

A RISING PANDEMIC OF SEXUAL VIOLENCE IN ELEMENTARY AND SECONDARY SCHOOLS: LOCATING A SECRET PROBLEM

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I. INTRODUCTION

This article posits that over the course of the last few decades incidents of sexual harassment in K-12 schools have been occurring at younger and younger ages and have become more sexually violent. Despite the paucity of survey data from elementary and middle school students and the general difficulty of acquiring data on sexual violence in schools, this article documents both of those assertions using ethnographic data, narratives acquired from lawsuits and reports in the media. Sexual violence in schools, which often gets named as something else, frequently is not reported to law enforcement or school officials; when it is surveyed, it is not disaggregated from incidents of physical violence, so these incidents of sexual violence are often classified as “physical violence.” Moreover, data on violence and coercion in teen relationships (sometimes called “teen dating violence” or “intimate partner violence”) outside of school is also considered as indicative of the increase in teen sexual violence. Despite this documented rise of sexual harassment and sexual violence in schools, the popular and more palatable term “bullying” is often used instead to describe these sexually violent incidents. Whether used innocently or as shorthand, when school officials call these sexual violent events “bullying,” the violent and illegal (either under civil law or under criminal law) nature of these incidents is obscured and the school’s responsibility and potential liability is deflected.

II. LISTENING TO THE SAME STORY

She was a twelve-year-old girl at the Eugene Butler Middle School in Jacksonville, Florida.¹ She was in the hall looking for an administrator to sign her tardy slip when she encountered several of her male classmates who were roaming the halls without a hall pass.² They grabbed her and pulled her down an empty corridor not far from where the school safety officer was usually located.³ The four boys threw her into a bathroom, and once they were all in there, they

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1. See Tonya Weathersbee, *Disturbing Butler Incident Raises Many Big Questions*, FLA. TIMES-UNION, Apr. 7, 2003, at B5; Dana Treen, *Parents Question School’s Security Child’s Rape Went Undetected*, FLA. TIMES UNION, Apr. 2, 2003, at B1.

2. Weathersbee, *supra* note 1.

3. *Id.*

bolted the door from the inside (it was one of those individual bathrooms that are usually not available to students and are supposed to be locked at all times unless under the supervision of an adult).⁴ For the next thirty minutes, she was raped by one boy and forced to perform oral sex on the three others.⁵ Her assailants were twelve, thirteen and fourteen years old, and her sexual assault happened during the school day.⁶

A. This is Not an Anomaly

Sexual assaults in schools can be found all over the country. For example, in February 2004, a ten-year-old girl in a Broward County, Florida school bathroom was raped.⁷ In the past two school years, 11 sexual batteries, 113 sexual offenses and 67 cases of sexual harassment were reported in Broward County public elementary schools.⁸ Many more incidents occurred at higher grade levels, for a total of 40 sexual batteries.⁹

Additionally, in December 2004 at the Benjamin Franklin Middle School in San Francisco, a group of four twelve and thirteen-year-old boys accosted a twelve-year-old girl, dragging her into a locker room and demanding oral sex while restraining her.¹⁰ The boys tried to remove her clothing.¹¹ A tally of sexual assault incidents in the first five months of the 2003-2004 school year, conducted by the San Francisco School District, showed twenty-five incidents: two took place at elementary schools, seventeen at middle schools, and six at high schools.¹² A comparative time period from the 2002-03 school year found a total of six incidents across the School District.¹³

While the preponderance of sexual assaults victimize girls (in fact, three-fourths of victims of juvenile sexual assault are female),¹⁴ young boys are also targeted. In Louisiana, a five-year-old boy went to the bathroom in the company of three other male kindergarten students.¹⁵ While in the restroom, the three boys sexually assaulted the one child by pulling down his pants, attempted anal intercourse with him and forced him to perform sexually explicit oral behavior with them.¹⁶ In another bathroom episode, in the Minneapolis,

4. Treen, *supra* note 1.

5. *Id.*

6. *Id.*

7. Jamie Malernee, *Harassment Programs Scrutinized; Schools Must Do Better Job Communicating*, *Experts Say*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 8, 2004, at B1.

8. *Id.*

9. *Id.*

10. Alison Soltau, *School Sex Crimes on Rise*, S.F. EXAMINER, Apr. 1, 2004.

11. *Id.*

12. Heather Knight, *Schools Report More Sexual Assaults*, S.F. CHRONICLE, Apr. 2, 2004, at B4.

13. *Id.*

14. CARL MCCURLEY & HOWARD SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN, VICTIMS OF VIOLENT JUVENILE CRIME 6 (July 2004), available at <http://www.ncjrs.org/pdffiles1/ojdp/201628.pdf>.

15. *Katz v. St. John the Baptist Parish Sch. Bd.*, 860 So.2d 98, 99 (La. Ct. App. 2003).

16. *Id.*

Minnesota public schools, a six-year-old boy was allegedly sexually assaulted in the bathroom by three boys ages 10-12.¹⁷

B. Limited Information from Surveys

Survey data on the prevalence of sexual violence in elementary and middle schools (children younger than twelve years old) is difficult to obtain and has not been consistently collected, disaggregated or reported. Researchers lack a complete picture of the violence that children experience including whether that violence is experienced at home, in the streets, in public spaces, or at school. The paucity and the inconsistent collection of information among students in this age group is largely due to resistance from parents who forbid researchers from gathering data from children about childhood (sexual) victimization.

Only recently has self-reported data from children younger than twelve years old been collected. Since its origin in 1929, the FBI's Uniform Crime Reporting (UCR) system and the Bureau of Justice Statistic's National Crime Victimization Survey (NCVS) did not collect information about crimes committed against persons less than twelve years of age, and thus could not provide a comprehensive picture of juvenile crime victimization.¹⁸ The new National Incident-Based Reporting System (NIBRS) is designed to replace the UCR as the national database for crimes reported to law enforcement and it now includes data about juvenile victims.¹⁹ However, participation by the states and local jurisdictions is incremental and voluntary,²⁰ and at the current time, the crime experiences of large urban areas are particularly underrepresented. In fact, only three cities with populations greater than one-half million are included thus far (Austin, Texas; Memphis, Tennessee; and Nashville, Tennessee), creating a portrait of juvenile crime that is not a nationally representative sample.²¹ The same data set (1997-1998) has been analyzed and published; one analysis published in 2000 includes twelve states²² while the other analysis published in 2004 includes seventeen states.²³

Nonetheless, the 1997 NIBRS data from twelve states revealed some key findings about juvenile crime and pre-teen victims. Although children younger than age twelve represent only a small percentage of all reported victims (3% of all crimes and 6% of crimes against persons), their crime profile is unusual.²⁴ Sexual assault accounts for almost one-third of preteen victimization, more than

17. David Chanan & Howie Padilla, *School Was Scene of Earlier Assaults; New Reports Surface at Banneker*, MINNEAPOLIS STAR TRIB., Dec. 19, 2001, at 1A.

18. DAVID FINKELHOR & RICHARD ORMROD, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN, CHARACTERISTICS OF CRIMES AGAINST JUVENILES 1 (June 2000), available at <http://www.ncjrs.org/pdffiles1/ojdp/179034.pdf>.

19. *Id.*

20. *Id.* at 3.

21. MCCURLEY & SNYDER, *supra* note 14, at 4.

22. FINKELHOR & ORMROD, *supra* note 18, at 3.

23. MCCURLEY & SNYDER, *supra* note 14, at 4.

24. FINKELHOR & ORMROD, *supra* note 18, at 10.

twice the proportion for older juveniles, and family offenders make up one-third of the offenders against this group, twice the proportion for older juveniles.²⁵

In the 2004 analysis that contained data from seventeen states, family members comprise 27% of the offenders, acquaintances comprise 66% of the offenders, and strangers comprise 3% of the offenders.²⁶ Such a large percentage of crimes committed by acquaintances may indicate that some or even a majority of these incidents may be occurring at school. Unfortunately, information about the location of the crimes is not available from this report. Once again, yet another survey provides only partial, albeit new information, in the quest to know the prevalence of sexual assaults that occur at school, during the school day, by students. The frustrating search to compose a full and accurate picture continues.

Additional data on sexual violence can be found in a report of school crime and safety from 2000 data.²⁷ This report uses a nationally representative sample of 2,270 public school principals who report information including violent deaths, crime and violence frequency, school policies, disciplinary problems and other information related to school crime.²⁸ In a category titled "serious violent incidents", which includes rape, sexual battery, physical attack or fight with a weapon, threat of physical attack with a weapon and robbery with or without a weapon, the report revealed that 20% of all schools experienced one or more serious violent incidents, with 14% of elementary schools, 29% of middle schools, and 29% of high schools reporting "serious violent incidents".²⁹

The results for the category of rape or attempted rape revealed a total of 143 incidents in 126 middle schools, representing 1% of all schools.³⁰ There were no reported rapes or attempted rapes in elementary school.³¹ A total of 650 incidents of sexual battery other than rape occurred in 520 elementary schools representing 1% of all schools.³² A total of 582 middle schools reported 1,141 incidents of sexual battery other than rape, representing 4% of all schools.³³

Clearly a self-reporting mechanism by school principals has limitations. Principals can only provide information that has come to their attention; therefore undercounting is an inevitable problem.³⁴ In addition, the survey may ask for information that the principals did not retain.³⁵ Moreover, some principals may withhold information from law enforcement for a variety of reasons, including preserving their school's reputation.

25. *Id.*

26. MCCURLEY & SNYDER, *supra* note 14, at 4.

27. See AMANDA K. MILLER & KATHRYN CHANDLER, U.S. DEP'T OF EDUC., VIOLENCE IN U.S. PUBLIC SCHOOLS: 2000 SCHOOL SURVEY ON CRIME AND SAFETY (Oct. 2003), available at <http://nces.ed.gov/pubs2004/2004314.pdf>.

28. *Id.* at 2.

29. *Id.* at iv.

30. *Id.* at 58.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 2.

35. *Id.*

C. Information Collected by the National Media

Daily newspapers sometimes report incidents of sexual assaults among youth that are occurring at school during the school day when the adults are supposed to be maintaining a safe learning environment. A LexusNexus search of the fifty-three largest newspapers from national and international sources from 2000-2004 found eighty-four articles about incidents of sexual violence in middle schools and twenty-seven articles about incidents of sexual violence occurring in elementary schools. The search was restricted to incidents that had happened during the school day, on the school grounds, and among children who were classmates. Two additional articles reported on three incidents among middle school students that occurred on a school bus.³⁶ In the vast majority of the cases, the victims of these attacks were girls and the assailants were their male classmates. There were only a few instances where boys were the targets and in those cases, other boys were their attackers and these sexual attacks often took place in the bathroom.³⁷ These results comport with crime surveys which show that girls are much more likely than boys to be the victims of sexual assaults,³⁸ of all juvenile sex offenses, girls are victims in 82% of all the cases, while boys are victims in 18% of the cases.³⁹

As we turn to review additional data from teenagers about their experiences with sexual harassment at school and with teen dating violence, we find that interpersonal violence is a normative feature in the lives of many youth.

III. NAMING THE REAL PROBLEM AS GENDERED OR SEXUAL VIOLENCE

The existence of peer-to-peer sexual harassment in K-12 schools has been well documented for decades.⁴⁰ Sexual harassment is now accepted as an unfortunate fact of life.⁴¹ Nearly 30 years after the passage of Title IX, a 2000 survey found rampant evidence of sexual harassment in schools.⁴² Students continue to

36. Michael Frazier, *Two Boys Charged With Rape In Assault On School Bus*, ARK. DEMOCRAT-GAZETTE, Dec. 19, 2003, at 17; *Students Face Felony Charges In Fondlings*, ST. PETERSBURG TIMES, Oct. 27, 2001, at 3B.

37. *Katz v. St. John the Baptist Parish Sch. Bd.*, 860 So.2d 98 (La. Ct. App. 2003); *School Board Might be Liable for Restroom Sexual Assault of Male Kindergarten Student*, EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT (Newsletter), Dec. 2003, at 1-4, available at <http://www.thompson.com/libraries/grantmanage/sink/samplenews/sink0312.html?SOURCE=news>; Channen & Padilla, *supra* note 17.

38. FINKELHOR & ORMROD, *supra* note 18, at 3.

39. *Id.*

40. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993)* [hereinafter AAUW, *HOSTILE HALLWAYS I*]; AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., *HOSTILE HALLWAYS II: BULLYING, TEASING AND SEXUAL HARASSMENT IN SCHOOL (2001)* [hereinafter AAUW, *HOSTILE HALLWAYS II*]; NAN STEIN, ET AL., *SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS (1993)* [hereinafter STEIN, *SECRETS*]; Susan Strauss, *Sexual Harassment in the School: Legal Implications for Principals*, NASSP BULL., Mar. 1988, at 93-97; Nan Stein, *Sexual Harassment of High School Students: Preliminary Research Results (1981)* (unpublished manuscript, Mass. Dept. of Education, on file with author) [hereinafter Stein, *Preliminary Research Results*].

41. AAUW, *HOSTILE HALLWAYS II*, *supra* note 40.

42. *Id.*

report that school personnel behave in sexually harassing ways, and/or that they do not intervene when sexual harassment occurs.⁴³

In the most recent scientific survey about sexual harassment in schools, the American Association of University Women (AAUW) along with the Harris pollsters found that among 2,064 students in grades 8-11, sexual harassment was widespread in schools, with 83% of girls and 79% of boys indicating that they had been sexually harassed.⁴⁴ Thirty percent of the girls and 24% of the boys reported that they were sexually harassed often.⁴⁵ Nearly half of all students who experienced sexual harassment felt very or somewhat upset afterwards, pointing to the negative impact that sexual harassment has on the emotional and educational lives of students.⁴⁶ As compared to the 1993 AAUW survey on sexual harassment among 8th-11th graders, the results from 2001 showed an increase both in awareness about and incidents of sexual harassment, yet students in 2001 had come to accept sexual harassment as a fact of life in schools.⁴⁷ The greatest change in the eight year period was in students' awareness of their schools' policies and materials to address sexual harassment.⁴⁸ Yet, despite this increased awareness of their schools' policies and materials, there were no more reported incidents of sexual harassment.⁴⁹

Educational personnel are also responsible for some of the sexual harassment, sometimes as perpetrators and other times as spectators.⁵⁰ According to the 2001 AAUW survey, 38% of the students reported being sexually harassed by teachers and other school employees.⁵¹ In a particularly egregious and notorious case in April 2002, at a Friday night school dance, the female assistant principal in a high school near San Diego, California required all girls to lift their skirts to prove that they were wearing underwear—she did not want a repeat of a previous year's prank where a few girls had “mooned” their bare bottoms (meaning, they lifted their skirts and “flashed” their naked bottoms).⁵² So, with-

43. See *Id.* at 14 (noting that although fewer students today report sexual harassment by teachers, sexual harassment by teachers and other school employees remains significant). See also *id.* at 17 (noting that students have complained that adults do not provide sufficient enforcement or take the issue seriously).

44. AAUW, *HOSTILE HALLWAYS II*, *supra* note 40, at 4.

45. *Id.*

46. *Id.*

47. *Id.* at 4 (“Because of the widespread nature of sexual harassment in school life, some students report that it’s not a big deal and many accept it as part of every day life.”). See also *id.* at 32.

48. *Id.* at 15.

49. *Id.* at 4-5, 8.

50. *Id.* at 5.

51. *Id.*

52. See generally Darcia Harris Bowman, *Calif. Vice Principal on Leave for Student Underwear Check*, EDUC. WEEK, May 8, 2002, at 4; Chris Moran, *Assistant Principals are Enforcers*, SAN DIEGO UNION-TRIBUNE, May 5, 2002, at B1; Barbara Whitaker, *National Briefing West: California: Uproar Over Underwear Check*, N.Y. TIMES, May 1, 2002, at A20; Eleanor Yang, *School Dance Incident Sparks Furor*, SAN DIEGO UNION-TRIBUNE, May 1, 2002, at NC-1; Eleanor Yang, *Incident at High School Dance Creates Furor*, SAN DIEGO UNION-TRIBUNE, May 1, 2002, at B1 [hereinafter Incident]; Eleanor Yang, *Assistant Principal on Leave; Underwear-check Investigation Could Take up to 2 Weeks*, SAN DIEGO UNION-TRIBUNE, May 2, 2002, at NC-1; Eleanor Yang, *Freak-dance Fever has Schools Freaking Out*, SAN DIEGO UNION-TRIBUNE, May 12, 2002, at B1.

out warning, and without requiring all boys to do the same, all girls had to lift their skirts, in public, if they wanted to be admitted to the dance.⁵³ Some girls refused to comply with this unusual request.⁵⁴

This is an example of administrative sanctioned sex discrimination—only girls were required to prove they were wearing underwear, and by requiring them to lift their skirts in public, sexual harassment enters the equation. After the fact, other administrators disavowed her conduct, but nonetheless, she possessed enough authority that she could force her arbitrary and discriminatory standards on the students.⁵⁵ She claimed not to know about Title IX and its requirements for her and other school administrators, and the liability that her conduct could have imposed on the school district.⁵⁶ She is not alone—there are plenty of other examples of administrators and teachers behaving in a harassing manner.⁵⁷

Moreover, the federal courts, including the Supreme Court,⁵⁸ have weighed in on the question of school district liability for peer-to-peer harassment, ruling that school districts have liability if they knew about the sexual harassment and did nothing to prevent it. After decades of battling for recognition of the problem, the Supreme Court's decision in *Davis* established that peer-to-peer sexual harassment exists among our youth, that the adults are liable for damages, and the requirements and standards under Title IX have been clarified. According to Deborah Brake, formerly of the National Women's Law Center, and co-counsel for the *Davis* family for over five years of litigation, including the oral arguments before the Supreme Court:

Under the Supreme Court's ruling, Title IX supports an action for damages where a school responds with deliberate indifference to peer sexual harassment once it has actual notice of the harassment. As long as the underlying sexual harassment is "so severe, pervasive and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect," the school is accountable for its response (or lack thereof). The plaintiff must prove that the school acted with deliberate indifference, but need not demonstrate that the school treated the harassment complaints of students differently based on the sex of the complainant, or acted out of an impermissible discriminatory notice toward persons of one sex.⁵⁹

A. Violence in Teenage Relationships

Moreover, there is evidence of growing violence in teenage dating relationships that add to the assertion that sexual violence among teenagers is increasing overall. The evidence comes from data derived from both the national ad-

53. See Incident, *supra* note 52.

54. *Id.*

55. *Id.*

56. *Id.*

57. John Gehring, *K.C. Students Strip-Searched Over Missing Lunch Money*, EDUC. WEEK, Apr. 3, 2002, at 4.

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

59. Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 39-40 (1999).

ministration of the Youth Risk Behavior Survey (YRBS) with its 2003 sample size of about 15,000 students fourteen to eighteen years old, and from the state administrations of the YRBS (with varying sample sizes, depending on the state).⁶⁰ The YRBS is a comprehensive survey about general behavior of teens administered by the U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention. Two of the questions on the survey ask about violence in teen dating relationships. One of those questions inquires about physical violence in a dating relationship (“[d]uring the last 12 months, did your boyfriend or girlfriend ever hit, slap or physically hurt you on purpose?”), and the second question asks about forced sexual violence in a dating relationship (“[h]ave you ever been physically forced to have sexual intercourse when you did not want to?”).⁶¹ A recent analysis of the national 2001 data from 6,864 female students in grades nine through twelve found that 9.8% of all girls reported being intentionally physically hurt by a date in the previous year and 17.7% of sexually active girls reported the same abuse.⁶² By 2003, the results for the U.S. overall showed that 11.9% of females experienced forced sexual intercourse, compared to 6.1% of males.⁶³

In Massachusetts, teenage girls experience a more violent reality from their dating partners. In the 1999 survey, up to 18% of females reported experiencing either physical violence or sexual violence.⁶⁴ In a more socially and religiously conservative state such as Idaho,⁶⁵ the report shows a safer picture, but 10% of students still reported physical violence from a dating partner in 2001 (7.6% females, 11.8% boys).⁶⁶ The 2001 responses from Idaho also showed that 7.8% of students reported being forced to have sexual intercourse (10.5 % females, and 5.2% males).⁶⁷ Data from the 2003 survey, however, shows a rise in dating violence, even in Idaho where one in nine students have been physically hit by a dating partner (12.1% of the females and 10.4% for the males)⁶⁸ while one in

60. Nancy D. Brener et al., *Methodology of the Youth Risk Behavior Surveillance System*, MORBIDITY AND MORTALITY WEEKLY REPORT, Sept. 24, 2004, at 9, available at <http://www.cdc.gov/mmwr/PDF/rr/rr5312.pdf>.

61. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH RISK BEHAVIOR SURVEY: 2003, available at <http://www.cdc.gov/HealthyYouth/yrbs/pdfs/2005highschoolquestionnaire.pdf>.

62. Jay G. Silverman, et al., *Dating Violence and Associated Sexual Risk and Pregnancy Among Adolescent Girls in the United States*, 14 PEDIATRICS 2, 220-225 (2004).

63. *Id.* at 213.

64. Jay G. Silverman, et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572, 574 (2001).

65. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, *supra* note 61.

66. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH ONLINE: COMPREHENSIVE RESULTS, at <http://apps.nccd.cdc.gov/yrbs/QuestYearTable.asp?cat=1&quest=Q21&loc=ID&year=Trend>.

67. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH ONLINE: COMPREHENSIVE RESULTS, at <http://apps.nccd.cdc.gov/yrbs/QuestYearTable.asp?ByVar=CI&cat=1&quest=Q22&loc=ID&year=Trend>.

68. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH ONLINE: COMPREHENSIVE RESULTS, at <http://apps.nccd.cdc.gov/yrbs/QuestYearTable.asp?cat=1&quest=Q21&loc=ID&year=Trend>.

seven has experienced sexual violence (14% of the females and 6% of the male students report they have been physically forced to have sexual intercourse).⁶⁹

B. Sexually Violent Hazing Among Youth

In the late spring through the early fall of 2003, a series of hazing episodes occurred among high school students that captured the attention of the general public. These events offer some insights into the ways in which the problems are framed (and obscured), and point the way towards the need to understand these events as gendered, and as violence.

First and foremost was the deeply troubling hazing episode in early May 2003 among girls from Glenbrook North High School in the suburbs of Chicago.⁷⁰ There, a large group of senior girls soon to celebrate their graduation from high school inducted a group of junior girls into the senior class.⁷¹

Ritualistically conducted in the forest, off school grounds, this voluntary induction was carried out through violent and humiliating beatings, and the forced consumption of beer, feces, mud, paint, and fish heads, all of which was either poured down the girls' throats or over their heads.⁷² Everything was videotaped by boys whose presence was no mistake—they were needed to carry in the kegs of beer and to serve as the video technicians and cheerleaders.⁷³ In other words, the senior girls performed violent masculinity in front of the boys by showing them that they could both out-gross and out-perform them.

In a critique of this hazing event, psychologist Lyn Mikel Brown and criminologist Meda Chesney-Lind wrote that the girl fighting is a symptom of deeper cultural problems. According to Brown and Chesney-Lind:

The senior girls used words like bitches, wimps and sluts to shame the juniors into staying on the field . . . but the fact that girls are fighting other girls in front of videotaping and beer-drinking boys is significant . . . girls used sexist and misogynistic language to control other girls during and after the event Girl-fighting gets acted out horizontally on other girls because this is the safest and easiest outlet for girls' outrage and frustration. Girls are essentially accessing and mimicking the male violence they sometimes know all too well. And they are choosing victims that are societally approved—other girls.⁷⁴

69. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH ONLINE: COMPREHENSIVE RESULTS, at <http://apps.nccd.cdc.gov/yrbss/QuestYearTable.asp?ByVar=CI&cat=1&quest=Q22&loc=ID&year=Trend>.

70. Amanda Paulson, *Female Aggression: Brutal Hazing Ritual Renews Nation's Interest in Female Anger*, CHRISTIAN SCI. MONITOR, May 13, 2003, at 4A; Jo Napolitano, *Girls' Game Turns Violent*, N.Y. TIMES, May 8, 2003, at 30.

71. Paulson, *supra* note 70.

72. *Id.*

73. Napolitano, *supra* note 70, at 30. See also Janet Fuller, *Teen Guilty of Taking Two Kegs to Hazing*, CHI. SUN TIMES, July 16, 2003, at 6; Megan Reichgott, *Parents Probed in Suburban Chicago Hazing*, ASSOCIATED PRESS, May 10, 2003.

74. Lyn Mikel Brown & Meda Chesney-Lind, *Bad Girls, Bad Girls: Whatcha Gonna Do?*, YOUTH TODAY 12, Sept. 2003, at 23.

By late August, reports of boys hazing other boys in very sexually violent ways emerged in the national press. First there were reports that three varsity football players from Mepham High School on Long Island, New York had brutally sexually assaulted younger teammates while attending a five-day football training camp.⁷⁵ They are alleged to have inserted broomsticks, pine cones and golf balls into the anuses of three younger boys.⁷⁶ The horrors came to light because two boys continued to bleed through their rectums, with one eventually needing surgery.⁷⁷

In mid-October reports of another sexually violent incident emerged. At least one boy from the high school soccer team in Friendship, New York had sexually assaulted another teammate in the locker room while other boys watched.⁷⁸ In both cases, the coaches were missing in action—no adults intervened or claimed to have any knowledge of these unfolding horrifying events.⁷⁹

Both instances include charges of sexual assault, sexual abuse or sodomy; they cannot simply be framed as hazing or the over-used term of bullying. But, the Mepham and Friendship cases did not produce the national outrage the Glenbrook girls did; there were no heart-felt wrenching discussions about the type of normative masculinity that includes perpetrating sexual violence coupled with colluding silence and lack of intervention from the other observing teammates.⁸⁰ The older girls at Glenbrook did not tie up the younger girls as was the case at Mepham High School, where the younger boys were bound with duck tape, stripped naked against their will and sexually assaulted and sodomized. Yet relative silence surrounded these violent boy-on-boy sexual assaults compared with the media attention directed at the girls from Glenbrook North High School in the Chicago suburbs. The Glenbrook incident produced commentaries about the supposed increasing rates of girls' criminal conduct.⁸¹ Over and over the video images of the girls hazing the other girls were shown on television, anesthetizing the nation.⁸² All perspective was lost and a context was never provided; there was never any mention of the increasing rates of rape and sexual assault of girls, particularly at the hands of boys and men they know.

75. Patrick Healy, *School District in Hazing Case Draws Anger From Parents*, N.Y. TIMES, Sept. 19, 2003, at B1; Patrick Healy, *L.I. District is Criticized in Hazing Case*, N.Y. TIMES, Sept. 23, 2003, at B1; Patrick Healy & Faiza Akhtar, *Football Players on L.I. Face Abuse Accusations in Hazing*, N.Y. TIMES, Sept. 12, 2003, at B5; Karla Schuster, et al., *Trouble for Team: Mepham Football Players Accused of Sex Abuse at PA Camp*, NEWSDAY, Sept. 11, 2003, at A3.

76. Robert Kessler, et al., *2 Teens Attacked 3 Separate Times at Camp*, NEWSDAY, Sept. 16, 2003, at A02; Patrick Healy, *L.I. District Is Criticized in Hazing Case*, N.Y. TIMES, Sept. 23, 2003, at B1; Patrick Healy, *Coach on L.I. Says He Knows of No Hazing*, N.Y. TIMES, Sept. 30, 2003, at B1; Selena Roberts, *Code of Silence Corrupts the Young*, N.Y. TIMES, Sept. 28, 2003, at 8.

77. B. Lambert, *Inquiry Widens in Abuse Case Against Football Players*, N.Y. TIMES, Oct. 7, 2003, at A28; Selena Roberts, *Code of Silence Corrupts the Young*, N.Y. TIMES, Sept. 28, 2003, at 8SP.

78. David Staba, *High School Player is Charged in Sexual Abuse*, N.Y. TIMES, Oct. 14, 2003, at B9.

79. See Karla Schuster & Keiko Morris, *Coach Says He's Sorry, But Declares He Took Every Precaution on Mepham Trip*, NEWSDAY, Oct. 1, 2003, at A2; Patrick Healy, *Coach On L.I. Says He Knew of No Hazing*, NY TIMES, Sept. 30, 2003, at B1.

80. Brown & Chesney-Lind, *supra* note 74, at 23.

81. *Id.*

82. *Id.*

The next section looks at the possible reasons as to why sexual harassment and sexual violence may be increasing in schools and explores the convergence of several developments that have led to the erosion of attention to sexual harassment in schools: (1) new legal mandates that attempt to elevate the “bullying” prevention framework over the rights framework (sex discrimination, sexual harassment) and therefore create a distraction from the more pressing problems of sexual harassment and sexual violence; (2) zero tolerance policies that emphasize suspensions and expulsions as opposed to education, counseling, and reform; and (3) high stakes tests that take teachers’ time and attention from emotional and physical safety of their students, including less time to focus on incidents of sexual harassment and sexual violence. In total, these three factors have produced schools that are leaner and meaner, and may have helped to create an atmosphere that allows sexual harassment and sexual violence to flourish.

IV. EROSION OF ATTENTION TO SEXUAL HARASSMENT

A. Bullying as a Distraction

As the national media focused on sexually violent hazing episodes of 2003, a new, all-consuming focus on bullying in schools has emerged. Since the school shootings at Columbine High School in April 1999, state legislators have been passing laws on school bullying which may serve to placate the general public. Concurrently, however, there has been an increase of incidents of sexual harassment and sexual violence in schools, along with greater frequency of violence in teen dating relationships. Unfortunately, the bullying focus may serve to both degender the problem of sexual harassment and sexual violence and to take attention away from the increasing severity of these problems.

B. Background on Bullying and Harassment.

In the United States, the discourse around bullying is a relatively new phenomenon, in large part imported from the Europeans and the research conducted there since the 1970s.⁸³ Throughout the 1990s and into the new century, bullying research studies using samples of U.S. children have emerged.⁸⁴ However original and uniquely American the research has become, a very elastic definition of bullying seems to be in vogue and is utilized by many of the U.S. researchers.⁸⁵

83. See, e.g., Dan Olweus, *BULLYING AT SCHOOL* (1993); I. Whitney & Peter K. Smith, *A Survey of the Nature and Extent of Bullying in Junior/Middle and Secondary Schools*, *EDUC. RES.* 31, 1, 3-25, (1993); Yvette Ahmad & Peter K. Smith, *Bullying in Schools and the Issue of Sex Differences*, in *MALE VIOLENCE* 70-88 (J. Archer ed., 1994); Peter K. Smith, & Sonia. Sharp, *SCHOOL BULLYING: INSIGHTS AND PERSPECTIVES* (1994).

84. R.A. Geffner et al. eds., *Bullying Behavior: Current Issues, Research and Interventions*, *J. EMOTIONAL ABUSE* 2, 2/3 [SPECIAL ISSUE] (2001); *BULLYING IN AMERICAN SCHOOLS: A SOCIOLOGICAL PERSPECTIVE ON PREVENTION AND INTERVENTION* (D. Espelage & S. Swearer eds., 2004).

85. Nan Stein, *What a Difference a Discipline Makes: Bullying Research and Future Directions*, *J. EMOTIONAL ABUSE*, 2, (2/3) [SPECIAL ISSUE], (2001), at 1-5 [hereinafter Stein, *What a Difference*]; Nan

Under the prevailing definition of bullying, almost anything has the potential to be called bullying, from raising one's eyebrow, giving "the evil eye," making faces (all very culturally constructed activities), to verbal expressions of preference towards particular classmates over others. There may be a tyranny of sameness that is implicitly being proposed in this pursuit to eradicate bullying behaviors. Yet, on the other hand, sometimes very egregious behaviors are named as bullying, when in fact they may constitute criminal hazing or sexual/gender harassment.⁸⁶ Thus bullying serves as a way to obscure or obfuscate these larger problems

This loose and liberal use of the term bullying may also be part of a general trend to label children, particularly in a culture that tends to psycho-pathologize behaviors. Psychologists seem to dominate the field of bullying research and largely seem unfamiliar with nearly 30 years of research from the fields of educational research, sociology, anthropology, and feminist legal scholarship, fields that might instead frame the bullying behaviors as gendered violence or sexual harassment. While the bullying researchers may acknowledge the existence of sexual harassment in schools, they generally only cite surveys or court decisions from the Supreme Court, and largely have ignored a wealth of studies and articles from researchers who have employed widely different methodologies and who have long argued for a gendered critique of children's behaviors.

Research on peer-to-peer sexual harassment in K-12 education has been underway since the late 1970s⁸⁷ and more formally undertaken in the 1990s through survey research.⁸⁸ Sexual harassment in schools ranges from jokes, comments, graffiti, sexually degrading skits, bra snapping, pulling pants down, skirt flipping, to attempted sexual assault and rape.⁸⁹ These behaviors are often conducted in public, sometimes in front of adults and school personnel who do not intervene, or who respond with a wink and a nod.⁹⁰ Such reactions from the adults give the students, be they the witnesses, targets or the perpetrators, the

Stein, *Bullying or Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783 (2003) [hereinafter Stein, *Missing Discourse*].

86. Nan Stein, *Sexual Harassment Meets Zero Tolerance: Life in K-12 Schools*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS (W. Ayers et al. eds., 2001); Stein, *What a Difference*, *supra* note 85; Stein, *Missing Discourse*, *supra* note 85.

87. See Stein, Preliminary Research Results, *supra* note 40; Strauss, *supra* note 40; Bogart & Stein, 64 PEABODY J. EDUC 146 (1987); NAN STEIN, CLASSROOMS AND COURTROOMS: FACING SEXUAL HARASSMENT IN K-12 SCHOOLS 2 (1999) [hereinafter Stein, CLASSROOMS AND COURTROOMS].

88. See AAUW, HOSTILE HALLWAYS I, *supra* note 40; AAUW HOSTILE HALLWAYS II, *supra* note 40; STEIN, SECRETS, *supra* note 40; Stein, CLASSROOMS AND COURTROOMS, *supra* note 87.

89. Nan Stein, *No Laughing Matter: Sexual Harassment in K-12 Schools*, in TRANSFORMING A RAPE CULTURE 311, 331, (E. Buchwald et al. eds. 1993) [hereinafter Stein, *No Laughing Matter*]; Nan Stein, *It Happens Here, Too: Sexual Harassment and Child Sexual Abuse in Elementary and Secondary Schools*, in GENDER AND EDUCATION: 92ND YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 191-203 (S.K. Biklen & D. Pollard eds. 1993) [hereinafter Stein, *It Happens Here Too*]; See, e.g., STEIN, CLASSROOMS AND COURTROOMS, *supra* note 87; AAUW, HOSTILE HALLWAYS I, *supra* note 40; AAUW, HOSTILE HALLWAYS II, *supra* note 40.

90. Nan Stein, *Sexual Harassment in K-12 Schools: The Public Performance of Gendered Violence*, 65 HARVARD EDUC. REV. 145 (1995) [hereinafter Stein, *Public Performance*]; See STEIN, SECRETS, *supra* note 40; Stein, *No Laughing Matter*, *supra* note 89; Stein, *It Happens Here Too*, *supra* note 89; STEIN, CLASSROOMS AND COURTROOMS, *supra* note 87.

sense that sexual harassment conduct is considered normal and appropriate.⁹¹ If such conduct is permitted in public, with adults watching, then what is to stop the students from thinking these sorts of behaviors are appropriate in private? Permission to proceed with harassing, violent, and battering behaviors in private becomes normalized and appropriate in part because it is tolerated in public.⁹² Schools may serve as the training grounds for domestic violence and sexual assault through the public performance of sexual harassment and gendered violence.⁹³

Results from Australia about a study on sexual coercion, which is part of a six country study, has found that anti-bullying policies are not effective in reducing or eliminating sexual harassment.⁹⁴ In a study of approximately 200 fourteen-year-old students who attended four schools in Adelaide, South Australia that all had anti-bullying policies, a substantial minority said they would ignore sexual harassment if they saw it happening and a smaller minority (boys) thought they would support the boy aggressor.⁹⁵ Some 37% estimated that sexual harassment happened on a weekly basis at school with bystanders present, while somewhat higher estimates were obtained in some other countries in the study.⁹⁶ Among the Australian students, 14% indicated that they would report it to a teacher.⁹⁷

In the absence of similar studies in the U.S., this sobering data from Australia points to the ineffectiveness of anti-bullying policies in changing or challenging the culture of sexual harassment in schools.

C. Anti-Bullying Laws

Occurring nearly simultaneously as the *Davis* case and in response to the Columbine shootings in 1999 was the movement to pass anti-bullying laws at the state level. Furiously reinserting themselves into educational policy generally and into the school safety movement particularly, state legislators across the U.S. borrowed a term from the psychological literature and passed new laws against bullying.⁹⁸

91. See Stein, *Public Performance*, *supra* note 90; STEIN, CLASSROOMS AND COURTROOMS, *supra* note 87.

92. See Stein, *Public Performance*, *supra* note 90; STEIN, CLASSROOMS AND COURTROOMS, *supra* note 87.

93. See Stein, *Public Performance*, *supra* note 90.

94. Transcript Broadcast by Ken Rigby (Sept. 4, 2004) (on file with author); Anti-Bullying Policies Failing to Cut School Harassment (ABC Australia radio broadcast, June 18, 2004), available at <http://www.abc.net.au/pm/content/2004/s1135441.htm>.

95. Ken Rigby & Bruce Johnson, *Students as Bystanders to Sexual Coercion*, YOUTH STUDIES AUSTRALIA, 23 (2), p. 11 (2004).

96. Rigby & Johnson, *supra* note 97, at 14; Personal Correspondence from Ken Rigby (Sept. 4, 2004) (on file with author); Anti-Bullying Policies Failing to Cut School Harassment (ABC Australia radio broadcast, June 18, 2004), available at <http://www.abc.net.au/pm/content/2004/s1135441.htm>.

97. Rigby & Johnson, *supra* 96 at 15.

98. See Stein, *Missing Discourse*, *supra* note 85; Limber & Small, *State Law and Policies to Address Bullying in Schools* 32 SCH. PSYCHOL. REV. 445 (2003) (finding that state laws on bullying, and sometimes harassment, have been passed in the following states: AK, CA, CO, CT, GA, IL, LA, ME, MN, NH, NJ, NV, NY, OK, OR, PA, RI, VT, WA, W.VA).

These anti-bullying laws have two broad consequences. The first is to de-gender school safety by the use of the gender-neutral term, bullying. While sometimes employing psychotherapeutic language (as bullying is a term that has been transplanted from thirty years in the psychological literature), anti-bullying legislation may serve instead to undermine the legal rights and protections offered by anti-harassment laws. The second consequence is to shift the discussion of school safety away from a larger civil rights framework (racial and sexual harassment) to one that focuses on, pathologizes, and in some cases, demonizes individual behavior—a/k/a the bully.⁹⁹

Unfortunately, anti-bullying laws that were passed by state legislatures in the wake of Columbine may serve to dilute the discourse of rights by minimizing or obscuring harassment. When schools put these new anti-bullying laws and policies into practice, the policies are often overly broad and arbitrary, resulting in students being suspended or expelled from schools for a variety of minor infractions.¹⁰⁰ On the other hand, sometimes egregious behaviors are framed by school personnel as bullying, when in fact they may constitute illegal sexual or gender harassment or even criminal hazing or assault.¹⁰¹ In an era when school administrators are afraid of being sued for civil rights/harassment violations, as a consequence of the May 1999 decision of the Supreme Court in the *Davis* case, naming the illegal behaviors as “bullying” serves to deflect the school’s legal responsibility for the creation of a safe and equitable learning environment onto an individual or group of individuals as the culprit(s) liable for the illegal conduct.¹⁰²

A conundrum emerges: there may be an urge by school administrators to name harassing behaviors as bullying in an attempt to exempt, deflect or diminish their legal liability. Yet, on the other hand, *Davis* plus Columbine placed sexual harassment into the zero tolerance arena by adding it to the long list of suspendable offenses.¹⁰³ Additionally, school administrators are able to self-righteously proclaim that they are taking action with the suspension of a student and thereby reduce their legal liability under *Davis*.¹⁰⁴ The common features in this emerging, contradictory, messy paradox is the ever-expanding, elastic nature of the term bullying, as well as the ever-expanding list of behaviors for which there are zero tolerance mandates, coupled with the ever-expanding powers given to school administrators by these new laws on school safety. The only feature not expanding is children’s rights.

99. See Stein, *Missing Discourse*, *supra* note 85.

100. See Stein, *Sexual Harassment Meets Zero Tolerance*, *supra* note 86.

101. See Stein, *What a Difference*, *supra* note 85; Stein, *Sexual Harassment Meets Zero Tolerance*, *supra* note 86.

102. See Stein, *What a Difference*, *supra* note 85; Stein, *Missing Discourse*, *supra* note 85.

103. See Stein, *Sexual Harassment Meets Zero Tolerance*, *supra* note 86.

104. *Id.*

D. Zero Tolerance Mandates

The punitive ideology of zero tolerance has become the dominant discourse on school discipline in U.S. schools.¹⁰⁵ Zero tolerance grew out of the manufacturing industry and then the drug interdiction efforts of the late 1980s, framed first by the U.S. Attorney of San Diego.¹⁰⁶ The Gun Free School Act,¹⁰⁷ passed by Congress in 1994, required states that receive federal funds to mandate expulsion, on a case-by-case basis, for at least one year, of any student who brought a weapon to school.¹⁰⁸ A weapon was defined as “guns, bombs, grenades, missile launchers, and poison gas; it did not include knives . . . though some states were permitted to use a broader definition of weapons.”¹⁰⁹

However, the expulsion policies have moved from a prohibition of real hardware—guns—to including toy weapons and squirt guns, fingers pointed in the shape of a gun, symbolic representations of drugs (e.g. drawings of marijuana leaves) to fighting, gang activity, threats of violence, hate offenses, sexual harassment, and all sorts of misbehaviors.¹¹⁰ The framework of zero tolerance both demonizes children and removes their entitlement to free expression, association and freedom from unreasonable search and seizure.¹¹¹ More and more children have been removed from school with no place to go; only a few states have requirements to establish alternative schools for these suspended and expelled children.¹¹² More and more young people are hitting the streets, becoming exiles, being criminalized.¹¹³ This trend to expel young people may also be a manifestation of the decline of our sense of collective responsibility for children and youth. One might be able to assert that zero tolerance harms children because it is predicated on removing children, not reforming or helping children, or even viewing them as minors.

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

105. Vincent L. Ferrandino & Gerald N. Tirozzi, *Zero Tolerance: A Win-Lose Policy*, 21 EDUC. WEEK, (Jan. 26, 2000); Russell Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, INDIANA EDUC. POL’Y CENTER, INDIANA U., POL’Y RES. REP. #SRS2 (August 2000); ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS (William Ayers et al. eds., 2001); Ronnie Casella, *Zero Tolerance Policy in School: Rationale, Consequences, and Alternatives*, TCHRS. C. REC. 105, 872-892 (2001); Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 747-779 (1999).

106. See Wasser, *supra* note 105.

107. *Id.*

108. Joan First, *The Pros and Cons of Zero Tolerance. Protection for Whom? At What Price?*, 16 HARV. EDUC. LETTER 8 (2000). [Steve: can we check the title of this article? I couldn’t find it on Westlaw or in the carrel. Thanks]

109. See Wasser, *supra* note 105.

110. See Skiba, *supra* note 105; Ayers, *supra* note 105; Casella, *supra* note 105.

111. See Skiba, *supra* note 105; Ayers, *supra* note 105.

112. See Casella, *supra* note 105.

113. *Id.*

regulation and policing of students to make schools safer.¹¹⁴ Development and implementation of policies within this framing of school safety tends to draw attention to the most extreme, least pervasive threat to school safety—violent crime. This construction of school safety eclipses other more pervasive aspects of school safety, including daily threats to psychological and social safety.¹¹⁵

Such are the contours of a post-Columbine world where students are controlled in ways that shred the U.S. Constitution and the Bill of Rights. Students have been suspended retroactively for papers they have written, thoughts they have had, and pictures they have drawn.¹¹⁶ Comments made by elementary-aged students in the heat of a touch football game or when the teacher would not permit a student to use the bathroom have been characterized as death threats.¹¹⁷ In a case from Jonesboro, Arkansas, an eight-year-old boy was suspended for pointing a chicken strip toward a teacher and saying “pow, pow”.¹¹⁸ And, not surprisingly, zero tolerance has racial implications: disproportionate numbers of students of color have been suspended and expelled under zero tolerance policies.¹¹⁹

Bullying has become another behavior that is now covered by the realm of zero tolerance. Schools proudly state that they will not tolerate bullies; there are bully-buster posters around school buildings and new rules to cover bullying. Eradicating bullies is all the rage with state legislators.¹²⁰ The larger unspoken trend, however, is to regulate groups of children—to predict and manage them as sites of potential danger.¹²¹ The rights discourse has been shifted to one of “dangerousness” and risk management—to exclude (as in zero tolerance with its suspensions and expulsions) rather than to punish appropriately.¹²²

A third and final factor that dominates the landscape of all schools is that of high stakes testing. It is THE fact of life in schools that is all consuming not just for the students, but also for all teachers and school administrators whose careers and reputations hang in the balance.

114. Kim Brooks et al., *School House Hype: Two Years Later*, JUST. POL. INST. AND CHILD. L. CENTER, INC. (2000).

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

116. *Commonwealth v. Milo M.*, 740 N.E.2d 967 (Mass. 2001).

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

118. *Boy Suspended for Pointing Chicken Finger at Teacher: ‘Pow, pow, pow’ Eight-Year-Old Said*, NAT’L POST, Feb. 1, 2001, at A3.

119. Russell Skiba, *When is Disproportionality Discrimination? The Overrepresentation of Black Students in School Suspension*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS (William Ayers, et al. eds., 2001); TAMMY JOHNSON ET AL., APPLIED RESEARCH CENTER, RACIAL PROFILING AND PUNISHMENT IN U.S. PUBLIC SCHOOLS: HOW ZERO TOLERANCE POLICIES AND HIGH STAKES TESTING SUBVERT ACADEMIC EXCELLENCE AND RACIAL EQUITY (2001); ADVANCEMENT PROJECT AND THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000); *See also* Skiba, *supra* note 105.

120. *See* Stein, *Missing Discourse*, *supra* at 85; Limber & Small, *supra* at 98.

121. *See* Stein, *Missing Discourse*, *supra* at 85.

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

E. High Stakes Testing

High stakes testing of students is everywhere; it is no longer optional, and in fact it would not be a stretch to say that these tests are controlling the school day for both the students and the school personnel. With the passage of the No Child Left Behind Act of 2001,¹²³ all schools are required to implement annual state assessments in math and reading or language arts to all students in grades three through eight, and beginning in 2005, in science.¹²⁴ While testing has become the norm, it still remains contested territory¹²⁵ and jokes abound about NCLB, alternatively called “no child left untested,” “no school board left standing,” and “no child’s behind left.”

Moreover, high stakes testing is influencing all parts of the instructional and curricular practices of teachers¹²⁶ both in the classroom and outside of the classroom.¹²⁷ Electives such as art, music and physical education have been eliminated from the school day, and the socio-emotional dimensions of children’s lives that contribute to their learning and performance have been minimized.¹²⁸ Anecdotal information from teachers and those who work on the professional development side of teaching point to the reduction of in-service training sessions that used to attract many educators to all day conferences and summer time workshops.¹²⁹ Topics such as emotional learning/intelligence, equal educational opportunity compliance, and curriculum development on women’s history and gender equity used to attract large numbers of teachers but in the past few years, the organizations that used to offer those workshops have ceased to do so because of low enrollment.¹³⁰

Furthermore, the impact of NCLB upon teachers has been revealed in the results from several research studies. Results from the Harvard Civil Rights Project’s *Listening to Teachers: Classroom Realities and No Child Left Behind*¹³¹ confirm that:

NCLB is influencing the instructional and curricular practices of teachers but it is producing unintended and possibly negative consequences. They reported that, in response to NCLB accountability, they ignored important aspects of the curriculum, deemphasized or neglected untested topics and focused instruction on the tested subjects, probably excessively. Teachers rejected the idea that the

123. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002).

124. *Id.*

125. Mindy L. Kornhaber & Gary Orfield, *High-Stakes Testing Policies: Examining Their Assumptions and Consequences*, in *RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUB. EDUC.* (Gary Orfield & Mindy L. Kornhaber, eds. 2001).

126. Gail L. Sunderman et al., *Listening to Teachers: Classroom Realities and No Child Left Behind*, HARV. CIV. RTS. PROJECT (2004).

127. *See id.*; National Education Association, *No Child Left Behind/ESEA*, www.nea.org/eSEA/index.html (last visited Mar. 1, 2005).

128. Kristen Loschert, *Curtain Call*, NEA TODAY, Nov. 2004, at 20, available at www.nea.org/neatoday/0411/coverstory.html.

129. *See Sunderman supra* note 126; National Education Association, *supra* note 127.

130. Organizations such as Facing History and Ourselves, National Women’s History Project, and Wellesley College Center for Research on Women to name a few have stopped sponsoring such workshops because of declining teacher enrollment.

131. *See Sunderman, supra* note 126.

NCLB testing requirements would focus teacher's instruction or improve the curriculum.¹³²

One can only infer from this finding that if non-tested subjects were avoided by teachers that among those non-tested subjects would be lessons and discussions about violence prevention and interpersonal relationships, including sexual harassment and teen relationship violence.

Results from other studies actually confirm this inference—that high stakes testing is narrowing the curriculum. In a study of Florida teachers, “*Voices from the Frontlines: Teachers’ Perceptions of High-Stakes Testing*,”¹³³ the researchers found that teachers felt forced “to teach only the subjects that were tested to the exclusion of the non-tested subjects such as science, social studies, and health.”¹³⁴

As we are still in the midst of the high stakes testing wave, the extent to which it is controlling all other learning is still unclear but these two studies seem to indicate that most of the focus is on teaching to the test, by limiting instruction to only those tested subjects.

To summarize this section on the convergence of factors that may be contributing to the increase of sexual harassment and sexual violence in schools, in no short measure can we dismiss the decisions made by social and educational policymakers. Their choices and emphases have a controlling influence on the lives of teachers, administrators and students.

V. CONCLUSION: FUTURE ACTIONS NEEDED AT BOTH THE SCHOOL AND SOCIAL POLICY LEVELS

There is an enormous sexual violence problem in our country; some of it is enacted as rape and sexual assault, and some of it manifests as sexually violent hazing.¹³⁵ Immediate and vast corrective actions on both the school and social policy level are needed to curb and eliminate these injustices.¹³⁶

A. Measures at the School Level¹³⁷

It is critical that we reconfigure the school violence prevention movement and discourse to acknowledge the presence of gendered violence in our schools among our youth. By using the momentum from the child abuse scandal perpetrated by Catholic priests and hidden by the church hierarchy, as well as the sexual assault scandal at the Air Force Academy and at other academic institutions, we need to also bring attention to the increasing incidents of sexual assault

132. See *id.* at 3-4.

133. Brett D. Jones & Robert J. Egley, *Voices From the Frontlines: Teachers’ Perceptions of High-Stakes Testing*, 12 EDUC. POL’Y ANALYSIS ARCHIVES, 1 (2004), available at <http://epaa.asu.edu/epaa/v12n39/v12n39.pdf>.

134. *Id.* at 3.

135. Nan Stein, *Bullying and Harassment in a Post-Columbine World*, in CRIMES AGAINST CHILDREN: THE SPECTRUM OF VIOLENCE 16-1 to 16-16 (Kathy Kendall-Tackett & Sarah Giacomoni eds., Jan. 2005).

136. *Id.*

137. This material is this section is reprinted in entirety from Nan Stein, *Bullying and Harassment in a Post-Columbine World*, in CRIMES AGAINST CHILDREN: THE SPECTRUM OF VIOLENCE 16-1 to 16-16 (Kathy Kendall-Tackett & Sarah Giacomoni eds., Jan. 2005).

of girls even among elementary and middle school children by their classmates during the school day. High quality, age-appropriate and evaluated curricula and lessons about sexual violence as it is experienced by both boys and girls need to be added into the school curriculum over the course of whole year, throughout all the grades. We can no longer rest on the original approach of “stranger-danger” which factually isn’t the case for sexual assault, rape, hazing or child sexual abuse. We must acquire data from elementary and middle school-aged children on their experiences (as witness/bystander, victim and perpetrator) of sexual harassment and sexual violence in schools.

In addition, we need to equip witnesses and bystanders with strategies for intervention, ways to get help and to disrupt the assaults that are taking place in front of their eyes. The deleterious effects of being on the sidelines of these violent episodes or fearing that you might be next should not be minimized, though it cannot be compared to the terror experienced by those who were violently sexually assaulted.

Equally important is to add quality mental health services to our schools including counseling groups for adolescents who find themselves in abusive relationships either as the abuser or as the target of the abuse. Professionally trained staff from sexual assault and domestic violence agencies as well as a few gender violence prevention groups comprised of both men and women are available to work in schools leading counseling groups or classroom discussions in partnership with school staff.

Moreover, it is not enough to suspend the alleged perpetrators, ban them from graduation exercises or the prom, cancel the football or soccer season, or even to criminally charge the attackers. Rather, we must engage in deep and hard conversations both in school and in the larger community about the meanings of masculinity and the ways in which it is expressed: boys-on-boys, and boys-on-girls, and even girls-on-girls, some of who seem to yearn to be as tough as the guys.

B. Social Policy Level¹³⁸

While the larger social policy challenge is to dismantle zero tolerance laws, we also need to work to halt the passage of additional anti-bullying laws that may simply be a kinder, gentler and more seductive version of zero tolerance laws. At the very least, anti-bullying laws take attention away from a larger discourse of collective civil rights by focusing on individual peoples’ feelings, on interpersonal relations and on the individual bully and victim. The scope and impact of anti-bullying laws diminish children’s rights as well as dilute the larger discourse of rights. The ideology of these anti-bullying laws punishes and excludes the bully; no one is reformed, only demonized. Researchers, lawyers and activists need to link anti-bullying laws to their older, bigger (and more dangerous) cousin, zero tolerance laws. Rather than wake up one day to notice that our civil rights and anti-harassment laws have been eroded in the name of

138. *Id.*

controlling meanness, we need to work toward restoring a discourse and framework of rights.¹³⁹ *

139. Stein, *What a Difference*, *supra* note 85, at 783-799.

* In late January 2005, following the completion of this article, I received a copy of the most recent school crime report, *Indicators of School Crime and Safety, 2004* published by the U.S. Department of Education and Justice (NCES 2005-002/NCJ 205290). Since there was not time to analyze the data and insert it into this law review article, I nevertheless wanted to see what if anything had changed from the earlier school crime reports that I had used in this law review article. My Wellesley College research assistant, Hao Nguyen and I were shocked to find out that this most recent and the 2003 report had omitted the information and the charts that disaggregated sexual assault statistics. The mapping of sexual violence in schools using information that had been available from 1998 through 2002 had become more difficult—data that had been available in prior reports had been removed.

The *Indicators of School Crime and Safety* reports present a comprehensive measure of crimes occurring at the nation's schools using "indicators" considered significant (e.g. physical fights or threats with a weapon). From 1998 to 2002, one indicator that the report included was specific statistics on sexual battery and rape that happened in school and were reported to the police. But in the latest report that I received after this paper was written, precise data on sexual violence had gone missing and was subsumed under broad categories of violence; all of the sexual violence data was aggregated under "serious violent" and "violent" crime. This new way of categorizing the sexual violence statistics would ensure that trends in sexual violence would be impossible to locate—sexual violence in schools had been rendered invisible to the public.

My research assistant and I began a correspondence with the authors of the *Indicators*, a group of researchers employed at the Department of Justice, the Department of Education, and two of their subcontractors, American Institutes for Research (AIR) and MPR Associates, informing them of our concerns over the difficulty (or absence) of locating data on sexual violence in schools. Rape and sexual battery are inherently gendered crimes; the vast majority of the victims are females and the assailants are male. The gendered nature of these crimes sets them apart from the other crimes in the categories of "serious violent crime," "violence crime" and "theft."

After a month of correspondence, we were delighted to learn that they accepted our arguments and agreed to report total incidents of rape and sexual assault both for totals and those reported to police. This significant change in the way data on sexual violence in schools is reported will help researchers and the public understand the context and role of this growing pandemic, and will allow us to locate with more clarity this secret problem.