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Columbine: A Lesson in Pragmatism: What's Being Done to Prevent School Violence and How It Can Be Done Better

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COLUMBINE: A LESSON IN PRAGMATISM: WHAT’S BEING DONE TO PREVENT SCHOOL VIOLENCE AND HOW IT CAN BE DONE BETTER

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I. INTRODUCTION

In an effort to address its “murder-a-day crime rate” and “rampant graffiti problem,” former Philadelphia, Pennsylvania Mayor W. Wilson Goode made a decision epitomizing the phrase making lemonade out of lemons.\(^1\) In 1984, Goode gave a local muralist named Jane Golden a six-week trial period to work with local graffiti gangs of various races to channel their creative energy into muralmaking.\(^2\) The success of the program culminated in the late 1990s, when people of all races came together and rallied around a multi-racial mural to address the divisiveness that caused an outbreak of racial violence in the neighborhood.\(^3\) While cities like New York and Peoria, Arizona continue, unsuccessfully, attempting to combat graffiti with things like double criminal sentences and surveillance cameras, Philadelphia’s Mural Arts Program is an incredible example of how what seems like an impossible problem can be solved with a little creativity and a lot of hard work. The murals also symbolize that increased penalization/criminalization is not always the best solution to a problem.

A problem equally complex, yet even bigger than graffiti, is violence in schools, which was brought to the forefront on April 20, 1999, when Eric Harris and Dylan Klebold brutally attacked students and teachers at Columbine High School in Littleton, Colorado. Ever since that fateful day, when one teacher and twelve students were killed, fifty-one more students/teachers have been killed and fifty-eight more injured in school shootings across the Nation,\(^4\) not to


\(^2\) Id.

\(^3\) Id.

\(^4\) These figures are not exhaustive and include students and teachers killed/injured at schools in the following cities: Conyers, Georgia (6 injured May 20, 1999), http://www.cnn.com/US/9905/20/conyers.school.shooting.05/; Santee, California (2 killed, 13 injured Mar. 5, 2001),
mention the fact that “Columbine-like” plots were foiled in nearly every state. Not only has Columbine “changed how we talk,” but “everyone knows what it means,” and it is doubtful that anyone can dispute that there is “something overwhelming about that kind of viciousness, predatory action, that kind of indiscriminate killing.” In addition to the fear it has instilled in parents, teachers, and legislators, Columbine has become a symbol of the ultimate revenge for troubled children who idolize Harris and Klebold for their actions. A 15-year-old boy who shot six people at Heritage High School in Conyers, Georgia told classmates he thought Columbine was “cool” and that he could do something similar. Similarly, a Wisconsin teenager charged with disorderly conduct for threatening violence admitted saying he wanted to take over his


6 These are the words of Littleton, Colorado resident Denny Fennell, spoken during his interview with Michael Moore in the film Bowling for Columbine. The very thought of Columbine and what it represented made Mr. Fennell break down as he spoke. BOWLING FOR COLUMBINE (Iconotoly Productions, Inc. & Vif Bablesberger Film Production GmbH & Co. 2002).

school like Columbine.\textsuperscript{8} Unfortunately, this situation has become all too common in the United States, and as a result, “Columbine” has become a sort of symbol, or euphemism, for school violence in general, no matter how real or imagined the risk. Columbine has become the driving force behind current attempts to combat and prevent school violence, namely in the form of increased information sharing between schools and law enforcement agencies and anti-bullying/harassment policies. While these governmental responses to Columbine appear to be effective means of addressing violence in schools that would likely withstand constitutional scrutiny, they merely scratch the surface and are insufficient to address the special needs of children in the school environment and actually prevent violence. While the problem cannot likely be solved by painting murals, it can be solved with the kind of creativity, pro-activity, and forward-thinking utilized by Mayor Goode and Jane Golden in Philadelphia.

In this article, I will address the policy issues and constitutional questions surrounding both information sharing and anti-bullying legislation. Specifically, in Part II, I will focus on Colorado’s information-sharing laws and how they will not prevent another Columbine from occurring in American public schools. I will discuss the lack of a uniform “profile” for school shooters, how the profiling approach itself is misguided, and how such information sharing affects students’ privacy interests. In Part III, I will discuss anti-bullying/harassment policies, particularly their constitutionality under the First Amendment. Part III will further involve discussion regarding school enforcement of such policies, focusing on the problems surrounding a “zero tolerance” approach. Part III will also discuss the constitutional issues surrounding criminalization of bullying behavior, namely Fourteenth and Fifth Amendment due process

\textsuperscript{8} In re A.S., 626 N.W.2d 712, 716 (Wis. 2001).
concerns. Finally, in Part IV, I will explain why “incident-based” policies are insufficient to prevent violence and will suggest some more proactive approaches for preventing another Columbine.

II. INFORMATION SHARING BETWEEN SCHOOLS AND POLICE


The Family Educational Rights and Privacy Act of 1974 (FERPA) was designed to protect the privacy of students’ education records. However, in 1994, Congress amended FERPA to allow state legislatures to enact laws for purposes of improving information sharing among school and criminal justice officials about students with histories of disciplinary problems. Apparently, privacy constraints prevented Columbine High School teachers and Jefferson County, Colorado law enforcement from sharing information about Dylan Klebold and Eric Harris. Thus, in an effort to prevent another Columbine, the Colorado legislature passed House Bill 00-1119 in 2000, which amended various state statutes to (1) require information sharing in certain situations and (2) allow information sharing in others.

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10 Education World, Information Sharing to Make Colorado Schools Safer, at http://www.education-world.com/a_issues/issues112.shtml (last visited Aug. 28, 2007); See also In re Gualt, 387 U.S. 1, 24 (1967) (recognizing that the secrecy of juvenile court records is more rhetoric than reality, as disclosure of court records is discretionary with the judge in most jurisdictions, and in most states, police keep a complete file of juvenile police contacts and have complete discretion to disclose).


In a formal opinion issued on August 3, 2000, then Colorado Attorney General Ken Salazar clarified the types of information that must be shared, the types of information that may be shared, and what must be done to maintain compliance with the privacy requirements under FERPA. Under the new Colorado law, law enforcement officials must share the following information with schools:

(1) Basic identification information whenever a student is charged with committing a crime of violence or unlawful sexual offense; (2) arrest and criminal records information whenever a delinquency petition is filed in juvenile court; (3) notice whenever a student is convicted or adjudicated for an offense involving a crime of violence, illegal use of controlled substances, or unlawful sexual behavior, (4) notice whenever a student is convicted or adjudicated for a crime that would result in mandatory expulsion proceedings under Colorado law (i.e. while on school grounds, possessing a dangerous weapon, sale of drugs, robbery, or first or second degree assault); and (5) notice whenever a court makes school attendance a condition of release, probation, or sentencing.

Further, school officials must share with law enforcement the following information:

Upon request . . . truancy, disciplinary and attendance records; reports of incidents on school grounds involving assault or harassment of a teacher or school employee; and notification of failure of a student to attend school, if school attendance is a condition of that student’s sentence or release.

Additionally, law enforcement officials may share the following information with school officials:

Upon request . . . records or information on students maintained by the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, when the information is

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14 Id. (emphasis added).

15 Id. (emphasis added).
required to perform the school officials’ legal duties and responsibilities. The information shared may include information or records of threats made by a student, arrest or charging information, records relating to the adjudication or conviction of a child for a misdemeanor or felony, court records in juvenile delinquency proceedings, and probation officer, law enforcement, and parole records.\textsuperscript{16}

The term “crime of violence” is limited to those situations where a student “used, or possessed and threatened the use of, a deadly weapon, or caused serious bodily injury or death” in the commission of the following offenses: (1) any crime against an at-risk adult or at-risk juvenile, (2) murder, (3) first or second degree assault, (4) kidnapping, (5) sexual assault, (6) aggravated robbery, (7) first degree arson, (8) first degree burglary, (9) escape, or (10) criminal extortion.\textsuperscript{17}

The term also includes “any unlawful sexual offense in which the student caused bodily injury to the victim, or in which the student used threat, intimidation or force against the victim.”\textsuperscript{18}

Once a school receives any of the aforementioned information, a district’s board of education is required to determine whether the student’s behavior is detrimental to the safety, welfare, and morals of the other students or school personnel, whether educating the student in the school may disrupt the learning environment or create a dangerous and unsafe environment for all, and is authorized to suspend or expel the student.\textsuperscript{19} This is true regardless of whether the conduct occurred on or off of school grounds.

\textbf{B. Information Sharing, Alone, Will Not Prevent Another Columbine}

\textsuperscript{16} Id. (emphasis added).

\textsuperscript{17} Id. (emphasis added).

\textsuperscript{18} Id.

\textsuperscript{19} Id. (emphasis added).
The first question that needs to be answered is whether, had the above information sharing laws been in effect at the time, school and law enforcement officials could have prevented Eric Harris and Dylan Klebold from killing thirteen people at Columbine High School. In 1998, Harris and Klebold were charged with mischief, breaking and entering, trespassing, and theft after they broke into a locked van to steal tools. None of these charges would qualify as a “crime of violence” under Colorado law, nor did the boys use a deadly weapon in commission of the crime. Thus, law enforcement officials were not obligated to divulge the information to school officials at Columbine High School. Rather, law enforcement officials would only have to disclose the information if officials at Columbine requested it. While one can only speculate whether school officials would have requested information on Harris or Klebold, given that the boys came from middle-class families and appeared “normal” as far as teenagers go, it is not likely school officials would have any reason to suspect that either Eric Harris or Dylan Klebold were capable of committing such horrific acts.

Assuming, however, that school officials were armed with knowledge of the charges, the question remains whether they would have suspended or expelled Harris and/or Klebold. If school officials listened to the opinion of the boys’ probation officer, it is not likely Harris or Klebold would be perceived as a threat to school safety. The boys’ probation officer discharged them from their diversionary programs several months early because they were so well-behaved. In fact, the probation officer described Harris as a “very bright individual who is

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21 Id.
likely to succeed in life” and Klebold as “intelligent.” Thus, it does not appear that increased information sharing between schools and law enforcement would have prevented Columbine.

The Colorado provisions also contain some questionable elements. While schools must disclose reports or incidents on school grounds of assault or harassment of a teacher or school employee by a student, they need not disclose incidents of assault or harassment of students by other students. This seems strange, given how common such peer-on-peer harassment is in American schools. Further, Colorado limited school officials’ ability to disclose crimes against juveniles to “at-risk” juveniles. Nowhere does the state define “at-risk juvenile,” and it seems odd that Colorado would even attempt to do so. Adolescence is a difficult time for every child, and arguably, all children are “at risk” of something. If all juveniles are “at risk,” then it seems as though schools should be justified in disclosing to law enforcement any crime committed by any student on another. However, it is unclear and unlikely that Colorado intended House Bill 00-1119 to have such broad implications.

The biggest problem with Colorado’s information sharing law, and with information sharing in general, is that it assumes that students who commit certain crimes or behave in a certain manner are more likely to commit an act of school violence than others. However, various studies have revealed that there is no “profile” of a “school shooter.” Despite the fact


\[\text{[t]here are no warning signs. There are no predictive signs for a school shooter".}\]
that there is no “profile,” these studies have still attempted to identify possible characteristics and warning signs of potential school shooters. One of the warning signs examined included prior criminal record, which Colorado deemed predictive of school violence through its mandatory information sharing requirements. According to the Safe School Initiative, nearly two-thirds of the attackers examined had never been in trouble or rarely were in trouble at school, less than one-third of the attackers were known to have acted violently toward others prior to the incident, and only about one-quarter of the attackers had a prior history of arrest. Even more significant, the FBI’s threat assessment did NOT include prior violent criminal history as one of the things to consider in assessing the risk a particular student posed to the school environment. Given such a lack of correlation between prior criminal acts and violence at school, Colorado’s interest in sharing such information becomes much more questionable because it is not furthering the State’s ultimate goal.

After obtaining knowledge of students’ criminal actions, Colorado schools are armed with the authority to suspend or expel students based solely on conduct occurring off school grounds, all in the name of “school safety.” However, given that most school shooters have


25 Mary Ellen O’Toole, PhD, The School Shooter: A Threat Assessment Perspective, available at www.fbi.gov. The FBI study included a list of forty-six different traits/characteristics in the four broad categories of (1) personality of the student, (2) family dynamics, (3) school dynamics, and (4) social dynamics. These factors were created in order to assist schools in assessing the threat level posed by different students, and included leakage, low tolerance for frustration, poor coping skills, lack of resiliency, failed love relationship, injustice collector, signs of depression, narcissism, alienation, dehumanizes others, lack of empathy, exaggerated sense of entitlement, attitude of superiority, exaggerated or pathological need for attention, externalizes blame, masks low self-esteem, anger management problems, intolerance, inappropriate behavior, seeks to manipulate others, lack of trust, closed social group, change of behavior, rigid and opinionated, unusual interest in sensational violence, fascination with violence-filled entertainment, negative role models, behavior appears relevant to carrying out a threat, turbulent parent-child relationship, acceptance of pathological behavior, access to weapons, lack of intimacy, student “rules the roost,” no limits or monitoring of TV and internet, student’s attachment to school, tolerance for disrespectful behavior, inequitable discipline, inflexible culture, pecking order among students, code of silence, unsupervised computer access, media/entertainment/technology, peer groups, drugs and alcohol, outside interests, and the copycat effect.
never committed a violent act, notifying a school every time one of its students gets in trouble with the law has severe negative implications for students. In its July 12, 2001 report, the Board of Directors for the National Association of Secondary School Principals (NASSP) listed several problems with such profiling, namely that it (1) unfairly labels many non-violent students as potentially dangerous while misidentifying other students who may actually commit a violent act as “safe,” (2) results in a school atmosphere that is overly fearful, distrustful, and not conducive to teaching or learning, and (3) risks stigmatizing and stereotyping students.26 Another problem with profiling students is that it deals with potential conduct instead of actual conduct, thereby taking away the educational rights of a student for what school officials think he or she might do.27 In addition to the risk of unnecessarily stigmatizing and punishing a student for out-of-school conduct, sharing criminal information implicates students’ privacy rights and serves to legitimize school officials’ biases.

One of the interests included under the broad term “privacy” is an individual’s interest in avoiding disclosure of personal matters.28 The Supreme Court recognized, however, that states have broad latitude in experimenting with solutions to problems of vital local concern.29 Further, it is generally recognized that the Constitution does not encompass a general right to

26 Gayle T. Carper et al., In Search of Klebold’s Ghost: Investigating the Legal Ambiguities of Violent Student Profiling, 174 WEST’S EDUC. L. REP. 793, 800 (2003). The legislative declaration in Colorado House Bill 00-1119 itself recognized that disclosure of such information carried the risk of stigmatizing children.

27 Id. at 804.

28 Whalen v. Roe, 429 U.S. 589, 599 (1977) (holding that an individual’s privacy interest is not violated when a state keeps computer records of names and addresses of people who have obtained prescription drugs for which there is a legal and illegal market).

29 Id. at 597.
nondisclosure of private information, including adult and juvenile court records.\textsuperscript{30} Even assuming that a juvenile’s privacy right is not violated when law enforcement officials notify school officials that he or she has committed a crime, sharing of such information encourages schools to jump to irrational conclusions about the student based on fear. Obtaining such information also legitimizes teachers’ biases and provides the ammunition necessary for them to rid themselves of “trouble-makers” or otherwise “difficult” kids.

Further, schools should not be so quick to report incidents occurring on school grounds to law enforcement officials, as not all incidents require criminal intervention. While Colorado’s House Bill 00-1119 authorizes schools to disclose any incidents occurring on school grounds to law enforcement, the FBI advocates that schools engage in threat assessment prior to notifying law enforcement.\textsuperscript{31} The FBI emphasized that all threats are not created equal and distinguished among low level, medium level, and high level threats, noting that only high level threats require immediate law enforcement involvement.\textsuperscript{32} Schools must exercise restraint before notifying law enforcement because violence is a highly complex behavior.

As Clay Calvert so eloquently stated in his article, “[a]n adolescent comes to school with a collective life experience, both positive and negative, shaped by the environments of family, school, peers, community, and culture. Out of that collective experience comes values,

\textsuperscript{30} \textit{See e.g.} J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (holding that a child’s constitutional right of privacy is not violated by disclosure of juvenile court records); Eagle v. Moran, 88 F.3d 620 (8th Cir. 1996) (citing \textit{Craig v. Harney}, 331 U.S. 367 (1947) to hold that a trial is a public event); Nilson v. Layton City, 45 F.3d 369 (10th Cir. 1995) (explaining that criminal activity is not protected by the right to privacy and that disclosure of arrest records, judicial proceedings, and information contained in police reports does not implicate the right to privacy).

\textsuperscript{31} O’Toole, \textit{supra} note 25.

\textsuperscript{32} \textit{Id.} High level threats are those that appear to pose an imminent and serious danger to the safety of others, are direct, specific, and plausible, and suggest concrete steps have been taken toward carrying it out. Clearly, this is more limited than the broad term “incidents” used by the Colorado legislature in House Bill 00-1119.
prejudices, biases, emotions, and the students’ responses to training, stress, and authority.”

Further, violent behavior involves an “interaction of psychological, biological, and social factors,” and as a result simplistic approaches will not remedy the problem of school violence.

Researchers cite a variety of explanations for why students commit violent acts at school, ranging from depression/suicidal tendencies to what has recently been termed “cynical shyness.” Mere sharing of information between schools and law enforcement does not sufficiently address such a complex issue, particularly when the information being shared has little, if any, relation to the problem attempting to be remedied and where the people receiving such information do not know how to appropriately respond to it. Further, much of the shared information does not come until it is already too late. A more appropriate approach to actually preventing the complex problem of school violence has come in the form of anti-bullying/harassment policies.

33 Id.


35 O’Toole, supra note 25.

36 “Cynical shyness,” coined by Bernardo J. Carducci, PhD and Philip Zimbardo, PhD, includes traits such as lack of empathy, low tolerance for frustration, angry outbursts, social rejection from peers, bad family relations, and access to weapons. Cynically shy people want to be social but disengage from other people after being rejected. According to Carducci, constant feelings of rejection lead to fantasies of retaliation against not only bullies, but more generally, any people who have in any way slighted the individual. The cynically shy individual tends to belittle those who have rejected him while at the same time expressing an attitude of superiority. Kathleen Doheny, What Triggers School Shooters?, http://www.webmd.com/mental-health/news/20070820/what-triggers-school-shooters (last visited Aug. 31, 2007).

37 The recent shootings in Cleveland, Ohio (Oct. 10, 2007) reveal how sharing information will not prevent violence at schools if the people receiving the information fail to adequately respond to it. Apparently, 14-year-old Asa Coon suffered from symptoms of bipolar, previously slapped his mother, attempted suicide, and was suspended from school for fighting. Despite knowledge of Coon’s violent tendencies, the school’s principal was “too busy” to speak with students regarding their concerns about Coon. CNN, Ohio School Shooter Gave Many Warnings, http://www.cnn.com/2007/US/10/11/cleveland.shooting/index.html (last visited Oct. 11, 2007). Principals and teachers must strive to never be “too busy” to listen to students’ concerns about possible violence at school. Here, had the principal made time to talk to students, four innocent victims might not be lying in hospital beds.
III. ANTI-BULLYING AND ANTI-HARASSMENT LEGISLATION

A. Prevalence and Forms of Bullying

According to some accounts, Eric Harris and Dylan Klebold were frequent targets of bullying,\(^{38}\) a fact hardly surprising given how common bullying is in American schools. Studies suggest that as many as fifteen percent of all students are either victims or perpetrators of bullying.\(^ {39}\) Further, according to the National Association of School Psychologists, one in seven children is a bully or the target of a bully.\(^ {40}\) Even more, research shows that eighty percent of adolescents report being bullied at some point during their school years, and ninety percent of fourth through eighth graders report being victims of bullying.\(^ {41}\) While these figures differ, there is no disputing the fact that bullying is alive and well. Bullying can encompass a wide range of behaviors.

Bullying may include physical violence and attacks, verbal taunts, name-calling and put-downs, threats and intimidation, extortion or stealing money and possessions, and exclusion from a peer group.\(^ {42}\) Both boys and girls engage in bullying, but boys generally use physical intimidation while girls mostly use psychological intimidation.\(^ {43}\) Thus, girls engage in bullying

\(^{38}\) Supra, note 20.


\(^{41}\) Susan H. Kosse & Robert H. Wright, How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes be the Answer?, 12 DUKE J. GENDER L. & POLY 53, 54 (2005).

\(^{42}\) Id.

\(^{43}\) Weddle, supra note 39, at 646.
that is less visible, namely “social alienation, intimidation, malicious gossip, note writing, and peer manipulation.” Whether the bully is male or female, bullying tends to involve (1) repetitive negative actions targeted at a specific victim, (2) direct confrontation caused by a perpetrated imbalance of power, and (3) effective manipulation of emotional responses such as fear or inadequacy. Bullying most often occurs at school – in class, on the playground, at lunch – but with the rise in technology has become more prevalent on the internet, a form that has been termed “cyberbullying.” Given the wide variety of forms bullying can take and its long history in American schools, many parents, teachers, and state legislatures do not take it seriously. In fact, even some courts do not take it seriously, dismissing it by saying “[h]ostility and competition among our youth is natural. It happens in competitive sports; it happens in adolescent love affairs; it happens among siblings; it is an inevitable part of growing up.” However, since Columbine, bullying has become the target of many state legislatures.

B. Bullying Defined

Most states that have enacted anti-bullying statutes mandate that school districts create anti-bullying policies and leave it to those districts to define “bullying.” For those states that

44 Id.
45 Id.
46 Renee Servance, Cyberbullying, Cyberharassment, and the Conflict Between Schools and the First Amendment, 2003 Wis. L. Rev. 1213 (2003). Cybergbullying has become very common in today’s society. For example, a website titled www.schoolrumors.com allows students to scrawl comments on a virtual bathroom wall. Kosse & Wright, supra note 41. Given that cyberbullying mostly occurs off-campus, it involves issues that are beyond the scope of this article and will not be discussed further. However, research in this area is encouraged.
47 In fact, thirty-three states have yet to address the issue by enacting anti-bullying statutes. Kosse & Wright, supra note 41, at 74.
49 Kosse & Wright, supra note 41, at 62.
do define bullying, the range of prohibited speech or conduct varies widely. Some states, such as Arkansas and New Hampshire, define the term broadly to encompass any conduct constituting “pupil harassment.”50 However, most states are more specific in how they define “bullying,” focusing on the intent of the perpetrator, the reasonableness of the perpetrator’s actions, or the effect the perpetrator’s actions have on the target.51 For example, Colorado has an intent-based statute defining “bullying” to include “any written or verbal expression, or physical act or gesture, or a pattern thereof, which is intended to cause distress upon one or more students in the school . . . .”52 Louisiana’s statute looks more to the effect the perpetrator’s actions have on the target, defining “bullying” as:

[A]ny intentional gesture or written, verbal, or physical act that a reasonable person under the circumstances should know will have the effect of harming a student or damaging his property or placing a student in reasonable fear of harm to his life or person or damage to his property; and [i]s so severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.53

Oregon’s statute was amended in 200754 to include a definition and prohibition of cyberbullying and focuses mainly on the effect the perpetrator’s actions have on the target by banning any act “that substantially interferes with a student’s educational benefits, opportunities or

50 Id.

51 Id. at 62-63. Definitions focusing on the effect bullying has on the target have also been labeled as “tort-based” definitions. See Kathleen Hart, Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Anti-Bullying Legislation as a Response to School Violence, 39 GA. L. REV. 1109, 1136 (2005).

52 Kosse & Wright, supra note 41, at 63.


performance.”  

An example of a statute that focuses mainly on how the perpetrator’s actions will be perceived by others defines “harassment or bullying” as:

[A]ny gesture or written, verbal, graphic, or physical act . . . that is reasonably perceived as being motivated either by any actual act or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression; or a mental, physical, or sensory disability or impairment; or by any other distinguishing characteristic.  

C. Zero Tolerance for Bullying

In the same way that states choose to define “bullying,” states also differ in their approach to punishing bullying behavior. Given the bad reputation bullying has had in recent years, particularly due to its relation to school violence as evidenced by Columbine, many states have taken a zero tolerance approach. In fact, Education World quoted Lee Sherman, editor of the Northwest Education magazine issue Learning in Peace, as saying in order to end bullying and violence, schools must send a “clear message of zero tolerance for harassment, put-downs, and bullying.” Many of these policies include zero tolerance for any speech, writing, or other expressive activity reflecting violence. The zero tolerance approach is flawed for a variety of reasons.


57 For example, following Columbine, in 1999 the Nevada legislature enacted a state-wide zero tolerance policy for any student labeled a “habitual disciplinary problem” for threatening behavior and allowed schools to automatically expel students for a minimum of one semester. Louis P. Nappen, School Safety v. Free Speech: The Seesaw Tolerance Standards for Students’ Sexual and Violent Expressions, 9 TEX. J. C.L. & C.R. 93, 105 (Winter 2003).

58 Education World, supra note 39.
First, because “[a] danger known is much safer than a danger that goes unspoken until it is too late,” zero tolerance inhibits the open exchange of student speech that is vital to school safety.\(^{59}\) Basically, zero tolerance will discourage students from expressing any violent thoughts or feelings, thereby preventing teachers from recognizing and responding to “red flags.” As both Columbine and the more recent events at Virginia Tech demonstrate, students often reveal important warning signs in class assignments. For example, Harris and Klebold made a video for a school project showing them pretending to shoot fake guns and snuffing students in the hallways, and they both focused on themes of violence in their creative writing projects.\(^{60}\) Such intentional or unintentional revelation of one’s feelings, thoughts, fantasies, attitudes, or intentions has been termed “leakage” by the FBI and is considered one of the most important clues that may precede an adolescent’s violent act.\(^{61}\) Additionally, the Secret Service and Department of Education’s Safe School Initiative report concluded that most attackers engaged in some behavior, prior to the incident, that caused others concern or indicated a need for help.\(^{62}\)

The absence of zero tolerance policies encourages students to freely submit their work, and consequently allows warning signs to surface.\(^{63}\) Granted, leakage may still occur even with a zero tolerance policy in place, but it is certainly less likely. Chilling such violent speech with


\(^{60}\) *Supra* note 20.

\(^{61}\) O’Toole, *supra* note 25. Examples of “leakage” included recurring preoccupation with themes of violence, hopelessness, despair, hatred, isolation, loneliness, nihilism, or an “end-of-the-world” philosophy which may be expressed in conversation, jokes, or seemingly off-hand comments to friends, teachers, parents, or siblings as well as recurrent themes of destruction or violence in writing or artwork.

\(^{62}\) *Supra* note 24. The report gave an example where a student’s English teacher became concerned about several poems and essays that the student submitted because they treated homicide and suicide as possible solutions to his feelings of despair.

\(^{63}\) Salgado, *supra* note 59, at 1395.
zero tolerance policies not only will schools fail to be made safer, but schools will actually be less safe than if school officials did nothing at all. A good example of a failed zero tolerance policy is Kip Kinkel, who, after being immediately expelled from school after being caught storing a gun in his locker, killed his parents and returned to school the next day to kill two classmates and wound twenty-five others. Of course, encouraging student speech will only make schools safer if teachers and school officials heed the warning signs. Rather than asking Harris about a gruesome tale he wrote, his teacher commented that his was a “unique approach” and that his “writing works in a gruesome way – good details and mood setting.” Thus, in the absence of a zero tolerance policy, teachers must be trained to recognize and respond to “leakage.”

In addition to limiting the number of warning signs available to schools, zero tolerance polices raise numerous due process concerns. Zero tolerance policies are questionable because they often lack specificity concerning what constitutes an offense. Not only must a violator be able to determine what constitutes a violation, but he must be able to discern whether he is actually committing the prohibited act. Zero tolerance polices also lack proportionality and rationality, thereby leading to absurd practical results. A student who unknowingly turns in a violent poem to a teacher would be punished in the same way as a student who holds a gun to his

64 Id. at 1396.
65 Supra note 20.
66 Weddle, supra note 39, at 680.
67 Id.
68 A lack of proportionality raises possible Eighth Amendment concerns. Id. at 681.
69 Id. at 679.
classmate’s temple and threatens to kill him. Other examples of real-life absurd results include a high school student being suspended for turning in a knife after talking a friend out of suicide and a six-year-old girl being suspended for offering a classmate a lemon drop because the teacher did not know what it was.\(^70\)

In addition to leading to unfair and ridiculous results, zero tolerance polices encourage wasteful use of taxpayer money\(^71\) and lead to costly litigation when students challenge their suspensions and expulsions in court.\(^72\) Worst of all is the fact that the school itself becomes a bully by “picking its victims on the basis of irrational and arbitrary criteria” and strips educators of their ability to take advantage of “teachable moments,” when children engage in bullying behavior.\(^73\) In recognition of the numerous flaws surrounding them, the American Bar Association has officially renounced zero tolerance policies, describing them as “one size fits all” policies that “eliminate the common sense that comes with discretion and, at great cost to society and to children and families, do little to improve school safety.”\(^74\)

D. Recommendations for Enforcing Anti-Bullying Policies

Given how common teasing and joking around are in schools everywhere, there is a significant risk that students will have no knowledge that their words or actions amount to a policy violation. First, with regard to the policy itself, to be effective and enforceable, the

\(^{70}\) Id. at 680.

\(^{71}\) Nappen, supra note 57, at 114.

\(^{72}\) Weddle, supra note 39, at 680.

\(^{73}\) Id. at 682.

\(^{74}\) Salgado, supra note 59, at 1393; See also Weddle, supra note 39, at 682.
definitions of “bullying” must be consistent throughout a state and provide specific examples of the types of conduct prohibited. Further, a policy should include provisions explaining how the policy will be disseminated and how employees and students should be trained. Training and education of students is absolutely essential if these anti-bullying statutes are to meet the constitutional requirements of due process.

There are essentially two issues surrounding the due process notice requirement, namely (1) the extent to which children know and understand the rules, and (2) the extent to which a child can predict or understand the consequences of his or her actions. The ability of a student to understand the rules is best evidenced by the amount of notice, or warning, the school provided that certain forms of expression could constitute a violation. To ensure that students are fully aware that bullying is prohibited, schools should provide them with handbooks and require that teachers take time to explain the content, including a discussion of why the rule exists and the potential penalties for violating it. Teachers should also explain the boundaries/limits of the rule by giving concrete examples of what would and would not constitute a violation. Lastly, the policy must be applied uniformly to students so they develop a respect for and appreciation of the policy and the purposes behind it. However, even if students fully understand the policy and faculty members apply it in a fair and even-handed manner, the policy may nevertheless fail constitutional scrutiny under the First Amendment.

75 Kosse & Wright, supra note 41, at 71-72.
76 Id.
77 Nappen, supra note 57, at 101.
78 Id. at 121.
79 Id. at 123.
80 Id.; See also Weddle, supra note 39, at 657.
E. Freedom of Speech and Expression: Bullying and the First Amendment

This section will explain how anti-bullying statutes can be analyzed under various First Amendment doctrines. Specifically, Part 1 will discuss the constitutionality of anti-bullying statutes under Tinker, and Part 2 will focus on the applicability of the “fighting words” doctrine to such legislation. Part 3 will examine how courts have analyzed bullying under the “true threats” doctrine. Parts 4 and 5 will explain why such statutes can be justified based on the secondary effects of bullying and as content-neutral time, place, and manner restrictions. Finally, Part 6 will contain suggestions for ensuring that anti-bullying statutes survive constitutional scrutiny under the First Amendment.

1. Constitutionality Under Tinker

The hallmark First Amendment case for student speech rights in schools is Tinker v. Des Moines Independent Community School District.81 In Tinker, after learning that two high school students and one junior high school student planned to wear black armbands to school in protest of the Vietnam War, a principal adopted a policy requiring suspension for students who refuse to remove black armbands.82 All three students refused to remove their armbands and were suspended for three weeks as a result.83 The students challenged the principal’s actions as violative of their First Amendment right to free speech and expression, and the Supreme Court found in the students’ favor, declaring the famous words, “[i]t can hardly be said that either students or teachers shed their constitutional right to freedom of speech or expression at the

82 Id. at 504.
83 Id.
schoolhouse gate.” In its speech-protective decision, the Court found that a school can only restrict student speech that “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”

In creating this new rule, the Court stressed that the wearing of black armbands to school was “entirely divorced from actually or potentially disruptive conduct by those participating in it.” Further, the Court explained that there was no evidence of interference, actual or nascent, or collision with the rights of other students to be secure and to be let alone and that the case did not involve speech or action that intrudes upon the work of the school. Explaining that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,” the Court noted that to justify prohibiting speech, states must have a reason beyond “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

At least one court has utilized Tinker to strike down anti-bullying legislation. In an opinion by now Supreme Court Justice Samuel Alito, Jr., the Third Circuit found an anti-
harassment policy unconstitutional, proclaiming that there is no “harassment exception” to the
First Amendment.\(^90\) The policy at issue defined “harassment” as:

\[
\text{[V]erbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile, or offensive environment.}\(^91\)
\]

While the court, in recognition that the primary function of a school is to educate children, did uphold the portion of the statute banning speech that substantially interferes with a student’s educational performance, it found that the portion relating to creation of a “hostile environment” was problematic because it allowed speech that did not actually cause a disruption but which merely intended to cause disruption, to be punished.\(^92\) The court explained that the mere fact that someone may take offense to speech is not a sufficient reason for prohibiting it and that \textit{Tinker} requires a school to reasonably believe that speech will cause an actual, material disruption.\(^93\) Further, the court refused to apply the “interfering with the rights of others” language from \textit{Tinker} because it was “unclear.”\(^94\)

\(^90\) \textit{Saxe v. State Coll. Area Sch. Dist.}, 240 F.3d 200, 204 (3d Cir. 2001).

\(^91\) \textit{Id.} at 202. The policy further explained that prohibited conduct could include any unwelcome verbal, written, or physical conduct which offends, denigrates, or belittles an individual because of any of the characteristics above, including, but not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicry, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extortion, or the display/circulation of written material or pictures. \textit{Id.} at 202-03. In addition, “other harassment” was defined to include harassment based on clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values, etc. \textit{Id.} at 203.

\(^92\) \textit{Id.} at 216-17; \textit{See also} Kosse & Wright, \textit{supra} note 41, at 76.

\(^93\) \textit{Saxe}, 240 F.3d at 215, 217.

\(^94\) \textit{Id.} at 217.
In the following year, however, the Third Circuit distinguished Saxe to reach the opposite result and uphold an anti-harassment policy.\(^95\) The policy at issue in Sypniewski prohibited harassing or intimidating utterances (i.e. name calling and use of racial or derogatory slurs) as well as the display or possession of racially offensive material.\(^96\) The court explained that the policy differed from the one in Saxe because of the language and circumstances it addressed.\(^97\) Specifically, Warren Hills’ history of racial hostility provided a substantial basis for legitimately fearing disruption from the type of speech prohibited, and the policy was aimed at addressing a particular and concrete set of problems involving genuine disruption.\(^98\) The court exclaimed that there is “no constitutional right to be a bully.”\(^99\)

In light of the fact that we are living in a post-Columbine environment and the telling statistics regarding the role bullying plays in school violence, it seems odd that the Third Circuit would argue that a statute aimed at harassing or abusive speech, generally, is based on an undifferentiated fear rather than a specific set of events.\(^100\) Columbine was a specific event, as were Virginia Tech and Red Lake. While there has not yet been a tragic school shooting in every school district, history has shown that violence does not discriminate and a Columbine

\(^{95}\) Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002). The court did, however, strike down the portion of the statute prohibiting “ill will” because it focused entirely on the listener’s reaction, which the court considered an insufficient basis for suppressing speech and expression. \textit{Id.} at 264.

\(^{96}\) \textit{Id.} at 261.

\(^{97}\) \textit{Id.} at 262.

\(^{98}\) \textit{Id.} (distinguishing the Saxe policy because it was not created in direct response to any particular set of events but rather on an undifferentiated fear of disruption).

\(^{99}\) \textit{Id.} at 264.

\(^{100}\) See Hart, \textit{supra} note 51, at 1148 (proposing that the Supreme Court make a determination that anti-bullying policies satisfy \textit{Tinker} in light of the context in which the laws were passed, namely because a broad prohibition of non-physical forms of bullying cannot be said to be based on “an undifferentiated fear or apprehension of disturbance”).
could happen anywhere. If retaliation for bullying is a main motive for many school shooters, it
seems completely rational and logical to try to cut down on bullying in schools – a move hardly
based purely on fearful speculation. In essence, the “undifferentiated fear or apprehension of
violence” argument falls apart after Columbine. This is just one of many reasons why the
“substantial disruption” standard in *Tinker* fails to assist schools in their efforts to prevent
bullying, thereby failing to protect students.\(^{101}\)

The “substantial disruption” standard is problematic because it is applied too narrowly by
focusing only on disruption at the moment speech occurs.\(^{102}\) Research shows that the effects of
bullying are not immediate but build over time and have a cumulative effect, often resulting in
violence which would certainly constitute a “substantial disruption” in the classroom.\(^{103}\) The fact
that the “substantial disruption” does not occur simultaneously with the speech causing it should
not provide absolute protection for such speech.

Further, according to Kay S. Hymowitz, *Tinker* as a whole represents the deconstruction
of childhood and adulthood.\(^{104}\) Essentially, *Tinker* weakens the kind of benign authority that
goes into shaping an ideal classroom and leads to the deconstruction and disempowerment of the

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\(^{101}\) Brett Thompson argues, by contrast, that *Tinker* strikes a proper balance between a school’s ability to maintain
discipline and students’ right to free speech because it allows schools to prevent bullying when speech is used to
intimidate or harass another student, thereby invading that other student’s rights. Brett Thompson, *Student Speech
Rights in the Modern Era*, 57 MERCER L. REV. 857, 899 (2006). This argument fails, however, to account for those
instances where a student teases another student in jest (i.e. without an intent to intimidate or harass), yet the student
being teased still suffers the negative side effects of bullying. Bullying, whether or not meant to intimidate or
harass, is damaging to the target.


\(^{103}\) *Id.* at 33-34.

teacher. Unless a student is disrupting the class as a whole, under Tinker, a teacher is powerless to prevent the most common subtle forms of bullying. Even more, Tinker and the “substantial disruption” standard fail to take into consideration the low value of speech consisting of teasing, taunts, and ridicule. While Tinker does contain language that could be used to support anti-bullying legislation, it does not appear that courts are willing to stray from the narrow approach taken in the case. However, anti-bullying statutes can withstand constitutional scrutiny if analyzed under different First Amendment doctrines/exceptions.

2. Constitutionality Under the “Fighting Words” Exception

The landmark case describing the “fighting words” doctrine is Chaplinsky v. New Hampshire. Several Jehovah’s Witnesses were convicted of violating a statute that banned “offensive, derisive, or annoying” words and any “noise or exclamation” in another’s presence that is made with the intent to “offend, or annoy him, or to prevent him from pursuing his lawful business or occupation.” A disturbance ensued after these individuals denounced all religion

105 Id. at 555, 557. Hymowitz further argues that “given free rein to say whatever they want, kids talk casually of murder, bombs, and suicide and adults support their right to do so until someone gets hurt” and concludes that Tinker ends up reinforcing the more natural obsessions of the teen imagination, which already get plenty of sustenance from the media and the peer group. Id. at 557, 562. Hymowitz makes a good point that children’s free speech rights should not be equal to adults, but her radical argument seems to advocate for suppression of all violent speech in schools. As discussed earlier in this article, schools run a serious risk if they attempt to completely shut down violent student expression because it will prevent red flags from appearing. However, most bullying is not violent per se, and Tinker stands in the way of safer and more supportive and encouraging schools.

106 Snook, infra note 112, at 679.

107 Namely, courts could find that bullying interferes, or collides, with the rights of other students to be secure and to be let alone. See Tinker, 393 U.S. at 508. This would not require that the bullying substantially interfere with a student’s ability to learn, but would basically protect students from being harassed, intentionally or otherwise, by fellow students.


109 Id. at 569.
as a “racket.”

The Court upheld the convictions and defined “fighting words” as “those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.”

The Court explained that the words “damn racketeer” and “damn Fascist” were epithets likely to provoke the average person to retaliate and that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Thus, by encompassing the low value of the speech, the Court found that it was within a state’s power to prohibit “offensive” words/names in order to maintain public peace. Since this decision, however, the Court has significantly narrowed the scope of the “fighting words” doctrine.

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10 Id. at 570.

11 Id. at 572 (emphasis added).

12 Id. The Court further declared that “resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded under the Constitution.” Id. See also Carmen M. Snook, Oregon’s “Bully Bill”: Are We Needlessly Repressing Student Speech in the Name of School Safety, 38 WILLAMETTE L. REV. 657, 679 (Fall 2002).

13 Chaplinsky, 315 U.S. at 573. Scholars also favor an approach that takes into consideration the speech’s low value, as the anti-social consequences of bullying justify its limited protection. Kosse & Wright, supra note 41, at 78. In their article, Kosse and Wright discuss the ideas of David Feldman, who suggests weighing the range of social and individual interests the speech serves and how the rights contribute to those interests. Id. In the context of bullying, allowing harassing speech serves no social interest and only a limited individual interest, if any, and there is a proven causal connection between it and victims committing suicide/homicide. Id. Further, it is argued that “[t]o apply the First Amendment without weighing the harm the speech creates is to choose theory over reality.” Id. at 80.

14 In fact, since the case was decided in 1942, the Supreme Court has never again upheld a fighting words conviction for adults. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1176 (2d ed. 2005); See e.g. Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing breach of the peace conviction for calling a group of protesters “slimy scum,” “snakes,” and “atheistic, Communist Jews” during a speech); See also Colleen Creamer Fielkow, Bullys, Words, and Wounds: One State’s Approach in Controlling Aggressive Expression Between Children, 46 DEPAUL L. REV. 1057, 1063 (1997) (explaining that Terminiello limited the “fighting words” doctrine by including in it only that speech which incited an immediate retaliation and not just those words that caused injury by utterance).
The “fighting words” doctrine became more limited after the Court’s 1971 decision in *Cohen v. California*.\(^{115}\) In *Cohen*, a man was convicted of “maliciously and willfully disturbing the peace and quiet of any neighborhood or person by offensive conduct” after he walked into a courthouse wearing a jacket that said “Fuck the Draft.”\(^{116}\) The Court held that the word “fuck” was not a “fighting word” because it was not directed to any specific person, people could avoid it by averting their eyes, and no one could reasonably take the words as a personal insult.\(^{117}\) Further, because the conviction rested solely on the basis of the speech itself, the Court declared that the state lacked power to punish him where there was no showing of an intent to incite disobedience or disruption of the draft.\(^{118}\) The next year, the Court overturned another “fighting words” conviction because punishment for use of “opprobrious” and “abusive” words that caused a “breach of the peace” went beyond the scope of *Chaplinsky*.\(^{119}\)

Twenty years later, the Court further explained the limited scope of the “fighting words” doctrine.\(^{120}\) Despite the fact that the Court was able to limit the construction of a statute’s language to the reach given it by the Minnesota Supreme Court, it still found the statute

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\(^{116}\) *Id.* at 16.

\(^{117}\) *Id.* at 20-21.

\(^{118}\) *Id.* at 18.

\(^{119}\) *Gooding v. Wilson*, 405 U.S. 518, 525 (1972). The Court explained that because the term “breach of the peace” was not narrowly construed by the state, its generic and broad language could include words that merely offended another and did not cause an immediate breach of the peace. *Id.* at 527.

\(^{120}\) *RAV v. City of St. Paul*, 505 U.S. 377 (1992). A youth burned a cross on the lawn of a black family during the early morning hours and was charged with violating a statute making it disorderly conduct to place “on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.” *Id.* at 379-80.
unconstitutional because it prohibited the speech itself rather than its non-speech elements.\textsuperscript{121} The Court explained that the reason that “fighting words” are unprotected is not that their content communicates any particular idea but that their content embodies a particularly intolerable (and socially unnecessary) \textit{mode} of expressing whatever idea the speaker wishes to convey.\textsuperscript{122} Thus, because the statute banned fighting words, \textit{regardless of the manner communicated}, it reflected an unconstitutional attempt to ban certain ideas.\textsuperscript{123}

In 1994, the North Dakota Supreme Court applied \textit{Chaplinksy} and the “fighting words” doctrine to a case involving a long-running feud between two boys that included threats, incessant teasing and harassment, and which caused one boy to fear going to school.\textsuperscript{124} The court examined whether the expression, if delivered to a reasonable and prudent person of common intelligence, would incite the addressee to an immediate breach of the peace, applying an objective test for face-to-face confrontation.\textsuperscript{125} The court found that the threats, taunts, and harassment were intended to adversely affect the safety, security, and privacy of the target, concluding that in light of the context in which the harassment took place, it rose to the level of “fighting words.”\textsuperscript{126} Despite the decisions limiting the scope of the “fighting words” doctrine, \textit{Svedberg} reveals that teasing and taunting may still be proscribable under it.

\textsuperscript{121} \textit{Id.} at 381, 386.
\textsuperscript{122} \textit{Id.} at 393.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Svedberg v. Stamness}, 525 N.W.2d 678 (N.D. 1994). The harassment at issue included threats to kill, as well as name calling (i.e. “Dumbo”) and creation/display throughout the community of three large snow figures with very large ears. \textit{Id.} at 680.
\textsuperscript{125} \textit{Id.} at 683 (context to include the age of the target, which in the case was only 14).
\textsuperscript{126} \textit{Id.} at 680, 683-84.
While arguably, most bullying does not incite an immediate retaliatory action by the targeted victim, the language in *Chaplinsky* does state that “fighting words” include those that “tend to incite an immediate breach of the peace” or those that “by their very utterance inflict injury.” Social science research consistently reveals that bullying injures children. Not only does the speech harm children, but its minimal social value could easily justify its prohibition. Further, unlike the words “Fuck the Draft” on the back of a jacket, bullying typically involves repetitive negative action targeted as a *specific victim*, making it unlikely the target can avoid the bullying and likely the target will be offended. Further, children are more vulnerable than adults, and they need greater protection from those things which *are proven* to harm them. Additionally, one could argue that anti-bullying statutes are not aimed at the content of the speech itself, but rather at the mode in which the speech is expressed, most often face-to-face and in a confrontational manner. Thus, anti-bullying statutes seem to satisfy the First Amendment definition of “fighting words,” which may be constitutionally proscribed. In addition to qualifying as “fighting words,” courts often examine bullying and other harassing speech or conduct under the “true threats” doctrine.

3. Constitutionality Under the “True Threats” Doctrine

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127 In fact, “[n]ot only do victims suffer the immediate pain and humiliation of being the subject of a bully’s torment, they suffer emotional and psychological effects that can remain with them well into their adult lives, as well as physical ailments and academic problems.” Weddle, *supra* note 39, at 647. Bulling leads to decreased self-confidence, nervousness, inability to concentrate, more frequent stomachaches, headaches, and problems with bed-wetting, and victims often tend to view the bullying as deserved, thereby leading to feelings of desperation and depression, often resulting in suicidal and homicidal thoughts. *Id.* at 647-48.

128 Weddle, *supra* note 39, at 646.
The Supreme Court first addressed the “true threat” doctrine in *Watts v. United States*, declaring that “political hyperbole” is not a “true threat.”129 Essentially, *Watts* tells us that there must be a realistic, actual threat, but it does not provide any further guidance.130 The Court did not offer a clear definition of what constitutes a “true threat” until 2003. In *Virginia v. Black*, the Court defined “true threats” as those statements where a speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.131 The Court further explained that a speaker need not intend to carry out the threat, as the prohibition protects individuals, in addition to the possibility that the threatened violence will occur, from fear of violence and from the disruption that fear engenders.132 The Court described the burning of a cross as a “symbol of hate” that may or may not have an intimidating message, as it may sometimes be a statement of ideology or of group solidarity.133 In striking down the statute as unconstitutional, the Court explained that the general sense of anger/hatred that is aroused as a result of cross burnings is not, alone, sufficient to justify a ban on all cross burnings; rather, each cross burning must be examined in light of the context surrounding it in order to determine if it was intended to intimidate.134 Despite these new rules,

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129 *Watts v. United States*, 394 U.S. 705, 708 (1969) (Watts declared that if the military made him carry a gun, the first person in his sights would be LBJ).

130 *Salgado*, supra note 59, at 1386-87.

131 *Virginia v. Black*, 538 U.S. 343, 359 (2003). Virginia banned cross burning done with intent to intimidate a person or group of persons, and a woman who lived near an open field where demonstrators burned a cross became scared by comments made by the demonstrators. Demonstrators were tried and convicted because Virginia treated cross burning as prima facie evidence of intent to intimidate. *Id.* at 347, 349.

132 *Id.* at 360.

133 *Id.* at 357, 365-66.

134 *Id.* at 366-67.
the Court failed to resolve the circuit split regarding how to determine if a speaker intended to intimidate.\textsuperscript{135}

This conflict is explained in \textit{Jones v. State}.\textsuperscript{136} While some circuits focus on the declarant and what he should have reasonably foreseen,\textsuperscript{137} others focus on the recipient and what he would reasonably believe.\textsuperscript{138} The court adopted the latter objective approach and cited the test laid out by the Eighth Circuit in \textit{Dinwiddie}.\textsuperscript{139} The court examined five factors: (1) the reaction of the recipient of the threat and other listeners, (2) whether the threat was conditional, (3) whether the threat was communicated directly to the victim, (4) whether the maker had made similar statements to the victim in the past, and (5) whether the victim had reason to believe the maker had a propensity to engage in violence.\textsuperscript{140} In applying these factors, the court concluded that the rap lyrics constituted a “true threat” because they were not conditional, the victim’s reaction was immediate and intense fear, the victim knew the speaker had a criminal record, and although he never threatened her before, she could reasonably believe he had the capacity to carry out his

\textsuperscript{135} Salgado, \textit{supra} note 59, at 1387.

\textsuperscript{136} Jones v. State, 645 S.W.2d 728 (Ark. 2002) (affirming an adjudication for first degree terroristic threatening by finding the existence of a “true threat”). A 15-year-old boy wrote a rap song for a girl that included threats to kill her and her family. \textit{Id.} at 730. The boy laughed as he gave it to her and said that he did not think it was a big deal, noting that it was modeled after the lyrics of Eminem. \textit{Id.} at 731. The school’s principal testified that the boy did not seem to understand that his writing could frighten or harm another student. \textit{Id.}

\textsuperscript{137} \textit{Id.} at 734 (citing United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997)).

\textsuperscript{138} \textit{Id.} (referring to the Sixth Circuit and citing United States v. Frances, 164 F.3d 120 (2d Cir. 1999) and United States v. Malik, 16 F.3d 45 (2d Cir. 1994)).

\textsuperscript{139} \textit{Id.} at 735 (citing United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996)).

\textsuperscript{140} \textit{Id.} The Eighth Circuit applied this test again in 2002. In finding a “true threat” existed, the court reasoned that although the speaker did not communicate directly with the target, the letter pronounced contemptuous and depraved hate by referring to her as a “bitch,” “slut,” “ass,” and “whore,” over 80 times in 4 pages and using the “F-word” at least 90 times, and that most, if not all 13-year-old girls (as well as most adults) would be frightened. Doe v. Pulaski County Special School Dist., 306 F.3d 616, 625 (8th Cir. 2002) (vacating its earlier decision in 263 F.3d 833 (8th Cir. 2001)).
threats.\textsuperscript{141} Application of the “true threats” analysis to student speech in the school setting has led to mixed results,\textsuperscript{142} and there are several reasons why it is ill-suited to deal with adolescent speech.

First, the “true threat” analysis encompasses only the most serious forms of bullying, while failing to account for the more common, yet no less damaging, forms of teasing, taunting, and name-calling. In addition, it is difficult to determine what a “reasonable speaker” or “reasonable recipient” is when children and teenagers are involved – is there even such a thing as a “reasonable teenager”?\textsuperscript{143} Further, due to the lack of clarity and agreement surrounding what constitutes a threat, “administrators are prone to classify virtually everything as a threat, regardless of its actual nature, and then allow the courts to sort it out later at the expense of taxpayers.”\textsuperscript{144} Additionally, the Dinwiddie factors are easily swayed by post-Columbine fears and are likely to lead to many false positives.\textsuperscript{145} The biggest problem with traditional threat analysis is that it fails to account for the significant differences between the ways adults and

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\textsuperscript{141} Jones, 645 S.W.2d at 737.

\textsuperscript{142} See e.g. In re A.S., 626 N.W.2d 712 (Wis. 2001) (upholding disorderly conduct violation after finding the existence of a “true threat” where a boy said that he was going to kill everyone at middle school, that he wanted to make people suffer, that an attack would take place over a 10 minute period, and that he would do something similar to Columbine – also noting that the reference to Columbine heightened the anxiety of listeners); See also In re Douglas D., 626 N.W.2d 725 (Wis. 2001) (holding that a student could not be prosecuted for violating a disorderly conduct statute for writing a story in his creative writing class that was written in third person, would be completed by other students, and contained hyperbole and attempts at jest because although crude and repugnant, the story did not constitute a “true threat”); See also People ex rel. C.C.H., 651 N.W.2d 702 (S.D. 2002) (reversing a child’s delinquency adjudication by refusing to analyze the word “kill” in a vacuum, particularly where a teacher, though afraid, nonetheless allowed a boy to leave her classroom after soliciting the boy about his problems with another student).

\textsuperscript{143} Salgado, supra note 39, at 1389-90.

\textsuperscript{144} Id. at 1392. (urging that this is an inadequate remedy since students have only a finite time in high school).

\textsuperscript{145} Id. at 1408.
teenagers communicate. To avoid unnecessarily stripping students of their First Amendment rights until courts restore them, schools should utilize the threat assessment guidelines created by the FBI before overreacting to student speech.

According to the FBI, there are four types of threats: (1) direct, (2) indirect, (3) veiled, and (4) conditional. Threats that pose a low level of risk are often vague and indirect with implausible or inconsistent information, whereas threats posing a medium level of risk are more direct, concrete, and detailed but may include some veiled reference to preparation. Threats that pose a high level of risk are direct, specific, plausible, and strongly suggest that concrete steps have been taken to carry them out. In assessing the likelihood that a particular student will carry out a particular threat, the FBI suggests that schools examine the student’s personality, family life, school life, and social dynamics. In the FBI’s view, the criminal justice system should only become a player after school officials conduct a thorough investigation and threat assessment. While use of such comprehensive threat assessment is

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146 Specifically, teen years are marked with bouts of self-doubt, insecurity, and anger toward authority, a fact emphasized by teenagers’ tendencies to speak in hyperbole (often shaped by the media they consume), characterizing each event in their lives as critical, pivotal, or otherwise earth-shattering. Id. at 1404-05.

147 O’Toole, supra note 25.

148 Direct threats identify a specific act against a specific target and are delivered in a straightforward, clear, and explicit manner (e.g. “I am going to place a bomb in the school’s gym”). Id. at 7.

149 Indirect threats are vague, unclear, and ambiguous, and while violence is implied, the threat is phrased tentatively (e.g. “If I wanted to, I could kill everyone in this school”). Id.

150 Veiled threats strongly imply but do not explicitly threaten violence (e.g. “We would be better off if you were dead”). Id.

151 Conditional threats are often seen in extortion cases and warn that a violent act will occur unless certain demands are met (e.g. If you don’t do my homework, I will beat you to a pulp”). Id.

152 Id. at 8-9.

153 Id. at 9.

154 See supra note 25 for full list of factors to be considered.
recommended, most typical forms of bullying will still not fall within the scope of the “true threat” analysis, and in order to justify anti-bullying policies, courts will have to look to a different First Amendment exception.

4. Constitutionality Under the “Secondary Effects” Analysis

In City of Renton v. Playtime Theatres, Inc., the Supreme Court declared that an ordinance aimed not at the content of speech, but at its secondary effects does not violate the First Amendment.\(^{155}\) The Court proclaimed that it would not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive, recognizing that legislators all have different motives for enacting/supporting a particular piece of legislation.\(^{156}\) The Court emphasized that the ordinance was the result of a long period of study and discussion of the problems adult movie theatres posed in cities,\(^{157}\) and was designed to prevent crime, protect the city’s retail trade, maintain property values, and generally protect and preserve the quality of the city’s neighborhoods, commercial districts, and quality of urban life.\(^{158}\) In upholding the ordinance, the Court found that it served a substantial government interest and allowed for reasonable alternative avenues of communication.\(^{159}\)

\(^{155}\) City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance prohibiting adult motion picture theatres from locating within 1,000 feet of any residential zone, single or multiple-family home, church, park, or school because of the harmful effects it had on society as a whole).

\(^{156}\) Id. at 48.

\(^{157}\) Id. at 51. The Court found it appropriate for the city to rely on the experiences of other cities, as the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem. Id.

\(^{158}\) Id. at 48.

\(^{159}\) Id. at 50. Specifically, the Court noted that the ordinance left 520 acres (more than five percent) of the city’s land area) to open an adult theatre. Id. at 53.
The Supreme Court has made clear, however, that a listener’s reaction to speech, or speech’s emotive impact on an audience, are not, alone, secondary effects.\textsuperscript{160} In fact, the Third Circuit rejected the “secondary effects” argument in \textit{Saxe} for this very reason.\textsuperscript{161} The reluctance of courts to apply the “secondary effects” argument to bullying is misguided, given that bullying has many effects beyond its effect on a listener. For instance, research shows that victims of bullying suffer serious life-long emotional problems, and bullies are substantially more likely than their peers to commit felonies later in their lives.\textsuperscript{162} Further, the effects of bullying on the victims go beyond emotions and include both physical ailments and academic problems.\textsuperscript{163} Even more significantly, there is the secondary effect of horrific shooting rampages like Columbine. Bullying also affects bystanders by modeling victimization of others as a normal part of life. Observers may learn to ignore what they see happening to their peers, and they may develop a sense of passivity, disengagement, and lack of caring.\textsuperscript{164}

Thus, it appears that under the “secondary effects” analysis, anti-bullying legislation is justified by a state’s interest in preventing crime, improving the safety and health of its youth, generally protecting and preserving the quality of life for its citizens, and fostering a sense of

\textsuperscript{160} \textit{RAV}, 505 U.S. at 394 (citing Boos v. Barry, 485 U.S. 312 (1988)).
\textsuperscript{161} \textit{Saxe}, 240 F.3d at 209.
\textsuperscript{162} Weddle, \textit{supra} note 39, at 642. Studies reveal that as many as 60 percent of boys identified as bullies have been convicted of a criminal offense by the time they are 24 years old, and as many as 40 percent have had three or more criminal convictions by that age. \textit{Id.} at 649-50.
\textsuperscript{163} \textit{Id.} at 647.
\textsuperscript{164} \textit{Id.} at 649.
humanity. In addition to being justified under a “secondary effects” argument, anti-bullying legislation could qualify as a content-neutral time, place, and manner restriction.

5. “Time, Place, and Manner” Restriction Under Hill v. Colorado

In his article, Matthew Earhart recommended that, in order to successfully prevent bullying in schools, courts can look to other cases involving harassing speech, namely Hill v. Colorado.  The State of Colorado made it unlawful within certain regulated areas for any person to “knowingly approach” within eight feet of another person, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”  The Court determined that the regulation was “content-neutral” because it (1) regulated where the speech could occur rather than the speech itself, (2) applied equally to all harassers regardless of viewpoint, and the statutory language made no reference to the content of the speech, and (3) the state’s interest in protecting access and privacy and providing police with clear guidelines were unrelated to the content of speech.  Thus, the statute passed muster because it established a minor place restriction on an extremely broad category of communications with unwilling listeners.

165 Cities need not perform their own studies regarding the effects of bullying, as the Supreme Court recognized in City of Renton, the studies already in existence are clearly relevant to the problem.

166 Earhart, supra note 102, at 34; Hill v. Colorado, 530 U.S. 703 (2000).

167 Hill, 530 U.S. at 707. The statute regulated speech-related conduct occurring within 100 feet of the entrance to any health care facility, and the conduct in question occurred outside of health care facilities offering abortions. Id.

168 Id. at 719. However, the Court did not address the Petitioner’s argument that the statute was not content-neutral as applied to some oral communication, namely that the content of the speech of those individuals who “knowingly approach” is irrelevant but for those who do not “knowingly approach” the content matters, because none of the lower courts addressed it.

169 Id. at 723.
The Court further found the statute to be viewpoint neutral because its enactment was not motivated by the conduct of the partisans on one side of a debate.\textsuperscript{170} In addition, the Court found the statute narrowly-tailored to serve Colorado’s “substantial and legitimate interest” in protecting people in “particularly vulnerable physical and emotional conditions” from “unwanted encounters, confrontations, and even assaults.”\textsuperscript{171} The Court also explained that the regulation need not be the least intrusive means and that the fact that a statute’s coverage is broader than the specific concern that led to its enactment is of no constitutional significance, for all that matters is that all persons entering and leaving the health care facilities share the interests served by the statute.\textsuperscript{172} Lastly, the Court explained that a person’s privacy interest in avoiding unwanted communication, an aspect of the broader right to be let alone, varies widely in different settings but that it increases when one is powerless to avoid the communication.\textsuperscript{173} Factors relevant in determining whether a particular time, place, and manner restriction is reasonable include the nature of a place, the pattern of its normal activities, and whether the manner of the expression is basically incompatible with the normal activity of a particular place at a particular time.\textsuperscript{174}

\textsuperscript{170} Id. at 724.

\textsuperscript{171} Id. at 725, 728-29. The Court emphasized the particularly vulnerable position people entering health care facilities are often in.

\textsuperscript{172} Id. at 725, 730-31 (noting that the comprehensiveness of the particular statute was a virtue not a vice and that a bright line prophylactic rule is justified by the great difficulty of providing adequate protection with legal rules that focus exclusively on the individual impact of each instance of behavior).

\textsuperscript{173} Id. at 716.

\textsuperscript{174} Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (upholding an anti-noise statute for protesting outside a school and declaring that schools “could hardly tolerate boisterous demonstrators who drown out classroom conversations, make studying impossible, block entrances, and incite children to leave the schoolhouse”).

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Significantly, in *Grayned*, the Supreme Court recognized a city’s *compelling interest* in having an “undisrupted school session conducive to the students’ learning.”

In applying the above principles to bullying in schools, particularly in light of the Court’s recognition that states have a compelling interest in undisrupted classrooms, governments could justify a ban on bullying. Schools are created to educate students, and bullying runs contrary to a school’s mission to provide an encouraging, fun, and enriching environment where all students can thrive. Further, like people entering medical clinics, children entering schools are particularly vulnerable, suffering from self-doubt, self-consciousness, and an overall fear of failure and “not fitting in.” In addition, compulsory attendance laws prevent students from avoiding any unwanted taunting and teasing by their peers. Banning abusive and harassing words made directly to other students while on school grounds appears to be legitimate, as all students – bully and bullied alike – share an interest in fostering a supportive and positive environment at school. Thus, rather than assuming *Tinker* is the only way to approach anti-bullying policies, courts should begin utilizing the above analyses to uphold content- and viewpoint-neutral anti-bullying policies, and states should consider these First Amendment issues when drafting such policies.

6. Drafting Statutes to Satisfy First Amendment

When state and local governments adopt policies and regulations proscribing bullying behavior, they should include a section explaining the ways in which bullying disrupts the classroom and its overall secondary effects. With enough supporting evidence, no anti-bullying policy can fail under *Tinker* for being based on “undifferentiated fear or apprehension of

\[175\] Id. at 109.
disturbance.” However, as argued above, in a post-Columbine America, the student speech standard set forth in *Tinker* is no longer sufficient. States should consider the standards set forth in *Hill* when drafting anti-bullying statutes, and courts should utilize *Hill* to uphold such policies. Anti-bullying statutes should be aimed more at the manner of communication (e.g. name-calling, jokes, spreading rumors, etc.) than the content of the communication itself. The policy should apply equally to all students, regardless of what name they are calling another student, and clear guidelines should be established for school officials to deal with bullying. Further, even if anti-bullying statutes satisfy First Amendment standards, drafters must be sure to exercise care to avoid a constitutional challenge based on vagueness.

F. Are Anti-Bullying Statutes Void for Vagueness?

In *Coates v. City of Cincinnati*, the Supreme Court struck down a statute making it a criminal offense for “three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons walking by . . .” on the grounds that it was overbroad.176 The Court explained that the statute subjected people to an unascertainable standard, or no standard at all, because conduct that annoys some people does not annoy others.177 The value underlying the prohibition on vague laws is to allow an actor to choose whether or not to engage in the prohibited conduct – if a person does not know what is

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177 *Id.* at 614 (explaining that the statute failed to specify upon whose sensitivity a violation depended – judge/jury, arresting officer, or a hypothetical reasonable man); *See also* Baggett v. Bullitt, 377 U.S. 360 (1964) (finding a statute prohibiting any “subversive behavior” and defining “subversive behavior” as unconstitutionally vague and overbroad).
prohibited, he or she is not able to make an informed choice. Applying the vagueness doctrine to anti-bullying policies in the school context, it is likely that such policies would withstand constitutional scrutiny.

First, unlike “annoying” and “subversive,” the word “bullying” is not dependent on the listener’s reaction. Bullying is almost universally recognized as a certain form/pattern of conduct, and it is unlikely that any student would have a question about what it was and what conduct was prohibited. In distinguishing among the four types of bullying definitions, it seems that those relating to the bully’s intent, the reasonableness of the bully’s actions, or how the bully’s behavior will be perceived by others would all allow a student to determine whether the conduct he or she is choosing to engage in falls within the range of prohibited conduct. However, statutes based on the effects bullying has on the target are more questionable, particularly in light of the Court’s holdings in Coates and Baggett. Just as not all people will be “annoyed” by the same things, not all students will experience the effects of bullying in the same way; in fact, it is likely that some students are even able to completely disregard it. Regardless, it would seem as if, in light of the special context of the school environment, one could presume that bullying harms students, despite their seeming thick skin and resilience.

While it does not appear that most anti-bullying statutes would be void for vagueness, school officials and legislatures must keep this in mind during the drafting process. Not only do

178 *Grayned*, 408 U.S. at 108 (holding that an “anti-noise” statute was not a vague or general “breach of the peace” statute but was written specifically for the school context with prohibited disturbances easily measured by their impact on normal activities of the school).

179 *See e.g. Sypniewski*, 307 F.3d at 266 (noting that an anti-harassment policy is not vague merely because it requires a person to conform to an “imprecise but comprehensible normative standard”).

180 *Supra* note 177.
students who bully other students subject themselves to punishment at school, but they are often subjected to criminal punishment as well.

G. Criminalization of Bullying Behavior

This section will involve an analysis of how the criminalization of bullying implicates students’ due process rights at school and why bullying is more properly addressed in schools rather than the criminal justice system.

1. Students’ Right to Due Process at School

Oftentimes, students are tried under criminal statutes for their bullying behavior. In one state a student was charged under an anti-stalking law, while in others, students have been charged with disorderly conduct or terroristic threatening. Regardless of the actual charges filed against students for engaging in harassing conduct or speech, many of them go through very similar procedural experiences. After a student or teacher notifies a principal, the principal usually calls the student down to his office and immediately begins questioning the student. Such questioning may or may not be in the presence of a Student Resource Officer (SRO), a position becoming more and more common in American public schools. The confessions

\[\text{181} \text{ Svedberg, 525 N.W.2d at 679 (affirming conviction for threatening, abusive, and assault-like behaviors); See also Fielkow, supra note 114, at 1058, 1071 (explaining that North Dakota’s anti-stalking law criminalized a pattern of conduct directed from one individual to a specific victim which frightens, intimidates, or harasses that person).}\]

\[\text{182} \text{ See e.g. A.S., 626 N.W.2d at 715 (finding that speech alone, in certain circumstances, can constitute disorderly conduct); See also Douglas D., 626 N.W.2d at 742; C.C.H., 651 N.W.2d at 704.}\]

\[\text{183} \text{ See e.g. Jones, 645 S.W.2d at 729 (affirming delinquency adjudication for first degree terroristic threatening after boy wrote note containing threatening rap lyrics).}\]

\[\text{184} \text{ SROs are plain-clothed police officers who work with schools to deal with a variety of issues, including drug and alcohol use, truancy, and school violence. The presence of SROs and their role in “interviews” occurring in the principal’s office raise questions about whether, at any given point, they are acting in their police role or their school liaison role. The distinction is key in the realm of Miranda, namely custody and interrogation, and whether a confession is made voluntarily.}\]
obtained during these school interviews are often later used against students in their criminal or delinquency cases. Most of these interviews are never audio- or video-taped, and students and their belongings are typically searched.

In fact, it appears that students “interviewed” at school often fail to receive the Due Process rights guaranteed to them under the Fifth and Fourteenth Amendments to the United States Constitution and by the Supreme Court. In *Gault*, the Supreme Court declared that the language of the Fifth and Fourteenth Amendments is “unequivocal and without exception” and protects any disclosures which one reasonably believes could be used in a criminal prosecution or lead to other evidence that could be used in a criminal prosecution. Thus, before being interviewed by police, a child and his or her parents should be informed of the child’s right to an attorney and of the child’s right to remain silent. The Court specifically acknowledged that the admissions and confessions of juveniles require special caution, given that juveniles are less mature than adults, are more susceptible to official pressure, and need more help in not becoming

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185 *See Jones*, 645 S.W.2d at 731 (where boy admitted to writing a note that he modeled after the lyrics of Eminem and in which he claimed he was just getting his feelings out); *See also A.S.*, 626 N.W.2d at 716 (where boy admitted to saying he wanted to take over the school like Columbine); Porter v. Ascension Parish School Bd., 393 F.3d 608, 612 (5th Cir. 2004) (where boy admitted to drawing a picture of a violent siege at his high school after being called down to the principal’s office for questioning).

186 *See e.g. Porter*, 393 F.3d at 612 (where search of boy’s bag uncovered a box cutter and notebooks with depictions of drugs, death, sex, gang symbols, and a fake ID).

187 *Gault*, 387 U.S. 1 (1967) (invalidating a student’s confession because it was made outside the presence of his parents, without counsel, without being advised of his right to remain silent, and was not reduced to writing).

188 *Id*. at 47-48.

189 Although not technically police, public school officials could properly be labeled agents of the police, particularly when they act to investigate situations leading to potential criminal charges against students.

190 *Gault*, 387 U.S. at 49.
a victim of their own fear and panic.\textsuperscript{191} In the words of the Court, “[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court.”\textsuperscript{192}

Thus, when school officials do think a student may be subjected to delinquency proceedings or criminal prosecution, they must maintain the same due process standards exercised by police. Regardless of whether an interview takes place in the principal’s office or in a police interrogation room, students must be afforded the rights guaranteed to them under the Constitution. With the rise of anti-bullying legislation, it becomes even more imperative for school officials to maintain due process when engaging in any activity that might lead to evidence resulting in criminal prosecution. However, even if students’ are afforded such rights, criminalization of bullying and other destructive behaviors should be a last resort, as public schools must work harder to fulfill the special role they play in society.

2. Bullying as a School Issue

In the same way that Judge Posner argued that shielding kids from violent images will leave them unequipped to cope with the world as we know it,\textsuperscript{193} attempting to eliminate bullying simply by removing the bullies will prevent schools from doing the job they were created to do. Early on in school, students are still learning how to interact appropriately with their peers, oftentimes by regularly engaging in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.\textsuperscript{194} The “educational mission” of

\begin{itemize}
  \item \textsuperscript{191} \textit{Id.} at 45-46.
  \item \textsuperscript{192} \textit{Id.} at 28.
  \item \textsuperscript{193} Calvert, \textit{supra} note 34, at 14 (explaining Judge Posner’s view that children have the right to receive speech, even if it is violent and adults fear it will harm them).
  \item \textsuperscript{194} Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651-52 (1999).
\end{itemize}
schools is not limited to academics, but includes other responsibilities like “friend, counselor, and all-too-often parent-substitute.” Further, schools serve to inculcate children with the “habits and manners of civility,” including tolerance and the boundaries of socially acceptable methods of discourse. Bullying and teasing are normal, yet unacceptable, parts of youth, and rather than merely criminalizing kids for it, schools must do more in order to foster mutual respect among youth.

IV. FROM AN INCIDENT-BASED TO A PREVENTATIVE APPROACH

If society wants to identify potentially violent youth before they commit horrific acts of terror, interventions must be positive and educational rather than penal. One of the most effective ways to prevent another Columbine is to change the “school climate,” or “school culture.” “School climate” refers to the “unwritten beliefs, values, and attitudes that become the style of interaction between students, teachers, and administrators.” This includes things like patterns of communication, norms of appropriate behavior, role relationships and perceptions, patterns of influence and accommodation, and rewards and sanctions. A healthy

195 Douglas D., 626 N.W.2d at 742.
196 Id. at 742-43.
197 Carper et al., supra note 26, at 802 (arguing against a penal approach because it punishes children for what they may do rather than what they actually did).
198 Education World, supra note 40 (citing the recommendations of education researcher J. David Hawkins of the University of Washington for eliminating disruption, incivility, and violence in schools, namely (1) fostering social bonding and academic achievement, (2) promoting norms of non-violence, (3) teaching skills for living according to non-violent norms (i.e. anger management, conflict resolution, and problem solving), and (4) eliminating firearms and other weapons); See also Weddle, supra note 39, at 652.
199 Weddle, supra note 39, at 652 (arguing that changing school culture is more effective than an incident-based approach because it focuses on creating a culture where bullying is unacceptable to everyone in the school rather than on a specific incident of bullying).
200 Id.
school climate has the ability to mitigate the effects of community factors like neighborhood violence and crime.\textsuperscript{201} The two main components of school culture are (1) social control\textsuperscript{202} and (2) social cohesion.\textsuperscript{203} A healthy school climate results only from deliberate and informed planning by school administrators, as well as sustained, consistent attention to providing high social control and social cohesion.\textsuperscript{204} Further, creating an anti-bullying culture requires the joint effort of everyone in the school\textsuperscript{205} and demands re-education.\textsuperscript{206} Schools should also provide counseling for bullies and their victims, as well as recommend strategies for victims to use to stand up for themselves against bullies.\textsuperscript{207} In addition to a necessary change in “school culture,” America as a whole has to undergo cultural change.

\textsuperscript{201} Id. at 653.

\textsuperscript{202} High social control, a necessity to prevent violence, depends upon clear structures and rules as well as set immediate and increasingly severe penalties for bullying and the requirement that the bully accept responsibility for the victim’s pain. \textit{Id}

\textsuperscript{203} High social cohesion, also necessary to prevent violence, depends on the culture of mutual respect among students, discipline policies that students believe in, and a dispute resolution process that allows people a way to move forward. \textit{Id}

\textsuperscript{204} Id. at 655. Some states have enacted statutes encouraging school districts to form programs and other initiatives that are aimed at the prevention of harassment, intimidation, or bullying and include teachers, parents, students, administrators, and other community representatives. \textit{See e.g.} \textit{Or. Rev. Stat.} 339.359 (2005).

\textsuperscript{205} Weddle, \textit{supra} note 39, at 655. Weddle uses the Olweus Bullying Prevention Program as an example, which includes an anonymous questionnaire given to students for obtaining statistics on bullying in the school, community- and school-wide meetings to discuss the problem, and ongoing discussions by the Bullying Prevention Coordinating Committee, which includes students.

\textsuperscript{206} Snook, \textit{supra} note 112, at 723 (advocating for the free airing of ideas and critical discussion by students and staff about bullying, harassment, and intimidation in order to restructure the school community).

\textsuperscript{207} Education World, \textit{Taking the Bully By the Horns}, http://www.education-world.com/a_books/books107.shtml (last visited Aug. 28, 2007) (providing examples from a book by Kathy Noll and Jay Carter titled \textit{Taking the Bully By the Horns}, including responses like “Excuse me,” asking them to repeat the insult, and teaching kids how to recognize bullying behavior).
Youth violence expert James Garbarino urges for a change in the “socially toxic environment.” Garbarino describes a “socially toxic environment” to include things like violent images, broken relationships, and spiritual crises – all things some children are more vulnerable to than others. When asked about his recommendations for making schools safer, Garbarino suggested smaller schools, more consistent commitment to character education and spiritual development, better lines of communication from kids to adults, absolute banning of guns for kids, violence prevention programs that change thinking and offer practice in changed behavior, and stronger mental health services starting in the early years. Further, states can and should hold schools responsible for bullying or violence when such schools fail to enact and implement policies aimed at prevention. School violence is, as mentioned previously, a complex problem that will require a complex solution.

V. CONCLUSION

As Philadelphia’s Mural Arts Program reveals, it is possible to find non-penal/criminal solutions to highly complex social problems. Once parents, teachers, principals, legislators, and children start taking the school violence issue seriously by thoroughly examining its many facets, progress can occur. Simplistic solutions like zero tolerance, increased criminalization, and


209 Id. Garbarino explains that the social dangers in society may be tolerable for children who have everything else going for them but highly dangerous for those who are already vulnerable.

210 Id.

211 Id. The Supreme Court authorized this under Davis in the context of student-on-student harassment under Title IX. The court limited a school’s liability to those circumstances where a school exercises substantial control over both the harasser and the context in which the known harassment occurs. Id. at 645 (expressly rejecting the argument that a school could be liable for “simple acts of teasing and name-calling ” among school children, but nonetheless finding liability because of the pervasiveness and severity of the harassment).
sharing of information are in and of themselves insufficient to remedy the problem. Anti-
bullying policies are a good way to tackle one piece of the school violence puzzle. However,
rather than scaring kids out of teasing each other, schools and communities must work together
to foster a greater sense of community and acceptance in order to eliminate kids’ desire to tease
one another altogether. Another Columbine can be prevented. The solution may not be a mural,
but it can be something equally remarkable.