M.R.M* (1999, 35) that involved searches of school lockers, the high court also discussed its interpretation of a safe and ordered school environment:

Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. When children attend school or school functions, it is they who must care for the children’s safety and well-being. It is they who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfill their potential. In order to teach, school officials must provide an atmosphere that encourages learning. During the school day, they must protect and teach our children.

While the safety of students is of paramount concern, schools also must be cautious that they do not censor creative expression. The case cited below attests to the negative impact zero-tolerance policies can have and the need for educators to reassess educa-

tional priorities when they clamp down on freedom of expression. An Ontario boy, who was incessantly bullied by peers, wrote a fictional story that depicted a bullied student who placed explosives in the school. Rather than use this opportunity to work with the perpetrators of the bullying, school authorities had the author arrested and imprisoned without bail for four weeks. Shortly after the boy's arrest, MacKay (2001, 7) made important observations regarding the implications of the school's handling of this case:

If in fact this student faces charges due to the content of a story written for a class assignment, the implications are serious and far-reaching. The Charter right to freedom of expression, regardless of content, is compromised. The right of students to freedom of expression will be further put into question. This is not to diminish the importance of safe schools and the growing problem of violence. Schools that are sometimes thought of as a marketplace of ideas may simply be a marketplace of acceptable ideas. The previously mentioned conflicting ideals of discipline and order on one side and the free exchange of ideas on the other continue. Which version of free speech should prevail depends heavily upon what society sees as the purposes of education.

Canadian Human Rights Law

The broad objective of Canadian human rights law is to eradicate antisocial conditions in society, especially sexual, racial, homophobic, and other prejudicial sources. Standards require employers and other institutional administrators to accommodate the needs of marginalized individuals to the point of undue hardship (Bowlby 1998). Human rights jurisprudence on sexual harassment in the workplace confirms that employers are responsible for addressing complaints of harassment even if they occur off premises, because they have the effect of poisoning the workplace environment for victims (Bowlby 1998). One could argue similarly that even if harassment takes place on the electronic airwaves, the effect of student cyberbullying is to poison the physical school environment for victims, thereby conveying a duty for schools to prevent it.

In the case of Azmi Jubran (*Jubran v. North Vancouver School District et al* 2002), mentioned previously, Jubran lived through four years of discrimination in a hostile school environment where school officials and teachers tacitly condoned homophobia. The victim claimed that he was not homosexual and argued that administrators made few proactive attempts to reduce homophobic attitudes or foster a positive school climate. The Canadian Human Rights Tribunal noted that whether the students knew or perceived Jubran to be homosexual is irrelevant. The school board had an obligation to provide him with an educational environment free from discrimination, and teachers knew, or ought to have known, that the epithets directed at him were homophobic, discriminatory, and designed to hurt him.

American Civil Rights Cases

The equivalent of Canadian human rights codes can be found in U.S. civil codes. The American Ministry of Education, Office of Civil Rights (OCR), is the law enforcement agency that enforces this regulation on approximately 51.7 million students who attend U.S. primary and secondary schools. Harassment issues were considered in *North-ern District of California, Doe v. Petaluma City School District* (1996) where students pro-

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voked fights and persistently called the victim names for two years. The counselor failed to advise parents of the Title IX grievance procedure, and school officials took no action to end the harassment. The district court noted that more than 85 percent of girls are subject to sexual harassment in schools. When a school district fails to counter harassment by developing and implementing policies, it must be inferred that the district intended the inevitable result of that failure—that is, a hostile environment (Welsh 1997).

If the courts are willing to hold immature adolescents criminally responsible for their actions, then mature, professional adults, who have the responsibility to protect and educate students should be held legally accountable if they fail.

In a landmark U.S. Supreme Court case, *Davis v. Munroe* (1997), the court ruled that victims who are sexually harassed are denied equal learning opportunities. Lashonda Davis, a fifth-grade student, was harassed for five months by a male classmate. The petitioners alleged that the school board's "deliberate indifference" to the persistent, sexual advances created an "intimidating, hostile, offensive, and abusive school environment" that violated Title IX of the Education

Amendment of 1972 (Welsh 1997, 1). The court noted that the drop in LaShonda's grades was a clear indication that she was not treated equally.

Improved Professional Development

The reactive stance and wall of defense adopted by many educators in relation to bullying is likely due to a lack of knowledge. While schools are inundated with information on how to address bullying, educators have little knowledge about its complexities, conditions, and forms. Instead of funding conferences that search for a nonexistent "blueprint" on bullying, it would be more prudent to invest in improved education for educators who need sensitizing to the complexities and devastating consequences of bullying.

This knowledge gap could be addressed at the university level, by faculties of education and law, through professional development programs at the undergraduate and graduate levels for teachers, school administrators, counselors, and prospective lawyers. Further, these classes need to be offered as part of the core degree requirements rather than as electives. To date, law-related education has had minimal success (Cassidy 2000) because it has not been grounded in educational theories of relevance to educators. Courses should draw upon social justice, leadership, and ethics of care theories, as well as cultural studies.

Compatible Theoretical Models

The compatibility of some educational theories with legal standards can be illustrated with examples. Burns' (1978) version of transforming leadership is a useful starting point to draw compatibilities between theory and legal defensibility. Burns proposed

that leadership is ethical and educational. In situations involving conflict, leaders must have the ability to recognize problems, articulate grievances, and address them in ways that raise the level of consciousness of all stakeholders. This leadership approach would meet the court's directive in *Ross v. New Brunswick* that educators have a duty to transform student perspectives. To be successful, educational leaders need to raise their own ethical aspirations, and those of students, to a higher moral platform. Burns maintained that good leaders should recognize potential conflict, but have the ability to interpret it as potential for health and growth instead of destruction and barbarism. The challenge for educators who confront cyberbullying is to recognize its potential to escalate and its impact on the physical school environment, and to transform that momentum into positive learning opportunities for perpetrators.

Foster (1989) extended Burns' theory to include critical and dialectic components. He suggested that educators critically assess school structures that marginalize victims and engage in dialogue with students to emancipate them. Within the bullying context, educators should promote reflective discourse with students regarding the impact of their words on victims, and review their own approach to zero tolerance.

Another model, compatible with substantive legal standards, is the constitutive leadership approach advocated by Heifetz (1994). Under that model, subordinates must reflect on their impact on goal achievement. Of particular relevance to bullying is Heifetz's consideration of whether people have the ability and skills to intervene in routine or unprecedented situations. A constitutive leader, when dealing with bullying, would adapt policies and practices to conform to the unprecedented changes that come with technology, pluralism, and evolving youth culture.

Noddings' (1992) work on ethics of care also is compatible with many legal standards. She emphasized dialogue, empathy, compassion, and modeling in every aspect of school life.

Dialogue is not only verbal communication, but also involves nonjudgmental receptivity through touch, smiles, affectionate sounds, silence, and body language (Noddings 1991). Dialogue is more successful if coupled with empathy. Noddings (1992, 30 and 33) explained that empathy requires a "feeling with the other," which also can be described as "engrossment." These notions allow psychological connections with students—connections that may meet legal objectives of addressing the potential for suicide and help victims of bullying deal with egregious psychological harm.

Greene (1991, 16) described compassion as a strong or deep "feeling with another human being." Compassionate educators are better positioned to accommodate student needs in compliance with human rights standards. Furthermore, compassionate educators are more likely to consider the health and welfare of their students rather than hide behind a wall of defense.

Other scholars have recognized the compatibility of ethics and substantive justice. In his discussion of justice and equality, Greek philosopher Gregory Vlastos (1962, 72) proposed

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that if true “equalitarian justice” is to be achieved, the individual or human worth of each individual must be considered. Vlastos (1962, 53) explained that an action is just “[i]f, and only if, it is prescribed exclusively by regard for the rights of all who it affects substantially.”

Vlastos’ perspective is supported by Coombs (1980), who made the distinction between goal-based morality and rights-based morality. Coombs explained that goal-based morality is based on a perspective about what sort of life is exemplary, including the ends for which one should strive and the means that should be used. In contrast, a rights-based morality is comprised of a set of views about how other persons and their interests are to be treated (Coombs 1980). A rights-based model of leadership is essential in addressing pluralism and conflict in schools. Eurocentric, androcentric, middle-class perspectives that persist in school administration often fail to address the rights and interests of children who do not fit a traditional, homogeneous framework of good and

bad (Razack 1999; Sefa Dei 1997). For instance, a principal who believes strongly that homosexuality is immoral may not protect a victim of homophobic bullying in the same way that he or she might protect a heterosexual victim of bullying.

The time has come to discard zero tolerance and address contemporary issues through ethical, educational, and legally defensible models that focus on student safety, empowerment, and education.

Final Thoughts

It is essential to couple law-related education courses with a comprehensive theoretical

base. Without contextual knowledge of their substantive legal obligations, educators rely on bureaucratic models of zero tolerance that are goal-based and grounded in rule-based conceptual approaches to discipline. These reactive responses to bullying spawn conflict rather than sustain inclusive, caring, and respectful school environments.

The time has come to discard zero tolerance and address contemporary issues through ethical, educational, and legally defensible models that focus on student safety, empowerment, and education. These models show great promise in helping educators navigate the dilemmas of tomorrow’s pluralistic society and helping schools meet their stated policy objectives to provide safe, inclusive, and caring school environments.

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