

Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace

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Abstract

Cyber bullying is a psychologically devastating form of social cruelty among adolescents. This paper reviews the current policy vacuum of the legal obligations and expectations of schools to monitor and supervise online discourse, while balancing student safety, education, and interaction in virtual space. The paper opens with a profile and conditions of cyber bullying using an analogy to Golding's (1954), Lord of the Flies. The anarchy and deterioration of unsupervised adolescent relationships depicted in the book are compared to the deterioration of social relationships among adolescents in virtual space. A discussion of the institutional responses to cyber bullying follows. Finally, emerging and established law is highlighted to provide guidelines to help schools reduce cyber bullying through educational means that protect students and avoid litigation.

Keywords: Cyber Bullying; Schools; Legislations; Lord of Flies;

Introduction

On a seemingly normal Tuesday afternoon, an eighth grade girl walks out of school and steps into her mother's car, ashen and visibly shaken. Unsure of how to proceed, her mother waits – she doesn't ask, she doesn't move the car. Finally her daughter speaks, saying she received the following cyber-message during class: *"Bitch, I know where you live. You'd better sleep each night with one eye open, on your knees. If you don't . . . I'll be there to be sure you do!"* *The Avenger*.

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Scenes like this are playing out in schools around the world. Students, especially adolescent girls, are increasingly victims (and sometimes perpetrators) of degrading, threatening, and/or sexually explicit messages and images conveyed electronically via cell phones, email, chat rooms, and personal online profiles (Barak, 2005; Herring, 2002; Ybarra & Mitchell, 2004; Blair, 2003; Campbell, 2005; Jackson, Cassidy & Brown, 2006). As Harmon (2004) observes, the internet has provided young people with an arsenal of weapons for social cruelty. The phenomenon is called *cyber bullying*, which Patchin and Hinduja (2006) define as “willful and repeated harm inflicted through the medium of electronic text” (p. 152). Cyber bullying has roots in traditional bullying that takes place in the physical school setting; however, the medium of cyber-space allows it to flourish in distinct ways creating numerous challenges.

Cyber bullying is especially insidious because of its anonymous nature. Moreover, it allows participation by an infinite audience. In the school context, it is dangerous because it most often takes place outside school hours on home computers, making it difficult, if not impossible, to supervise. In that regard, cyber bullying is a modern day version of Golding’s (1954) *Lord of the Flies*. In this classic tale, Golding places a small group of schoolboys on a deserted island, where the rule-makers are removed, compelling the boys to deal with the resulting vacuum. Their first thoughts are to look for adult authority figures:

“Where’s the man with the megaphone?” ... “Aren’t there any grownups at all?”

“I don’t think so.” The fair boy said this solemnly; but then the delight of a realized ambition overcame him (p. 7).

The parallels between what happens on that island and what is happening today in schools are astounding. Left alone with no supervision, for example, Golding’s boys harass, then terrorize, and ultimately kill one another. Cyber bullying similarly puts students on a virtual island with no supervision and very few rules, which allows bullying to escalate to dangerous, even life-threatening levels. Further, the boys on the island realize that being evil is easier when they assume a different persona, and so they paint their faces for anonymity before they attack. Cyber-bullies are no different; they hide behind pseudonyms (*The Avenger*) and well-disguised IP addresses, making it difficult, if not impossible, for the victim to determine the source of the

threat. This anonymous nature of cyber bullying is perhaps the most troubling of all, for it leaves victims wondering which of their classmates might be the “Avenger.” Indeed, the entire class might be involved. For a victim of cyber bullying, attending school, confronting unknown perpetrators is like being on an island -- there is no escape.

Unlike in Golding’s time, today’s young people do not have to go to a remote island to find such a world. It is as close as the cell phone or the family computer. Cyberspace has become a real locale without rules and without civilization. On the internet, no one has yet found an acceptable and workable way to create and enforce the modicum of culture that allows people to get along with each other. Nowhere on the internet is this more true than in the virtual space frequented by children, who often have the technological capacity and skill to run electronic circles around their elders; but, who lack the internal psychological and sociological controls to moderate their behavior.

Maintaining civilization and civil behavior is difficult enough in organized society, even where the rule of law is supposed to prevail, and where order and authority exists to protect innocent citizens. But what happens—as in dystopian fiction—when the rules and the authority are removed? This is the dilemma that schools confront as they attempt to navigate the legal and moral challenges around responding to cyber bullying, and ultimately, develop in student’s appropriate moral compasses for an electronic age.

Our paper focuses on the legal responsibilities for schools in dealing with cyber bullying, although we recognize that adults in society (through internet networks, media and technology corporations) have provided the technological tools; condoned, and modeled many of the negative behaviors that evolve in the virtual islands of unsupervised cyber-space. American legislation, in fact, protects technology corporations at the expense of victims of cyber-targeting, defamation and harassment (Myers, 2006; Servance, 2003; Wallace, 1999). Further, while many aspects of cyber bullying are clearly criminal in nature and would most likely be subject to prosecution if brought before the courts (such as threats of violence, criminal coercion, terrorist threats, stalking, hate crimes, child pornography, and sexual exploitation), we focus greater attention on the institutional responsibilities of schools and Internet providers, as opposed to the criminal liability of students.

By reviewing established and emerging law relating to school obligations to prevent cyber bullying, we draw attention to a need for

guidelines that would help schools adopt educational means to prevent and reduce cyber bullying. We appreciate that legislative initiatives and judicial efforts are often designed to avoid the floodgates of litigation on cyber bullying and cyber-targeting. Our paper explains how, regrettably, initial judicial and school responses tacitly condone cyber bullying and perpetuate the problem. We suggest a policy approach that will move the dialogue toward educational and protective measures that might better enable children to learn in physical and virtual school environments without fear of cyber bullying, as unprecedented problems related to new technologies surface. Ultimately, this shows greater promise of the floodgates to litigation than criminal liability and laws that protect ISP providers.

In addition, we explore the challenges for schools in monitoring students' online discourses because cyber bullying typically occurs outside supervision boundaries. This raises important legal questions about the extent to which schools can be expected to intervene when their students cyber bully off campus, outside school hours, from home computers. The policy vacuum must be addressed because parents are often too busy with their own lives and careers to be aware of what their children are doing online. As Wallis (2006) observes, most family homes are wired with computers in each room, cell phones for each member of the family, i-pods, CD players, and televisions, many of which are in use at the same time. Young people are far more adept at multi-tasking than their parents, and as they grow up, they become immersed in technology, making the lines between their virtual and "real" or physical lives increasingly blurred.

This paper draws on a body of emerging research about cyber bullying³ and begins by providing background on the forms and conditions of bullying in general, followed by an explanation of how cyber bullying differs. Next, we review and analyze relevant case law to identify applicable legal standards for schools, both in Canada and the United States. The international focus is intentional, since cyber

³ Specifically, it draws on research related to the impact of cyber bullying on student safety and learning in U.S. and Canadian schools (Willard, 2003; Servance, 2003; Aftab, 2004; Belsey, 2005; Balfour, 2005; Myers, 2006). It builds on publications and on-going work by Shaheen Shariff, Principal Investigator, Margaret Jackson and Wanda Cassidy, Co-Investigators, and Colleen Sheppard, Collaborator, under a grant funded by the Social Sciences and Humanities Research Council of Canada to research the legal and educational policy implications of cyber bullying, (the "Cyber bullying Project"). The project goal is to develop a profile of cyber bullying as it differs from general bullying; examine its prevalence and impact; review legal considerations related to freedom of expression, safety, and school liability; and contribute to international conventions relating to children's rights (Shariff, 2005; Shariff & Gouin, 2005; Shariff & Strong-Wilson, 2005; Jackson *et al.*, 2006).

bullying quickly crosses jurisdictional boundaries rarely encountered in other school challenges. We close with recommendations for the development of ontology of the legal boundaries in cyber-space as they relate to schools. We encourage the development of informed guidelines for the implementation of inclusive, educational, and legally defensible policy approaches to cyber bullying.

I) Bullying: Its Forms and Conditions

Cyber bullying is an extension of general bullying in schools. Therefore, it is important to define the most prevalent forms of bullying and the conditions under which it occurs, before presenting a profile of its cyber-counterpart.

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. It can include verbal harassment that incorporates racial, sexual, or homophobic slurs.

Several conditions are present when bullying occurs in schools. These conditions distinguish bullying from friendly teasing and horseplay. First, bullying is unwanted, deliberate, persistent, and relentless, creating a power imbalance between perpetrator(s) and victims. Second, victim blame is a key component, and it is used to justify social exclusion from the peer group (Katch, 2001). Victims might be excluded for looking different; for being homosexual or lesbian; or simply appearing to be gay (Shariff, 2004). They might be teased about their clothes, accent or appearance; or for being intelligent, gifted and talented, or having special needs and/or disabilities (Glover, Cartwright, & Gleason, 1998).

II) Cyber bullying as an Extension of Bullying

Cyber bullying is an insidious and covert variation of verbal and written bullying. It is conveyed by adolescents and teens through electronic media such as cell-phones, websites, web-cams, chat rooms, and email (Harmon, 2004; Leishman, 2002). Students create personal online profiles (e.g. Xanga, MySpace) where they might list classmates they do not like. Xanga and MySpace are social networking sites in which students can create personal profiles. These profiles combine

web-logs, pictures, audio, video, instant messaging, bulletin boards and other interactive capabilities. Cyber bullying can also take the form of sexual photographs (emailed in confidence to friends), that are altered and sent to unlimited audiences once relationships sour (Harmon, 2004).

Preliminary research discloses that in Canada, 99% of teens use the Internet regularly; 74% of girls aged 12-18 spend more time on chat rooms or instant messaging than doing homework; one in every seventeen children is threatened on the Internet; and one in four youth aged 11 -19 is threatened via computer or cell phone (Leishman, 2002; Mitchell, 2004). A recent survey of 3,700 middle school students disclosed that 18% experienced cyber bullying (Chu, 2005). A similar Canadian study of 177 middle school students in Calgary, Alberta (Li, 2005), disclosed that 23% of the respondents were bullied by email, 35% in chat rooms, 41% by cell phone text messaging, 32% by known school-mates, 11% by people outside their school, and 16% by multiple sources including school-mates.

A comparative review of cyber bullying incidents under the Cyber bullying Project disclosed the following results, all of which are cited in an unpublished report (the "Cyber bullying Project Report, 2006") prepared by Jackson, Cassidy, and Brown. The review disclosed that Australia is the global leader in SMS (text messaging) with approximately 500 messages being sent each month as opposed to 10 million in 2000. The report discloses that 12% of children between six to nine used text messaging at least once a day; 49% of youth aged ten to fourteen and 80% of fifteen to seventeen year olds used SMS daily. Moreover, 61% of Australian homes had computers and 46 of those had internet access. Finally, 46% of fourteen year-old Australian youth, 55% of fifteen year olds and 73% of sixteen year olds have their own cell phones.

Moreover, the report confirms that in Japan, children are exposed to digital gadgets at a very early age. Interestingly, only about half of Japanese children at age eleven use the Internet, and only 20% are regular users (Dickie, Merchant, Nakamoto, Nuttall and Terazono, 2004). Dickie *et al* further explained that more than 80% of children and adolescents in Britain have access to home computers and that 75% of children at age eleven own a cellular phone.

Further, according to a study conducted by National Children's Home and Tesco Mobile ("NCHTM" 2002), approximately 16% of

British children and adolescents reported receiving threatening text messages or being bullied over the Internet; one in four young people between the ages of eleven and nineteen were threatened via personal cell phone or personal computers; and, approximately 29% of those surveyed had not reported the cyber bullying. Of those reporting cyber bullying, 42% confided to a friend and 32% reported to parents.

In a recent study of over 300 teens under age 18 (Patchin & Hinduja, 2006), 60% reported they had been ignored by peers online, 50% said they had been disrespected, 30% had been called names, and 21% had been threatened (p. 158). The students in the study also reported negative effects from being bullied, with 42.5% saying they were frustrated and 40% reporting feelings of anger. Nearly a third of the teens reported that cyber bullying had affected them at school (31.9%), and 26.5% said it had affected them at home. (p. 161.)

Disturbingly, the NCHTM study found that caregivers' knowledge of cyber bullying was minimal. The survey disclosed that 56% of parents are not concerned about their children being bullied electronically and many are in denial as to the impact of such behavior. 19% believed such incidents are rare. Paradoxically, but not surprisingly, British teachers are very concerned about such bullying, with 50% confirming that their students had experienced such bullying. Another distressing finding is that 67% of those teachers are elementary school teachers for children younger than eleven years old.

The review also found that in the United States approximately 70% of children between the ages of four and six have used computers and 68% under the age of two have used screen media. Surprisingly, only 13% of eight to seventeen year olds in the U.S. own cell phones unlike their counterparts in the U.K. and Canada.

a) Anonymity, Lack of Supervision and an Infinite Audience

In addition to the findings that caregivers may not realize the seriousness of cyber bullying, there are several aspects that make it a significant challenge for schools. As with Golding's (1954) boys who hid their identities behind painted faces and masks, most cyber bullying is anonymous. Anonymity in cyber-space adds enormously to the challenges for schools (Harmon, 2004). For example, in Li's (2005) study, 41% of the students surveyed did not know the identity of their perpetrators. Second, it allows participation by an infinite audience and can originate anywhere, making the boundaries of supervision difficult

for schools to determine. A third concern is that sexual harassment is a prevalent aspect of cyber bullying, which subjects young adolescent girls; boys who might appear to be homosexual; and, gay and lesbian students to increased vulnerability.

Although cyber bullying begins anonymously in the virtual environment, it affects learning in the physical school environment. The consequences can be psychologically devastating for victims, and socially detrimental for all students (Gati, Tenyi, Tury, & Wildmann, 2002). Just as the immaturity of Golding's boys on that deserted island drove them to commit acts they might never have endorsed under the watchful eye of adults; so too in cyber-space, young people who might otherwise be inclusive and respectful in face-to-face interactions, are increasingly tempted to engage in negative online discourse without realizing the impact of their actions (Willard, 2005; Parks & Floyd, 1996). Ybarra and Mitchell (2004) explain that cyber-space provides adolescents with the ability to withhold their identity in cyber-space, providing them with a unique method by which to assert their dominance. Moreover, the computer keyboard provides the control and sense of power that some students cannot achieve in face-to-face relationships (Jackson, *et al*, 2006).

Young people in cyber-space lose their inhibitions in the absence of no central power, clear institutional or familial boundaries, or hierarchical structures (Milson & Chu, 2002). As Bandura (1991) explained over a decade ago, physical distance provides a context in which students can ignore or trivialize their misbehavior, as easily as Golding's boys did on their distant island. In cyber-space this form of disengagement is amplified.

Jackson *et al* (2006) also discuss the social presence theory (Rice, 1987; Rice & Love, 1987; Short, Williams & Christie, 1976) and social context cues theory (Sproull & Kiesler, 1991) as they apply to social interactions in cyber-space. The theories posit that online social interactions become increasingly impersonal with the reduction of contextual, visual, and aural cues, reducing sensitivity to online patrons and becoming increasingly confrontational and uncharacteristic. Parks and Floyd (1996) for example, observe that cyber-space is "another life-world, a parallel universe" (p.93). We observe the parallels with the island in *Lord of the Flies*, which provided the boys with a parallel universe where no rules existed.

b) Lack of Rules and Supervision

Lack of institutional and parental rules in cyber-space have the effect of creating virtual islands similar to the physical islands in *Lord of the Flies*. The absence of adult supervision allows perpetrators free reign to pick on students who may not fit their definition of “cool” because of their weight, appearance, accent, abilities or disabilities (Shariff and Strong-Wilson, 2005). Cyber-space provides a borderless playground that empowers some students to harass, isolate, insult, exclude and threaten classmates. The Internet, unlike the school day, is open and available around the clock – empowering infinite numbers of students to join in the abuse. Without limits and clear codes of conduct, communication in cyber-space (even among adults) can rapidly deteriorate into abuse because of the knowledge and sense of security that comes with the limited possibility of being detected and disciplined.

This is illustrated in *Lord of the Flies*, when young Piggy (nearsighted and overweight) is excluded, isolated, harassed, and hunted down. His perpetrators take advantage of his disabilities leading to his eventual death. The fear and isolation that Piggy experiences on that island is not far removed from that regularly experienced by victims of cyber bullying. Fear of unknown cyber-perpetrators among classmates and bullying that continues at school distracts all students (victims, bystanders, and perpetrators) from schoolwork. It creates a hostile physical school environment where students feel unwelcome and unsafe. In such an atmosphere, equal opportunities to learn are greatly reduced (Devlin, 1997; Shariff & Strong-Wilson, 2005).

It is interesting to note that although Golding’s *Lord of the Flies* was written in 1954, the author had tremendous foresight into what can happen when authority figures, caregivers, and parents are absent for long periods of time from any setting, including a virtual one. He might well have been predicting young people’s social relations on the Internet. As we noted earlier, the Internet has provided young people with an arsenal of weapons for social cruelty (Harmon, 2004), without making allowances for supervision of their use. Not only is this similar to Golding’s analysis of what might occur if adolescents placed on a deserted island completely unsupervised, it is also akin to providing them with weapons to help destroy each other.

The characteristics and conditions relating to the power shifts, and the behavioral and ethical breakdowns in cyber-space, suggest an obligation on adults and public institutions that influence young people's lives (parents, teachers, school administrators, network providers, community stakeholders and the courts), to work toward improved supervision, attention to adolescent online discourse, and increased accountability on the part of Internet providers.

While school administrators and teachers argue that they cannot possibly be expected to supervise students on home computers, parents are increasingly beginning to sue schools and technology companies for failing to protect their children. One such example is illustrated in the plight of David Knight, a boy from Ontario, Canada, who was bullied persistently in the physical school setting from elementary through high school (by the same classmates). In high school the bullying was magnified as cyber bullying took over. His classmates set up a website where they described him as homosexual (which he wasn't), a drug trafficker and pedophile (which were also untrue). The website received millions of hits where participants contributed insults and derogatory comments.

Unsupervised by school or parents (with the web-provider refusing to close down the website for fear of being challenged as breaching free expression rights), David's nightmare continued for six months until he sued the school board and Internet provider. Scholars of cyber bullying internationally await the Canadian judicial decision in David's case, which continues to be postponed. Some of the issues raised in his case are nonetheless important, and we address them as part of our analysis of the legal considerations.

While research suggests that bullying is reduced by 50% when young people are allowed to contribute to rule-making (Olweus, 1997), a complete lack of supervision can result in enormous power differentials between dominant and weaker peers resulting in anarchy and a total breakdown of social and ethical norms and structures. This is especially true when adolescents are involved, because their social development is influenced by hormonal changes and social influences (Boyd, 2000; Tolman, 2001).

Importantly, research on bullying finds that typically 30% of on-lookers and by-standers support perpetrators instead of victims (Salmivalli et al, 1996; Boulton, 1993). The longer it persists, the more by-standers join in the abuse, creating a power imbalance between

victim and perpetrators. Isolation renders victims vulnerable to continued abuse, and the cycle repeats itself. What might begin as friendly banter among class-mates at school, can quickly turn into verbal bullying that continues in cyber-space as covert psychological bullying. The difference in cyber-space is that hundreds of perpetrators can get involved in the abuse, and, as in *Lord of the Flies*, peers who may not engage in the bullying at school, can hide behind technology (masks, face paint and screen-names), to inflict the most serious abuse (see examples in Shariff, 2004; Shariff & Strong-Wilson, 2005).

Consider another internationally known case of the “Star Wars Kid.” Young Ghyzlain Reza (a slightly overweight boy from Quebec, Canada) had filmed himself playing out a Star Wars character. He left the video on his school’s film room. Two class-mates found the tape and posted it on the Internet (see www.jedimaster.net). This website attracted 15 million hits. 106 clones of the video were made and redistributed. Wherever Ghyzlain went, his school-mates would jump on desks and tables and imitate him. He finally withdrew from school and is now home-schooled. The case was to be heard on April 10, 2006, but was settled out of court.

These examples illustrate that even when frustrated parents turn to the courts for guidance; their claims are often delayed or settled out of court because of the lack of clear legal boundaries regarding freedom of expression; student privacy, and protection in cyber-space (Wallace, 1999; Shariff & Johnny, in press). In cases where cyber-perpetrators are known (as they were in the Star Wars case), class-mates are also being charged with criminal harassment. While David and Reza have supportive parents to turn to, our concern is with victims of cyber bullying, who, like Piggy in *Lord of the Flies*, cannot turn to parents or caregivers for emotional or financial support. This is confirmed in the findings of the National Children’s Home and Tesco Mobile (2002) noted earlier, regarding the lack of concern by caregivers relative to cyber bullying, making it a significant issue.

Research also suggests that victims are reluctant to report cyber bullying for fear that their own computer and cell-phone privileges will be removed (iSafeAmerica, 2006). Lost computer privileges would ostracize them to an even greater extent from their peer groups whose virtual relationships have become an integral aspect of their social relationships. In some cases, the isolation and ridicule becomes too much, resulting in suicide (see Shariff, 2004; 2005, for case examples).

Prior to moving on to a discussion of stakeholder roles and responsibilities, it is important to note that sexual and homophobic harassment have been found to be highly prevalent in cyber bullying.

c) Prevalence of Sexual and Homophobic Harassment

Preliminary research suggests that although both genders engage in cyber bullying, there are differences (Chu, 2005; Li, 2005). It has been argued that children who engage in any form of bullying are victims. However, studies (Dibbell, 1993; Evard, 1996) have shown that teenage girls are more often at the receiving end of cyber violence.

A review of the scholarly literature (Shariff & Gouin, 2005) finds that according to Herring (2002), 25% of Internet users aged 10-17 were exposed to unwanted pornographic images in the past year, and 8% of the images involved violence in addition to sex and nudity. Mitchell *et al* (2001, cited in Barak, 2005), who conducted a survey of American teenagers, found that 19% of these youths (mostly older girls) had experienced at least one sexual solicitation online in the preceding year. According to Adam (2001), one in three female children reported online harassment in 2001. This is not surprising given that girls aged 12 to 18 have been found to spend at least 74% of their time on chat rooms or instant messaging (Berson & Ferron, 2002).

Moreover, adolescent hormones rage and influence social relationships as children negotiate social and romantic relationships and become more physically self-conscious, independent, and insecure (Boyd, 2000). Research on dating and harassment practices at the middle school level (Tolman, 2001) shows that peer pressure causes males to engage in increased homophobic bullying of male peers and increased sexual harassment of female peers to establish their manhood. During this confusing stage of adolescent life, the conditions are ripe for bullying to take place. The Internet provides a perfect medium for adolescent anxieties to play themselves out.

III) Roles and Responsibilities: Schools or Parents?

While its nebulous nature and ability to spread like wildfire are indeed challenging, cyber bullying does not elicit school responses that differ significantly from reported reactions to general forms of bullying (Shariff, 2004; Harmon, 2004). A review of emerging litigation on bullying (Shariff, 2003) disclosed common patterns in school responses to victim complaints. For example, plaintiffs explained that when

approached for support, school administrators and teachers put up a “wall of defense.” According to some parents surveyed during that research, school administrators allegedly: a) assumed that the victim-plaintiffs invited the abuse; b) believed parents exaggerated the problem; and c) assumed that written anti-bullying policies absolved them from doing more to protect victims. Despite well-meaning and seemingly sensible anti-bullying programs, this approach means that some educators tacitly condone negative and non-inclusive attitudes, thus sustaining the power structures that exist in a discriminatory school environment. For example, some scholars argue that the tendency in schools to implement blanket zero-tolerance policies (Skiba & Petersen, 1999; DiGiulio, 2001; Giroux, 2003) overlooks the various forms of oppression that marginalize some students in schools.

Not surprisingly, these responses have produced minimally effective results, other than to criminalize young people and add a burden to the criminal justice system (Giroux, 2003, DiGiulio, 2001; Shariff & Strong-Wilson, 2005). To make matters worse, most Internet providers refuse to close websites or block emails to avoid breaching free expression rights because they are protected from liability by legislation, at least in the United States (Myers, 2006). This increases the danger to victims. Children’s “behavior” cannot be the sole focus of policy – multi-disciplinary attention to institutional context is crucial. This is where schools can, and in our opinion ought to implement their mandate as educational leaders. While parents undeniably have an obligation to monitor their children’s activities on the Internet, teachers, school counselors, administrators, judges, and policy makers have no less a responsibility to adapt to a rapidly evolving technological society, address emerging challenges, and guide children to become civic-minded individuals.

It is reasonable to suggest that since schools use technology to deliver curriculum and assign homework (and increasingly provide laptops for students’ use at home), it is also imperative they pay attention to how their students use it. They need to recognize and establish standards and codes of conduct with respect to Internet and cell phone use, and define acceptable boundaries for their students’ social relationships in cyber-space. Educators, in their valuable role of fostering inclusive and positive school environments, would benefit from scholarship and legally defensible policy guidelines. These should become part of teacher preparation programs, leadership programs, and

professional development. The study of bullying and cyber bullying must be re-conceptualized from an inter-disciplinary, institutional, educational, and legal perspective. An interdisciplinary perspective would draw upon academic expertise in the fields of education, psychology, criminology, sociology, and law – all of which are relevant to the study of cyber bullying.

IV) Legal Obligations

Before we move onto a discussion of the legal obligations for schools, it is worth a short discussion of the legal standards currently applied to technology companies. It is these corporations that create and provide the nexus for cyber bullying, cyber-harassment, cyber-targeting, and other forms of online abuse. While a comprehensive survey of the legislation covering technology companies is underway but not completed (Shariff, in progress), David A. Myers (2006) undertakes an in-depth evaluation of one relevant piece of legislation in the U.S., the *Communications Decency Act* of 1996. Under this federal legislation, Congress granted broad immunity to Internet service providers (ISPs). This legislation leaves no one legally accountable for cyber-targeting (which includes cyber bullying, harassment, stalking, defamation, threats and so on). Section 230 of this Act provides in part:

(c) Protection for “Good Samaritan” blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil Liability. No provider or user of an interactive computer service shall be held liable on account of – (A) Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protect; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Myers (2006) explains that one landmark case, *Zeran v. America Online, Inc.* (1997) is the general precedent used by American courts to rule on Internet abuse. This case resulted in leaving no one legally accountable for injuries caused by anonymous postings on the Internet. The case involved a series of anonymous postings on America Online's (AOL) message board following the Oklahoma City bombings in April, 1995. The messages claimed to advertise "naughty Oklahoma t-shirts." The captions on the t-shirts included "Visit Oklahoma . . . It's a Blast!!! And "Finally a Day Care Center That Keeps Kids Quiet – Oklahoma 1995." (*Zeran v. AOL, 1997*). The individual who posted the messages identified himself as Ken Z and provided Zeran's phone number as the person to call to order the offensive t-shirts. Zeran received abusive telephone calls and even death threats as a result and notified AOL, which in turn terminated the contract from which the messages originated. However, the perpetrator continued to set up new accounts with false names and credit cards. Zeran finally sued AOL claiming negligence. The court ruled that Section 230 of the CDA provided absolute immunity to AOL regardless of its awareness of the defamatory material.

The Zeran ruling, Myers notes, maintains the status of Internet providers as "distributors" rather than "publishers." Publishers (e.g. book publishers) are liable for defamation by third parties using their services, especially if they are made aware of them and fail to act to prevent the behavior. Zeran followed a case in which an Internet provider was elevated to the status of "publisher" (*Stratton Oakmont v. Prodigy Services Co., 1995*). Prodigy had decided to regulate the content of its bulletin boards (in part so that it could market itself as a "family orientated" computer service). By taking on an editorial role, Prodigy opened itself up to greater liability than computer networks that do not edit content. Thus service providers argued that if they agree to monitor and edit online content, they in fact subject themselves to greater liability. This is why most Internet providers ignore reports of abuse. Most are confident that they will not be held liable subsequent to Zeran. The irony of this, as Myers (2006) points out, is that the title of S.230 reads "Protection for 'Good Samaritan' blocking and screening of offensive material." The objective of the CDA was to protect pro-active online service providers and preserve competition between ISPs on the Internet.

Myers makes the point that if David Knight were bringing his lawsuit in the United States, S.230 might make it too difficult for him to argue that the Internet provider he is suing was aware that of the website with his picture, labeling him as a homosexual pedophile and drug pusher. Nonetheless, he believes “the winds of change are stirring” (p. 5) for S.230 immunity. At the State level, he cites common law case, *Bryson v. News America Publ’ns, Inc.* (1996). The case involved a fictional story entitled “Bryson” written by Lucy Logsdon. Lucy wrote about being bullied at school by Bryson who she referred to as a “slut.” The real Bryson read the story and remembered living in the same town as Lucy Logsdon. She sued News America for libel and won. The court stated that even though the story was labeled as fictional, it portrayed realistic characters, responding in a realistic manner to realistic events and that a reasonable reader might logically conclude that the author of the story had drawn upon her teenage experiences to write it. If the courts rely on this case, David Knight’s lawyers might well argue that the website with David’s picture labeling him as a pedophile could reasonably be interpreted as true by those who visited the website, resulting in negligence and liability against the Internet provider.

Furthermore, in *John Doe v. GTE Corp.* (2003), involving the secret filming of athletes showering in a change room that was posted and sold on a website, the Seventh Circuit Court of Appeals upheld S.230 immunity relying on *Zeran*, in favor of GTE corporation. However, Judge Easterbrook questioned the reasoning in *Zeran*, noting that S.230 is supposed to be the “Good Samaritan,” blocking and screening offensive material, but in fact, by eliminating liability for ISP’s, it ends up defending abusers and defeating legitimate claims by victims of tortuous abuse on the Internet.

The law is slow to change, especially when judges are well aware of the floodgate of litigation that might be unleashed if Internet providers are held liable. In the meantime, schools need guidelines that provide reasonable boundaries and direction as to the extent of their responsibility. This would alleviate their reluctance to breach freedom of expression guarantees or student privacy rights. Educators need to know the extent to which they have the authority to protect victims from abuse by their classmates – and their ultimate responsibility to foster inclusive school environments that encourage socially responsible discourse – on or off school grounds, in the physical school setting and in virtual space.

V) The Educational Policy Vacuum

Traditional responses to bullying are largely ineffective because of the anonymous nature of cyber bullying, its capacity for an infinite audience, and participation by large numbers of young people. In this regard, it is important to consider the emerging legal stance adopted by the courts towards cyber-harassment. In the following section we review legal principles of Canada and the United States as they relate to cyber bullying: freedom of speech/expression, privacy, torts, and human rights/anti-discrimination law.

a) *Freedom of Speech and Expression Rights*

Canadian school officials and Internet providers worry that if they intervene with student discourses in cyber-space, they might face challenges under Section 2(b) of the *Charter of Rights and Freedoms* (the “Charter”) for infringement of student free expression rights. Freedom of expression, thought, and opinion are guaranteed to all Canadians, including students, under Section 2(b) of the *Charter*. These freedoms are only limited by Section 1 of the *Charter*, which helps the courts weigh and balance individual rights with the collective rights of the greater good in a democracy. Section 1 of the *Charter* states that the rights set out in it are subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Any school policy that infringes individual rights must therefore be justified by the policy-maker as having a pressing and substantial objective to protect the greater good. The onus also rests with policy-makers to establish that the rights in question will be infringed as minimally as possible (*R. v. Oakes*, 1986).

As MacKay and Burt-Gerrans (2005) point out, expression is constitutionally protected as long as it is not violent (see for example, *Irwin Toy Ltd. v. Québec (A.G.)*, 1989). This means that any expression that intends to convey non-violent meaning is normally safeguarded by Canadian courts. This interpretation has been extended to the school setting. For instance, one of the best known cases of protected freedom of expression in schools involved a rap song that contained a message to students to reduce promiscuity. In a well-known Canadian freedom of expression case (*Lutes v. Board of Education of Prairie View School Division No. 74*, 1992), Chris Lutes sang a song by Queen Latifah, entitled “Let’s Talk About Sex” even though a school district

administrator objected to the song. He was suspended and sought judicial review. The court found that his freedom of expression rights under Section 2(b) had been violated and that the administrator's objection to the song did not reasonably justify the infringement of those rights. In fact, the court stated that this was an overreaction to an educational song about sexual abstinence.

This raises important legal questions as they relate to cyber bullying. Is online harassment considered to be a violent expression? Even though physical force cannot take place online, victims can (and do), perceive online sexual threats as very real. The impact on the victim is no different from the telephone threat that caused Canadian teenager Dawn Marie Wesley to commit suicide. The words "You're f....g dead!" by a classmate caused her to perceive real harm would come to her. Her perpetrator was convicted of criminal harassment because the court observed that perceived harm by the victim amounts to the same thing as actual harm (Shariff, 2004). Herring (2002) explains that online harassment which negatively affects the physical, psychological, or emotional well-being of a victim constitutes a form of actual violence. Barak (2005) notes that harassers can use sexual coercion through several means – directly offensive sexual remarks that humiliate the victim; passive sexual harassment by using nicknames and online identities such as "wetpussy" or "xlargetool"; or graphic gendered harassment which includes sending unwanted pornographic content, sexual jokes, and other graphic sexual context. These forms of online harassment make recipients feel powerless, demeaned, and threatened.

Some United States judges, however, have refused to acknowledge that online harassment contains a violent message. Consider some of the initial court rulings on cyber-harassment cited by Wallace (1999). In one instance, a student set up a website denouncing the administrators and teachers at a university. The judge's response was as follows, "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech" (as quoted in Wallace, 1999, p. 131).

Similarly, in *United States of America, Plaintiff v. Jake Baker* (June 21, 1995, as cited in Wallace, 1999), Jake Baker posted a story to the newsgroup alt.sex.stories. His story graphically described the rape and torture of a university classmate. He also communicated (via email to a friend), his plans to actually carry out the rape. Students who read the story were outraged and charged him with criminal harassment. The

district court threw out the claim, holding that because there was no possibility of physical rape on the Internet there could be no claim for harassment. Moreover, the court was reluctant to infringe on Baker's freedom of expression rights. The precedents set by these courts were followed in *The People v. B.F. Jones* (cited in Wallace, 1999). The case involved sexual harassment of a female participant in a MUD group by Jones, a male participant. The court explained that:

It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it. (Quoted in Wallace, 1999, p. 228)

In another case, *Emmett v. Kent School District No. 415* (2000), a boy placed mock obituaries on a website called "The Unofficial Kentlake High Home Page," which allowed visitors to vote on who should be "the next to die." The school, upon learning of the website, expelled the student (and then later reduced this to a five-day suspension). The family brought suit, and the court ruled in favor of the student, stating that the school had not proven the website "intended to threaten anyone."

This reluctance by the courts to avoid involvement in the quagmire of cyber-space is not surprising and not much different from their stance regarding Internet companies. The courts have typically adopted a hands-off approach in matters of educational policy. In the realm of physical violence in schools, for example, American courts have set a very high threshold for plaintiffs to bring claims for negligence against schools, in some cases even when students have been shot or knifed (Shariff, 2003, 2004; Shariff & Strong-Wilson, 2005).

The worrisome aspect regarding the failure of claims for criminal harassment is that pedophiles and predators gain significantly easier access to Internet "Lists of Hos" (names of girls labeled as prostitutes) for example, and capitalize on them. This takes adolescent cyber bullying into the more dangerous adult realm of pornography. For example, in one case reported by Harmon (2004), photographs of a young girl who masturbated for her boyfriend were dispersed on the Internet once the relationship soured. The boundaries of this type of harassment need clarification. Laws against the distribution of

pornography have been in existence for many years, but they need upgrading to address virtual infringements of privacy. Once in the hands of sexual predators, such photographs could result in life threatening circumstances for teenage victims if they are contacted and lured into a physical relationship.

Moreover, Servance (2003) confirms that when addressing cases of cyber bullying in the school context, American courts continue to apply a standard for protecting student free expression that goes back to the 1960's when students protested against the Vietnam War. They continue to apply the standards established in three landmark cases (the "Triumvirate"): *Tinker* (1969), *Fraser* (1986), and *Hazelwood* (1988). *Tinker v. Des Moines Independent Community School District* (1969) involved students' rights to wear black armbands as a form of silent protest against the Vietnam War. Despite warnings ahead of time not to engage in this activity, many students participated and were suspended. The students sued the school administration, and the court held in favor of the students – establishing the famous quotation that "students do not leave their free expression rights at the school house gate" (Servance, 2003). The court asserted that unless the speech materially and substantially disrupts learning, schools may not restrict it.

This point is illustrated in *Beidler v. North Thurston School District Number 3* (2000). The student in this case denounced the high school assistant principal as an alcoholic and Nazi. Teachers complained about being uncomfortable having Karl Beidler in their classes. He was given emergency suspension and transferred for the remainder of his junior year to an alternative setting within the district. Beidler brought suit saying his website had caused "no substantial disruption," and the court agreed, ruling that the district had not met the *Tinker* standard regarding disruptive speech.

So far, cases such as *Beidler* and others (e.g. *Flaherty v. Keystone Oaks School District*, 2001) have usually involved students posting questionable material regarding the *adults* in the school. In the absence of school disruption or direct threats, courts have basically sent the message that schools may not limit student speech (posted online on personally owned computers) that is critical, even offensive about adults. Still emerging are cases involving student-to-student cyber bullying, which, according to research (Devlin, 1997; Gati et al, 2002) has an impact on the emotional well-being of the victims in the school setting. Based on the research, a strong case could be advanced that

cyber bullying materially and substantially disrupts learning for the victims and potentially other students, as well.

A new standard was set in the second case in the Triumvirate in 1986. The Supreme Court held in *Bethel School District #403 v. Fraser* (1986) that schools may prohibit speech that undermines their basic educational mission. In this case a student Matthew Fraser's campaign speech included "obscene, profane language" that contained insinuations to sexual and political prowess:

I know a man who is firm – he's firm in his pants . . . (He) takes his pants and pounds it in He doesn't attack things in spurts – he drives hard, pushing and pushing until finally -- - he succeeds . . . (He) is a man who will go to the very end --- even the climax for each and every one of you. (p. 1227)

The school suspended Fraser, and the courts upheld the school's action, noting that schools are not the arena for the type of vulgar expression in *Fraser's* speech. Importantly, the judge noted that schools should not have to tolerate speech that is inconsistent with school values. While he acknowledged that it is crucial to allow unpopular speech, he emphasized that schools have a vital role in preparing students to participate in democratic society by teaching appropriate forms of civil discourse that are fundamental to democratic society.

Of significant relevance to cyber bullying today, this ruling also stated that schools must teach students the boundaries of socially acceptable behavior. The court stated that threatening or offensive speech has little value in a school setting and cannot be ignored by schools. Moreover, the court noted that the speech infringed the rights of others (although it did not specifically state it, the rights of females in the audience). The sexual insinuations to rape were clearly offensive and threatening to students.

The *Fraser* decision extends *Tinker* and is also, in our view, applicable to student freedom of expression in the cyber bullying context. As explained in the profile of cyber bullying, a substantial amount of the emerging research on Internet communications reveals the prevalence of sexual harassment, sexual solicitation, homophobia, and threats against women or female students. Not only does this form of cyber bullying materially disrupt learning and impede educational objectives, it creates power imbalances within the school environment and distracts female and gay or lesbian students from equal

opportunities to learn. Consistent with the *Fraser* ruling, expression of this nature infringes their constitutional rights in an educational context and creates a hostile and negative school environment (physical and virtual).

The third American court decision, *Hazelwood vs. Kuhlmeier* (1988), involved the principal's decision to censor portions of the school newspaper. The principal was worried that two articles, one on teen pregnancy and the other on divorce, were too transparent to protect student identities. The students who worked on the articles sued, citing infringement of their First Amendment rights to free speech. The court in *Hazelwood* reasoned that since schools are entitled to exercise control over school sponsored speech, they are not bound by the First Amendment to accept or tolerate speech that goes against the values held by the school system.

It is plausible that the reasoning in *Hazelwood* might be extended to cyber bullying that originates on school computers. First, it is important to note that unlike the *Tinker* (1969) case, which questioned whether a school should tolerate particular student speech, in *Hazelwood* the courts questioned whether the First Amendment requires a school to promote student speech. They noted that "the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression" (p.509). Certainly, when a school allows students to use its computers for both classroom-related and extracurricular activities it is providing students with resources and thereby becoming a tacit sponsor of such activities. Therefore, it would seem that educators do not violate First Amendment rights when they exercise control over inappropriate forms of communication disseminated using school computers.

Moreover, the courts noted that educators have authority over school sponsored activities since they are considered part of the school's curriculum. This means that schools are not legally obliged to promote or allow school-sponsored speech that is incompatible with its educational goals. This point is firmly solidified in *Fraser* where, as previously noted, a student could be disciplined for speech that is "wholly inconsistent with the 'fundamental values' of public school education" (Servance, 2003, p. 1218). If we apply this logic to the cyber bullying context, it seems reasonable for schools to place limitations on

any form of student expression (including digital forms) that either infringes upon the rights of others or is inconsistent with school values. Similarly, it could be argued that school computers are school property; therefore, any emails or correspondence between students, including websites created using those computers, could be censored. Schools may also impose disciplinary consequences for bullying behavior generated on school-owned equipment if schools have a policy regulating the type of content that may be sent or received from school computers.

The legal boundaries of supervision are murkier for schools, however, when students are engaged in bullying behavior from home on their personal computers. For example, in *Emmett v. Kent School District No. 415* (2000), which was mentioned earlier, the courts did not give schools the same authority to act as they have for websites that are created on school computers. A key factor here was that the schools could not show that the off-campus-created website would cause a “material and substantial disruption” in school. Similarly, in *Killion v. Franklin Regional School District*, (2001), the court drew from *Fraser*, *Tinker*, and *Hazelwood* (as well as *Emmett* and *Beussink*) to determine that schools must be able to show substantial disruption in order to limit off-campus speech. In this case a student used his website to denounce the high school athletic director and make attacks on his sex life and his obesity. The court noted that the school could provide no evidence that disruption to classes had occurred.

In contrast, if a website is clearly derogatory, profane, threatening, or disruptive, the schools may be supported in taking action, even when the website was created on a home computer. In *J.S., a Minor v. Bethlehem Area School District* (2000), a student created a website “Teacher Sux,” in which graphic pictures of severed heads, along with a statement to “send \$20.00 to help pay for a hit man” was enough for a judge to uphold the expulsion of the student. The court relied on other cases (e.g. *Beussink v. Woodlands R-IV School District*, 1998) holding that websites that are accessed at school, with an intended audience within the school community, can be dealt with as on-campus speech. The court further ruled that disciplining the student for off-school behavior was appropriate in this case because the action “caused actual and substantial disruption of the work of the school.”

More recently, in *Layshock v. Hermitage School District* (2006), senior Justin Layshock created a parody of the principal on

Myspace.com, which depicted him as, among other things, too drunk to remember his own birthday. School administrators placed Justin in an alternative school and banned him from participating in any Hermitage High School events, including graduation. The parents went to court, requesting a temporary restraining order to allow Justin to participate at school until the case could come to trial. In deciding about whether or not to lift the restraining order, the court noted that the school was able to show substantial disruption to the work of school. In this case, so many students accessed the website that the school had to shut down its computer system, causing lost of instructional time and access for other students. Indeed, the school was “abuzz about the profiles, who created them, and how they could be accessed.” Judge McVerry, therefore, refused to lift the restraining order, upholding the school’s discipline. By the time the case can reach a full trial, the student will have long graduated.

In regard to off campus behavior and Canadian courts, the high court has established in *Ross v. New Brunswick School District No. 15* (1996), that schools must maintain conditions that are conducive to learning. Although the Ross case involved the free speech of a teacher who distributed anti-Semitic publications outside of school, the following statement from the ruling has been quoted in almost every Charter argument for a positive school environment:

Schools 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. (Para 42)

Even though Ross’s anti-Semitic publications were distributed outside the school context, the court noted that he poisoned the school and classroom environment for his Jewish students within the classroom. They knew about his publications and felt threatened, fearful, and uncomfortable. This is highly applicable to the cyber bullying context. For example, schools often maintain that cyber bullying falls outside their realm of responsibility because it occurs after regular schools hours. However, if we are to draw upon the rationale used in the preceding cases from both Canada and the U.S., it would seem that the on-campus/off-campus (physical vs. virtual space)

distinction is moot if the actions cause disruption to the learning environment. It is the *effect* of the harassment, bullying, and threats (despite the fact that they are made outside of the physical school setting) that is important. The key for schools is to determine a clear nexus between the cyber bullying act and the school. This can be established if the cyber bullying was accessed or displayed at school, if it causes substantial disruption to the learning environment, or if the act created a poisoned or hostile environment for any student. Once the nexus is determined, school officials are justified - even obligated, to address it.

In sum, while U.S. courts lean toward supporting student free expression, they stress certain limits in the school context. Expressions that substantially or materially disrupt learning, interfere with the educational mission, utilize school-owned technology to harass, or threaten other students are not protected by the First Amendment and allow school intervention. The reasoning in these decisions does not substantially differ from a Supreme Court of Canada decision in *R. v. M.R.M.* (1998) relating to the right of schools to restrict constitutional rights when school property and student privacy rights are involved.

b) Student Privacy and Cyber bullying

Another legal issue could arise in cyber bullying situations, is the need for schools to search a computer. In Canada, under Section 8 of the Charter, everyone has the right to be free from unreasonable search and seizure. Hence protection of privacy is guaranteed within reasonable limits in a free and democratic society. Furthermore, Section 7 of the Charter states that “everyone has the right to life, liberty, and security of the person.” In the cyber bullying context, both these sections are relevant. The boundaries with respect to the obligations on schools to override search and seizure rights to protect others must be balanced with the right to life, liberty, and security of the person. Furthermore, victims might argue that their rights to life, liberty, and security of the person are infringed under Section 7 when schools fail to intervene and protect them from cyber bullying.

Based on Section 1 considerations, the courts generally give priority to the safety of the greater number of stakeholders as justification for overriding privacy rights. In *R. v. M.R.M.* (1998) for example, the Supreme Court of Canada ruled that as long as a school principal is not acting as an agent of the police, he or she can search

student lockers if there is a suspicion of hidden weapons or drugs. The high court held that school lockers are the property of schools. When there is a danger to safety and learning of the students, the infringement on student privacy rights can be reasonably justified under Section 1 of the Charter. Given the devastating psychological consequences of cyber bullying on victims and the entire school environment, it is quite possible that a Charter interpretation that requires a balancing of the victim's right to safety under S. 7 and the perpetrators' right to computer privacy under S. 8 and free expression under S. 2(b), the court might rule in favor of the victim.

The rationale used by the Supreme Court of Canada in *R. v. M.R.M.* (1998) was that students should already have a lowered expectation of privacy because they know that their school principals or administrators may need to conduct searches in schools, and that safety ought to be the overriding concern to protect students. The high court explained 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. (p. 394)

Similarly in the United States, the Fourth Amendment of the U.S. Constitution guarantees protection from unreasonable searches and seizures. The legal cases involving schools have generally involved searches of lockers and backpacks, but recently the principles of those cases are being applied to searches of computers. Courts have held that schools need only "reasonable suspicion" to search, but caution, "A student's freedom from unreasonable search and seizure must be balanced against the school official's need to maintain order and discipline and to protect the health and welfare of all the students" (Alexander & Alexander, 2005). Schools may search school-owned property, such as lockers for routine maintenance or when they have reasonable suspicion that a student is harboring something illegal. In *People v. Overton* (1967), the courts noted that schools can issue policies

regarding what may be stored in school lockers. Correspondingly, educators are entitled to conduct spot checks or involuntary searches of lockers to ensure that students comply with these regulations. In fact, the courts regard the inspection of student lockers not only as a right but also as a duty of schools when it is believed that a student is using school property to harbor illegal materials.

In terms of technology it could be argued that, similar to lockers, emails are owned by the school because they are transmitted using school property. Therefore, if a student is suspected of sending harassing comments via email or has found such comments while browsing on school computers, the school should consider it their responsibility to monitor and discipline this activity. This point might be further justified by cases such as *Garrity v. John Hancock Mut. Life Ins. Co.* (D. Mass. May 7, 2002), where it was found that employers have a right to inspect employee email accounts in cases where employees have been warned their messages are accessible to the organization. With regard to school searches, we can also consider cases such as *New Jersey v. T.L.O.* (1985). In this ruling it was found that although students have a legitimate expectation of privacy within the school setting, schools also have a right to search student property if there are reasonable grounds for suspecting that the student is violating either the law or the regulations of a school. Since the landmark T.L.O. case, courts have given schools even more latitude in conducting searches. In *Veronia School District 47J v. Acton* (1995), for example, the constitutionality of conducting random drug testing among student athletes was upheld. This was expanded again in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002), where Justice Thomas said that students in *any* extra-curricular activity “implicitly have a lower expectation of privacy.” Again, it would seem reasonable for schools to apply this rationale to technology, since students often use school-owned computers for purposes beyond the academic curriculum. If students are informed in advance that school equipment may be routinely searched (thus reducing their expectation of privacy), schools are likely to be upheld in random searches of their networks and school-owned equipment for purposes such as routine maintenance or when they have genuine concern for students’ safety. Individual searches of computers or a specific student’s internet use may be carried out if school administrators have reasonable suspicion

that a student has acted in violation of district policy or has committed a criminal act.

c) Tort Law and Negligence

Constitutional claims are expensive and time consuming. When suing schools, parents often turn first to the law of torts and negligence because it is remedial and plaintiffs can seek compensation for torts or “wrongs” by the institution. Negligence in supervision of children at school is one form of a tort.

When a claim in negligence is brought against a school, the plaintiff must establish that there was a duty of care and tangible harm, that the tangible harm was foreseeable, and that the school official’s actions or omissions either proximately or remotely caused the injury. Even though physical injuries are tangible and (in Canada) easier to establish (MacKay & Dickinson, 1998), the threshold for claimants in the U.S. is very high. School law cases involving psychological harm are less common, but there are precedents. In *Spears v. Jefferson Parish School Board* (1994), for example, a kindergarten teacher scared one of his students by joking that he had killed another student. He even went so far as to put a rope around the child’s neck and have him pretend to be dead. All of this caused considerable psychological damage to the student who was the brunt of joke, causing the court to find the school liable for the actions of the teacher that resulted in emotional harm to the child.

Courts have also supported claimants in cases involving suicide or psychological harm that could potentially result in suicide (Shariff, 2003). Bullying research and numerous media reports confirm that “bullycide” (suicide by victims of bullying) is on the rise (Harmon, 2004; DiGuilio, 2001). Similarly, courts in Britain have ruled that bullying is not only an educational problem -- it is also a health problem, acknowledging the severe consequences on the emotional and sometimes physical health of victims (Shariff, 2003). Gradually, the courts are beginning to recognize emotional and psychological harm as “tangible,” including mental shock and suffering (Linden & Klar, 1994). Therefore, claims for negligence against schools under tort law may be more successful than charges of criminal harassment against perpetrators.

d) Canadian Human Rights and United States Sexual Harassment and Discrimination Law

Another area of law that relates to cyber bullying (particularly with respect to sexual harassment in institutional settings), is Canadian human rights law which has established an institutional obligation to protect sexual harassment victims. Two cases illustrate this point.

The first involved a Canadian case of sexual harassment by a co-worker, both inside and outside the workplace (*Robichaud v. Canada, Treasury Board, 1987*). The Supreme Court of Canada ruled that institutions are responsible for providing safe environments for their employees even if the sexual harassment by a co-worker occurs outside of the workplace. The fact that the victim must face their tormentors in the workplace imposes an obligation on the employer to address the problem effectively. This case is highly relevant to cyber bullying because school officials often maintain they are not responsible for harassment by school-mates that occurs outside of school grounds, or outside school hours. As the Supreme Court of Canada confirmed in *Robichaud*, if the victim has to face the perpetrator within the institution, the institution is responsible for correcting the problem no matter where the harassment actually takes place.

A second example involves the homophobic harassment of a male high school student of Iranian heritage in British Columbia, Canada (*Jubran v. North Vancouver School District 2002*). Even though Azmi Jubran was not gay, his appearance caused the majority of students in his class to tease him as being gay for the duration of his four years at Handsworth Secondary School in North Vancouver. The British Columbia Human Rights Tribunal ruled that the school had created a negative school environment in failing to protect Jubran, or disciplining the perpetrators. The tribunal ruled that they did an inadequate job of educating the students to be inclusive and socially responsible. Upon appeal by the school board and the high school, the British Columbia Supreme Court adopted a narrow construction of the case. The judge ruled that, because the claim was brought under S. 8 of the Human Rights Code (which protects homosexuals from harassment), and because Jubran claimed that he was not homosexual – he had no claim! The British Columbia Court of Appeal, however, rendered a more thoughtful and practical ruling, overturning the Supreme Court decision and re-instating the tribunal decision. The court reiterated that Jubran had every right to a claim against the school

and school board because they fostered and sustained a negative school environment in which he was prevented from equal opportunities to an education free of discrimination and harassment (see Shariff & Strong-Wilson, 2005).

United States law provides protection from sexual harassment and gender discrimination is provided under Title IX of the Education Amendments of 1972. Additional protection for all forms of discrimination is provided under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, along with specific federal laws (e.g. Titles VI and VII of the Civil Rights Act of 1964) and states' Human Rights Laws.

Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Schools are clearly included in this group, and courts have held that schools must take reasonable steps to intervene in sexual harassment issues.

Title IX guidelines suggest that it is the school's responsibility to take action when they know or should have known about harassment. However, the standard of "actual knowledge" versus "should have known" was tested in a landmark case on sexual harassment in schools. In *Gebser v. Lago Vista Independent School District* (1998), the Supreme Court of the United States, in a 5-4 decision, supported the "actual knowledge" standard. In this case a student was suffering abuse from her teacher. Some of it occurred on school grounds during an Advanced Placement class, in which she was the only student. The plaintiffs argued that the school should have known about the abuse through proper supervision of the teacher. The court ruled that since the student had told no one about the abuse, the school could not be held liable. Although this seems to relieve schools of some responsibility, the Gebser ruling made it clear that if the school had received any information about this misconduct and had failed to take immediate action, the court would have considered that "deliberate indifference." This premise was tested in the controversial landmark decision also in 1998. The case of *Davis v. Munroe* (1988) involved the persistent sexual harassment of a 5th grade female student, Lashonda Davis, whose parents informed the teachers and the school principal numerous times to no avail. Lashonda's grades dropped and her health was negatively affected. In a majority 5:4 decision, the Supreme Court ruled that in

failing to act to protect Lashonda, the school had created a “deliberately dangerous environment” which prevented “equal opportunities for learning.”

In *Nabozny v. Podlesny* (1996), the court relied on the protections guaranteed in the 14th Amendment of the U.S. Constitution in finding for the plaintiff when the school failed to protect him against relentless harassment he had faced for being gay. The federal judge pointed out that it was the school’s responsibility to protect gay students just as much as they would any other student.

The above cases illustrate that schools will be held liable if they fail to act when students are being harassed at school. The logical next assumption is that schools must likewise protect students from cyber bullying, which creates a similarly dangerous environment for victims; engendering fear and distraction and preventing victims from equal opportunities to learn.

IV) Conclusion and Implications

This paper has drawn attention to the complexities of cyber bullying, its insidious and anonymous nature, and the forms through which it is conveyed. We have explained that because it takes place prevalently on home computers and personal cell-phones, it becomes difficult to supervise by school personnel. We have provided the analogy of *Lord of the Flies*, which highlighted social deterioration that occurs when adolescents remain unsupervised. We have explained that it is most prevalent among adolescents and that it comprises a significant amount of gender-based harassment and homophobia. Our review of the legal considerations that arise with respect to defamation, freedom of expression, student safety, and privacy in the school context highlights that although online harassment occurs in virtual space, it nonetheless constitutes a form of “real” violence and ought to be understood and interpreted this way by schools and courts.

The United States constitutional cases covered in this paper disclose that while courts continue to consider freedom of expression from a geographical perspective – namely, on-campus versus off-campus expression, *Tinker* (1969) is applicable to cyber bullying because it allows schools to intervene if such expression materially and substantially disrupts learning. Furthermore, *Fraser* (1986) confirms that schools are well within their rights to intervene when expression impedes the educational mission of the school. Finally, as *Kuhlmeier* (1988) and *R. v. M.R.M.* (1998) confirm, student privacy rights are

subject to school authority in cases where student safety is concerned – justifying school locker searches. It can be argued that when cyber bullying is conducted on school computers, such communication can be confiscated and dealt with by school officials.

The right of schools to intervene to reduce cyber bullying is also related to their obligations to provide students with a safe school environment that provides equal opportunities to learn. Canadian constitutional decisions in *Ross* (1996) and *R. v. M.R.M.* (1998) support the need for schools to provide positive school environments, which we have argued extend to virtual space. Furthermore, human rights jurisprudence on sexual harassment in Canada and the U.S. has supported the institutional obligation to address harassment regardless of whether it takes place on or off school property.

Until the courts provide schools and Internet providers with policy directions that specifically address cyber bullying, these rulings at least provide reasonable guidelines to inform educational policy and practice. In the meantime, it is important for schools to foster inclusive school environments and attend to every complaint of cyber bullying through educational and communicative means. To do so, we propose a four pronged approach, which involves: 1) developing appropriate policies; 2) encouraging university research, teacher education and professional development; 3) endorsing online educational programming; and 4) empowering young people to engage in critical thinking to promote positive online interaction.

1) Policy Development

As several scholars observe (Mackay & Burt-Gerrans 2005; Cassidy & Jackson 2005), zero-tolerance policies, suspension, and criminal harassment charges against adolescents rarely solve school problems (Giroux, 2003; DiGuilio, 2001). In this regard, it is important that schools acknowledge their important role as educators, and work with parents and relevant stakeholders to develop non-arbitrary policies that can be implemented through positive educational programs and critical thinking tools that provide students with beneficial Internet experiences. A Canadian Internet organization that supports schools (Media Awareness Network), has recently released its results on positive and negative uses of the Internet (Steeves & Wing, 2005). Its website provides excellent programming options for students at all grade levels. In the United States, i-SAFE America, a nonprofit

internet safety foundation endorsed by the U.S. Congress, provides valuable resources to schools, students, parents, and law enforcement officials in protecting the online experiences of K-12 students. Our point is that schools cannot address this problem alone. They must inform their policies through collaboration with other stakeholders.

2) Research, Teacher Education, and Professional Development

University faculties of education can assist the efforts of policy makers by conducting further research, which can inform teacher education and professional development on this emerging and complex form of virtual harassment. They should also collaborate with the legal community to develop guidelines for schools and incorporate this knowledge into teacher education, leadership preparation, and professional development programs. By working together, Ministries/Departments of Education, law enforcement providers, the legal community, education and legal academics, Internet corporations, and community organizations can curtail cyber bullying and protect students. It will require considerable effort and a unified approach in order to delineate clearly the parameters of civil behavior and establish consequences for misbehavior. But only with such guidelines can we hope to rescue students from the virtual "Lord of the Flies" island where they now find themselves. The first step is to provide educators with the tools they need to develop and implement inclusive, educational, and legally defensible policies and practices in a rapidly evolving age of new technologies.

3) Interactive Online Educational Programs

We also advocate the development of interactive online educational programs that would help students arrive at their own moral and ethical judgments about social relationships and discrimination. It is essential that students are empowered to take leadership and responsibility in fostering positive and inclusive virtual environments. A number of positive initiatives have been commenced by Media Awareness Network (Steeves & Wing, 2005); Willard (2005); Balfour (2005) where adult programming provides the support and guidance on Internet and technology use and relationships. Media Awareness Network, for example, found in their recent study (Steeves & Wing, 2005) that children as young as nine were interested in knowing how to authenticate information on the internet to avoid

predators and harassment. Many of the students interviewed expressed an interest in finding educational resources and expressed a desire to engage in responsible use of the resources available to them.

4) Student Empowerment and Critical Thinking

Finally, empowerment and student participation in learning, critical thinking and rule-making are of significant importance so that we do not abandon young people on the island of virtual reality. It is crucial that we engage young people in the rule-making aspects relating to responsible-use of new technologies, and work with them (on a consistent and supportive basis) to help them think critically about the consequences of their actions for the victims, their own education and their families. In this regard, the international work of TC2 (The Critical Thinking Consortium) directed by Professor Roland Case (in press, 2005) would be highly applicable. The consortium works with schools and teachers to infuse critical thinking into the curriculum, whereby students are presented with problematic scenarios and taught the tools to help them to make reasoned judgments about their actions, attitudes, and responses in specific situations. As Willard (2005) suggests, in the cyber bullying context, it is of crucial importance that we provide the supports to help young people reconnect with their sense of ethics so that they can think critically about the impact of their online actions and attitudes.

In sum, now that the complexities and negative potential of new technologies have emerged, it is time to work collaboratively with students, parents, technology corporations, universities, law enforcement providers, and government to establish codes of conduct and guidelines. While technology corporations are reluctant to monitor and edit online abuse because of the reverse effect of protective laws that might hold them liable in the United States, courts need to revisit their approach to liability and develop a more balanced approach that resembles the decision adopted by a British court in *Godfrey v. Demon Internet Ltd.* (1999). The court in that case held that once the ISP knows about the cyber bullying and fails to act, it is liable under *the Defamation Act of 1996, 31* (Eng.).

Regardless, we cannot rely on Internet providers or the courts. We must monitor virtual discourse on a regular basis, and act quickly to address complaints of cyber bullying before adolescent relationships deteriorate to the level that they did on that remote island in *Lord of the*

Flies. If we can prevent even one child or teenager, like Piggy, from falling through the cracks and down the cliff of virtual reality, then we are well on our way to protecting and educating students, and keeping schools out of court.

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