MORE HARM THAN GOOD? WHY SCHOOLS WHO TAKE A ZERO-TOLERANCE STANCE ON CYBERBULLYING CAUSE MORE PROBLEMS THAN SOLUTIONS

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ABSTRACT

Cyberbullying has become an epidemic in today’s society. Cyberbullying has escalated so much that some victims commit suicide in order to escape their tormentors. Increased media coverage of these suicides has led the public to demand legislative action. Although no federal law exists, state legislation has been enacted to prevent bullying and cyberbullying. Most states delegate this task to public schools that respond by implementing zero-tolerance policies. Zero-tolerance policies against bullying and cyberbullying can impinge on many student rights, including speech protected by the First Amendment. Well-intentioned zero-tolerance policies may infringe on Constitutionally protected free speech, and it is important for schools to be aware when their policies infringe on alleged bullies’ First Amendment rights. Due to the sensitive balance between student speech rights and the schools’ need to create a safe learning environment, zero-tolerance policies should be reserved for cyberbullying that constitutes a true threat. To prevent more typical instances of bullying and cyberbullying, schools should establish positive atmospheres and use punishments that focus on rehabilitating student offenders.
INTRODUCTION

Bullying is not a new phenomenon. Bullying, like many other aspects of society, has changed over time due to new technologies. The creation of the Internet, smartphones, and social networking has created a new form of bullying, cyberbullying. Cyberbullying is arguably more dangerous than traditional bullying because “electronic communications provide anonymity to the perpetrator and [there is] the potential for wide-spread distribution” of the offensive and harmful speech. In the past, bullying generally only occurred at school when students were together, but because of technological advances, bullying can now occur at any time and from any location. Additionally, cyberbullying is more visible and widespread, which makes the humiliation of the victim more widespread.

Cyberbullying is a common occurrence amongst school-aged children. The effects of cyberbullying on the victim can be devastating. Students being bullied may experience an increase in absenteeism, a decrease in grades, suffer from depression, or even harm themselves or others. One parent whose child committed suicide because of bullying said, “the bully murdered my son using the keyboard as his weapon, just as surely if he had crawled through a broken window and choked the life from him with his bare hands.” High-profile media coverage of children committing suicide creates awareness to the severity of consequences cyberbullying creates and leads to a demand for legislative action.

1. What is Bullying, http://www.stopbullying.gov/what-is-bullying/definition/index.html (last visited Nov. 17, 2013) (Bullying is repeated “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance.”).


3. Cyberbullying and Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Hon. Committee on the Judiciary House of Representatives, 111th Cong. 111-76 (2009) (statement of Hon. J. Gohmert, Ranking Member of the Subcommittee on Crime, Terrorism, and Homeland Security) (“This literally means that kids can be bullied any hour of the day and night and even in their own homes, which is a marked contrast to the bullies of yesterday that could only bully on the playgrounds”)


7. Like those of Megan Meier, Phoebe Prince, and Ryan Halligan. See infra pp. 7-8.
Congress is working on legislation that will criminalize cyberbullying. However, nothing has been passed yet. Although Congress thus far has been unsuccessful in creating anti-bullying legislation, states have been quite successful. Most states require public school districts to create policies that eradicate cyberbullying. Proponents of this approach believe that schools are in the best position to enforce anti-cyberbullying rules because of their unique position in children’s lives. School “anti-bullying policies often take a zero-tolerance form.” Zero-tolerance policies mandate school administrators to impose a specific punishment, generally suspension or expulsion, regardless of the circumstances surrounding the offense. Because cyberbullying can negatively impact an adolescent’s life, taking a hard stand against bullying assures the public that this behavior is intolerable. However, zero-tolerance bullying policies are a double-edged sword. While these policies may appear to successfully reduce bullying and satisfy the parents' and community’s cry for action against bullying, zero-tolerance policies may be ineffective and infringe upon a student’s First Amendment rights.

This Note will focus on the issues that schools face when enforcing a zero-tolerance bullying policy. Part I of this Note will address the history of zero-tolerance policies and cyberbullying. It will describe how the federal government, states, and school districts are responding to and regulating cyberbullying. Part II will address the circumstances where bullying constitutes protected speech under the First Amendment. Most student speech cases involving bullying or cyberbullying will be analyzed by courts applying the substantial disruption test set forth in Tinker v. Des

8. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (1st Sess. 2009) (providing “a new federal crime (felony) prohibiting communications made with the intent to coerce, intimidate, harass, or cause substantial emotional distress that use electronic means to support severe, repeated, and hostile behavior.”).


10. Allison Virginia King, Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech, 63 Vand. L. Rev. 845, 859 (April 2010) (“By delegating conscription and enforcement of cyberbullying prohibition to public schools, these legislatures may have picked the most appropriate forum in which to address the problem”).


12. Id. at 1714 (stating that parent associations support strict policies for bullying).

13. Key Policy Letters from the Educ. Secretary and Deputy Secretary (Jan. 8, 2014) available at http://www2.ed.gov/policy/elsec/guid/secletter/140108.html ("Suspending students also often fails to help them develop the skills and strategies they need to improve their behavior and avoid future problems.")
However, a case study will show that in many jurisdictions cyberbullying will not create a substantial disruption and will be protected under the First Amendment unless it can be considered a true threat. Part III will ask if zero-tolerance policies are the least restrictive means for preventing bullying that is protected by the First Amendment. Part III will conclude that zero-tolerance policies are not the least restrictive method to prevent bullying. Finally, Part IV will conclude that public schools’ existing efforts to prevent cyberbullying through zero-tolerance policies go too far in restricting speech and should therefore be limited to bullying and cyberbullying that constitutes a true threat.

I. HISTORY OF ZERO-TOLERANCE POLICIES, CYBERBULLYING, AND LEGISLATIVE RESPONSE

Legal reform reflecting a change, or awareness, of society’s objectives, often comes quickly on the heels of an event that shocks the core of America’s values. School safety failures, such as shootings, suicide, and drug abuse, enrage parents and the public at large. This creates a significant pressure on politicians and school boards to respond. In schools, these responses generally involve the implementation of a zero-tolerance policy towards the act that led to the public outrage. Zero-tolerance policies require automatic and specific punishment, generally suspension or expulsion, without taking additional circumstances into consideration. These policies are intended to demonstrate to the student body and the community that the problem is serious and severe action will be taken against any student who violates the policy.

Zero-tolerance policies are generally enacted as a response to a high-profile event that represents an “epidemic” that has plagued the nation. These epidemics include gun violence, drugs, and now bullying. The 1994 Gun Free School Act, as its name suggests, a zero-tolerance policy prohibiting students from bringing firearms on school grounds for any reason. The 1994 Gun Free School Act dictates that students who bring a firearm to school will face expulsion. This shows the general public’s view that firearms in a student’s possession should never be tolerated, and the severity of the punishment – which may have long-term consequences for the student’s future education and employment – is meant as a harsh

17. Id.
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Deterrent. By 1995, most states adopted zero-tolerance policies against guns and would soon implement them in the war against drugs.\(^{18}\)

Drug-use is another epidemic that caused schools to adopt zero-tolerance policies. “Politicians and the public panicked about the perceived widespread, dangerous use of mind-altering substances, and schools rushed forward with punitive and invasive responses.”\(^{19}\) Schools have been granted the authority to prevent exposure of drugs to students and to take steps to stop students from advocating for the use of illegal drugs.\(^{20}\) Now, a new epidemic plagues public schools: cyberbullying.\(^{21}\)

Everyone who has attended, or is currently attending a public school in the United States has likely experienced bullying either as the aggressor or as the victim. However, now, bullying is not confined to school or school functions because of the Internet, smart phones, and social networking websites. New technologies have led to cyberbullying, which can occur at anytime from anywhere. Students now subscribe to forums such as Twitter,\(^{22}\) Facebook,\(^{23}\) Instagram,\(^{24}\) Yik Yak,\(^{25}\) and Snapchat.\(^{26}\) These

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19. Ahrens, supra note 11, at 1674.
22. Twitter, https://support.twitter.com/articles/13920-new-user-faqs# (last visited Jan. 16, 2015) (22 “Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages. People write short updates, often called ‘Tweets’ of 140 characters or fewer. These messages are posted to [the] profile, sent to your followers, and are searchable on Twitter search”).
23. Facebook, https://www.facebook.com/facebook/info (last visited Jan. 16, 2015) (“Founded in 2004, Facebook’s mission is to give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them”). According to a 2013 study, 45% of adolescents are on Facebook. Justin W. Patchin, Cyberbullying Research: 2013 Update, Cyberbullying Research Center (November 20, 2013), available at http://cyberbullying.us/cyberbullying-research-2013-update/.
24. Instagram, http://instagram.com/about/faq/# (last accessed Jan. 16, 2015). According to a 2013 study, 42% of adolescents are on Instagram. Justin W. Patchin, Cyberbullying Research: 2013 Update, Cyberbullying Research Center (November 20, 2013), available at http://cyberbullying.us/cyberbullying-research-2013-update/ (“Instagram is a fun and quirky way to share your like with friends through a series of pictures. Snap a photo with your mobile phone, then choose to filter to transform the image into a memory to keep around forever”).
25. iTunes, https://itunes.apple.com/us/app/yik-yak/id730992767?mt=8 (last accessed Mar. 13, 2014) (Yik Yak is a mobile app self-described as “the anonymous social wall for anything and everything”). Although it is intended for users ages 17 and
forums enable students to post pictures, statuses about their thoughts, and messages to their friends, or in the case of Yik Yak, any user within a one-mile radius from the speaker. The cyberbully is able to use these forums to harass his or her victims. For instance, Facebook allows users to create interest pages. These webpages are generally dedicated to a particular hobby, skill, association, or group. A cyberbully may create a page that ridicules another student and encourages other students to join in on the “fun.”

Another forum where cyberbullying has become prevalent is online video gaming. Major video game consoles allow players to play games online with one another in real time. Players with headsets can talk to one another and may engage in verbal taunting, an act considered cyberbullying under the broad definitions of most state statutes. For children and teens that utilize the Internet to satisfy social needs, there may be no escape from bullying. Some adolescents are victimized by bullying to such an extent that they download apps to make anonymous bomb threats and for anonymous cyberbullying. See also Sarah Perez, Amid Bullying and Threats of Violence, Anonymous Social App Shuts Off Access to U.S. Middle & High School Students, TECHCRUNCH (Mar 13, 2014), http://techcrunch.com/2014/03/13/amid-vicious-bullying-threats-of-violence-anonymous-social-app-yik-yak-shuts-off-access-to-u-s-middle-high-school-students (Yik Yak bullying has become so severe that Yik Yak’s creators “applied geo-fences around middle schools and high schools using their GPS coordinates, which would actually prevent the app from working while students were on school grounds”).


See Kim Bellware, Anonymous Message App Yik Yak Faces Backlash From an Entire City, THE HUFFINGTON POST (updated: 03/24/2014 2:59 pm EDT), http://www.huffingtonpost.com/2014/03/10/yik-yak-app_n_4921365.html (Amid backlash from parents and educators because of cyber-bullying via Yik Yak, Yik Yak creators temporarily disabled the app in an entire city).

See Kowalski v. Berkeley County Sch., 652 F.3d 565 (4th Cir. 2011) (a student used her computer to create a webpage primarily devoted to bullying a classmate).

Gamers can either log onto Xbox Live or PlayStation Network in order to play video games with other online users playing the same game console.

In Kansas, cyberbullying is “bullying by use of an electronic device through means including, but not limited to, email, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites.” Kan. Stat. Ann. § 72-8256(a)(2) (2013). Depending on the recipient, almost any offensive statements or action is bullying. Adolescents who play the popular game Halo online face the risk of being “tea-bagged” by other users. Tea bagging occurs when “a man inserts his scrotum into another person’s mouth in the fashion of a tea bag into a mug with an up/down (in/out) motion.” URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=tea-bagging (last visited Jan. 16, 2015). Tea-bagging is offensive and therefore can be considered bullying, and because the act occurs while playing a game online, it constitutes cyberbullying.
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a great extent that they commit suicide in order to gain relief. These instances often times result in high media coverage, and include as examples the suicides of Megan Meier, Ryan Halligan, and Phoebe Prince.

Megan Meier was bullied on Myspace. Megan befriended “Josh Evans” on Myspace and they began to form a relationship. One day, Megan received a message from Josh stating, “[t]he world would be a better place without you.” Later that day, she committed suicide. The most heart wrenching part of Megan’s story is that Josh Evans did not exist and Josh was really Lori Drew, her “friend’s” mother. Megan was only thirteen years old when she committed suicide.

Ryan Halligan was also thirteen when he committed suicide because of bullying. A girl Ryan had a crush on pretended to like him online before proceeding to share their instant messaging conversations with the school to embarrass and humiliate Ryan. When she called Ryan a loser, Ryan told her “[i]t's girls like you who make me want to kill myself.” Later, Ryan Halligan committed suicide by hanging himself.

Phoebe Prince is another adolescent who committed suicide by hanging herself because of bullying. Phoebe was a new student that became the victim of bullies who were mad she was dating a popular football player after only being in school for a few weeks. Phoebe’s bullies called

31. See Aherns, supra note 11, at 1687 (Although there are many instances where children have committed suicide because of bullying, “death is not the representative outcome of bullying incidents”).

32. Myspace is a social networking forum that was popular before the creation of Facebook. See Caitlin Dewey, Myspace still exists, and it’s desperate enough to blackmail you into logging in, WASHINGTON POST (June 2, 2014), http://www.washingtonpost.com/news/the-intersect/wp/2014/06/02/myspace-still-exists-and-its-desperate-enough-to-blackmail-you-into-logging-in/ (explaining the downfall and rebirth of Myspace).


34. Id.

35. Id.

36. Id.

37. Id.


39. Id.

40. Id.

41. Id.

her an “Irish slut” and “whore” on her social networking profile websites. In this case, Phoebe committed suicide, her bullies continued to post vicious comments about her on her Facebook memorial page.

Unconscionable and preventable tragedies like these have enraged parents and communities at large. Parents and community members are concerned for the safety of their children and want the government to take action to ensure that other children do not succumb to the same fate. Congress has introduced two acts that attempt to deal with cyberbullying: the Megan Meier Cyberbullying Act and the Adolescent Web Awareness Requires Education Act. However, neither have been enacted. On the other hand, States have been far more successful in establishing anti-cyberbullying laws and each have their own approach on dealing with this issue. Some states have attempted to criminalize cyberbullying. Others have set up research grants to determine how to handle cyberbullying. But, the majority of states have legislation that delegates this issue to the public school systems.

Public schools in most states have expressly been given the authority to regulate bullying and cyberbullying from their respective state legislatures. Furthermore, even if the states did not task schools with regulating cyberbullying, schools would have the ability to regulate some bullying under federal law.

43. Id.
44. Id.
45. See J. Gohmert, supra note 3. The Megan Meier Cyberbullying Act would make communications made with the intent to coerce, intimidate harass, or cause substantial emotional distress that use electronic means to support severe, repeated, and hostile behavior a felony violation. H.R. 1966, 111th Cong. (1st Sess. 2009). However, Judge Gohmert believes that “[t]he offenders would likely be adjudicated otherwise they would go to federal prison for embarrassing someone.” Furthermore, there are concerns that criminalizing bullying could violate the First Amendment, however this Note will not discuss concerns of cyberbullying criminal statutes.
46. The Adolescent Web Awareness Requires Education Act (AWARE) would provide a grant to be used in educating people about cyberbullying in order to prevent it. Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009).
47. See ARK. CODE ANN. § 5-71-217 (2011), LA. REV. STAT. ANN. §14:40.3 (2010), MO. REV. STAT. §§ 565.090 and 565.225 (2012), N.C. GEN. STAT. §14-458.1 (2009), TENN. CODE ANN. §39-17-308 (2010). It is important to note that even the states that do criminalize bullying generally also have legislation that require the schools to adopt a policy addressing bullying as well. See Sameer Hinduja and Justin W. Patchin, State Cyberbullying Laws (February 2014), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.
49. If a student who is a member of a protected class is being harassed at school, a school is obligated to address the inappropriate conduct under Title IV and VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972,
Many schools tasked with creating and enforcing a policy against bullying and cyberbullying implemented zero-tolerance policies. However, this is problematic for a variety of reasons. First, what constitutes cyberbullying is unclear. Zero-tolerance policies against guns and drugs are successful because people know and agree on what a drug or what a gun is. However, “almost anything has the potential to be called bullying, from raising one’s eyebrow, giving ‘the evil eye,’ making faces . . . to verbal expressions of preference towards particular classmates over others.” For the purposes of this Note, cyberbullying is when an adolescent uses “technology to harass, threaten, embarrass, or target another person.” Zero-tolerance policies can also be problematic because victimized students can sue the school for failing to enforce its anti-cyberbullying policy. These policies may also be unconstitutional if the cyberbullying is protected speech under the First Amendment. This Note will focus on the First Amendment issues zero-tolerance policies face.

II. WHEN IS CYBERBULLYING PROTECTED SPEECH?


50. See Aherns, supra note 11, at 1700 (stating that anti-bullying disciplinary policies often take a zero-tolerance form).

51. See statutory definitions, definitions created by experts, and disciplinary codes are broad and varied, so there is no one clear definition. Id. at 1689-90.


54. Ahrens, supra note 11, at 1689.


57. See infra Part II and III.
“Congress shall make no law . . . abridging the freedom of speech.”\textsuperscript{58} While the rights of students may be more limited than an adult’s rights,\textsuperscript{59} it is well established that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{60} Speech is a means of self-expression and self-definition that cultivates tolerance.\textsuperscript{61} Cyberbullying does not cultivate tolerance, but neither does penalizing cyberbullying.\textsuperscript{62} Despite the lack of tolerance and appreciable value for speech that bullying and cyberbullying show, scholars have argued “the freedom of expression must be respected in the classroom if it is to be respected at all.”\textsuperscript{63} Although there have been cases involving cyberbullying, the Supreme Court has not yet ruled on a case involving student Internet speech or student cyberbullying. The lower courts that have heard these cases have applied the Supreme Court’s First Amendment framework regarding the regulation of student speech to the cyberbullying context.

\textit{A. Student Speech First Amendment Framework}

1. \textit{Tinker v. Des Moines Independent Community School District}

\textit{Tinker v. Des Moines Independent Community School District} established the “substantial disruption” test.\textsuperscript{64} This case concerned of a group of students wearing black armbands to school in protest of the Vietnam War.\textsuperscript{65} School officials believed that their protest would cause a disruption in the educational environment and suspended the students who wore the armbands to school.\textsuperscript{66} The Supreme Court held that the students’ suspensions violated the students’ First Amendment rights.\textsuperscript{67} “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and
unpleasantness that always accompany an unpopular viewpoint.” School officials can only restrict student speech if the speech “substantially interferes with the work of the school or impinges upon the rights of other students”. The Tinker “substantial disruption” test balances students’ First Amendment rights with schools’ need to create safe and productive learning environments. The “substantial disruption” test has been extended by many circuits to include off-campus student speech, but the test has not been extended off-campus by the Supreme Court.

2. Bethel School District v. Fraser

The Supreme Court limited protected student speech in a 1986 case, Bethel v. Fraser. In that case, a student gave a speech containing lewd references encouraging students to vote for a particular candidate in an upcoming student government election. Although the student’s speech was related to student politics, the Supreme Court distinguished the student’s lewd speech from Tinker’s political speech and stated society has a “countervailing interest in teaching students the boundaries of socially appropriate behavior.” School officials may punish explicit, indecent, lewd, or patently offensive speech that is negligible to public discourse “to make the point to pupils that such speech is wholly inconsistent with the ‘fundamental values’ of public education.” Like lewd and vulgar speech, defamation, libel, and true threats are treated as unprotected forms of speech and expression. However, it is important to note that school officials may only punish students for making lewd speech said in school. Cyberbullying, however, can occur no matter where the bully is. It makes no difference if the cyberbully is on his or her phone at home or at school the result is the same.


68. Id. at 509.
69. Id.
70. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
71. Fraser stood before an assembly of fellow students and proceeded to give the following speech: “I know a man who is firm – he’s firm in his pants . . . Jeff Kuhlman is a man who takes his point and pounds it in . . . He doesn’t attack things in spurts. He drives hard, pushing and pushing until finally, he succeeds. Jeff is a man who will go to the very end – even the climax, for each and every one of you” Bethel, 478 U.S. at 687 (Brennan, J. concurring).
72. Id. at 681.
74. See Alison Virginia King, Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech, 63 Vand. L. Rev. 845, 867 (2010).
The Supreme Court established school censorship rights for student publications in the 1988 decision of Hazelwood School District v. Kuhlmeier. Students in the Hazelwood School District wrote articles about teen pregnancy and birth control for the school paper but the principal wanted the articles removed. The principal believed that the stories contained content inappropriate for some of the younger students. The Supreme Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Educators have wide discretion “to determine reasonable pedagogical concerns, ranging from speech that is ‘inadequately researched’ to that which is ‘unsuitable for immature audiences.’” Hazelwood generally only applies to inappropriate on-campus speech or school-sponsored speech.

4. Morse v. Frederick

The Supreme Court in Morse v. Frederick held that schools can regulate off-campus speech made at school-sanctioned functions if the speech contradicts the school’s interest. A student, Joseph Frederick, displayed a “Bong Hits 4 Jesus” banner as the Olympic Torch passed through his town. When school administrators saw Frederick’s banner, they told him to take it down. Frederick refused and was subsequently suspended for violating the school’s policy against advocating illegal drugs. Although the event was off-campus, the Supreme Court considered it a school-sanctioned function because it occurred during school hours and the students had permission to attend. Because Frederick’s speech was made at a school-sanctioned function, the Supreme Court found that the school could punish the student as if the speech had been made on-campus.

76. Id. at 263-64.
77. Id. at 264 (finding that the “article’s references to sexual activity and birth control were inappropriate for some of the younger students at the school.”).
78. Id. at 273.
79. King, supra note 73, at 868 (citing Hazelwood, 484 U.S. at 271).
81. See generally Morse v. Frederick, 551 U.S. 393 (2007).
82. Id. at 397.
83. Id. at 398 (relating that “Principal Morse immediately crossed the street and demanded that the banner be taken down.”).
84. Id. at 398.
85. Id. at 400.
Frederick’s message was interpreted as promoting marijuana, and schools have an interest in preventing students from engaging with illegal drugs. Schools are thus able to prohibit students from displaying messages that undermine the school’s interest in discouraging negative behaviors like drug use.

Schools therefore may prohibit and punish a student for speech occurring on-campus, and at school-sponsored functions, if it causes a substantial and material disruption at school, or is a true threat. However, when the student’s speech is made online, it becomes harder to determine where the speech occurs and how it affects school operations. The remainder Part II will discuss how lower courts have applied the existing student speech First Amendment framework by first analyzing how courts have determined if the cyberbullying occurred on-campus or off-campus. Next, it will explore how lower courts determine if cyberbullying creates a substantial and material disruption at school. Lastly, it will look at when cyberbullying may be considered and treated as an unprotected true threat.

B. Location, Location, Location.

Students who bully during school hours or at school sanctioned activities are not protected by the First Amendment. Bullying, by its very nature, is offensive. Under Fraser, as long as the offensive speech occurs at school, the school may punish a student to demonstrate that their behavior is socially inappropriate. Bullying prevention is a legitimate pedagogical concern for all schools and many states require schools to prohibit and punish bullying. Anytime a student bullies another and the act can be related back to reflect on the school’s ideals it is punishable under Hazelwood. However, the biggest problem schools face now are when students are cyberbullying other students off-campus during non-school hours. “Most cyberbullying takes place outside of school hours.” Some proponents argue that schools should not be able to regulate digital speech made off-campus. However, others argue that off-campus speech that is even slightly connected to the school can be considered on-campus speech

86. See 551 U.S. 401.
87. Id. at 402.
88. See Part II, supra Section A for a discussion of the First Amendment analysis framework for student speech cases provided by the U.S. Supreme Court.
89. See Fraser, 478 U.S. 681.
90. See Stuart-Cassel, supra note 9, at 47.
91. See 484 U.S. 260.
92. Aherns, supra note 11 at 1695.
93. See Mary-Rose Papandrea, Student Speech Rights in the Digital Age, 60 FLA. L. REV. 1027, 1030 (2008) (“permitting schools to restrict student speech in the digital media would necessarily interfere with the free speech rights juveniles enjoy when they are outside the schoolhouse gates.”).
subject to punishment. This section seeks to answer when off-campus student speech is considered on-campus speech that is punishable by school administrators.

One of the first issues courts must address in student digital speech cases is whether the digital speech is made on-campus or off-campus. Currently, lower federal courts and state courts disagree over whether school administrators can punish students for their off-campus online speech. A minority of courts have found that the First Amendment protects off-campus digital speech and school officials cannot regulate it. For example, one student created an unofficial homepage for his school, which contained mock obituaries of certain students and a vote for who should die next. “Student distribution of non-school-sponsored material cannot be prohibited on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials.”

The court held that “the speech was entirely outside the school’s supervision or control” even though “the intended audience was undoubtedly connected to” the high school. Furthermore, in Layshock v. Hermitage School District, a student created a “parody profile” of his school’s principal on Myspace using his grandmother’s computer during non-school hours. The parody profile was accessed at school; however, the district court held that school officials were not authorized to “become censors of the world-wide web” just because the offensive website was accessed at school. The speech needed to be created on-campus in order to be punishable.

However, the majority of courts hold that school administrators may punish a student for creating disruptive digital speech off-campus. For example, one student created a top-ten list containing offensive remarks

94. See King, supra note 75 at 870.
95. See Erb, supra note 81, at 263.
96. See Papandrea, supra note 94, at 1054 (noting that there is a lack of direction for handling digital media student speech cases).
97. See e.g. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619 (5th Cir. 2004) (noting some courts have found that “off-campus speech is entitled to full First Amendment protection even when it makes its way onto school grounds without the assistance of the speaker”).
99. Id. at 1090 (quoting Burch v. Baker, 861 F.2d 1149 (9th Cir. 1988)).
100. Id.
102. Id. at 591.
103. Id. at 597.
104. See infra Part III, which discusses what constitutes disruptive speech.
105. See Aherns, supra note 11, at 1709.
about his school’s athletic director’s penis. The lists’ creator did not bring the list to school, but the list was brought and distributed to the school by an undisclosed student. The court held that it did not need to resolve the issue over whether the speech occurred off-campus because “the overwhelming weight of authority has analyzed student speech (whether on or off-campus) in accordance with Tinker.”

In other cases, students who have created offensive websites off-campus and invite other students to view the site will also be analyzed under Tinker even though the speech was not created on-campus. Other courts have gone even further to diminish the importance of where the speech was created by holding the speech’s origin is less important than the content of the speech. In S.J.W. v. Lee’s Summit R-7 School District, the court upheld the student’s punishment because the student’s posts “could be reasonably expected to reach the school and impact the environment.” The court did not care that the speech was created off-campus because the student’s posts were directed at the school. When courts determine that the student’s off-campus speech can be regulated as if it was created on-campus, it must then determine if the speech created a substantial and material disruption under Tinker.

C. Does Cyberbullying Cause a Substantial Disruption?

Most jurisdictions will analyze off-campus cyberbullying by using the Tinker “substantial disruption” test. Substantial disruptions can include situations involving insights to violence or school faculty and staff becoming diverted away from their responsibilities to address the speech. In certain situations, a substantial disruption does not have to

107. Id. at 449.
108. Id. at 455.
109. See Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011) (upholding a student’s punishment because she “used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District’s recognized authority to discipline speech” under Tinker.); See also Neal v. Efurd, Civ. No. 04-2195, at 1-2 (W.D. Ark. Feb. 18, 2005), http://www.splc.org/pdf/nealvefurd.pdf (holding that a student’s website criticizing the school created off-campus was protected by the First Amendment because it did not cause a substantial disruption, not because it was created off-campus).
110. See S.J.W. v. Lee’s Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012).
111. Id.
112. Id.
occurs; it just needs to be foreseeable.\textsuperscript{114} However, students discussing the speech at issue during school without further disruption is unlikely sufficient to meet the Tinker “substantial disruption” standard.\textsuperscript{115} Therefore, whether bullying and cyberbullying causes a substantial disruption poses an interesting question.

Cyberbullying causes the victims to panic and dread attending school and having to deal with their tormentor and people who associate themselves with the bully. “Students cannot learn and teachers cannot teach in environments that are unsafe and frightening.”\textsuperscript{116} “Over 200,000 kids a day are not going to school because they are being bullied.”\textsuperscript{117} If a student is not attending school because he or she is being bullied, then his or her education has been substantially disrupted and his or her right to receive education in a safe environment is interfered with. However, Tinker did not define what constitutes a “material and substantial” disruption. The lack of clear definition has led to an inconsistent application of the Tinker “substantial disruption” standard.\textsuperscript{118}

When determining if the school has been substantially disrupted, courts consider whether the speech caused any students or teachers to miss school\textsuperscript{119} or if the classes became uncontrollable.\textsuperscript{120} Courts also look at how quickly the school responded to the speech and the reactions students and teachers had.\textsuperscript{121} However, courts disagree on which factors should be considered when determining if there has been a substantial disruption. According to several legal commentators, schools will find it difficult to overcome the Tinker “substantial disruption” standard in cyberbullying cases even though the standard is ambiguous.\textsuperscript{122}

Although commentators believe that school administrators must jump over a high hurdle to prove cyberbullying has caused a substantial disruption, certain jurisdictions have set the bar lower than others. Schools in the Fourth Circuit have a lower hurdle to pass when proving a

\begin{footnotes}
\item[114] Id.
\item[115] See J.C., 711 F. Supp. 2d 1094.
\item[116] Ensuring Student Cyber Safety Hearing before the Subcommittee on Healthy Families and Communities, 111th Cong. 111-69 (2010) (statement made by Chairwoman Carolyn McCarthy).
\item[117] Id.
\item[118] See King, supra note 75, at 873 (stating that Tinker has been applied inconsistently), and Papandrea, supra note 94, at 1065 (noting that the lower courts are all over the map in their application of Tinker).
\item[120] Id.
\item[122] See King, supra note 75, at 873 (arguing that the Tinker substantial disruption burden is too high to capture many cases of cyberbullying); Erb, supra note 81, at 267-71 (stating that the Tinker standard may be overly protective).
\end{footnotes}
substantial disruption because those courts appear to be more lenient when applying Tinker. Kowalski v. Berkeley County Schools set forth that, “schools have a duty to protect their students from harassment and bullying in the school environment” and that duty is more important than a student’s First Amendment rights. In that case, a high school senior was at home when she created the webpage entitled “S.A.S.H.” This webpage served as a forum for the student and her friends to ridicule another student, thereby violating the school’s policy against harassment, bullying, and intimidation.

The student invited her fellow classmates to join S.A.S.H., which led the court to hold that the webpage could reasonably be expected to reach the school or impact the school environment, especially because the students were joining together to say one student had herpes and was a slut. Students discussing the page and the victim caused distractions and the victimized student felt unable to go to school and face her fellow classmates. The court ruled that the school had a duty to ensure a safe atmosphere for all students and that a different student is not afforded constitutional protection for speech that infringes upon another student’s rights, in this case, the ability to learn in a safe environment.

The Fourth Circuit suggested that a student’s right to feel safe at school trumps any First Amendment protection claim that an alleged bully may have. Students have a right to have the ability to learn in a safe environment. Under Tinker, schools can regulate speech that interferes with the rights of other students. Only the Fourth Circuit has gone so far to rule that bullying creates an unsafe learning environment, which infringes on another student’s rights. The Ninth Circuit has held that schools are able to regulate student speech that attacks other student’s core protections, including race, religion, and sexual orientation, under Tinker’s interference of rights standard. The Ninth Circuit’s District Courts acknowledged that schools “have an obligation to protect students from

124. Id.
125. According to Kowalski, S.A.S.H. stands for Students Against Sluts Herpes however; there is evidence on the record saying it stands for Students Against Shay’s Herpes, Shay being the victimized classmate. Id. at 567.
126. Id. at 569.
127. Id. at 573.
128. Id. at 572.
129. Id.
131. Id. at 1123 (interpreting Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1180 (9th Cir. 2006), which held that wearing a T-shirt containing a message condemning homosexuality at school impinged on other student’s rights under Tinker).
psychological assaults that cause them to question their self-worth.”

This seems to be harmonious with the Fourth Circuit’s belief that bullying can create an unsafe environment. Psychologically abused students may be afraid to go to school and face their bully. However, the Ninth Circuit has held that Tinker does not allow schools to “regulate any speech that may cause some emotional harm to a student.”

The Ninth Circuit has suggested that bullying only leads to embarrassment and hurt feelings. The emotional harm experienced by students being bullied does not lead to an unsafe environment nor does the act of bullying count as psychological assault. This is shown in J.C. v. Beverly Hills Unified School District, where a student created a recording of students making fun of different students while off-campus and after school. The court said that embarrassment and hurt feelings is not enough to warrant school discipline. The court further went on to acknowledge that the “fear that students would gossip or pass notes in class simply does not rise to the level of substantial disruption.” This suggests that disruption to one student, most likely the victim, will not cause a substantial disruption to the school’s operations to justify suppressing another student’s First Amendment rights.

Many lower courts seem to agree that “for the Tinker “substantial disruption” test to have any reasonable limits, the word ‘substantial’ must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure.” For example, in Nixon v. Hardin County Board of Education, a student’s Twitter message referencing shooting another girl in the face was protected under the First Amendment. The student’s message was created outside of school and was directed towards another student, but it was not directed towards the school. The school was unable to prove that the message disrupted school activities or even impacted the school environment. Despite the offensive nature of the

132. J.C., 711 F. Supp. 2d at 1123.
133. Id.
135. Id.
136. Id. at 1117.
137. Id. at 1120.
138. Id. See also Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998) (where the court determined that the student’s discipline did not result from a fear of disruption, it was a result of administrator’s being offended at the speech’s content).
140. Id. at 32.
141. Id.
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student’s message, the school was not permitted to punish the student because the speech did not cause a substantial disruption.\textsuperscript{142}

Courts are unlikely to find that cyberbullying constitutes a substantial disruption without definitive proof. Referring back to Killion v. Franklin Regional School District,\textsuperscript{143} the school did not provide the court with any hard evidence that the top-ten list caused a substantial disruption. The teachers could control their classrooms and nobody was forced to take a leave of absence. In cases where the school provides evidence that students discussed the cyberbullying in class, courts will not find a substantial disruption if the disruption does not exceed the typical amount of classroom disruption.\textsuperscript{144}

However, in cases where courts find that the student’s speech causes a substantial disruption, the disruption has been extreme.\textsuperscript{145} In J.S. v. Bethlehem Area School District,\textsuperscript{146} a student created a webpage that included an outline on why a particular teacher should die, and then solicited funds to pay for a hit man.\textsuperscript{147} The targeted teacher accessed the website and became so distraught that she became physically ill and was unable to return to school to finish teaching for the rest of the school year.\textsuperscript{148} The court stated that the teacher’s absence due to the speech created an adverse substantial disruption to the school environment and “unquestionably disrupted the delivery of instruction to the students.”\textsuperscript{149} Here, the court stated that “there must be more than some mild distraction or curiosity created by the speech . . . [but] complete chaos is not required for a school district to punish student speech.”\textsuperscript{150}

The purpose of this Note is not to resolve what acts of cyberbullying constitute a substantial disruption under Tinker, it is to evaluate the problems schools may face in attempting to enforce a cyberbullying zero-tolerance policy when student First Amendment rights are unclear. Therefore, no solution will be suggested on how to resolve the lack of

\textsuperscript{142} Id. at 33-34.


\textsuperscript{144} See J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. Super. Ct. 2002) (holding there was no disruption where a student created an online profile of her principal insinuating he was a sex addict and pedophile but teachers acknowledged their classrooms were not disrupted any more than usual with discussion of the page).

\textsuperscript{145} With the exception of the Fourth Circuit decision in Kowalski v. Berkeley County Sch., 652 F.3d 565 (4th Cir. 2011).

\textsuperscript{146} See J.S., 807 A.2d 847.

\textsuperscript{147} Id. at 858-59.

\textsuperscript{148} Id. at 852.

\textsuperscript{149} Id. at 869.

\textsuperscript{150} Id. at 868.
uniformity in Tinker’s application in lower courts. But it is important to note that many jurisdictions find it difficult to determine that cyberbullying causes a substantial disruption required by Tinker.

Currently, student digital speech either needs to cause a disruption to numerous students by preventing them from receiving continuous uninterrupted educational instruction, or by creating an unsafe environment that goes beyond harming the psyche of one student. Under this standard, most cyberbullying will go unpunished because of the individualized nature of cyberbullying. Because cyberbullies typically do not target the entire school community and instead focus on select individuals, the potential to cause a substantial disruption that satisfies Tinker is limited and unlikely. Furthermore, courts seem hesitant and unwilling to find that cyberbullying and bullying are psychological assaults or impinge on another student’s rights. Unfortunately for school administrators, this makes it difficult, if not impossible, to prohibit cyberbullying.

D. Can Cyberbullying be a True Threat?

Obscene speech and true threats are not protected under the First Amendment. Schools can only regulate obscene speech made on campus, but that same standard does not apply to speech that is a true threat. “Threats of harm or violence constitute a good portion of bullying incidents, and cyberbullying is no exception.” When does cyberbullying turn into a true threat?

A true threat is a statement “where the 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.” “A communication which an objective, rational observer would tend to interpret, in its factual context, as a credible threat, is a true threat, which may be punished.” “The Supreme Court has offered three justifications for exempting true threats from First Amendment protection: preventing fear, preventing the
disruption that follows fear, and diminishing the likelihood that the
threatened violence will occur.”

The true threat doctrine has been applied to student expression in
Lovell v. Poway Unified School District. A student allegedly threatened
a guidance counselor “that she would shoot her if [the guidance counselor]
did not make changes to [her] class schedule.” When determining if a
true threat was made, the court considered an objective test analyzing
“whether a reasonable person would foresee that the statement would be
interpreted . . . as a serious expression to harm or assault.” Because
“alleged threats should be considered in the light of their entire factual
context, including the surrounding events and the reaction of the
listeners,” the court found the student’s statement to be a true threat.

D.G. v. Independent School District Number 11 of Tulsa County used the
Lovell true threat test. In that case, a student wrote a poem stating
that she wanted her teacher to die and was suspended in accordance
with the school’s zero-tolerance policy regarding threats. The court again
stated that true threats were analyzed using an objective standard. When
it evaluated the merits of D.G.’s claims it first considered what D.G.’s
intent and state of mind was when she wrote the poem. The court then
stated that “if she has intended this poem to convey a genuine threat, or
even if she wrote the poem with the intent of putting teachers in fear by
making them think it was a genuine threat, the school district could
appropriately punish her.” However the court concluded that she did not
intend to threaten her teacher and did not foresee that her poem would be
perceived as a threat and therefore the poem did not constitute a true
threat.

In another case involving cyberbullying on websites, a court held that a
student’s speech did not constitute a true threat. Joshua Mahaffey created
a list of “people I wish would die” on a website called “Satan’s Web

159. See Stanner, supra note 60, at 388.
160. See Lovell by & Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th
Cir. 1996).
161. Id. at 368.
162. Id. at 372.
163. Id.
164. See D.G. v. Independent Sch. Dist. No. 11, 2000 U.S. Dist. LEXIS 12197 (N.D.
165. Id. at 5.
166. Id.
167. Id. at 13.
168. Id.
169. Id. at 14-15.
The court found that it did not constitute a true threat because there was no evidence that the statements were communicated to anyone in particular and that the speaker said “the website was created for laughs.”

Additionally, D.C. v. R.R. considered cyberbullying as a true threat. Although this was a civil case between two families, legal principles apply to cyberbullying cases involving a school district. The victimized adolescent had his own webpage that allowed other Internet users to post comments. The bully posted a message stating in part:

I want to rip out your fucking heart and feed it to you. . . . I’ve . . . wanted to kill you. If I ever see you I’m . . . going to pound your head in with an ice pick. Fuck you, you dick riding penis lover. I hope you burn in hell.

The court then went on to discuss that the circuit courts are split on the true threat standard. Some courts use an objective standard to determine if a credible threat has been made while others use a subjective standard that requires the speaker to intend the speech as a threat of bodily harm. This court held that a true threat existed under both standards.

Under the objective determination of whether a true threat was communicated, this court determined that a serious expression of intent to cause physical harm was demonstrated by the phrases, “rip out your fucking heart,” “want to kill you” and “pound your head in with an ice pick.” The court also said that the author intended to harm the victim by saying “fuck you,” “burn in hell,” and “dick riding penis lover.” The fact that this message was conveyed electronically and the defendant had the opportunity not to send the message but decided to send it anyways demonstrated that the defendant’s speech was deliberate. Furthermore, an objective person would reasonably believe that the threat was credible. The recipient’s father saw the message and immediately contacted police because he feared that his son would be physically harmed.

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171. Id. at 781.
172. Id. at 786.
174. Id. at 1199.
175. Id.
176. Id. at 1213.
177. Id.
178. Id. at 1219.
179. Id.
180. Id.
181. Id. at 1220.
182. Id.
The court also held that the defendant’s speech was a true threat under a subjective standard because the tone of the message was not humorous.\textsuperscript{183} “A true threat is a serious one, not uttered in jest, idle talk, or political argument.”\textsuperscript{184} The defendant’s argument that his speech was a joke made in poor taste is a typical response cyberbullies use when confronted by authoritative figures.\textsuperscript{185} However, the court held that “the peculiar sense of humor attributable to this defendant does not lessen the seriousness of the legal consequences of his acts.”\textsuperscript{186} The court rejected the defendant’s argument that his statements “were merely jests to show toughness and to establish a position among other students” and found they were true threats because his statements induced fear.\textsuperscript{187}

Schools will be able to penalize students for making true threats even if the threat is masked by jest by applying the objective Lovell “true threat” test or the subjective true threat standard from D.G. depending upon the jurisdiction they are located in. However, at least one court has been willing to lessen the true threat standard in student speech cases involving cyberbullying.\textsuperscript{188} In that case, the student, J.S., had created a website outlining why a particular teacher should die and included a mock solicitation for donations to hire a hit man.\textsuperscript{189} The court felt that J.S.’s website was not a serious expression of intent to inflict harm. Rather, “the web site, taken as a whole was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody.”\textsuperscript{190} The website consisted of cartoons and songs comparing the teacher to Adolf Hitler and reasonable people did not view the web site as a serious expression of intent to inflict harm.\textsuperscript{191} The court did not analyze the student’s speech as a “true threat.” Instead, the court analyzed whether it was reasonable for the teacher and principle to have felt threatened by the contents of the website.\textsuperscript{192} This creates a standard where potentially threatening speech is punishable by school administrators.\textsuperscript{193}

\begin{itemize}
  \item \textsuperscript{183} \textit{Id.} at 1221.
  \item \textsuperscript{184} United States v. Fuller, 387 F.3d 643, 646 (7th Cir. 2004).
  \item \textsuperscript{186} D.C., 182 Cal. App. 4th at 1222 (“When teens are asked why they think others cyberbully, 81 percent said that cyberbullies think it’s funny”).
  \item \textsuperscript{187} \textit{Id.}
  \item \textsuperscript{189} \textit{Id.}
  \item \textsuperscript{190} \textit{Id.} at 859.
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{193} See Hils, \textit{supra} note 62 at 369.
\end{itemize}
True threats are unprotected by the First Amendment. Cyberbullies who communicate true threats can be punished. It is unlikely for cyberbullying to be considered a true threat, but it is still possible. Cyberbullies who are overly aggressive and repeatedly attack the same students could be communicating a true threat to their target. Although cyberbullying is a serious problem that needs to be penalized, courts should not create new legal standards. If courts relax the true threat standard by allowing school administrators to punish students for communicating potentially threatening language, then school administrators could be violating the student’s First Amendment rights unless the potentially threatening language is exempted from constitutional protection for other reasons. Although it is important to protect the victims of cyberbullying, it is also important to protect their bullies’ constitutional rights.

III. ARE ZERO-TOLERANCE POLICIES THE LEAST RESTRICTIVE MEANS TO PREVENT BULLYING?

Whether cyberbullying is protected under the First Amendment is murky due to the lack of uniformity amongst courts applying Tinker. However, many courts do not find cyberbullying to cause a substantial disruption in school nor rise to the level of a true threat. In light of this, cyberbullying is likely protected under the First Amendment. Just because cyberbullying is likely protected under the First Amendment does not mean that it cannot be regulated, although it becomes much more difficult. Policies that regulate content protected speech must pass strict scrutiny. “The Supreme Court has interpreted the First Amendment to require that state actors imposing a content-based restriction on speech prove that the restriction (1) advances a compelling government interest, and (2) is narrowly tailored to achieve that end.”

State statutes that require public schools to develop policies to prevent bullying and cyberbullying call for the creation of content-based restriction on speech, especially when schools implement zero-tolerance bullying policies as a result. Therefore, schools should create bullying policies that meet this level of strict scrutiny, unless the bullying is unprotected as a true threat.

There is a compelling government interest to regulate cyberbullying. Congress has found that cyberbullying can lead to many negative consequences. For instance, cyberbullying can cause depression, emotional distress, negative academic performance, extremely violent behavior, and in extreme cases murder and suicide. “Sixty percent of mental health

195. Such as being lewd, obscene, causing a substantial disruption, or stating fighting words.
professionals who responded to the Survey of Internet Mental Health Issues report having treated at least one patient with a problematic Internet experience within the previous five years; fifty-four percent of these clients were eighteen years of age or younger.  

Furthermore, “cyberbullying victims were almost twice as likely to have attempted suicide compared to youth who had not experience cyberbullying.” When these facts are added to the heart-breaking and high profile suicides of Megan Meier, Phoebe Prince, and Ryan Halligan the public demands government action to ensure cyberbullying is halted or penalized even if bullies’ rights are impinged upon.

However, just because the public may believe that preventing more students from becoming victims of cyberbullying is more important than protecting the bullies’ First Amendment rights, states must create narrowly tailored policies to keep the bullies’ rights intact.

States responding to the outraged public and negative data regarding cyberbullying generally pass legislation requiring public schools to develop and adopt policies that seek to prevent and penalize bullying and cyberbullying. Public school officials tasked with creating policies against bullying and cyberbullying often times develop and enact a zero-tolerance policy even though there are other more narrowly tailored policies. If somebody challenges these zero-tolerance policies, courts will need to determine if the public school’s zero-tolerance policy is narrowly tailored to achieve the government’s goal of preventing bullying and cyberbullying.

When determining if a school’s zero-tolerance policy is narrowly tailored, courts will analyze whether the policy offers the least restrictive means (or infringement on a person’s First Amendment rights) of achieving the state’s compelling interest. This means that the policy cannot impinge on a student’s legal rights any more than absolutely necessary to achieve the state’s compelling government interest.

The goals of zero-tolerance policies include gaining control of the student body, reducing undesirable behaviors, and creating safer learning environments by suspending or expelling students that engage in the

198. Id.
200. Id. at 7-8.
201. Id. at 8.
202. Id.
203. See generally Stuart-Cassel, supra note 9.
204. See Ahrens, supra note 11 at 1700.
206. Id.
prohibited behavior. By removing the cyberbullying student, either by suspension or expulsion, the school can temporarily resolve that instance of bullying. However, by removing the offending student, schools may be impinging on that student’s First Amendment rights and more importantly their state constitutional right to receive an education. Thus, these zero-tolerance policies, although well-intentioned, often result in denying children access to alternative educational opportunities, removing troubled students from important school-based support services, punishing all offenders (including first-time offenders) alike, and disparately impacting children of color.

Suspending or expelling a student is an extreme disciplinary measure, and is not imposed without significant cost to both the school and its students. First, “[s]tudents who are suspended or expelled from school may be unsupervised during daytime hours and cannot benefit from great teaching, positive peer interactions, and adult mentorship offered in class and in school.” Additionally, these measures fail to help students improve their behavior and avoid future problems. Second, zero-tolerance policies “can erode trust between students and school staff and undermine efforts to create the positive school climates needed to engage students in a well-rounded and rigorous curriculum.”

If such a zero-tolerance policy were to be challenged in court, it is likely that the court would find that the policy is not the least restrictive means to further the government’s interest in preventing bullying. Suspending or expelling a student for offensive speech that does not create a substantial disruption to the school environment deprives the student of their right to receive an education and impedes the school’s ability to effectively correct the student’s future behavior.

Furthermore, zero-tolerance policies raise many legal and social concerns. Such policies may implicate students’ Eighth Amendment rights or violate their substantive due process rights. Additionally,

207. See Wasser, supra note 51, at 758-759.
208. Id. at 752.
210. Id.
211. Id.
212. See Weedle, supra note 16, at 681. “Zero-tolerance, as one commentator has noted, "represents the ultimate rejection of penal proportionality" by focusing only on the result of the conduct at the exclusion of other factors. While the courts have yet to go so far in applying the Eighth Amendment to school discipline settings, a willingness to do so may exist in light of recent decisions that have recognized Eighth Amendment protections that reach beyond criminal settings.” (noting that zero-tolerance policies represent a rejection of penal proportionality, which recent decisions have recognized that the Eighth Amendment reaches beyond the criminal setting, and that courts may be willing to apply Eighth Amendment protections in a school discipline setting).
when challenged in court, zero-tolerance policies often lead to costly litigation. Moreover, “[s]imply relying on suspensions and expulsions...is not the answer to creating a safe and productive school environment.” Because zero-tolerance policies “create an atmosphere in which ‘putting out matches’ is even less likely to occur than it does now,” lawmakers and educators should recognize that these policies are likely to encourage, rather than discourage, bullying behavior. For example, in one New Jersey school with a zero-tolerance policy, a group of students physically bullied Lennon Baldwin, a student who later committed suicide. Before any school administrators found out that Lennon had been victimized, his bullies told him to tell the administrators the attack was just a joke. Even though Lennon complied with his bullies’ request, at least one bully was suspended. Then, less than one month before Lennon committed suicide, the remaining group of bullies robbed Lennon outside of the school and told him it was Lennon’s punishment for the bully’s suspension.

If the government’s interest is preventing bullying and cyberbullying, then implementing a zero-tolerance policy is an ineffective and overly restrictive way to achieve that goal. Instead, schools should take a positive reinforcement approach when handling bullying and cyberbullying. Schools should punish bad behavior by taking corrective actions that

213. See Christopher D. Pelliccioni, Is Intent Required? Zero Tolerance, Scienter, and the Substantive Due Process Rights of Students, 53 CASE W. RES. L. REV 977, 978 (2003) (stating that the United States Court of Appeals for the Sixth Circuit essentially struck down zero-tolerance policies, stating in Seal v. Morgan that ‘suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon’ would violate substantive due process, referring to a zero-tolerance policy that was struck down on due process grounds in Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000)).


215. Duncan, supra note 205.

216. Weedle, supra note 16, at 682. See also Christopher Boccanfuso & Megan Kuhfeld, Promising Results: Evidence-Based Non-Punitive Alternatives to Zero Tolerance, CHILD TRENDS (Mar. 2011), available at http://www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf (“Psychological research has suggested that suspension and expulsion are likely to further reinforce negative behavior by denying students opportunities for positive socialization in school and nurturing a distrust of adults, both of which inhibit adolescent development.”).


218. Id.

219. Id.

220. Id.
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attempt to deter the behavior and demonstrate why such behavior will not be tolerated, but should refrain from suspending and expelling bullies as a first offense. Additionally, schools should create a school atmosphere that discourages bullying so students will not feel compelled to bully in order to advance their social standing amongst their peers. Moreover, as Arne Duncan, the U.S. Secretary of Education, has said, “schools must teach and reward positive behavior as well.” By promoting positive social behaviors, schools can decrease the amount of bullying and cyberbullying offenses on their campus.

Ultimately, reliance on zero-tolerance policies is not the answer to creating a safe school. Schools should be hesitant about imposing these violations in the name of school safety when there is a possibility that they are infringing upon a student’s constitutional rights and it is not the least restrictive method of enforcement. Under most circumstances, cyberbullying will not create a substantial disruption in school, which means it is protected under the First Amendment. Therefore, schools should not adopt zero-tolerance policies against bullying and cyberbullying that does not create a true threat.

IV. ONLY BULLYING THAT IS A TRUE THREAT SHOULD BE RESTRICTED THROUGH ZERO-TOLERANCE POLICIES

Zero-tolerance policies against bullying and cyberbullying are generally inappropriate. Zero-tolerance policies mandate a severe punishment, such as expulsion or suspension, which has a significant impact on the penalized student. Due to the significance of the punishment, zero-tolerance policies should require schools to find that the disciplined student had the mens rea or “guilty mind” to commit the punishable act.

221. Requiring student counseling is one such punishment.
223. See Andrea Cohn & Andrea Canter, Bullying: Facts for Schools and Parents, NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS (Oct. 7, 2003), available at http://www.nasponline.org/resources/factsheets/bullying_fs.aspx (stating that a positive school climate will reduce bullying and victimization and that one such program decreased peer victimization by 50%).
224. See supra Part II.C.
225. See infra Part IV.
226. See generally Pelliccioni, supra note 209, at 979-1007 (concluding that although school disciplinary decisions are not criminal matters, the use of strict liability in the context of zero-tolerance policies should be analyzed under this framework because of the interests that students possess in attending public schools and because of the serious consequences of such policies in affecting their right to an education).
Typical bullying and cyberbullying will be analyzed under Tinker. However, Tinker does not require the school to prove that the disruptive student intended to cause a substantial disruption or impingement upon another student’s rights. Therefore, a student could be expelled or suspended for creating speech that inadvertently caused a substantial disruption. Even though the student may not have intended to cause harm or create a substantial disruption, he or she will lose educational instruction that he or she is entitled to during the term of his or her punishment. When students have that much to lose, schools should apply a stricter standard to apply before suspending or expelling a student.

Bullying and cyberbullying found to constitute a true threat can be punished differently than typical bullying and cyberbullying. True threats are not afforded protection under the First Amendment, and courts analyze true threats with a stricter standard than Tinker’s “substantial disruption” test. Courts analyze true threats by either using a subjective standard or an objective standard. Both standards require courts to find that a reasonable person would foresee and interpret the statement as a serious expression to harm or assault to somebody. However, the subjective analysis of the true threat doctrine, which was used in the cyberbullying case D.G. v. Independent School District No. 11, requires the court to determine whether the speaker intended to make a genuine threat or if he or she intended the statement to be received as a genuine threat.

True threats are subjected to a stricter standard of review than typical bullying and cyberbullying. Because true threats are analyzed under a stricter standard, schools should be allowed to enforce a zero-tolerance policy against true threats. To ensure that schools do not excessively punish a student, administrators should be sure to find that the student intended to make a threat before suspending or expelling them. Therefore, courts should analyze student speech cases involving cyberbullying as a true threat under the subjective true threat standard.

Schools should be required to find that the student making the alleged true threat had the intent to make the threat before suspending or expelling them from school. Students who intend to communicate a true threat are not protected under the First Amendment and are deserving of punishment. Zero-tolerance policies regarding true threats therefore pose little, if any, legal concerns, because it is clearer that the students deserve significant punishment more so than for typical bullying. “By punishing speech which does not rise to the level of a true threat . . . school administrators”

228. Id.
229. See Lovell by & Through Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996).
231. Hils, supra note 62, at 373.
the message that there is “zero-tolerance” for the expression of unfavorable speech. Thus, schools should abandon such policies and instead teach students to be tolerant of the expression of other viewpoints.” Schools should maintain policies that teach students that threatening other people is inappropriate and will not be tolerated though, which is why if a school insists on maintaining a zero-tolerance policy, it should be limited to speech involving a true threat.

CONCLUSION

It is unlikely that any school policy can create an environment free of bullying or cyberbullying. However, zero-tolerance bullying and cyberbullying policies can create more problems than solutions. Zero-tolerance of bullying and cyberbullying can infringe on a plethora of student rights including the First Amendment, Eighth Amendment, the right to education, and more. Additionally, penalizing bullying without taking any rehabilitative measures to prevent future bullying statistically does not solve the problem bullying causes in society. Therefore, schools should only adopt zero-tolerance policies involving bullying that rise to the level of a true threat, and work on establishing a positive school atmosphere that will lead to a reduced amount of bullying offenses.

232. Id.

233. See Ahrens, supra note 11, at 1721.