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### You're On Your Own, Kid... But You Shouldn't Be

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# YOU'RE ON YOUR OWN, KID . . . BUT YOU SHOULD'N'T BE

Daniel B. Weddle\*

## I. INTRODUCTION

Allow me to pose a simple, straight-forward question: Should courts recognize a duty on the part of schools to implement proven strategies to reduce and prevent bullying?

How one answers that question depends upon a number of considerations, but perhaps nothing influences the answer so powerfully as whether one understands the nature of bullying as it exists in schools today. Once understood, bullying seems less like a rite of passage or a means of developing strong character and more like child abuse perpetuated by schoolmates.<sup>1</sup> That realization—that many children in our nation's schools are suffering the sort of abuse that inflicts long-lasting and severe damage—shifts the analysis immediately from whether the problem is serious enough for courts to engage, to how courts might effectively engage it.

Addressing the question requires an understanding of what educational researchers mean when they refer to bullying in schools, as well as what educators have long known about proven strategies that reduce bullying dramatically. Such an understanding underscores the seriousness of the problem and the legitimacy of courts imposing a duty upon those who run our schools to take steps to reduce the problem and protect students in their care.

Two bases exist upon which courts might legitimately act to impose such a duty upon schools officials. Both legal theories deserve much greater depth of discussion than this short discussion can provide, but by sketching them out, I hope to show that their viability is at least an intriguing possibility.<sup>2</sup>

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<sup>1</sup> Sue Ellen Fried, who has spent a number of years writing and speaking about the problem of school bullying, characterizes bullying—accurately, I think—as child abuse perpetrated by children's peers. SUE ELLEN FRIED & PAULA FRIED, *BULLIES, TARGETS, & WITNESSES: HELPING CHILDREN BREAK THE PAIN CHAIN* 3-4 (2004).

<sup>2</sup> See Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 1, 23-26 (2008) (discussing school officials' authority under *Tinker's* rights prong to discipline speech that targets individual students). See also Daniel B. Weddle, *Brutality and Blindness: Bullying in Schools and the Tort of Negligent Supervision*, in *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN*, 425-48 (Maurice R. Dyson and Daniel B. Weddle eds., 2009) (discussing the tort of negligent supervision and the duty to supervise students to prevent bullying). A more complete consideration of the constitutional right, under *Tinker's* second prong, to be

The first theory is based upon the rather neglected second prong of the *Tinker* standard governing private student speech. Receiving relatively new attention by the courts, the “rights of other students to be secure and to be let alone[.]” seems perfectly suited to the recognition of a constitutional right to be reasonably protected from peer-on-peer abuse in public schools.<sup>3</sup> The second theory is rooted in section 320 of the Restatement of Torts, where the duty on the part of school officials to be vigilant to prevent bullying has been explicitly recognized for over-seventy years.<sup>4</sup> Taken together, this constitutional right on the part of students and this long-recognized duty on the part of school officials provide complimentary protections to school children—protections that courts should readily recognize and enforce.

## II. BULLYING AS A PROBLEM WORTHY OF THE COURTS’ ATTENTION

What the educational community has known for years is that bullying is severely damaging for victims and bullies alike and it is widespread in schools across the country.<sup>5</sup> The educational community has also known for decades how to reduce dramatically the prevalence of bullying in any type of school, yet few schools in the United States have made the attempt or even seriously acknowledged the problem.<sup>6</sup> To understand how outrageous this neglect really is, one must understand the problem of bullying itself.

## III. A DEFINITION OF BULLYING

First, what bullying is not: it is not the occasional teasing or insults or even physical intimidation that all children encounter as they grow up. Those acts may be part of a more serious bullying situation, and they demand immediate and appropriately calibrated responses from adults when they are observed. These occasional encounters, however, are not what researchers mean by “bullying.”<sup>7</sup>

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reasonably protected from bullying by peers is the subject of a work in progress by the Author. The Author would also like to thank Professor Kristi L. Bowman, who first suggested to him that *Tinker*'s second prong might have important implications for the problem of bullying.

<sup>3</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>4</sup> RESTATEMENT (SECOND) OF TORTS § 320 (1965).

<sup>5</sup> E.g., KATHRYN CHANDLER ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2001 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY 1-7 (2005).

<sup>6</sup> E.g., DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (1993).

<sup>7</sup> CHANDLER ET AL., *supra* note 5, at 1-3.

Rather, "bullying," as the term is used by educational researchers, refers to an ongoing pattern of abuse that targets an individual and is sustained over weeks, months, or even years. It is cruel and inescapable, based generally upon a real or perceived imbalance of power. That imbalance may exist because the victim is outnumbered, is physically unable to confront the bully effectively, or is simply "out-gunned" in some other, less obvious way—for example, the bully may be highly popular and have the backing of enough friends to ensure that the victim can never gain the upper hand, even if the victim turns to adults for aid. The abuse is generally designed to humiliate and isolate the victim and to frighten and intimidate the victim and any well-meaning bystanders from doing anything about the aggression. It may take the form of verbal abuse, deliberate destruction of friendships the victim might otherwise have enjoyed, or physical intimidation and physical abuse.<sup>8</sup>

#### IV. THE EFFECTS OF BULLYING

Because of the ongoing, relentless nature of true bullying, its effects are startlingly damaging. Victims of bullying routinely experience a severe erosion of self-esteem and self-confidence, even when they began with robust personalities and high self-confidence. They are very often ashamed to admit they are victims, even to their parents, because the victims come to believe that the bullying is somehow their own fault, that they deserve what they are getting, and that they are pitifully weak because they cannot stop the abuse.<sup>9</sup>

Over time, victims develop an inability to concentrate on school work and begin to avoid school, often begging their parents to send them elsewhere or to school them at home. Their isolation increases as bystanders and friends become unwilling to associate with them lest the bully's attention turn toward the bystanders. As a result, victims of bullying have a significantly increased likelihood of dropping out of school, compared to their non-victim peers.<sup>10</sup>

Unsurprisingly, bullying victims frequently suffer from severe depression and are plagued by suicidal ideations.<sup>11</sup> Those ideations, of

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<sup>8</sup> *Id.*

<sup>9</sup> Jaana Juvonen, *Myths and Facts About Bullying in Schools*, 25 BEHAV. HEALTH MGMT. 36, 37-38 (2005); Faye Mishna & Ramona Alaggia, *Weighing the Risks: A Child's Decision to Disclose Peer Victimization*, 27 CHILD. & SCHS. 217, 217-22 (2005); see also Joseph A. Dake et al., *The Nature and Extent of Bullying at School*, 73 J. SCH. HEALTH 173, 175 (2003).

<sup>10</sup> CHANDLER ET AL., *supra* note 5, at 12-13.

<sup>11</sup> See Catherine M. Herba et al., *Victimisation and Suicide Ideation in the TRAILS Study: Specific Vulnerabilities of Victims*, 49 J. CHILD PSYCHOL. & PSYCHIATRY 867, 868 (2008) (examining suicidal ideations in bullied school children).

course, often become suicide attempts, which are far too often successful. Recently, in fact, several suicides by bullying victims have received national attention.<sup>12</sup>

Little need be said about the other horror that may occur when victims run out of hope: retaliation against their classmates. Nearly every school shooting that has taken place in the United States, including Columbine, has involved shooters who were victims of bullying at school.<sup>13</sup> When a child decides that he would rather kill himself than endure anymore bullying, he may well decide that he has nothing to lose by taking his tormentors with him. That victims often find themselves abandoned by their peers because of the bullying may explain why the retaliation is often targeted broadly at their peers rather than simply at the bullies themselves.

The effects on bullies are also alarming. Children who bully as students are more likely to become bullies as adults in their homes and their workplaces. As they grow up, they are able to refine their tactics to become more effective in their bullying and more difficult to stop; therefore, the damage they inflict is consistent with what researchers know about younger victims. A great deal of research has been conducted on adult workplace bullying, and the damage is just as severe for adult victims as for children.<sup>14</sup> In fact, the prevalence of severe bullying is actually much higher in the adult workplace than it is in the lower schools.<sup>15</sup>

Additionally, children who bully are more likely than their peers to end up in the criminal justice system. One study showed that sixty

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<sup>12</sup> See generally Michael Inbar, *Sexting Bullying Cited in Teen Girl's Suicide*, MSNBC.com, Dec. 2, 2009, [http://www.msnbc.msn.com/id/34236377/ns/today-today\\_people](http://www.msnbc.msn.com/id/34236377/ns/today-today_people); Susan Donaldson James, *Teen Commits Suicide Due to Bullying: Parents Sue School for Son's Death*, ABCNews.Com, Apr. 2, 2009, <http://abcnews.go.com/Health/MindMoodNews/story?id=7228335>. The stories are, of course, heartwrenching. Thirteen-year-old Hope Witsell "sexted" a boy, sending him a cell phone picture of her exposed breasts; another student discovered it on the boy's phone and sent it to friends. Inbar, *supra*. Before long, it was all over school and beyond, and students began to relentlessly torment Hope, calling her "whore" and "slut" as she walked down the hallways and entered classrooms. *Id.* After several months, she hung herself in her bedroom. *Id.* Her mother found her when she went up to kiss Hope goodnight. *Id.* Seventeen-year-old Eric Mohat, who had been severely bullied, was finally told by one bully that he should go home and shoot himself. James, *supra*. He did. *Id.* The parents alleged that three other students in Eric's class committed suicide in one year because of bullying. *Id.*

<sup>13</sup> Nancy Meyer-Adams & Bradley T. Connor, *School Violence: Bullying Behaviors and the Psychosocial Environment in Middle Schools*, 30 CHILD. & SCHS. 211, 212 (2008).

<sup>14</sup> Lynn Sperry & Maureen Duffy, *Workplace Mobbing: Family Dynamics and Therapeutic Considerations*, 37 AM. J. FAM. THERAPY 433, 433-36 (2009).

<sup>15</sup> See Paula Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. MGMT. STUD. 837, 849 (2007).

percent of children who had been bullies in ninth grade had been convicted of at least one felony by the time they were twenty-four years old. Sixty percent of that group had three or more felony convictions.<sup>16</sup> Therefore, allowing bullies to continue their behavior not only creates a high likelihood of their victimizing others as adults, but also creates a high likelihood that they will eventually run afoul of authorities who will not tolerate their aggression.

#### V. BULLYING CULTURES IN SCHOOLS

Researchers have consistently and nearly universally found that seven to fifteen percent of children in elementary and secondary schools are victims of severe bullying.<sup>17</sup> New research suggests, in fact, that the number may be as high as thirty percent.<sup>18</sup> The type of school seems to make little or no difference: suburban, urban, and rural schools are alike when it comes to the prevalence of bullying, as are private and public schools. It is disheartening to realize that in a high school of say, 2000 students, 300 or more students are tormented regularly by peers who are indifferent to the extensive and dangerous effects their behavior is inflicting. Even more disheartening (infuriating, really) is the fact that bullying flourishes under particular conditions—conditions school officials have the power to control.<sup>19</sup> Where bullying is most rampant, teachers and administrators are unaware of the bullying, do not look for bullying, and do not take bullying seriously. They either believe that bullying does not exist in their schools because they are sure they would know about it if it did, or they simply do not believe bullying is a behavior to be concerned about—i.e., they believe it is a rite of passage, an inevitable and often salutary part of growing up to face the real world.<sup>20</sup>

What school officials fail to realize, apart from the obviously damaging effects of bullying, is that bullies are typically bright enough to keep their activities hidden from adults who might intervene. Bullies are not the insecure, unloved children that populate stereotypical notions of bullying. They are far more likely to be confident, popular,

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<sup>16</sup> JAMES ALAN FOX ET AL., *FIGHT CRIME: INVEST IN KIDS, BULLYING PREVENTION IS CRIME PREVENTION* 9 (2003).

<sup>17</sup> Ron Banks, *Bullying in Schools*, ERIC DIG., ED407154, Apr. 1997, available at <http://www.ericdigests.org/1997-4/bullying.htm>.

<sup>18</sup> RACHEL DINKES ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *INDICATORS OF SCH. CRIME AND SAFETY: 2009* (2009).

<sup>19</sup> Sharmilia Bandyopodhyay et al., *Validity of Three School Climate Scales to Assess Bullying, Aggressive Attitudes, and Help Seeking*, 38 SCH. PSYCHOL. R. 338, 339 (2009).

<sup>20</sup> See *id.*

and intelligent. They are often very good at securing the admiration of adults while they destroy peers out of those adults' sights. They know how to turn the tables on victims who complain to school officials, and they know how to deflect blame even when they are caught victimizing another child. Their most important and widely shared characteristic is actually a lack of empathy. They can continue and very much enjoy victimizing others because they have a dulled capacity to comprehend emotionally what their victims are suffering. They certainly understand the pain intellectually, but they simply do not care.<sup>21</sup>

This seeming contradiction in students who seem to be "good kids" makes their behavior difficult to spot, hard to believe, and easy to excuse. Victims find out quickly that school officials will do little to intervene and next to nothing to follow up, so victims avoid telling adults to avoid retaliation from the bullies. Therefore, bullying is a largely underground phenomenon; and school officials who do not look for it or take steps to prevent it are blissfully unaware of what is happening in their hallways, classrooms, and playgrounds.<sup>22</sup>

## VI. BULLYING PREVENTION

While it may sound as though nothing can be done to solve the problem of bullying, quite the reverse is true. Bullying in any school can be reduced dramatically in a single year if the school is willing to implement proven strategies that target the bullying culture in the school. The secret seems to be twofold: first, the administration must take a strong, focused, and sustained lead in implementing a proven bullying prevention program; second, the program must engage the entire school community in a coordinated effort to transform the school's bullying culture.

One of the most effective programs has been the Olweus Bullying Prevention Program, which was developed first in Norway in the early 1980's. After three otherwise unrelated incidents in one summer in which students committed suicide to escape bullying in their schools, Norway undertook a major research effort to understand and prevent bullying. The research into the nature of bullying and bullying cultures resulted in a whole-school approach to preventing bullying that typically reduces bullying by fifty percent in the first year and sometimes as much as seventy percent. Longitudinal studies have shown that the reductions

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<sup>21</sup> Aluede Oyaziwo et al., *A Review of the Extent, Nature, Characteristics & Effects of Bullying Behaviour in Schools*, 35 J. INSTRUCTIONAL PSYCHOL. 151, 152-53 (2008).

<sup>22</sup> Juvonen, *supra* note 9, at 37-38; Mishna & Alaggia, *supra* note 9, at 217-22; *see* Dake et al., *supra* note 9 at, 175.

have been sustained over years where the administration and faculty have been careful to maintain the gains.<sup>23</sup>

The approach incorporates a year-long effort that begins with gathering data through anonymous questionnaires exploring the extent to which students are being subjected to bullying. The gathered data is shared with the entire school community—administrators, teachers, support staff, students, and parents. The school then initiates a process that involves everyone in the school in an ongoing discussion to develop a workable policy with broad buy-in. The program uses focus groups, task groups, classroom discussions, etc., to foster openness and a shared responsibility for successfully creating and maintaining a no-bullying culture. The resulting policy must have teeth in it, and administrators must be committed to enforcing it and to protecting from any sort of retaliation anyone who reports bullying.<sup>24</sup>

If the school implements a whole-school approach effectively and seriously, it can expect dramatic reductions in bullying the first year and sustained reductions from year to year. Further, the school can expect reductions in other types of school disorder as well. It seems that once students take responsibility for one another's well-being, they no longer find theft, vandalism, and disruption acceptable. After spending a year deeply involved in transforming a bullying culture, it may be that students develop a sense that the school is theirs to save or to ruin. At the very least, they develop the freedom to involve adults in correcting what they see as abusive behavior.<sup>25</sup>

## VII. THE QUESTION

Given the seriousness of bullying's effects and the availability of proven strategies for dramatically reducing its prevalence, I will pose the question again: Should courts recognize a duty on the part of schools to implement proven strategies to reduce and prevent bullying?

The answer, it seems to me, is yes. Not only is the problem of bullying serious enough to warrant a legal obligation on the part of schools to address it, the legal doctrines already exist to support the imposition of such an obligation. Courts should recognize from *Tinker* a clear constitutional right on the part of students "to be secure and to be let alone[]" that includes the right to be reasonably free from bullying by

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<sup>23</sup> U.S. Dep't of Educ., *Exploring the Nature and Prevention of Bullying*, <http://www.ed.gov/print/admins/lead/safety/training/bullying/bullying.html#group> (last visited Dec. 14, 2009).

<sup>24</sup> Lynne Edmondson & John Hoover, *Process Evaluation of a Bullying Prevention Program: A Public School-County Health Partnership*, 16 RECLAIMING CHILD. & YOUTH 25, 27-28 (2008).

<sup>25</sup> Oyaziwo et al., *supra* note 21.



their peers.<sup>26</sup> Secondly, courts should shed any reluctance to include in the definition of reasonable supervision a duty to implement anti-bullying strategies that have been developed, refined, and proven to be effective in schools across the world over the past two decades.

#### VIII. *TINKER'S* FORGOTTEN PRONG

In *Tinker v. Des Moines Independent School District*, the Supreme Court established a two-prong test for the constitutionality of school officials' attempts to silence private student speech.<sup>27</sup> The Court declared that school officials may not discipline students for their private expression unless the expression would create "a material and substantial disruption of the school's work or would collide with the rights of other students to be secure and to be let alone."<sup>28</sup> Since *Tinker*, courts have concentrated most often upon the first prong, determining whether school officials could show a real potential for disruption. The "right of other students to be secure and to be let alone[]" garnered little attention until recently.

In addressing the censoring of various slogans, symbols, and other forms of expression on tee-shirts, caps, etc., some courts have begun to turn to *Tinker's* second prong for the proposition that in school, children have a right not to be subjected to highly hurtful rhetoric that targets identity characteristics such as race, religion, gender, etc. As the Ninth Circuit observed, "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."<sup>29</sup> In *Poway*, a student's wearing of a tee-shirt that read, "HOMOSEXUALITY IS SHAMEFUL" and "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED[,] constituted expression that "'coll[ides] with the rights of other students' in the most fundamental way."<sup>30</sup> The court explained that

[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.

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<sup>26</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>27</sup> *Id.* at 512-13.

<sup>28</sup> *Id.*

<sup>29</sup> *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (vacated as moot).

<sup>30</sup> *Id.* at 1178 (quoting *Tinker*, 393 U.S. at 508).

As *Tinker* clearly states, students have the right to “be secure and to be let alone.”<sup>31</sup>

Using much of the same reasoning, the Sixth Circuit upheld a school’s refusal to allow a student to wear clothing depicting an image of the Confederate flag because “[u]nlike in *Tinker*, Plaintiffs[’] free-speech rights [to display the flag] ‘colli[de] with the rights of other students to be secure and to be let alone.’”<sup>32</sup> Because “courts accord more weight in the school setting to the educational authority of the school in attending to all students’ psychological and developmental needs[,]” the school district was justified in protecting its students from exposure to the flag, given the school’s history of high racial tension and “serious racially motivated incidents, such as physical altercations or threats of violence[.]”<sup>33</sup>

Taking a similar approach, the Tenth Circuit approved a school’s suspension of a student for drawing a Confederate flag during math class in violation of the school’s Racial Harassment and Intimidation Policy because of a history of serious racial tensions.<sup>34</sup> The court concluded that, “based upon recent past events, [the district] officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone.”<sup>35</sup> It follows that if a tee-shirt or a flag that broadcasts a harmful message targeting no particular student can be held to impinge upon students’ right to be secure and let alone—and the resulting distractions and fear constitute a material and substantial disruption to the school’s mission—verbal and physical abuse that continuously and deliberately targets a particular child is an even clearer violation of that right. Given the severely damaging effects of bullying, the schools’ responsibility for “attending to all students’ psychological and developmental needs[.]” makes bullying prevention imperative.<sup>36</sup> A public school, therefore, should be held responsible for the denial of that right when the school has the power to intervene to protect the victim and to transform a bullying culture. While substantive due process theories are rife with their own obstacles in such cases, where those obstacles can be overcome, the denial of the right to be secure and to be

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<sup>31</sup> *Id.* (quoting *Tinker*, 393 U.S. at 508).

<sup>32</sup> *Barr v. Lafon*, 538 F.3d 554, 568 (6th Cir. 2008) (quoting *Tinker*, 393 U.S. at 508).

<sup>33</sup> *Id.* at 567–68.

<sup>34</sup> *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000).

<sup>35</sup> *Id.*

<sup>36</sup> *See Barr*, 538 F.3d at 567–68.

let alone provides a clear underlying constitutional violation to sustain the due process claim.<sup>37</sup>

#### IX. THE RESTATEMENT'S FORGOTTEN COMMENT

Like *Tinker's* rights prong, a seldom cited comment to Section 320 of the Restatement of Torts provides an explicit basis for imposing upon schools a duty to protect students from peer-on-peer abuse and to implement proven strategies for reducing the likelihood of such abuse. Added to the First Restatement of Torts in 1934, it was repeated in the Second Restatement in 1965.

Section 320 itself defines the duty of a "Person Having Custody of Another to Control Conduct of Third Persons":

One who is required by law to take . . . custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.<sup>38</sup>

The section explicitly contemplates the relationship between educators and their students, and its doing so makes perfect sense.<sup>39</sup> Students in public schools attend under compulsory education laws and are forced to matriculate with other students, some of whom are quite likely to inflict harm, given the chance. In addition, while students are at school, they cannot protect themselves as they normally would were their parents immediately available. Even if they go home to their parents and complain of other students' abuse, the parents cannot attend school with their children to protect them; they and their children are completely reliant upon school officials for protection from other

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<sup>37</sup> See Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 659-73 (2004).

<sup>38</sup> RESTATEMENT (SECOND) OF TORTS § 320 (1965).

<sup>39</sup> *Id.* at cmt. a ("The rule stated in this Section is applicable to . . . teachers or other persons in charge of a public school. It is also applicable to persons conducting . . . a private school . . .").

students. Importantly, however, the restaters actually considered the problem of bullying in schools as early as the First Restatement. Describing the extent of the duty to protect, they explained that:

[o]ne who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need thereof, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it . . . . *So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is so whether the actor is or is not under a duty to take custody of the other.*<sup>40</sup>

Over twenty-five years of empirical research has made clear what kind of careful preparations will give children effective protections against bullying and provide the sort of vigilance that will alert school officials to the need for giving that protection to specific students who are being subjected to bullying. Implementing proven whole-school approaches will create school cultures in which school officials can discover bullying before a pattern of abuse can develop and do actual and serious harm to the victims.

The only thing that has changed in the seventy-five years since the publication of the First Restatement is that abundant empirical research has provided courts the materials to craft a reasonable duty regarding bullying in schools. Preventing or dramatically reducing severe, ongoing peer-on-peer abuse and its effects is no longer a guessing game or a matter of theory beyond the expertise of courts. The evidence gathered over the past two decades compellingly demonstrates what does and does not work in preventing bullying, and the courts need only to be exposed to it.

Imposing a duty to implement proven bullying prevention strategies does not break with traditional tort principles or create an unworkable standard. The strategies and training are readily available, and the results are widely published regarding the reliable approaches.

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<sup>40</sup> *Id.*

Educators know what to do, and they know they must do it if they have been paying any attention at all to the research in their own fields and to the concern bullying is generating, not only nationally but worldwide.

Courts need only recognize what educational researchers have long known—that large numbers of children are the victims of sustained, damaging peer-on-peer abuse in the very schools the states compel them to attend. Recognizing the duty that flows from that professional knowledge requires nothing radical in the development of negligence law—the law has recognized such a duty for three quarters of a century, and educational research has made plain how that duty should be satisfied.

#### X. DUTY TO TAKE REASONABLE STEPS TO PREVENT BULLYING

It is hardly radical to conclude that students have a constitutional right to be reasonably secure from severe peer-on-peer abuse while in the care of public school teachers and administrators and that school officials may not ignore the denial of that right when they know such abuse exists and know how to protect students from it. Neither is it radical to recognize a complimentary, decades-old common law duty on the part of school officials to be reasonably vigilant to anticipate and prevent bullying.

Given what abundant research has consistently shown regarding bullying prevention, school officials' responsibility to their students should include a duty to implement proven strategies to reduce and prevent bullying. Where school officials refuse to do so, they have failed in their obligation to protect their students' constitutional rights and have breached their duty to provide reasonable supervision to prevent peer-on-peer abuse.

Both federal constitutional law and state common law require what common sense and professional competence plainly require—that school officials become serious and proactive against bullying in their schools and that they use proven methods for doing so. Children cannot do it. Parents cannot do it. The schools are the only players with the power to protect their students from powerful, abusive peers. Their failing to do so is morally and professionally inexcusable. It should be legally inexcusable as well.