Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying

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Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying

I. INTRODUCTION

A. Phoebe Prince’s Struggle

Phoebe Prince was a fifteen-year-old high school girl from South Hadley, Massachusetts.\(^1\) Students at the high school bullied Phoebe, calling her “Irish slut” and “whore” on Twitter, Facebook, and other forms of social media.\(^2\) Phoebe was also harassed and physically threatened at school. Bullies threatened Phoebe in the school library and in the hallway. When she was walking home from school, one of the bullies drove by Phoebe and threw a Red Bull at her. Because of this terrible turn of events, on January 14, 2010, Phoebe walked into her house and hung herself in a stairwell. Months of no arrests outraged

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2. *Id.*
Phoebe's community, and community members were incredulous that local law enforcement had not punished the bullies.\footnote{Id.} Eventually, law enforcement charged nine teenagers with a range of crimes and civil rights violations in connection with Phoebe's suicide.\footnote{Id.} After the teenagers were indicted, investigators revealed that members of the South Hadley High School faculty were aware of the bullying and did nothing to stop it; however, no adults were charged for their inaction.\footnote{Id.} In May of 2011, a juvenile court judge sentenced five of these teenagers. The judge sentenced the teenagers to probation and community service. Because of this terrible situation, some of these teenagers even expressed remorse and apologized for what they did to Phoebe.\footnote{Id.}

Citizens of this Massachusetts community addressed a serious and devastating bullying problem through the legal system and criminal prosecution.\footnote{See id.; see also Kennedy, supra note 1.} They demanded that the police reprimand the bullies, and the authorities punished the teenagers accordingly. However, this is not the case in all communities. Many communities still do not use criminal prosecution for school bullies.

B. Akian Chaifetz's Story

Akian Chaifetz is a ten-year-old autistic boy from New Jersey.\footnote{Ian Johnston, Dad Wires Up Autistic Son, 10, to Expose 'Bullying' by Teaching Staff, NBC NEWS, Apr. 25, 2012, http://usnews.nbcnews.com/_news/2012/04/25/11389266-dad-wires-up-autistic-son-10-to-expose-bullying-by-teaching-staff?lite.} Stuart Chaifetz, Akian's father, began to worry about Akian when he received notes from Akian's teacher stating that he was misbehaving at school.\footnote{Id. These notes stated that Akian was hitting his teacher and teacher's aide and throwing chairs.} This behavior was out of the ordinary for Akian, so Stuart hired a behaviorist to determine the root of the problem. Months later, Stuart was still unable to figure out what caused Akian's terrible mood swings, so Stuart hid a recording device on Akian when he went to...
school. Stuart’s recording showed that the teacher and aide in Akian’s class were making Akian miserable, which caused his unusual behavioral problems. Akian’s teacher called him a “bastard” and the teacher was later heard stating, “Go ahead and scream, because guess what? You are going to get nothing until your mouth is shut.” Stuart posted his thoughts and the recordings themselves on YouTube.

As a result of this verbal abuse and Akian’s tremendous unhappiness, Stuart asked for a public apology from the teacher and also called for legislative action. He wanted to ensure that “no teacher who bullie[d] a child, especially one with special needs,” could continue to teach. Stuart did not want to file a lawsuit, so he started a petition calling New Jersey legislators to ensure that schools immediately fire teachers who bully children.

In this terrible situation involving a special needs student, Stuart, the student’s father, felt the appropriate solution to this type of bullying was for the school district and the legislature to put procedures in place to prevent this type of bullying from happening in the future. This was a different solution from the one sought in Phoebe Prince’s case.

C. Amanda Todd’s Legacy

Although this situation took place in Canada, it is a tragic example of the way bullying impacts students across the world, including the United States. Amanda Todd was a fifteen-year-old girl. Amanda made headlines when she posted a video about her struggle with bullying during her young life. The eight-minute video consisted of frames of Amanda holding up handwritten cards to tell the world her story. She told a terrible, but real, tale about exposing her breasts to a man online when she was just twelve years old, and the man sending this picture to his family and friends. After this picture of Amanda, taken by a

10. Id.
11. Id. Along with the verbal abuse, there was also a conversation between two women in the class talking about drinking wine and heaving or vomiting the morning after drinking alcohol. Id.
12. Id.
13. Id.
14. Id.
15. Id. Maureen Reusche, Superintendent of Cherry Hill School District, issued a statement that the district no longer employed the teachers on the recording who spoke inappropriately to children. Id.
16. See id.
17. See id.; see also Kennedy, supra note 1. Here, the boy’s father sought a legislative solution to bullying while the family in Phoebe’s case sought criminal prosecution to punish the bullies.
manipulative older man, was made public, Amanda’s peers at school began to bully and harass her about the picture.\textsuperscript{18}

This terrible harassment and ridicule led to “years of self-harm” and suicide attempts by Amanda.\textsuperscript{19} She believed that she had no one in her corner. Although Amanda’s video received many supportive posts and over ten million views on YouTube, she still could not move past the damage caused by her bullies and taunters. On October 10, 2012, about a month after she first posted her video, Amanda committed suicide.\textsuperscript{20} Amanda’s shocking story and her untimely death led to over forty anti-bullying vigils around the world. The purpose of the vigils was to honor Amanda and to bring awareness to those who suffer from bullying.\textsuperscript{21}

On October 18, 2012, police arrested eight teenage girls in connection with Amanda Todd’s suicide. These teenage girls face criminal harassment charges.\textsuperscript{22} The Thames Valley District School Board called on the community to help stop bullying, demanding, “[W]hy can we not change [behaviors] and attitudes around bullying?”\textsuperscript{23}

In Amanda’s case, the school board rallied the public to help eliminate bullying for good.\textsuperscript{24} The community and others around the world peacefully protested bullying and honored Amanda’s bravery in sharing her story with the world. Furthermore, as a result of the bullying that Amanda faced, the local police made arrests, and the bullies faced criminal charges.\textsuperscript{25}

Based on these three real-life stories, there are different ways to solve the profound problem of bullying: criminal prosecution; national, state, and local legislation; and awareness and protests. Many school districts use a combination of all three methods to eliminate bullying, and at this point in time, most states have some form of anti-bullying legislation.\textsuperscript{26}

Whether it was a personal experience in elementary school, victimization in high school, or a story heard on the nightly news, everyone is aware


\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} See id.


\textsuperscript{23} Id.

\textsuperscript{24} Id. The school board previously asked the community to sign an anti-bullying pledge that collected over 70,000 signatures. Id.

\textsuperscript{25} Id.

\textsuperscript{26} Brenda High, BULLY POLICE USA, http://www.bullypolice.org (last visited Mar. 3, 2013) (highlighting that forty-nine states have passed anti-bullying legislation).
that bullying is a serious problem in schools. Similarly, extensive media coverage of bullying has raised public awareness of this very troubling trend. In the past few years, there have been many instances of severe bullying that the media has covered. Vast news coverage impacts the way people think about this problem and the way that lawmakers solve this problem in the legislature. As a result of these media reports, and for a variety of other reasons, bullying is at the forefront of concerns facing twenty-first century students. Bullying impacts people differently, and some bullying situations have led students to tragic ends. This Comment will discuss the problem of bullying and the various methods that national, state, and local governments use to solve it.

II. THE HISTORY OF THE BULLYING PROBLEM AND REGULATION OF STUDENT SPEECH

A. Historical Overview

Over the years, researchers have identified bullying as a problem in schools. This identification is due to the increased awareness researchers have brought to this serious issue and to the widespread media coverage of bullying and school violence.

Prior to the 1970s, American society did not consider bullying to be a significant problem. At the time, many people had the attitude that students should toughen up, or that bullying was an inevitable part of life. In the early 1970s, Dan Olweus, a psychology professor at the University of Bergen in Norway, completed the first large-scale study of school bullying. In 1978, Olweus published the study in the United States in the book Aggression in the Schools: Bullies and Whipping Boys. This book helped to raise awareness about the problem of bullying in the schools. In the 1980s, Olweus conducted the “first systematic intervention study” that discussed the benefits of a bullying prevention program. Since this study, educators have conducted other large-scale intervention programs in the schools. In 1993, Olweus wrote the book Bullying at School: What We Know and What We

28. Id.
29. Id.
31. Carpenter & Ferguson, supra note 27.
32. Id.
During the 1990s, this book was considered to be the world's leading authority on bullying. Olweus's research has played an important role in increasing awareness about the problem of bullying.34

Another catalyst to the realization that bullying is a real, modern-day problem was the Columbine, Colorado school shooting in the late 1990s.35 Based on post-Columbine statistics, many attackers, such as the school shooters in the Columbine massacre, experienced severe bullying and harassment at school.36 Also, over sixty percent of male students labeled as bullies in sixth through ninth grade were convicted of a crime by age twenty-four.37

Over the past forty years, the cutting-edge research and findings of those like Dan Olweus, and the tragic events that have befallen American schools, such as the Columbine massacre, have brought bullying to the forefront of American educational concerns. Because of the public's increased awareness of school bullying, almost all of the states have taken action and implemented anti-bullying and harassment policies in their schools. These policies help improve the learning environment by providing students with a feeling of safety and security which is vital to the academic success of all students.38

33. Id.; Dan Olweus, Bullying at School: What We Know and What We Can Do (Understanding Children's Worlds) (1993).

34. Carpenter & Ferguson, supra note 27. Researchers and educators now recognize bullying as a "growing social problem." Id.

35. 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, 1109 (2005). On April 20, 1999, two Columbine High School students, Eric Harris and Dylan Klebold, walked into the school and shot twelve fellow students and a teacher before committing suicide. Later, the media revealed that the boys had major plans to blow up the school and kill hundreds of people. This is one of the deadliest school shootings in United States history. The Columbine massacre led to numerous reforms across the country to prevent school violence and bullying. Gina Lamb, Columbine High School, N.Y. Times, Apr. 17, 2008, http://topics.nytimes.com/top/reference/timestopics/organizations/c/columbine_high_school/index.html.


37. Id. at 1116.

38. Saul McLeod, Maslow's Hierarchy of Needs, Simply Psychology, http://www.simplypsychology.org/maslow.html (last visited Mar. 10, 2013). Psychologists have long determined, via Abraham Maslow's hierarchy of needs, that an individual must satisfy "lower level basic needs" before attaining "higher level growth needs." Id. First, a student must satisfy her biological needs—such as food, water, and shelter—before she can focus on any other needs. Id. The next need on the hierarchy is safety, meaning a student cannot learn in a school environment unless she feels safe and secure. Id. In other words, schools must take steps to prevent bullying and meet students' safety needs to ensure their academic progress.
B. Landmark Cases: Determining Students' Speech Rights and Schools' Authority

The United States Supreme Court has interpreted school district and state policies to determine the power of schools to limit students' free speech rights. In each of these landmark cases, the Court balanced First Amendment free speech rights with the school administration's authority to discipline and control student behavior and speech. Through these cases, the Court determined steps a school can take to limit student speech even when it relates to bullying. Below is a discussion of three important Supreme Court cases that greatly impacted students' speech rights in school.

The 1969 United States Supreme Court case, *Tinker v. Des Moines Independent Community School District*, discussed students' free speech rights and schools' administrative power over these rights. In *Tinker*, high school students wore black armbands to school to protest the United States' involvement in the Vietnam War. The school sent those students home and suspended them until the students came back without the armbands. Parents of the students filed a complaint seeking an injunction to stop school officials from disciplining their children for protesting the Vietnam War. The United States District Court for the Southern District of Iowa dismissed the complaint and upheld the constitutionality of the school administrator's authority to prevent the disturbance of school discipline. The United States Court of Appeals for the Eighth Circuit was equally divided on the matter; therefore, the Supreme Court granted the students' parents' petition for certiorari.

The Supreme Court reiterated that freedom of speech under the First Amendment to the United States Constitution has always been available to both students and teachers. On the other hand, the

40. See id.
41. Id. at 504-05.
42. Id. The district court referred to the *Burnside v. Byars* decision that held that wearing symbols, like the black armband, to school cannot be prohibited unless the demonstration "materially and substantially" interferes with school discipline. 363 F.2d 744, 749 (5th Cir. 1966).
43. *Tinker*, 393 U.S. at 505.
44. U.S. CONST. amend. I.
45. *Tinker*, 393 U.S. at 506; see, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that because the Fourteenth Amendment to the United States Constitution applies the United States Bill of Rights to the states, students in public schools do not have to salute the flag under the First Amendment).
Court recognized the need for student control in the schools.\textsuperscript{46} Therefore, the Court went on to apply the facts of this case to the law and held that a state must show that a student's speech "materially and substantially" interfered with school discipline.\textsuperscript{47} The Court determined that protection of "constitutional freedoms" is vital in the schools because schools help foster ideas and develop future leaders; thus, throughout the learning process, schools must expose students to a variety of beliefs and opinions.\textsuperscript{48} This opinion was not unanimous, and Justice Black's dissent discussed the ability of the school to control student discipline.\textsuperscript{49} Justice Black wanted the Court to give school administrators more deference to help maintain student discipline in the schools.\textsuperscript{50}

Despite Justice Black's vigorous dissent, the Court established a standard for regulation of student speech at school.\textsuperscript{51} This standard—the Material Disruption Standard—requires that student speech substantially disrupt the school environment before the school can take disciplinary action.\textsuperscript{52} This decision set the precedent that students, although at school and under school direction, still have the constitutional rights afforded to every American.\textsuperscript{53}

\textit{Bethel School District v. Fraser}\textsuperscript{54} is another landmark case regarding student speech rights at school. In this 1986 case, the Supreme Court gave schools authority to prohibit lewd and obscene student speech.\textsuperscript{55} In 1983, Matthew Fraser, a Bethel High School student, gave a speech in front of approximately six hundred high school students in support of one of his peers running for a student government office.\textsuperscript{56} During the speech, Fraser referred to this candidate using an "elaborate, graphic, and explicit sexual metaphor."\textsuperscript{57} Fraser had practiced the speech in front of a couple of his teachers, and those teachers warned Fraser that the speech was not appropriate and might result in disciplinary

\begin{itemize}
  \item \textsuperscript{46} \textit{Tinker}, 393 U.S. at 507.
  \item \textsuperscript{47} \textit{Id.} at 509 (quoting \textit{Byars}, 363 F.2d at 749).
  \item \textsuperscript{48} \textit{Id.} at 512.
  \item \textsuperscript{49} \textit{Id.} at 515 (Black, J., dissenting).
  \item \textsuperscript{50} \textit{Id.} at 526. Justice Black opined that "the Federal Constitution [does not compel] teachers, parents, and elected school officials to surrender control of the American public school system to public school students." \textit{Id.}
  \item \textsuperscript{51} \textit{See id.} at 509 (majority opinion).
  \item \textsuperscript{52} \textit{Id.}
  \item \textsuperscript{53} \textit{Id.} at 511.
  \item \textsuperscript{54} 478 U.S. 675 (1986).
  \item \textsuperscript{55} \textit{Id.} at 685.
  \item \textsuperscript{56} \textit{Id.} at 677.
  \item \textsuperscript{57} \textit{Id.} at 677-78.
\end{itemize}
consequences for Fraser. As a result of Fraser's speech violating this school policy, the school's assistant principal suspended Fraser for three days and took Fraser's name off of the list of potential graduation speakers.

After a review by the local school board, Fraser's father filed suit against the school district in the United States District Court for the Western District of Washington. The district court held that the school's disciplinary sanctions violated Fraser's free speech rights under the First Amendment because the school's disruptive-speech policy was "unconstitutionally vague and overbroad." The United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment. The Supreme Court granted certiorari and reversed the lower courts' rulings.

In this case, the Court compared and contrasted the students' armband protest in Tinker with Fraser's sexually explicit speech. Furthermore, the Court discussed that even in the United States Congress "there are rules prohibiting the use of expressions offensive to other participants in the debate." Thus, the Court markedly pointed out that even in the nation's Capitol, limits are placed on speech to prohibit lewd and offensive discussion. The Court highlighted, however, that the First Amendment grants freedom in "adult public discourse," but the First Amendment does not afford the same freedom to children in public schools. Therefore, the Court held that because certain limits can be placed on free speech rights, Fraser's high school

58. Id. at 678.
59. Id. The rule provided that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." Id. (internal quotation marks omitted).
60. Id.
61. Id. at 679.
62. Id.
63. Id. (holding that this situation was not different from the black armbands in Tinker and was not materially or substantially disruptive).
64. Id. at 680.
65. Id. (stating that the lower courts did not give enough consideration to the silent political protest of the armbands in Tinker and the lewd, sexual speech in this case); see also Tinker, 393 U.S. at 509.
66. Fraser, 478 U.S. at 681.
67. Id. at 681-82.
68. Id. at 692. In New Jersey v. T.L.O, the Court reiterated that constitutional rights of students in public schools and rights of adults in other public settings are not created equal. 469 U.S. 325, 340-42 (1985).
rightly punished Fraser for his obscene and sexual speech. 69 Similarly, the Court determined that schools have the authority to restrict and prohibit lewd, vulgar, and obscene speech that distracts from the schools’ "basic educational mission." 70

In Justice Stevens’s dissent, he agreed with the majority that Fraser’s speech would be inappropriate in most formal school settings. 71 Justice Stevens, however, acknowledged that Fraser’s speech may not have seemed disruptive in a locker room conversation among Fraser’s peers. 72 Thus, Justice Stevens stated that because Fraser’s speech took place in a room of almost entirely young people, Fraser must not have realized that his speech would lead to disciplinary consequences. 73 According to Stevens, this led to the conclusion that Fraser’s speech was not obviously offensive to a young person of Fraser’s maturity and intelligence. 74

The Court in Fraser limited the broad Tinker holding that student speech has to be “materially and substantially” disruptive in order to be restricted by the school. 75 In this case, the Court held that student speech rights in school are not as broad as adult speech rights in other public settings. 76 This standard allows schools to crack down on student speech that may be appropriate outside of the school doors, but is lewd, obnoxious, and disruptive inside of the school.

Morse v. Fredrick 77 is another landmark case that helped to determine schools’ authority over student speech. In this 2007 case, the Supreme Court held that a principal did not violate a student’s First Amendment rights by taking down a banner promoting illegal drug use. 78 In Morse, a principal saw students at a school-sponsored event holding up a banner that said “BONG HiTS 4 JESUS.” 79 The principal asked the students to remove the banner, but one of the students, Joseph Frederick, refused to do so; hence, the principal confiscated the

69. Fraser, 478 U.S. at 684-86 (recognizing that protecting children from lewd language is a strong policy reason in favor of limiting a student’s free speech rights).
70. Id. at 685.
71. Id. at 696 (Stevens, J., dissenting).
72. Id.
73. Id.
74. Id. at 695-96.
75. Compare id. at 685 (holding that public school students do not always have the same rights as adults), with Tinker, 393 U.S. at 512-13 (holding that for a school to restrict student speech the speech must be “materially and substantially” disruptive).
76. Fraser, 478 U.S. at 686.
77. 551 U.S. 393 (2007)
78. Id. at 397.
79. Id.
banner and suspended the student. The Juneau School District Board of Education upheld the student's suspension and sided with the principal.80

As a result, Frederick filed suit alleging that the school board violated his First Amendment rights. Frederick sought declaratory and injunctive relief and monetary damages. The United States District Court for the District of Alaska granted summary judgment for the school board and the principal, and the United States Court of Appeals for the Ninth Circuit vacated the district court's ruling. The Ninth Circuit determined that the school disciplined Frederick without a showing that his speech caused a substantial disruption—this violated Frederick's First Amendment rights. The Supreme Court granted certiorari to determine whether Frederick was within his rights when he held up the banner.81

The Court first determined that this was a school speech case, and as a result, it needed to determine whether a school can regulate student speech that promotes illegal drug use at a school event.82 Then, the Court analyzed both of the aforementioned student speech cases—Tinker and Fraser.83 The Court reiterated the holdings of both cases, and then went on to clarify the main points of Fraser:

For present purposes, it is enough to distill from Fraser two basic principles. First, Fraser's holding demonstrates that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings .... Second, Fraser established that the mode of analysis set forth in Tinker is not absolute.84

The Court discussed the fact that school children have constitutional rights, but the rights that they have in school must be appropriate for the educational context.85 Moreover, it is understood from this student-speech line of authority that deterring illegal drug use by students is a "compelling" interest.86 Hence, the Court determined that because

80. Id. at 398-99.
81. Id. at 399-400.
82. Id. at 400, 403.
83. Id. at 404; see Tinker, 393 U.S. at 503; Fraser, 478 U.S. at 675.
84. Morse, 551 U.S. at 404-05 (quoting Fraser, 478 U.S. at 682 (internal quotation marks omitted)); see also Tinker, 393 U.S. at 514.
86. Id. at 407. The Court stated illegal drug abuse can cause serious physical health problems, and the psychological effect of drugs on school age children is "most severe." Id. The Court also referred to startling statistics that showed the seriousness of the drug
schools have an interest in protecting the school environment, and the
government has an interest in stopping child and teen drug abuse,
schools have the power to restrict student speech that promotes illegal
drug use.\textsuperscript{77} In contrast, the Court did not apply \textit{Fraser} so broadly as to state that
Frederick's speech should be restricted because it was offensive.\textsuperscript{88} The
Court stated the reason for this application or non-application of \textit{Fraser}
was because schools should not restrict all speech categorized as
offensive.\textsuperscript{89} For instance, political and religious speech can be offensive,
but such kinds of speech are important for school discussion.\textsuperscript{90} Thus,
the Court held the school made the right decision by restricting
Frederick's speech, not because the speech was offensive, but because it
promoted illegal drug use.\textsuperscript{91}

In his dissent, Justice Stevens stated that the First Amendment
protects student speech if the speech "neither violates a permissible rule
nor expressly advocates conduct that is illegal and harmful to stu-
dents."\textsuperscript{92} It was the dissent's opinion that Frederick's banner was just
"nonsense" and did not violate a rule or advocate illegal conduct.\textsuperscript{93} The
dissent concluded that a school should allow students to express more
than one point of view regarding the prohibition of illegal drugs.\textsuperscript{94}

In \textit{Morse}, the Supreme Court discussed two previous student speech
cases—\textit{Fraser} and \textit{Tinker}—and attempted to reconcile the two deci-
sions.\textsuperscript{95} In the end, the \textit{Morse} decision held that student speech must
be more than just "offensive" to be restricted, and that it is important for
students to have an understanding and exposure to a variety of beliefs
and opinions, including controversial ones, in school.\textsuperscript{96}

One other important student speech case is the 1988 Supreme Court
case, \textit{Hazelwood School District v. Kuhlmeier}.\textsuperscript{97} Here, the Supreme
Court held that schools have the power to restrict student speech in

\begin{footnotesize}
\begin{itemize}
    \item[87.] \textit{Id.} at 408.
    \item[88.] \textit{Id.} at 409.
    \item[89.] \textit{Id.}
    \item[90.] \textit{Id.}
    \item[91.] \textit{Id.} at 409-10.
    \item[92.] \textit{Id.} at 435 (Stevens, J., dissenting).
    \item[93.] \textit{Id.}
    \item[94.] \textit{Id.} at 448. According to the dissent, "Whatever the better policy may be, a full and
frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana
is far wiser than suppression of speech because it is unpopular." \textit{Id.}
    \item[95.] \textit{Id.} at 403-05 (majority opinion).
    \item[96.] \textit{Id.} at 409-10.
    \item[97.] 484 U.S. 260 (1988).
\end{itemize}
\end{footnotesize}
school activities if the school’s “actions are reasonably related to legitimate pedagogical concerns.” In *Kuhlmeier*, student staff members of a school newspaper filed suit when a teacher removed their articles about pregnancy and the impact of divorce on students from the school newspaper. The student writers sought declaratory and injunctive relief and monetary damages. The United States District Court for the Eastern District of Missouri determined that school officials can restrict student speech in activities that are an “integral part of the school’s educational function—including the publication of a school-sponsored newspaper.” The district court held that the principal’s action in removing the articles was justified to avoid giving the impression that the school supported teen pregnancy and the other issues discussed. The United States Court of Appeals for the Eighth Circuit held, on the other hand, that the school officials were not entitled to remove the articles because there was no potential tort or libel action for invasion of privacy. The Supreme Court granted certiorari.

In *Kuhlmeier*, the majority first decided whether this school newspaper was a “public forum.” To be considered a public forum, school authorities must have opened the school facilities for public use. Because the school newspaper was part of the educational curriculum and controlled by the faculty and staff of the school, the Supreme Court ruled that the school newspaper was not a public forum. At this school, the school newspaper was an educational experience solely for journalism students, not a public forum; thus, based on previous case law, such as *Tinker*, the school could regulate the students’ articles.

Under that law, educators are entitled to more control over speech that occurs as part of a school-sponsored activity versus speech that coincidentally occurs on school property. This is because a school must be able to set “high standards” for student speech that is dissemi-

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98. *Id.* at 273.
99. *Id.* at 263-64. The principal was concerned that the story about teen pregnancy unfairly identified pregnant teenagers at the school and that references to sexual activity and birth control were inappropriate topics for the younger students at the school. *Id.* The principal also felt that the parents of the student in the divorce article should have had an opportunity to respond to the article. *Id.*
100. *Id.* at 264.
102. *Id.* at 264-66.
103. *Id.* at 267.
104. *Id.*
105. *Id.* at 269-70.
106. *Id.* at 270.
107. *Id.* at 270-71.
nated under school authority.\textsuperscript{108} Schools must also be able to regulate student speech based on the maturity of their students. For example, an elementary school may limit a discussion about the existence of Santa Claus, and a high school may limit the discussion of sexual habits.\textsuperscript{109} The Court determined that because education is vital to America's youth, educators can exercise regulatory control over the content of student speech in school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns."\textsuperscript{110} The dissent, written by Justice Brennan, deduced that the school did not afford its students basic First Amendment protections.\textsuperscript{111} Brennan similarly opined that the principal's censorship did not have a "legitimate pedagogical purpose."\textsuperscript{112}

The Court in \textit{Kuhlmeier} determined that schools can regulate student speech if it is part of a class, like Journalism II, or other school-sponsored activity if there is a reasonable concern about the educational nature of the speech.\textsuperscript{113} Thus, the Court set further standards for school regulation of student speech.

This line of student-speech cases establishes standards for when a school has the power to prohibit or regulate a student's speech. In synthesizing these cases, the Supreme Court has held that: (a) schools have the authority to regulate student speech if it is materially disruptive; (b) schools have the authority to restrict and prohibit lewd, vulgar, and obscene speech that distracts from the school's basic educational mission; (c) schools have power to restrict speech that promotes illegal drug use; and (d) schools can limit student speech that is school-sponsored and reasonably related to legitimate pedagogical concerns.\textsuperscript{114}

These student-speech cases give schools guidance on how to handle bullying under the First Amendment. For example, if one student is bullying another student and this harassment substantially disrupts school discipline, then the school can limit the bully's speech. The Supreme Court's line of decisions balances the school's authority in handling bullies during school hours with students' First Amendment rights at school. Because bullying has become such a great problem in

\begin{itemize}
  \item \textsuperscript{108} Id. at 271-72.
  \item \textsuperscript{109} Id. at 272.
  \item \textsuperscript{110} Id. at 273.
  \item \textsuperscript{111} Id. at 290 (Brennan, J., dissenting).
  \item \textsuperscript{112} Id. at 289.
  \item \textsuperscript{113} Id. at 273 (majority opinion).
  \item \textsuperscript{114} See \textit{Tinker}, 393 U.S. 503; \textit{Fraser}, 478 U.S. 675; \textit{Morse}, 551 U.S. 393; \textit{Kuhlmeier}, 484 U.S. 260.
\end{itemize}
schools, educational authorities need power to prohibit certain speech that harasses and torments other students. Students, however, do have some free speech rights, and school administrators must respect those rights.

The question then becomes whether the solution to bullying is to allow more speech in schools or less speech in schools. Schools, by nature, must allow an open discourse and exchange of ideas to promote learning. However, this discourse must be somewhat limited to protect students' well-being. Determining when this should be limited, then, is the challenging issue.

A major political blunder of 2012 illustrates the more-or-less speech debate. There is a great, although unique, parallel between school speech and the tragic incident at the Libyan Consulate in September 2012. In Benghazi, Libya, according to some, the protests outside the United States Consulate began as a result of a video called "The Innocence of Muslims" which was posted on YouTube. In that video, Mohammad, the Islamic leader, was depicted in a very negative and blasphemous light. According to initial reports, this portrayal angered the Libyan Muslim population. How could a YouTube clip that most Americans had never heard of, let alone seen, affect the Libyan population so deeply? Because in countries with a very strict, militant government regime such as Libya, people are not used to hearing or seeing views and opinions that may be different, or even offensive to their own beliefs. It was initially argued that the Libyan government limited speech in its country to protect its people and promote one particular belief system. However, this backfired because when the Libyan people were exposed to another point of view that was offensive to them, it led to public protests and violence.

To most Americans, this type of reaction is unfathomable. Many Americans come across offensive or different opinions and ideas regularly, but it does not lead to protests and violence every time. One reason for this open-mindedness in Americans is that the First Amendment grants free speech to all U.S. citizens. Free speech promotes a sort of tolerance for all opinions and ideas, with some exceptions. Because the United States promotes more speech instead of


less speech, Americans are less likely to react violently the way that some Libyans did as a result of the anti-Islamic video.

Tying this foreign affairs fiasco into student speech, exposing students to more instead of less speech helps promote growth as intellectual beings as well as their tolerance for different beliefs. When schools expose students to a variety of ideas, students tend to become more open-minded and respectful of others' ideas and opinions. The Supreme Court gives school administrators a right to limit some, but not all, student speech. Generally, the American court system has found the solution to free speech controversies and disputes to be more speech, not less speech. Why should it be any different in schools? Students deserve to have a safe environment in which to learn, or they will not thrive academically. However, schools need to encourage a dialogue about real-world issues, such as bullying, that students face on a regular basis. Allowing more speech on these problems and issues promotes social awareness, tolerance, and respect for other people which may help to end the bullying problem altogether.

III. DEFINITION AND DISCUSSION OF MODERN DAY BULLYING

Although in the past people considered bullying a rite of passage, modern research has found that bullying is a form of abuse, harassment, and violence.\textsuperscript{117} According to the National Institute of Health, bullying affects more than five million students in the United States.\textsuperscript{118} Similarly, one out of seven students reported being victimized by a bully.\textsuperscript{119} Bullying affects many school students; yet, some students are bullied and no one is aware there is a problem.\textsuperscript{120} Ignoring these bullying situations can lead to violence or greater issues.\textsuperscript{121}

A. Defining Bullying

Generally, "[r]epeatedly teasing someone who clearly shows signs of distress" constitutes bullying.\textsuperscript{122} There are two main types of bullying: direct bullying and indirect bullying. Direct bullying "usually involves hitting, kicking, or making insults, offensive and sneering comments, or threats."\textsuperscript{123} Indirect bullying occurs when a student is purposely

\textsuperscript{117} U.S. DEP'T OF HEALTH & HUMAN SERVS., BULLYING IS NOT A FACT OF LIFE (2003).
\textsuperscript{118} Id. at 1.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 2.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 4.
\textsuperscript{123} Id.
isolated from a group or when a bully spreads a rumor about a peer. Boys are more likely than girls to bully; girls who bully typically use subtle, indirect methods. Another form of bullying is group bullying. Group bullying is defined as "a number of children and young people who may at times be involved in bullying, but who would not usually take the initiative themselves." There are four "mechanisms" used in group bullying. The first mechanism is social contagion. If a student admires the bully, then that student may be more likely to join in the bullying, as peer pressure plays a big role. The second mechanism is a weakening of normal controls. If teachers or other students do not try to stop bullying, this can "weaken[] the controls" against aggressive or destructive tendencies of third parties. In turn, this may strengthen group bullying. The third mechanism is a decreased sense of individual responsibility: the more people that participate in bullying, the larger the influence over other students to take part in bullying. Students begin to feel that bullying is acceptable behavior if most of their peers are participating. The fourth mechanism is gradual changes in the perception of the victim of bullying. If a student is a repeated bullying victim, students may begin to view this student as a "worthless" person who is a deserving target. This lessens the feelings of guilt that students may feel for bullying and the sympathy they may have for victims. Many of these group bullying situations involve a greater number of students than would normally participate because this behavior appears acceptable. Turning a blind eye to repeated bullying of a particular student leads to a learned behavior or habit that is difficult to break. Group bullying is one of the most detrimental bully-victim situations because of the humiliation and embarrassment the victim feels by being the target of a group.

124. Id.
125. Id.
126. Id. at 12.
127. Id. at 13.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id.
135. Id.
B. Cyberbullying

Because of the increase in online communication capabilities, social media has negatively contributed to the world of bullying. Cyberbullying is defined as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.” Because of the physical distance between students who bully via the internet and their targets, bullies feel more confident and tend to be more cruel and aggressive behind the shield of a computer screen. Schools have a very difficult time regulating cyberbullying because it is a very new form of harassment and most of this bullying takes place off campus.

One of the most well-known cyberbullying cases is the 2009 California case, United States v. Drew. Lori Drew, a mother of a thirteen-year-old daughter set out to harass one of her daughter’s friends, Megan Meier, online. Drew and her “conspirators” set up a fake MySpace profile posing as a sixteen-year-old male named Josh Evans. Under this false identity, Drew and her fellow conspirators contacted Megan telling her that Josh “no longer liked [Megan]” and that “the world would be a better place without her in it.” Later on that day, Megan committed suicide. At trial, the government’s case against Drew turned on whether Drew violated the Computer Fraud and Abuse Act (CFAA). There are three elements to a criminal misdemeanor offense under the CFAA: (1) the defendant intentionally accessed a computer without authorization; (2) the access of the computer involved interstate or foreign communication; and (3) by engaging in that conduct, the defendant obtained information from a computer used in interstate or foreign communication. This statute also states that any person suffering a loss because of a violation of this act may bring a civil action against “the violator.” The district court found that computers that

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137. Id.

138. Id. Because most cyberbullying occurs at home, schools have a hard time “enforcing policies without overreaching their legal authority.” Id.


140. Id. at 452.

141. Id. Drew and her friends decided to create this false account because Megan Meier had allegedly spread rumors about Drew’s daughter. Id.

142. Id.


145. Id. at 456; see also 18 U.S.C. § 1030(g).
provide “web-based application” via the Internet satisfy the interstate communication requirement of the statute. Likewise, the court concluded that the third element in the statute is satisfied when a person using a computer goes to an Internet site and reads anything on that site.

The main issue, according to the court, related to the first element of 18 U.S.C. § 1030(a)(2)(C) and the definition of “unauthorized access.” The only basis for Drew’s unauthorized access was that she created a false MySpace account in violation of the site’s Terms of Service. The court found that a knowing and intentional breach of a site’s terms of service may equate to unauthorized access under the statute, but this definition may also be unconstitutionally vague. The vagueness is caused by the fact that it would be unclear which violations of the Terms of Service would meet the definition of unauthorized access under the CFAA. Thus, the court granted Drew’s motion for acquittal and held that allowing a violation of MySpace’s Terms of Service to constitute an intentional unauthorized access of a computer would “result in transforming section 1030(a)(2)(C) into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanant criminals.”

In Drew, the district court was hesitant to label a violation of a web site’s terms of service as criminal behavior. The court did not want to create an entire group of “misdemeanant criminals” merely by declaring that a violation of a website’s terms of service results in a criminal misdemeanor conviction. This is a logical interpretation of the CFAA because most people violate a website’s terms of service without any knowledge of such violation. Many Internet users are ignorant of the majority’s ruling on websites’ terms of service. This ruling, however, caused a woman who bullied a child via the Internet to receive no punishment for her actions. The confusion over the definition of “unauthorized action” under 18 U.S.C. § 1030 led to the exoneration of Lori Drew despite the brutal reality that her words led to a child’s suicide.

146. *Drew*, 259 F.R.D. at 458. “It has been held that ‘as a practical matter, a computer providing a “web-based” application accessible through the [I]nternet would satisfy the “interstate communication” requirement.’” *Id.* (alterations in original) (quoting Paradigm Alliance, Inc. v. Celeritas Tech., 248 F.R.D. 598, 602 (D. Kan. 2008)).
147. *Id.*
148. *Id.*
149. *Id.* at 466.
150. *Id.* at 466-67.
151. *Id.* at 466, 468.
152. *Id.* at 466.
As evidenced by Drew, courts are still very unsure about how to interpret laws relating to Internet issues. Internet predator and cyberbullying statutes fall into that category of new legislation. There is not much history concerning punishment of cyberbullying or abuse of the Internet, as it is a modern problem. Courts are still learning about social media and various technologies that facilitate cyberbullying. Developing a solution to bullying and harassment on the web while protecting free speech rights is very difficult because methods for cyberbullying and harassment are constantly evolving. Regulation and tracking of online activity is challenging, and courts are still exploring effective ways to prevent cyberbullying and harassment.

C. Bully-Victim Situations Before and After School

Although many people think that bullying takes place mainly before or after school, research has shown that approximately forty to seventy-five percent of bullying takes place in school.\(^1\) Most often, bullying occurs during breaks: at recess, in bathrooms, or in locker rooms.\(^2\) However, bullying can also take place in the classroom depending on the level of supervision. Thus, “behavior, attitudes, and routines” of authority figures at school have a big impact on the extent of bullying.\(^3\)

There are three required elements or conditions of a bully-victim situation: (1) Bullying is an intentional act. A child who bullies wants to harm the victim—it is no accident; (2) Bullying is a repeated occurrence. The victim must be a target of harassment repeatedly; and (3) Bullying involves a power deferential. Generally, there is a disparity of power between the victim and the bully, with the bully being more powerful.\(^4\)

Bullies and victims generally display certain tendencies or traits. Victims tend to fall into a two different categories. First, “the passive or submissive victim” tends to be quiet and sensitive.\(^5\) These students are usually not confident and have few friends.\(^6\) Second, the “provocative victim” can be restless or clumsy, and he may be quick-tempered.\(^7\) Also, the provocative victim may try to bully weaker or

\(^1\) U.S. DEP’T OF HEALTH & HUMAN SERVS., supra note 117, at 6.
\(^2\) Id.
\(^3\) Id.
\(^4\) Id. at 5.
\(^5\) Id. at 8.
\(^6\) Id.
\(^7\) Id. at 9.
more vulnerable students. As for the bullies, they tend to be more aggressive towards authority; they have a need to dominate over other students by force and threats; they tend to be stronger than their peers; they are usually hot-tempered; and they can be manipulative.

Despite the fact that bullying has been around for decades or longer, researchers and lawmakers have only recognized it as a real problem since the 1970s. Bullying affects many students across the country each year. Even though most people think bullying happens at the bus stop or after school, in reality, it occurs mostly during school. Furthermore, bullies tend to be strong-willed, angry children, and victims tend to be passive, easily angered, sensitive, and less confident in themselves. Further, group bullying involves peer pressure or group-think mentality that recruits even neutral students into the bullying circle. Bullying is a serious problem in our schools to which researchers are trying to bring awareness and lawmakers are trying to solve.

IV. SOLUTIONS TO SCHOOL BULLYING

State and federal governments have made various efforts to prevent bullying in schools. Most states have implemented anti-bullying legislation. Others have prosecuted bullies as in the Phoebe Prince case. The federal government supports the states in these efforts and implements its own policies that address bullying. Whatever the solution may be, states and the federal government are taking actions to prevent the bullying epidemic from continuing on to the next generation. Below is a discussion of a variety of ways that state and federal governments are taking matters into their own hands.

A. State Anti-Bullying Statutes

In response to this troubling bullying trend, forty-nine states currently have anti-bullying legislation on the books. Along with this trend, forty-five state laws require school districts to adopt bullying policies. Forty-two states contain “clear statements” prohibiting bullying, and most state legislatures mention bullying or harassment specifically when framing anti-bullying legislation. Because of the increase in Internet-based bullying, thirty-six states also include

160. Id.
161. Id. at 10.
162. High, supra note 26. Montana is the only state without anti-bullying legislation.
163. See Kennedy, supra note 1.
provisions in their education codes prohibiting cyberbullying.\textsuperscript{166} About half of the states give the legislature the power over anti-bullying policy development.\textsuperscript{167} Similar to the policies Stuart Chaifetz encouraged in Akian’s story, these types of laws “set expectations for districts to develop local polices, and prescribe specific provisions in school district bullying policies.”\textsuperscript{168} The rest of the states either allow the legislative body and state department of education to control anti-bullying policy decisions, or local districts have the discretion over anti-bullying policy development.\textsuperscript{169}

In 1999, Georgia became the first state to enact anti-bullying legislation.\textsuperscript{170} Georgia’s statute O.C.G.A. § 20-2-751.4\textsuperscript{171} enacted policies that “prohibit[] bullying of a student by another student.”\textsuperscript{172} Section 20-2-751.4(a) defines bullying as behavior that occurs on school property, at school bus stops, in school vehicles, or by use of school technology.\textsuperscript{173} The following are examples of bullying from this portion of the statute:

(1) Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so;
(2) Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm; or
(3) Any intentional written, verbal, or physical act which a reasonable person would perceive as being intended to threaten, harass, or intimidate.\textsuperscript{174}

The statute goes on to explain that each local school board shall adopt a policy that prohibits bullying.\textsuperscript{175} Similarly, under the statute, local school boards must make parents aware of the new anti-bullying policies, and the school boards must inform parents if their child has been involved in a bullying situation at school.\textsuperscript{176} Along with these guidelines that apply to local school boards, there are also procedures

\textsuperscript{166} Id.
\textsuperscript{167} Id. at 19.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Hart, \textit{supra} note 35, at 1115.
\textsuperscript{171} O.C.G.A. § 20-2-751.4 (2012).
\textsuperscript{172} O.C.G.A. § 20-2-751.4(b)(1).
\textsuperscript{173} O.C.G.A. § 20-2-751.4(a).
\textsuperscript{174} O.C.G.A. § 20-2-751.4(a)(1)-(3).
\textsuperscript{175} O.C.G.A. § 20-2-751.4(b). Each local board had to adopt a policy that prohibits bullying no later than August 1, 2011. O.C.G.A. § 20-2-751.4(b)(1). These policies must require that a student who has committed three acts of bullying in one year be moved to an alternative school. O.C.G.A. § 20-2-751.4(b)(2).
\textsuperscript{176} O.C.G.A. § 20-2-751.4(b)(3), (4).
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that apply to the Georgia Department of Education (DOE). The Georgia DOE must provide information to administrators, parents, and teachers on its website. Currently, the Georgia DOE website includes a Bullying Prevention Tool Kit, which provides information on Georgia bullying laws as well as many bullying prevention resources including websites, hotlines, and training sites.

Moreover, Georgia's statute mandates which provisions must be included in a student code of conduct. O.C.G.A. § 20-2-751.5 states that each school's student code of conduct must contain provisions that address verbal assault, physical assault, disrespectful conduct towards others, sexual harassment, battery of other students, damage to property, possession of a weapon, and possession of drugs and alcohol.

Georgia's anti-bullying statutes lay out a plan that schools must implement, but the statutes also give schools some leeway in developing their own policies to effectively address bullying issues particular to their student bodies. This deference allows Georgia schools to address the problem individually, thereby giving schools flexibility for more effective diagnosis and treatment. If state legislatures enable schools and school districts to develop bullying policies, school districts can tailor their rules to meet the needs of the students in their district. Bullying and harassment problems vary from school to school and district to district. Georgia's statute allows for these variations by giving each school district the power to develop rules to prevent bullying in their local schools.

Maryland is another state with an exceptional bullying statute. Under Maryland Code § 7-424, Maryland defined bullying and implemented mandatory reporting procedures. The Maryland anti-bullying law reads, "[b]ullying, harassment, [and] intimidation' means intentional conduct . . . that [c]reates a hostile educational environment" and that occurs on school property or at a school event or on a school bus. Under this law, a county school board must report this type of bullying

177. O.C.G.A. § 20-2-751.4(c). The Georgia Department of Education was required to develop a "model policy regarding bullying" by January 1, 2011. Id.
178. Id.
181. Id.
182. MD. CODE ANN., EDUC. § 7-424 (LexisNexis 2008).
183. MD. CODE ANN., EDUC. § 4-724(a).
184. Id.
against a student.\textsuperscript{185} This statute also mandates that Maryland's Department of Education create a standard bullying report form.\textsuperscript{186} This form must identify the bully's victim, describe the bullying incident, indicate the location of the incident, identify any physical injury suffered by the victim, and include any other pertinent information about the incident.\textsuperscript{187} Then, the Department of Education must submit a report compiling the bullying incident reports filed by the county school boards to the Maryland Senate Education, Health, and Environmental Affairs Committee and the Maryland House Ways and Means Committee.\textsuperscript{188}

The Maryland legislature took a unique approach to bullying. Maryland requires mandatory reporting. This places pressure on teachers and administrators to report any incidences of bullying to the school board. Likewise, it places pressure on the school board to report all bullying to the state Department of Education. Placing this responsibility on school officials ensures that they will take the problem of bullying seriously. Also, similar to other states, the legislature used statistics to determine the root causes of bullying in Maryland. Through the use of the bullying forms, schools and districts specifically diagnose particular areas of concern regarding student victims and bullies. This system helps to individually break down the problem of bullying to determine its cause. As a result, these laws enable Maryland schools to develop effective solutions to the problem of bullying.

Legislatures across the country have enacted laws to put an end to the bullying epidemic. Some states, including Maryland, have required teachers and administrators to report bullying to the local school board. Others, like Georgia, have required school districts to adopt some form of anti-bullying statute. Also, states have required that anti-bullying rules and procedures are posted in a public place.

B. Criminal Prosecution for Bullies

As discussed earlier in Phoebe Prince's story, some states have given their respective criminal justice systems a role in bullying prevention. Traditionally, schools have held the power over the prevention of school bullying, exclusively. However, with states enacting anti-bullying legislation and treating bullying as criminal conduct, there appears to be a shift toward the criminal justice system handling severe cases of bullying.\textsuperscript{189} Seven states now include provisions imposing criminal

\textsuperscript{185} MD. CODE ANN., EDUC. § 7-424(b)(1).
\textsuperscript{186} MD. CODE ANN., EDUC. § 7-424(c)(1).
\textsuperscript{187} MD. CODE ANN., EDUC. § 7-424(c)(2).
\textsuperscript{188} MD. CODE ANN., EDUC. § 7-424(f).
\textsuperscript{189} U.S. DEP'T OF EDUC., supra note 136, at 19-20.
sanctions for bullying behavior. Missouri's state law mandates that schools impose sanctions on school officials who fail to comply with the mandatory reporting requirements. Additionally, some states have placed bullying provisions into their juvenile justice codes. For example, North Carolina passed a law criminalizing cyberbullying as a misdemeanor for juveniles. Similarly, Kentucky passed the "Golden Rule Act," which amended provisions of its education code and referenced statutes in the criminal code related to bullying. In Massachusetts, where the Phoebe Prince tragedy occurred, sixty-one percent of registered voters expressed "approval for making school bullying a crime."

Since states have begun criminalizing bullying behavior, a trend toward serious punishments for students who bully in school exists. The media's coverage of this issue and highlighting of poignant stories, such as Phoebe Prince's tragic suicide, have pushed legislatures and local governments to take very tough stances on bullying. The most controversial problem related to the criminalization of bullying is that not only are the victims children, the bullies themselves are also children who learn the behavior from others, whether it is from parents, other adults in their lives, or fellow students. Therefore, a lingering question is whether it is fair to punish children for bullying when they may or may not fully grasp the effects it can have on their peers. For example, Phoebe Prince's bullies probably never thought that their taunting and bullying was life-threatening, but it was to Phoebe. Juveniles typically have little appreciation for long-term consequences. Thus, is criminally punishing children for bullying actually conveying the message that bullying is wrong? These are some questions that lawmakers will need to flesh out. These strict laws may enable bullying not only to negatively impact the future of the victim but also the future of the bully.

C. Federal Solutions to Bullying

Because the Constitution does not mention education, the Tenth Amendment gives power over education to the states. There are

190. Id. at 20.
191. Id.; see also MO. ANN. STAT. § 167.117.1 (West 2000).
196. U.S. CONST. amend. X.
no federal laws directly dealing with school bullying, but sometimes, other laws collaterally help protect students from bullying. Although the federal government has implemented policies that help to prevent bullying, some scholars believe that there should be a national bullying statute.\textsuperscript{198}

1. Title IX. Although people who hear mention of Title IX\textsuperscript{199} probably think about women's sports, Title IX applies to bullying as well. Title IX is a federal law that prohibits all discrimination on the basis of sex, including harassment and bullying, in schools that receive federal funding.\textsuperscript{200} Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."\textsuperscript{201} This statute applies to almost all public schools and school activities.\textsuperscript{202} The regulations in Title IX require all "federally funded education programs" to take certain precautions to address sex discrimination, including (1) designating an employee to ensure the school or educational entity is complying with Title IX; (2) "adopting and publishing grievance procedures" that allow the school to quickly and efficiently resolve complaints; and (3) implementing a policy that prevents sex-based discrimination.\textsuperscript{203}

Public school districts violate Title IX when sex-based discrimination by peers "creates a hostile environment for the victim and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees."\textsuperscript{204} Although there is a common misconception that Title IX applies only to women, Title IX protects both male and female students from sex-based harassment and discrimination in schools.\textsuperscript{205}

\textsuperscript{197} Id. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.


\textsuperscript{200} Id. § 1681(a); see also \textit{Title IX Protections from Bullying and Harassment in School: FAQs for Students}, NAT'L WOMEN'S LAW CTR. (Dec. 12, 2011), [hereinafter \textit{Title IX Protections}].

\textsuperscript{201} Id.

\textsuperscript{202} \textit{A Basic Guide to Title IX}, NAT'L WOMEN'S LAW CTR. 1, [hereinafter \textit{Title IX Protections}].

\textsuperscript{203} Id. at 2.

\textsuperscript{204} Id.

\textsuperscript{205} Id.
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Under Title IX, harassment can take many forms including verbal acts, like name-calling, and physically threatening actions.\textsuperscript{206} Again, for this type of bullying to be prohibited by Title IX, it must be “on the basis of sex.”\textsuperscript{207} Gender-based harassment is harassment or bullying because a student “does not conform to gender stereotypes.”\textsuperscript{208} For example, if students bully a female student because she wants to try out for the football team and not the cheerleading squad, this is gender-based harassment. The harassing student and victim do not have to be of the opposite sex; as long as the harassment is on the basis of sex, it is prohibited by Title IX.\textsuperscript{209}

Gender-based harassment creates a hostile environment when it is so “sufficiently severe, pervasive, or persistent that it interferes with or limits a student’s ability to participate in or benefit from school.”\textsuperscript{210} Thus, a public school, under Title IX, must take action about sex-based bullying that it knows or reasonably should know about. A school must investigate this harassment in a “prompt, thorough, and fair way.”\textsuperscript{211} The school must then take effective steps to end the harassment and prevent it from occurring again.\textsuperscript{212} As a last resort, students who feel that their school is not complying with Title IX can file a complaint with the United States Department of Education’s Office for Civil Rights.\textsuperscript{213}

Under Title IX, all federally funded educational entities must investigate, end, and prevent future gender-based bullying. This statute works by providing protections for a specific type of bullying—gender-based bullying. Title IX partners with state anti-bullying legislation to protect all students’ rights to an equal and safe education.

2. Other National Anti-Bullying Initiatives. The Safe and Drug-Free Schools and Communities Act\textsuperscript{214} is part of the No Child Left Behind Act of 2001.\textsuperscript{215} Even though this Act provides federal support to promote school safety, it does not address bullying in schools verbatim. The purpose of this Act is “to support programs that prevent violence in and around schools” and to support “community efforts and

\begin{footnotes}
\item[206] Id.
\item[207] Id. (internal quotation marks omitted).
\item[208] Id.
\item[209] Id.
\item[210] Id.
\item[211] Id.
\item[212] Id.
\item[213] Id.
\end{footnotes}
resources to foster a safe and drug-free learning environment that supports student academic achievement.\textsuperscript{216} This statute gives schools the ability to ensure that their students feel safe and have the ability to learn in a secure environment.

The United States Department of Education hosted its Third Annual Bullying Prevention Summit in August 2012.\textsuperscript{217} This summit focused on “coordinating anti-bullying efforts with the best available research.”\textsuperscript{218} The United States Department of Justice also introduced some strategies and steps it is taking to prevent school bullying.\textsuperscript{219} Likewise, panels addressed how to support and understand children who bully and suicide prevention strategies. A variety of speakers, including Education Secretary Arne Duncan, spoke about pertinent topics relating to bullying.\textsuperscript{220} This type of summit is beneficial to the anti-bullying movement because it demonstrates that the federal government supports the local school districts in their fight against school bullying. These public summits promote the development and discussions of unique strategies to prevent bullying and different ways schools can build a safe, strong community environment.

As a result of the lack of federal laws that directly address bullying, some scholars are calling for a national anti-bullying statute.\textsuperscript{221} Supporters of a national statute have a variety of reasons to support this idea. First, courts could provide a uniform interpretation of a federal anti-bullying statute. Thus, there would be no need for extended litigation over various anti-bullying issues in other states. The Supreme Court would be able to establish a national anti-bullying standard once and for all.\textsuperscript{222} Likewise, Congress could “condition disbursement of federal education funds on acceptance of this national anti-bullying statute.”\textsuperscript{223} This has been done before with Title IX.\textsuperscript{224} Second, the national anti-bullying statute could contain important school speech rights components that the courts have established previously. For example, the national anti-bullying statute could contain specific

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{216} 20 U.S.C. § 7102.
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Id.} Acting Associate Attorney General Tony West discussed initiatives to prevent school bullying as well as strategies to prevent cyberbullying. \textit{Id.}
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} See, e.g., Speraw, supra note 198.
\item \textsuperscript{222} \textit{Id.} at 1190.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} \textit{Id.}
\end{enumerate}
\end{footnotesize}
language from these landmark cases like the substantial, material disruption standard in Tinker.\textsuperscript{225} This would help clarify conflicting definitions of bullying and set a specific standard of behavior that is categorized as bullying. Third, a national anti-bullying statute would provide a solution to students bullied in states, such as Montana, who have not enacted an anti-bullying statute or states whose anti-bullying legislation is minimally protective. This ensures that students in states across the country have protection from school bullying regardless of what their state legislature has enacted.

There are two ways to implement this national anti-bullying standard. One way is to draft a model anti-bullying statute that states must use in structuring their anti-bullying legislation. Another way is for Congress to enact a national anti-bullying statute. If the goal of this statute is uniformity, then the latter would be more effective. It would ensure that there is no debate about how states should implement these procedures at the local level, and it would eliminate any confusion over the definition of terms or standards used to evaluate bullying in the schools.

Although federal laws specific to bullying do not exist, the federal government has enacted laws that collaterally impact bullying. Also, the federal government has recently worked tirelessly to bring awareness about the serious problem of school bullying and helped provide training and resources to educational leaders across the country. However, some feel the federal government is not doing enough to stop bullying.\textsuperscript{226} These individuals believe that a national anti-bullying statute or a model anti-bullying statute is the most effective solution to school bullying. A national standard may help relieve some inconsistency and confusion when it comes to anti-bullying policies at the state level and in local school districts.

D. Intra-School Solutions to Bullying and Community Building

Motivated by tragic stories, such as Amanda Todd’s, many schools have implemented creative methods to encourage student positivity and curtail bullying. For example, many middle and high schools sponsor programs that promote student communication with teachers and

\textsuperscript{225} Id. at 1191.
\textsuperscript{226} Id. at 1192. The model statute in this law review article borrows from “the most strongly-drafted state anti-bullying legislation.” Id. First, the article states that anti-bullying legislation must have a “clear purpose statement.” Id. Second, the statute must define bullying and harassment. Third, the model statute must provide for a reporting system. Finally, the model legislation should include a “process for handling bullying incidents.” Id.
guidance counselors concerning incidences of bullying. These programs can take the form of leaving a note in a comment box or making a face-to-face appointment with a guidance counselor to report a bullying incident. The purpose of these reporting programs is to foster an open dialogue between students and teachers about bullying. As a result, students will feel more comfortable when they need to discuss a concern related to bullying with an authority figure. Another unique intra-school solution is peer mediation. Peer mediation programs encourage students to solve problems amongst themselves (with some supervision). Students can apply anonymously for peer mediation, or they can discuss this option with their guidance counselor. These programs are structured to allow trained student mediators to help feuding parties solve their disagreement. Peer mediation builds student communication, problem-solving, and critical thinking. Also, because students become more aware of their peers' views and struggles, peer mediation helps build a community of openness and tolerance in schools.

As a result of the growing bullying problem, many education programs focus on building a strong, healthy classroom culture to prevent bullying. One organization, Teach for America, proposes that teachers provide non-academic activities and team-building experiences to help promote tolerance and patience among students. For example, it encourages teachers to focus not only on academic material but also on modeling and teaching values such as tolerance, respect, and empathy. Then, teachers reward students who demonstrate these values in the classroom. This unique view allows teachers to nurture and grow their classroom environment into a place where students respect one another. This mutual respect would prevent the bullying problem from beginning in the first place.

Schools and educational organizations are striving to develop original solutions to bullying. These solutions include peer mediation programs, anonymous bullying reporting, team-building instruction, and positive classroom culture activities. Students tend to respond well to positive reinforcement and unique lessons they can apply to their everyday lives.

227. Prior to law school, the Author was a middle school educator in Atlanta. This particular school had a specific system for students to report bullying. Students would fill out a detailed and kid-friendly form with the guidance counselor about the bullying incident. Then, the guidance counselor would address the bullying incident appropriately. This included taking steps such as calling parents, notifying teachers, or even mediating the situation between students.

228. The Author participated in peer mediation when she was in grade school. It was very effective and helped students to solve their problems independently.
Therefore, the solution to bullying may lie in these more holistic methods rather than in legislative or legal means.

V. CONCLUSION

For students across America today, bullying is a very real problem. On the nightly news, viewers see horrific stories of the bullying that takes place in local school districts. Many researchers and lawmakers have taken steps to bring light to this dark issue.

The Supreme Court has attempted to address the issue of bullying by helping schools develop policies that protect students' First Amendment rights while at the same time protecting students from harmful bullying. Is the solution to this student-speech issue more speech or less speech? Restricting student speech does not always expose students to the same degree of varying opinions and ideals as encouraging speech. Thus, students may not be as informed about other beliefs that may or may not apply to them. This naiveté and lack of information may cause students to be intolerant of other students. Therefore, prohibiting students from discussing controversial issues may encourage bullying and intolerance among students. On the other hand, if schools allow more speech about these issues, it may cause dissension among students. Students may feel isolated based on what other students think of them or say to them. Because of a lack of maturity, students may be easily offended which could lead to harassment of the student or students that upset or offended them. Whether more speech or less speech is necessary to protect student speech rights, while encouraging learning and fostering safety at the same time, will have to be fleshed out in future Supreme Court decisions.

To solve the bullying problem, most states have enacted anti-bullying statutes to protect students and encourage school districts to implement their own anti-bullying policies. Some states have mandatory bullying statutes that require school administrators to report incidences of bullying to the school district. Also, some states require public posting of bullying policies on a website or other public forum. Moreover, some states, in extreme cases, are prosecuting school bullies in superior and juvenile court. In these states, communities are encouraging lawmakers to set harsh penalties for student bullies. Is this the most effective way to prevent bullying? Do juvenile students fully understand the impact of their words and actions on their peers? Lawmakers need to fully answer these questions in order to ensure the safety and development of all students.

On a national level, the federal government has enacted several laws such as Title IX and No Child Left Behind that indirectly address bullying. Similarly, the federal government has brought attention to
bullying as a national issue by calling on schools and communities to develop effective solutions to prevent bullying. There are some who say that this is just not good enough. These individuals propose that the federal government develop a uniform national anti-bullying statute. Then, the states would equally implement the student speech law interpreted and pronounced by the Supreme Court. Likewise, there would be no litigation of each state's individual anti-bullying statute. If there was a national statute, courts could interpret and provide guidance on a uniform standard. As a result, the Supreme Court's findings would establish a national standard applicable to all school districts. Although the most effective way to implement this uniform standard would likely be in the form of a national anti-bullying statute, a model anti-bullying statute is also a possibility. A model statute would help states define the problem of bullying and answer some difficult questions states may have in developing their own anti-bullying legislation.

Although there are many different ways federal and state governments are approaching the bullying problem, both are providing effective solutions. As during any period of awakening in American society, there is a growth and transition phase. The solution to the problem might not always come as quickly as society would like it to. But we must remain encouraged and hopeful for the future that one day students can go to schools free of bullying and harassment and feel special, successful, and, most importantly, safe.

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