

Spring 2015

Biting the Bullet: Why the Gun Free Schools Act Must be Repealed to Protect Student Speech, 49 J. Marshall L. Rev. 593 (2015)

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BITING THE BULLET: WHY THE GUN FREE SCHOOLS ACT MUST BE REPEALED TO PROTECT STUDENT SPEECH

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I. A BOY AND HIS BREAKFAST

Seven-year-old Joshua Welch arrived at his Maryland school on a cool March morning in 2013 before class began, just like any other school day. He gathered with his friends in the cafeteria and collected his breakfast, which included a toaster pastry. As Joshua slowly ate his breakfast, he amused himself by attempting to chew it into different shapes. A rectangular tart soon became a misshapen mountain. After another few bites, the strawberry-filled tart took on the crude shape of a two-dimensional gun. So young Joshua did what any other kid his age would do: he “aimed” the toaster pastry and said “bang.”¹

* J.D. Candidate 2016, The John Marshall Law School, Chicago, IL; B.A. Anthropology 2008, University of Central Florida (#GoKnights), Orlando, FL. First and foremost, I thank my parents, Jill and Scott, for never reprimanding me whenever I thought a stick looked like a gun, and for always having the confidence that no matter what decisions I made in life, I would probably turn out okay. I also thank my editors for catching what I did not and recognizing that so much of who I am is embedded in this comment. Finally, I dedicate this

Unfortunately for the second-grader, his pop-tart pistol started a chain reaction that soon spiraled out of his control. Joshua's actions caused the teacher to get upset.² She reported the incident to the school principal, and he in turn suspended Joshua for two days per the school district's zero tolerance policy.³ The school notified Joshua's parents of his suspension, telling them that guns have no place in school, whether imaginary or not.⁴ For playing with his toaster pastry, Joshua is branded for the rest of his school life.⁵ A permanent mark will follow him to every public school he attends, all because he chewed his breakfast into the shape of an "L" and had the audacity to think it looked like a gun.⁶

This Comment targets some of the worst offenders and failures of zero tolerance policies. Part II of this Comment explores the history of zero tolerance, which in many instances has the effect of "throwing out the baby with the bathwater."⁷ Part II further tracks

comment to every teacher I know—my mom, my girlfriend, and friends I made in Japan, to list a few—who encounters kids like me every day and perseveres. They deserve to be recognized for their hard work and should be unshackled from burdensome bureaucratic restrictions that limit their ability to reach students who need help the most.

1. Donna St. George, *Anne Arundel Second-Grader Suspended For Chewing His Pastry into the Shape of a Gun*, WASH. POST (Mar. 4, 2013), www.washingtonpost.com/local/education/anne-arundel-second-grader-suspended-for-chewing-his-pastry-into-the-shape-of-a-gun/2013/03/04/44c4bbcc-84c4-11e2-98a3-b3db6b9ac586_story.html.

2. See Wayne Harris, *Pop Tart Gun, Josh Welch: School Suspends 7-Year-Old for Biting Pop Tart Pastry into "Shape of Gun"*, ABC15.COM (Mar. 4, 2013, 4:42 PM), www.abc15.com/news/national/pop-tart-gun-josh-welch-school-suspends-7-year-old-for-biting-pop-tart-pastry-into-shape-of-gun (reporting Joshua as saying the teacher was "pretty mad"). Although the school board later said that Joshua was suspended for ongoing incidents, this reasoning conflicts with the story the school gave his parents the day he was suspended. *Id.* According to the original notice given to the parents, the suspension revolved entirely around the boy's actions at breakfast that morning. *Id.*

3. See MD. CODE ANN., EDUC. § 7-305(a)(1) (West 1996) (giving broad discretion to school principals to suspend students as long as they act within the confines of the county board's rules on suspensions); Anne Arundel County Public Schools, Policy JCC(D)(5) (issued Aug. 20, 2014), www.aacps.org/aacps/boe/board/newpolicy/Sections/section_900/adminreg902.03D.pdf (vesting in the principal sole determination of a student's guilt and punishment regarding possession of a weapon).

4. See Harris, *supra* note 2 (noting the school informed parents that "[a] student used food to make an inappropriate gesture.").

5. Joe Burris, *Official Says Arundel Schools Should Uphold Suspension in Pastry Gun Incident*, BALTIMORE SUN (Jun. 30, 2014), http://articles.baltimoresun.com/2014-06-30/news/bs-md-pastry-kid-recommend-0701-20140630_1_pastry-gun-incident-b-j-welch-joshua-welch [hereinafter Burris, *Pastry Gun*].

6. *Id.*

7. Glenn W. Muschert & Eric Madfis, *Fear of School Violence in the Post-Columbine Era*, in RESPONDING TO SCHOOL VIOLENCE: CONFRONTING THE COLUMBINE EFFECT 13, 29 (Glenn W. Muschert, et al. eds., 2014) [hereinafter Muschert & Madfis, *Fear of School Violence*].

the state of free speech in schools, and the current analyses courts use to address threatening language. While many articles have addressed zero tolerance in schools, very few have discussed the pendulum swinging back the other way.⁸

Studies have shown that zero tolerance policies adversely affect minority students,⁹ and the extensive reach of zero tolerance can have a chilling effect on all student speech.¹⁰ Part III of this comment scopes out some of the most appalling examples of zero tolerance abuses,¹¹ while also analyzing courts' inabilities to correct the problems.¹² Part III continues by reloading the oft-debated data about school violence to explore why extremely rare incidents like school shootings draw such drastic countermeasures as zero tolerance.¹³ Finally, Part IV takes aim at plans intended to maintain school safety while also providing students with an adequate learning environment.¹⁴ Part IV shoots for providing

8. See Rebecca Morton, Note, *Returning "Decision" to School Discipline Decisions: An Analysis of Recent, Anti-Zero Tolerance Legislation*, 91 WASH. U. L. REV. 757, 759 (2014) (discussing anti-zero-tolerance legislation in Texas, North Carolina, Colorado, and Massachusetts).

9. Jacob Kang-Brown et al., *A Generation Later: What We've Learned About Zero Tolerance in Schools*, 3-4 (2012), www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf. Middle schools suspend black students nearly four times as often—and Latino students twice as often—as whites. *Id.* at 3.

10. See Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 BYU L. REV. 1371, 1390 (2005) (asking whether students will have to self-censor in order to avoid triggering a punishment).

11. See, e.g., Mayra Cuevas, *10-Year-Old Suspended for Making Fingers into Shape of Gun*, CNN (Mar. 4, 2014, 9:26 PM), www.cnn.com/2014/03/04/us/ohio-boy-suspended-finger-gun/ (suspending an Ohio student for making a finger gun); Maya Rhodan, *Gun Hand Gesture Gets Student Suspended, Revives Debate*, TIME (Sept. 10, 2013), <http://swampland.time.com/2013/09/10/hand-gesture-of-gun-gets-student-suspended-revives-debate/> (pointing his fingers in the shape of a gun gets a Maryland student suspended); Adam Edelman, *Boy, 7, Suspended for Throwing Imaginary Grenade*, NEW YORK DAILY NEWS (Feb. 5, 2013, 6:24 PM), www.nydailynews.com/news/national/boy-7-suspended-throwing-imaginary-grenade-article-1.1256200 (throwing an imaginary grenade to "save the world" resulted in a Colorado boy's suspension).

12. See generally Salgado, *supra* note 10 (providing examples of cases where the court failed to alleviate a student's punishment).

13. SIMONE ROBERS, ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2014 at 7 (2015), www.bjs.gov/content/pub/pdf/iscs14.pdf.

14. E.g., Arne Duncan, U.S. Sec'y of Educ., *Rethinking School Discipline*, Remarks at The Academies at Frederick Douglas High School, Baltimore, MD (Jan. 8, 2014), www.ed.gov/news/speeches/rethinking-school-discipline (outlining alternatives to removal from the classroom); Jeffrey R. Sprague, et al., *Encouraging Positive Behavior*, in RESPONDING TO SCHOOL VIOLENCE: CONFRONTING THE COLUMBINE EFFECT, 157, 158 (Glenn W. Muschert, et al. eds., 2014) (reinforcing positive behavior creates a better learning environment than punishing negative behavior); Christopher Boccanfuso & Megan Kuhfeld,

students with enough leeway to use their imagination without school administrators firing off suspensions left and right.

II. HOW ZERO TOLERANCE AND THE COURTS LIMIT THE ABILITY TO “EXPRESS YOURSELF”¹⁵ IN SCHOOL

A. *From the Streets to the Schools—The Evolution of Zero Tolerance*

Zero tolerance began as a customs enforcement tool in the 1980s.¹⁶ Zero tolerance gave government officials a broad brush with which to paint an alleged violator.¹⁷ These policies eliminated the guesswork in handing down punishments: if someone did the crime, then he or she must do the time.¹⁸ The practice quickly gained traction in other areas, moving from customs enforcement to pollution regulation and eventually into the school system.¹⁹

The underlying premise of zero tolerance policies is that relatively minor offenses left unchecked will lead to greater and greater offenses causing serious disruption or destruction.²⁰ In

Multiple Responses, Promising Results: Evidence-Based, Nonpunitive Alternatives to Zero Tolerance, CHILD TRENDS (Mar. 2011), www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf [hereinafter Boccanfuso & Kuhfeld, *Multiple Responses*] (creating programs that emphasize positive reinforcement can benefit children).

15. N.W.A, *Express Yourself*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988). The irony of referencing this song is that the group realized that to evade censorship and promote free expression it would have to avoid much of the language and ideas that it embraced in other songs. *Id.* Similarly, students must abandon parts of themselves in order to evade discipline in the current school structure. See Salgado, *supra* note 10, at 1405 (noting that the way teenagers verbalize their identities is through “the media they consume,” including rap and hip hop music).

16. Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 2 (2000), www.indiana.edu/~safeschl/ztze.pdf.

17. Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 88, 88–89 (2011).

18. See Philip Mongan & Robert Walker, “*The Road to Hell Is Paved With Good Intentions*”: A Historical, Theoretical, and Legal Analysis of Zero-Tolerance Weapons Policies in American Schools, 56 PREVENTING SCH. FAILURE 233, 238 (2012) (stating that a lack of *mens rea* in zero tolerance laws leaves uncertainty as to the correct offender).

19. Skiba, *supra* note 16, at 2.

20. See Teske, *supra* note 17, at 89 (citing the “Broken Windows” theory of crime as the basis for zero tolerance).

This theory analogizes the spread of crime to a few broken windows in a building that go unrepaired and consequently attract vagrants who break more windows and soon become squatters. The squatters set fires inside the building, causing more damage or maybe destroying the entire building. The broken windows theory argues that communities should get tough on the minor offenses and clean up neighborhoods to deter serious crimes. Thus, it becomes

order to prevent the most extreme offenses, the slightest infractions need to be punished.²¹ Shifting to zero tolerance also allowed officials to punish perpetrators where they were previously unable.²²

In 1994, the United States Congress entered the discussion of zero tolerance in public schools by enacting the Gun Free Schools Act (GFSA).²³ This law required all states receiving federal education dollars to mandate expulsion for students who possessed a weapon on school grounds.²⁴ GFSA defined “weapon” pursuant to federal statute as a firearm, which by way of an explosive can project an object.²⁵ Using a broader definition that included individual gun parts as well as “any destructive device” gave officials a wider net to cast on students.²⁶

GFSA mandated that students who possessed a firearm on school grounds receive a minimum of a yearlong expulsion.²⁷ The federal law did include an exception, allowing school superintendents to modify in writing the expulsion requirement on

necessary to punish minor offense violators. *Id.*

21. *See* Skiba, *supra* note 16, at 3 n.1 (explaining that definitions of zero tolerance differ slightly between studies, but the more common definitions emphasize “punishing a range of behaviors, both major and minor, equally severely.”). Unless otherwise noted in this comment, zero tolerance refers to the punishment of students through removal from the classroom setting for predetermined forbidden actions.

22. *See* *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (holding that students have Due Process rights to notice and evidence of the charges against them before being expelled from school).

23. Gun Free Schools Act, 20 U.S.C. § 8921 (1994), *repealed by* Gun Free Schools Act (GFSA), 20 U.S.C. § 7151 (2002).

24. *Id.* Congress can require states to adopt policies that it wanted to promote through conditional spending, made constitutional through *South Dakota v. Dole*, 483 U.S. 203 (1987). Congress’s goal to eliminate guns from campuses served the general welfare. *Cf. id.* at 208 (prohibiting persons under age 21 served the general welfare). Congress gave states the option to continue to accept federal funding for education in return for enforcing the elimination of guns on campuses. *Cf. id.* (noting that South Dakota accepted the federal highway funds to improve its roads). Third, although education is primarily thought of as a state interest, the federal government had an interest in protecting students long enough for them to graduate and become active, participating taxpayers. *Cf. id.* at 208–09 (admitting that safe interstate travel is an important government interest). Finally, no “other constitutional provision” existed to prevent Congress from conditioning its spending on states adopting laws that expelled students for bringing guns to school. *Cf. id.* at 210 (“[T]he ‘independent constitutional bar’ limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.”).

25. 18 U.S.C. § 921(a)(3) (1996).

26. *Id.* The definition also included singular parts of a firearm: a student could be expelled for possessing a gun frame, a receiver, a silencer or muffler, or “any destructive device,” although the definition excluded antique firearms from the list. *Id.*

27. GFSA, 20 U.S.C. § 7151(b)(1).

a case-by-case basis.²⁸ Of course, the federal law only set the baseline for punishing students.²⁹ By tying federal funding to the adoption of zero tolerance policies, Congress wanted to strong-arm states to take matters of school safety seriously.³⁰

For example, Illinois enacted its own version of the GFSA that mandates expelling a student for at least one year but no more than two if the school found the student in possession of a weapon.³¹ But where Congress somewhat limited its definition of “weapon” to firearms, Illinois broadened the definition further to include “any other object if used or attempted to be used to cause bodily harm.”³² Furthermore, the Illinois legislature expanded the scope of zero tolerance to extend beyond school grounds and out to any event “bear[ing] a reasonable relationship to school.”³³ The increase in jurisdiction gave school officials a greater amount of control in their fight against violence in schools.³⁴

Like our criminal justice system at large, the primary goal of zero tolerance policies was deterrence.³⁵ Deterring violence and disruptive outbursts can be an important part of maintaining classroom order and safety, both of which are important goals in educational environments.³⁶ Teachers could better focus on teaching if predetermined student actions deemed detrimental to the classroom had pre-established, standardized punishments.³⁷ By

28. *Id.*

29. See Muschert & Madfis, *Fear of School Violence*, *supra* note 7, at 26 (writing that states and school districts soon expanded the list of expellable behavior).

30. 67B AM. JUR. 2D *Schools* § 384 (2015). Although courts have not typically ruled this way, the amount of education funding the federal government provides the states borders on the line where persuasion becomes compulsion, and the principles of federalism are threatened. *Cf.* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (discussing funding-based compulsion in the scope of Obamacare). Thus, whether states adopted zero tolerance policies to deal with school discipline because it was a good idea is irrelevant; they did not have a choice in the matter.

31. 105 ILL. COMP. STAT. 5/10-22.6(d) (West 1998).

32. 105 ILL. COMP. STAT. 5/10-22.6(d)(2).

33. 105 ILL. COMP. STAT. 5/10-22.6(d).

34. Mongan & Walker, *supra* note 18, at 233.

35. See *id.* at 238 (realizing that “deterrence is crucial to punishment policies” yet finding that zero tolerance policies punish too randomly to act as an effective deterrent for students).

36. *Contra* Kang-Brown et al., *supra* note 9, at 4 (finding zero tolerance policies have no benefit on classroom discipline or school safety). In fact, some studies show that zero tolerance policies might have negative effects on schools. *Id.* Less than five percent of expulsions and suspensions nationally are handed out because of weapons violations, but more than forty percent of punishments address simple classroom disruptions. *Id.* Statistics such as these seem to run counter to the intended goals of public education. That is, when students are sent out of the classroom, they understandably cannot learn *in the classroom*.

37. See Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U.

the year 2000, every school district in the country raced to create the toughest restrictions, hoping to avoid another Columbine-style attack.³⁸

While the federal GFSA took the initiative in prohibiting violence at schools by banning firearms, many states used it as a rallying cry.³⁹ In an attempt to crack down on dangerous behavior and prevent any and all violence at school, officials began punishing students for actions having little or nothing to do with possessing guns on campus.⁴⁰

In Illinois, the state legislature expanded the power of school officials to expel and suspend students for “gross disobedience or misconduct.”⁴¹ The legislature, however, failed to define what constitutes gross disobedience or misconduct.⁴² The broad or ill-defined terms used by the legislature created a wide net that can catch many students unaware.⁴³

L. REV. 1039, 1044–45 (determining that zero tolerance policies marked a shift away from corporal punishment as a way to maintain classroom order).

38. Aviva M. Rich-Shea & James Alan Fox, *Zero-Tolerance Policies, in* RESPONDING TO SCHOOL VIOLENCE: CONFRONTING THE COLUMBINE EFFECT 89, 90–91 (Glenn W. Muschert, et al. eds., 2014) [hereinafter Rich-Shea & Fox, *ZT Policies*]. *But cf.* Donna Leinwand Leger, “Active Shooter” Incidents on the Rise, USA TODAY (Sept. 25, 2014, 11:22 AM), www.usatoday.com/story/news/nation/2014/09/24/active-shooter-incidents-rising-fbi-finds/16158921/ (finding that despite the number of “active shooter” incidents increasing, the number of mass shootings has not increased over the last eight years).

39. *E.g.*, KY. REV. STAT. ANN. § 158.150(1)(a) (West 2006) (adding “[w]illful disobedience . . . use of profanity . . . or other incorrigible bad conduct” to the list of offenses for which a student can be suspended or expelled); OHIO REV. CODE ANN. § 3313.534 (West 1998) (requiring school boards in each city to adopt zero tolerance policies for “violent, disruptive, or inappropriate behavior, including excessive truancy”); *see also* Insley, *supra* note 36, at 1047 n.46 (providing a comprehensive list of all fifty states’ adoption of laws matching or based on the GFSA).

40. *See* Rich-Shea & Fox, *ZT Policies, supra* note 38, at 90–91 (expanding prohibited weapons to include knives, nail files, and scissors; including possession of drugs or alcohol; and adding fighting and even general disobedience to the list of offenses for which a student could be suspended or expelled). Overzealous school officials saw no end to the list of behaviors that needed to be stamped out in order to preserve the learning environment.

41. 105 ILL. COMP. STAT. 5/10-22.6(a).

42. *But see* Whitfield v. Simpson, 312 F. Supp. 889, 897 (E.D. Ill. 1970) (holding that a statute was not vague or overbroad for failing to define “disobedience”). While the court decided this case prior to the Illinois legislature passing the zero tolerance laws that this Comment discusses, the ruling still shows that the court defers to the legislature when it comes to statutory language in these instances. Further, Illinois was not the only state to add a broad catch-all to its zero tolerance laws. *See* S.C. CODE ANN. § 59-63-210 (2001) (allowing school officials to suspend students for “gross immorality, gross misbehavior, persistent disobedience,” or for violating any other rules handed down by the school board or the state).

43. *See S. Carolina Student Arrested After Writing About Shooting a Dinosaur*, RT (Aug. 21, 2014, 11:16 PM), <http://rt.com/usa/182004-gun-dinosaur>

When school officials apply these laws to student actions they can often abridge the students' due process rights.⁴⁴ The vast amount of wiggle room in zero tolerance laws gave school officials unilateral control over the students, making educational facilities seem much more like prisons.⁴⁵ By outlawing otherwise normal behavior and calling it disruptive, school officials have created an environment where children are not students who are there to learn, but are more like prisoners, ordered to obey.⁴⁶

Take, for example, Joshua Welch's story.⁴⁷ He chewed his breakfast pastry in such a way that he thought it looked like a gun.⁴⁸ Joshua's teacher believed that his strawberry breakfast tart posed enough danger to the rest of the class to report him to the principal.⁴⁹ His story highlights the extreme measures taken to thwart suspected disruption.

Joshua's story illustrates only the most ridiculous application of zero tolerance policies against guns.⁵⁰ Since the passage of GFSA, schools have punished students for pretending pencils were guns,⁵¹ suggesting a bubble battle,⁵² and throwing imaginary grenades.⁵³ All of these cases overshoot the supposed purpose of the law:

-student-suspension-arrest/ (suspending a student for writing a short story involving guns).

44. See *Colquitt v. Rich Tp. High Sch. Dist.* No. 227, 699 N.E.2d 1109, 1115 (Ill. App. Ct. 1998) (applying the due process standards of *Goss v. Lopez* to lengthier punishments). The Supreme Court has said that students have a property interest in the expectation of continuing education. *Goss*, 419 U.S. at 574. Some form of due process must be given before a student can be removed for a significant amount of time that would threaten his or her right. *Id.* at 584.

45. See Rich-Shea & Fox, *ZT Policies*, *supra* note 38, at 103–04 (applying zero tolerance and using school resource officers (SROs) “varies inversely” with traditional educational methods). SROs are police officers brought on to school grounds to enforce the school's zero tolerance policies. *Id.* at 93. Schools with more stringent zero tolerance policies tend to employ the use of SROs more liberally in enforcing those policies. *Id.* at 104.

46. *Id.* at 103.

47. Harris, *supra* note 2.

48. *Id.*

49. See St. George, *supra* note 1 (reporting that the assistant principal felt the entire incident warranted a letter to each student's parents explaining the disruption and that the school has counselors available should any student want one).

50. Cf. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611–12 (5th Cir. 2004) (punishing a student for two-year-old drawings “depicting the school under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons”).

51. *Two Boys Suspended for Pointing Pencils Like Guns*, RT (May 10, 2013, 8:16 PM), <http://rt.com/usa/boys-pencil-gun-point-118/>.

52. Alyssa Newcomb, *Kindergartner Suspended Over Bubble Gun Threat*, ABC NEWS (Jan. 20, 2013, 12:45 PM), <http://abcnews.go.com/blogs/headlines/2013/01/kindergartner-suspended-over-bubble-gun-threat/>.

53. Edelman, *supra* note 11.

preventing gun possession on school grounds.⁵⁴ As a result, we are left with school officials having a vast amount of control and students having little to no understanding of what actions will merit punishment.⁵⁵

Even after receiving a suspension or expulsion for an action, a student's problems may only get worse.⁵⁶ Schools will update a student's record to reflect any disciplinary actions against the student, including expulsions, suspensions, and sometimes even detentions.⁵⁷ The reason for the punishment often accompanies the mark as well, and this file stays with a student for his or her entire school career.⁵⁸ Increasingly, permanent marks against a student stem from school officials applying zero tolerance policies to student speech.⁵⁹

B. Restricted Speech in Schools

"Congress shall make no law . . . abridging the freedom of speech."⁶⁰ The Constitution makes it abundantly clear that the ability to speak freely is highly valued and an essential part of a functioning democracy.⁶¹ Furthermore, the Supreme Court has held that students, simply for being students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁶² But despite retaining the same rights as everyone else, students are not exempt from restrictions on those rights.⁶³

54. See 67B AM. JUR. 2D *Schools* § 384 (explaining that the act "encourages states [to punish] pupils for possessing guns at school[s]").

55. See American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, AMERICAN PSYCHOLOGIST 852, 854 (Dec. 2008), www.apa.org/pubs/info/reports/zero-tolerance.pdf (determining that the deterrent effect zero tolerance should produce likely creates more bad apples than prevents them).

56. See Mongan & Walker, *supra* note 18, at 234 (finding many students could be stuck with a permanent black mark on their record that could follow them for the rest of their life).

57. See Joe Burris, *Arundel School Board Hears Case Involving Student Suspended in Pastry Gun Incident*, THE BALTIMORE SUN (Sept. 3, 2014), http://articles.baltimoresun.com/2014-09-03/news/bs-md-ar-pastry-kid-hearing-20140903_1-pastry-gun-incident-school-system-b-j-welch (reporting that attorney for Joshua Welch wants the boy's record expunged of the suspension).

58. See St. George, *supra* note 1 (quoting Joshua Welch's father's worry that his son could be denied a job requiring security clearance because of the negative mark against him in second grade).

59. See generally Lynda Hils, "Zero Tolerance" for Free Speech, 30 J. L. & EDUC. 365 (2001) (arguing that in an effort to prevent school violence before it begins, administrators are punishing student speech).

60. U.S. CONST. amend. I.

61. *Id.*

62. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

63. See *id.* at 507 (indicating that schools must balance students' freedom of

The United States Supreme Court created the preeminent standard for student speech in *Tinker v. Des Moines Independent Community School District*.⁶⁴ In December 1965, three students decided to wear black armbands to school as a form of protest against the Vietnam War.⁶⁵ The students' school district learned of the plan ahead of time and created a policy forbidding such an action.⁶⁶ In spite of the restriction, John and Mary Beth Tinker and their friend Christopher Eckhardt proceeded with their plan on December 16.⁶⁷ The school suspended the students for violating its policy, and the students appealed all the way to the Supreme Court.⁶⁸ The Court established that the First Amendment protects student speech, as long as it does not "materially disrupt[] classwork or involve[] . . . invasion of the rights of others."⁶⁹

Where some find a disruption, however, others may find nothing more than unpopular opinion.⁷⁰ Locating the balance between protected and unprotected speech in schools requires drawing a very difficult line between speech and disruption.⁷¹ In subsequent decisions, the Court clarified its *Tinker* standard by allowing schools to prohibit speech that interferes with the education of other students.⁷²

Bethel School District No. 403 v. Fraser, a case dealing with a lewd student government stump speech, saw the Court expand *Tinker*, authorizing schools to censor "offensive" speech.⁷³ The major

speech rights with safeguarding the school).

64. See *Tinker*, 393 U.S. at 513 (holding that the First Amendment does not protect a student's conduct that "for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others").

65. *Id.* at 504.

66. *Id.*

67. *Id.*

68. *Id.* at 504–05.

69. *Id.* at 513.

70. *Morse v. Frederick*, 551 U.S. 393, 434 (2007) (Stevens, J., dissenting).

71. Compare *Tinker*, 393 U.S. at 513 (wearing armbands in support of protesting the Vietnam War did not disrupt school), with *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) (compelling other students to wear freedom buttons was a disruption).

72. *E.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (permitting "vulgar and lewd speech . . . would undermine the school's basic educational mission"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (holding that educators have an increased level of control in restricting speech in school-sponsored activities and events).

73. *Fraser*, 478 U.S. at 683. While *Fraser* dealt with lewd or obscene speech, and thus, falls outside the scope of this Comment, parallels can be drawn between the ban on obscene speech and the prohibition on violent or suggestively pro-gun speech. As Chief Justice Burger writes for the majority, "the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others." *Id.* (internal quotations omitted). Following this logic, if the mention of guns offends even one person, it has no place in public discourse. *But see Morse*, 551 U.S. at 409 (emphasizing that a blanket definition of "offensive"

takeaway from *Fraser* was that although students enjoy free speech protection, their rights still fall short of adults'.⁷⁴ *Hazelwood School District v. Kuhlmeier* reiterated that schools could censor speech "inconsistent with its 'basic educational mission.'"⁷⁵ The Court also broadened a school's reach in prohibiting student speech to any school-sponsored activity, event, or assignment.⁷⁶

The Supreme Court in *Tinker* realized that certain student speech could be unpopular, but that it should also receive protection because the classroom uniquely represents the "marketplace of ideas."⁷⁷ Simply because some may find a student's speech offensive does not make it unprotected in school.⁷⁸ Schools may not prohibit student speech unless it inhibits the ability to promote safety and education in the classroom.⁷⁹

To make matters even more complicated, the standard only requires that school authorities have the reasonable belief that a student's actions or conduct will materially disrupt the classroom.⁸⁰ This subtle interpretation allows teachers and administrators to preemptively punish kids the moment they fear a disruption, rather than wait for the disruption to occur and then pass judgment.⁸¹ In some cases, a teacher's mere belief that a student will cause a disruption looks far less reasonable.⁸² In other instances, a student's

grants schools too much power).

74. *Id.* at 682.

75. *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

76. *Id.* at 271. As publisher of a school paper, schools do not only have the power to prohibit materially disruptive speech, but also to forbid speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.* The Court left to a school's discretion the ability to refuse to disseminate work that might "associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272. In today's highly politicized society, such blanket authority can easily lead to stifling less politically popular opinions.

77. *Tinker*, 393 U.S. at 512.

78. *Morse*, 551 U.S. at 409.

79. *See id.* at 410 (finding that student Frederick's speech was not protected because it "promot[ed] illegal drug use"). Based on public opinion and the billions of dollars spent on anti-drug campaigns, many people feel that schools have a duty to prohibit drug use by students. *Id.* at 408. Stamping out speech that tends to promote drug use falls within the confines of that duty. *Id.* School authorities have likewise extended the principles of GFSA in preventing firearms from coming on to campus to apply to any language promoting guns.

80. *Brown ex rel. Brown v. Cabell County Bd. of Educ.*, 714 F. Supp. 2d 587, 596 (S.D. W. Va. 2010).

81. *See Morse*, 551 U.S. at 401 (holding that a school principal was justified in confiscating a banner saying "BONG HiTS 4 JESUS" because it could be interpreted as promoting illegal drug use and cause a disruption among students).

82. *Compare Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 674 (7th Cir. 2011) (reasoning that *the thought* "that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school" is sufficient to proscribe school

actions or potential actions warrant proactive discipline in order to maintain safety and decorum.⁸³

Fears of mass shootings at schools plague the national conscience and influence the minds of those charged with overseeing students.⁸⁴ Students in a public school setting comprise a captive audience, adding another dangerous layer to the possibility of violence on school grounds.⁸⁵ School authorities, therefore, take very seriously anything seen as a threat to the safety of students, teachers, or the school in general.⁸⁶

C. True Threats Analysis by the Courts

While the First Amendment provides many protections over a person's speech, it does not protect a person who makes threats.⁸⁷ But determining whether a statement or action constitutes a threat proves to be a difficult task.⁸⁸ Courts have split on whether to apply an objective test—either the objective speaker or reasonable recipient—or the subjective-intent test to a person's statement or action.⁸⁹

speech), *with* B.H. v. Easton Area Sch. Dist., 827 F. Supp. 2d 392, 408-09 (E.D. Pa. 2011) (holding that wearing “I <3 BOOBIES” bracelets would not cause a substantial disruption, and thus, could not be banned), *and* Eugene Volokh, *High School Student Suspended for Refusing to Remove NRA T-Shirt*, WASH. POST (Mar. 13, 2014) www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/13/high-school-student-suspended-for-refusing-to-remove-nra-t-shirt/ (suspending student for refusing to remove his NRA t-shirt likely violated his First Amendment rights).

83. *E.g.*, *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007) (holding that a student's journal entries describing a Columbine-style attack posed a threat to school safety and warranted suspension).

84. *See Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 374 (9th Cir. 1996) (holding that because school violence is prevalent, a reasonable person could interpret a student's statement as a threat).

85. *See Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (citing his concurrence in *Ginsberg v. State of N.Y.*, 390 U.S. 629, 649–50 (1968) (permitting states to restrict the rights of minors because they do not have the full capacity that adults possess)).

86. *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 633 (8th Cir. 2002) (en banc).

87. *Watts v. United States*, 394 U.S. 705, 707 (1969) (finding constitutional a statute which criminalized threats against the President); *see also* *Virginia v. Black*, 538 U.S. 343, 359 (2003) (holding true threats to be “statements 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”).

88. *Salgado*, *supra* note 10, at 1387–88. Speech that qualifies as venting or blowing off steam does not rise to the level of true threats. *Id.* at 1386. Responding to being drafted, Robert Watts exclaimed, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Watts*, 394 U.S. at 706. The Court found Watts's speech to be “political hyperbole,” and thus, outside the scope of the statute under which he was prosecuted. *Id.* at 708.

89. Nine Circuit Courts of Appeals have held that an objective test applies

The objective test considers the speaker's statements or conduct from the perspective of an objective listener.⁹⁰ The test asks whether a reasonable person would hear or see the words and fear an act of violence.⁹¹ This test places the onus on proving only whether the speaker intended to communicate a threatening message; intent to carry out the threat is not considered.⁹² The objective speaker test protects individuals from the fear of violence or the disruption that such a fear could cause.⁹³

The subjective-intent test focuses on whether the speaker actually intends to cause fear in another; the emphasis rests solely on the speaker.⁹⁴ This test comports with the general principle that the First Amendment serves to protect a person's right to speak.⁹⁵ However, the subjective-intent test has gained little traction with the courts.⁹⁶

in true threats cases. *See* *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (holding that the government only need prove transmission of a message a reasonable recipient could interpret as a threat is sufficient); *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997) (holding that the objective standard protects speakers from "an unusually sensitive listener" and protects listeners if the threats reasonably resemble threats); *United States v. Myers*, 104 F.3d 76, 80–81 (5th Cir. 1997) (declining to hold that the law against threatening communications requires specific intent); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) (holding an intent to transmit is sufficient); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) (overruling the district court that 18 U.S.C. § 875(c) requires specific intent), *cert. denied*, 505 U.S. 1206, 112 S. Ct. 2997 (1992); *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991) (holding that the making of the threat is most important, followed by protecting the "recipient's sense of personal safety"); *United States v. Schneider*, 910 F.2d 1569, 1570–71 (7th Cir. 1990) (applying a reasonable recipient test to determine that the defendant intended to threaten "public serpents"); *United States v. Callahan*, 702 F.2d 964, 965–66 (11th Cir. 1983) (focusing on the defendant's intentional transmission of the message that a reasonable person would consider it a threat); *United States v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972) (affirming the lower court's instructions to the jury that it must "find that the maker had an apparent determination to carry out the threat" (internal quotations omitted)). Only the Ninth Circuit Court of Appeals applies the subjective-intent standard. *See* *United States v. Twine*, 853 F.2d 676, 680–81 (9th Cir. 1988) (finding that threats prosecuted under 18 U.S.C. § 875(c) require a showing of specific intent).

90. Salgado, *supra* note 10, at 1388. Contra the objective speaker test, which considers the statements from the perspective of "a reasonable person standing in the shoes of the speaker." *Id.*

91. Andrew P. Stanner, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385, 410 (2006).

92. *Manning*, 923 F.2d at 86; *Callahan*, 702 F.2d at 966.

93. *Whiffen*, 121 F.3d at 21; *Manning*, 923 F.2d at 86.

94. Stanner, *supra* note 91, at 410.

95. *See id.* at 411 (arguing that adding a mens rea element to the test would require genuine proof of an intent to threaten before speech could be punished).

96. *United States v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013) (interpreting the Court's ruling in *Virginia v. Black* to require only an intent to communicate a threat, not the intent to threaten), *rev'd on other grounds*, 135 S. Ct. 2001

III. THE PROBLEM WITH “SAFETY” OVER SPEECH

Students must now attempt to navigate the quagmire created by the combination of zero tolerance policies and tightening restrictions on interpreting student speech. Part III.A explores the failures in protecting student speech brought on by zero tolerance policies. Part III.B shows why the true threats test most often used by the courts exacerbates the problem. Part III.C examines the data surrounding school violence to show that zero tolerance policies act as a solution in search of a problem.

A. Zero Tolerance Leads to Over-Inclusion and Excessive Punishments

Since the mid-1990s when zero tolerance for weapons in schools became the norm throughout the United States, school administrators have pushed the boundaries for what qualifies as a violation.⁹⁷ Federal law makes clear that possession of a firearm is the only requirement for expelling a student for a minimum of one year.⁹⁸ State laws, such as Illinois’s, have expanded the list of weapons to include anything that could be “used or attempted to be used to cause bodily harm.”⁹⁹ Ignoring that such a broad definition would leave classrooms bare of teaching materials,¹⁰⁰ these zero tolerance policies end up targeting actions having nothing to do with actual weapons possession.¹⁰¹

Joshua Welch’s story about receiving a suspension for his pop-tart pistol adds one more link to the chain of countless abuses of

(2015). The Court punted on the First Amendment issue and instead remanded the case because the parties had not addressed whether recklessness fulfills the mens rea requirement of 18 U.S.C. § 875(c). *Elonis*, 135 S. Ct. at 2012.

97. See Skiba, *supra* note 16, at 3–4 (citing instances of schools punishing students by classifying everything from a squirt gun or a homemade rocket to nail clippers and a toy plastic ax as a weapon).

98. GFSA, 20 U.S.C. § 7151(b)(1).

99. 105 ILL. COMP. STAT. 5/10-22.6(d)(2).

100. See Kate Linthicum, *Student Uses Pencil to Repeatedly Stab Santa Rosa Teacher, Police Say*, LA TIMES (Nov. 21, 2013), <http://articles.latimes.com/2013/nov/21/local/la-me-ln-santa-rosa-teacher-stabbed-20131121> (reporting that student stabbed a teacher multiple times using his pencil). The reality is that anything can be used in a manner that could cause bodily harm to another, which makes the language in the Illinois statute extremely overbroad. See Russell Anglin, *Student Hit Teacher with Textbook, Spearman Police Say*, AMARILLO GLOBE-NEWS (Aug. 30, 2012, 9:22 PM), <http://amarillo.com/news/local-news/2012-08-30/police-student-hit-teacher-textbook> (reporting that a student hit his teacher in the face with a textbook).

101. See Kang-Brown et al., *supra* note 9, at 4 (citing studies showing that no more than five percent of expulsions and suspensions are because of weapons possession).

zero tolerance quelling student speech.¹⁰² All over the country, students like Joshua have fallen on the wrong side of zero tolerance policies, often for innocuous or otherwise childlike behavior.¹⁰³

In May 2014, eight-year-old Kody Smith's teacher told him to watch the clouds and draw whatever shapes he thought he saw.¹⁰⁴ Feeling inspired by the distribution of cirrus, cumulus and stratus clouds above him, Kody drew a gun.¹⁰⁵ His teacher filed a behavior report against Kody because she deemed his drawing "disruptive to the learning community."¹⁰⁶

In early 2013, Alex Evans, a seven-year-old boy in Colorado, played a make-believe game of "rescue the world" during recess one day.¹⁰⁷ The game, as one might imagine, involved saving the world from the forces of evil. In order to accomplish this lofty goal, young Alex threw an imaginary grenade—that is, he physically threw *nothing*—"into a box with pretend evil forces inside."¹⁰⁸ Unfortunately for Alex, his school had a list of "absolutes" designed to ensure school safety.¹⁰⁹ The list states that the school will tolerate

102. Burris, *Pastry Gun*, *supra* note 5.

103. See Cuevas, *supra* note 11 (reporting that a ten-year-old boy was suspended for pointing his fingers in the shape of a gun at another student and saying "BOOM"); *Two Boys Suspended for Pointing Pencils Like Guns*, *supra* note 51 (reporting two elementary students were suspended for pointing pencils at each other and "making gun noises"); Chris Eger, *5-Year-Old With Loaded Crayon Made To Sign Suicide Contract (VIDEO)*, GUNS.COM (Oct. 11, 2014), www.guns.com/2014/10/11/5-year-old-with-loaded-crayon-made-to-sign-suicide-contract-video/ (reporting that a five-year-old girl was forced to sign a "safety contract" after pointing a crayon at another student and saying "pew-pew") (video no longer exists). It is absurd that students are being punished for pointing fingers and writing utensils at each other. The entire scenario is so divorced from reality that holding these students to the same standards as someone who brings an actual firearm to school lacks all common sense. After all, everyone knows guns "[don't] go 'pkew-pkew'; [they] go 'bang-bang-bang!'" *South Park: Lil' Crime Stoppers* (Braniff Productions Apr. 23, 2003).

104. Kristin Haubrich, *Gun Picture Gets Boy In Trouble*, KKTV.COM (May 21, 2014, 1:39 PM), www.kktv.com/home/headlines/Gun-Picture-Gets-Boy-in-Trouble-260059701.html.

105. See *id.* (imagining the clouds looked like a gun, Kody drew a gun).

106. Eric Owens, *Teacher Asks Second Graders To Draw What They See In Clouds, Boy Sees Gun, Teacher WRITES UP BOY*, DAILYCALLER.COM (May 24, 2014, 7:25 AM), <http://dailycaller.com/2014/05/24/teacher-asks-second-graders-to-draw-what-they-see-in-clouds-boy-sees-gun-teacher-writes-up-boy/>.

107. Edelman, *supra* note 11.

108. David Mitchell & Julie Hayden, *7-Year-Old Playing an Imaginary Game at School Gets Suspended For Real*, KDVR.COM (Feb. 4, 2013, 9:55 PM), <http://kdvr.com/2013/02/04/7-year-old-playing-an-imaginary-game-at-school-gets-suspended-for-real/>.

109. ABSOLUTES for Mary Blair Elementary, <http://kdvr.com/2013/02/04/7-year-old-playing-an-imaginary-game-at-school-gets-suspended-for-real/> (follow 'Click here to see the Mary Blair "Absolutes"' hyperlink) (last visited Jan. 24, 2016) [hereinafter ABSOLUTES].

“absolutely no fighting, real or imaginary.”¹¹⁰ Alex’s school maintains that it did not suspend him “for having an imaginary weapon,” but the young boy’s story—that it was all make-believe—remained consistent each time he was asked.¹¹¹

Rhett Parham drew a cartoon bomb—the archetypal cartoon bomb found in Wile E. Coyote and The Roadrunner cartoons—based on one of his favorite video games, *Bomberman 64*.¹¹² An autistic student, Rhett took his drawing to school to show his classmates.¹¹³

110. Mitchell & Hayden, *supra* note 108. The Mary Blair Elementary’s “Absolutes” provided to KDVR is listed below:

To insure this Time to Teach Program, we have come up with some ABSOLUTES to make Mary Blair a safe environment.

The ABSOLUTES for Mary Blair Elementary:

1. No Physical Abuse or Fights—real or “play fighting”
2. No weapons (real or play), illegal drugs (including tobacco) or alcohol
3. No serious disrespect toward people or property (includes, but is not limited: profanity, racial slurs, deliberately refusing to follow a staff directive, graffiti, etc.)

ABSOLUTE Procedure:

- An ABSOLUTE must be witnessed by an adult
- A student will be placed in the Principal’s office or sent home for the rest of the day if he/she violates an ABSOLUTE. A student will be allowed two non-severe, non-suspension occurrences. The third occurrence will constitute a formal suspension, which could be up to five school days. A conference is always held with the teacher and the principal as to the severity of the consequence.
- Each time a student violates an ABSOLUTE, a “Parent Notification of Behavior Problem” form will be sent home with the child.
- Each time a student is suspended, a “Behavioral Plan” will be written with parents, principal, teacher and the student (when possible). This conforms to Thompson R2J School District policy and Colorado Discipline Code.
- Every ABSOLUTE that is broken following the first suspension will also be a suspension.

ABSOLUTES, *supra* note 109.

111. Jessica Maher, *Loveland Schools Now Guarded About Reason for Suspension*, REPORTERHERALD.COM (Feb. 7, 2013, 6:01 PM), www.reporterherald.com/ci_22535410/loveland-schools-now-guarded-about-reason-suspension.

112. Derek Dellinger & Cody Alcorn, *Suspension of SC Autistic Student Who Drew Bomb Lifted*, FOXCAROLINA.COM (Nov. 13, 2013, 2:25 PM), www.foxcarolina.com/story/23690052/mother-special-needs-son-suspended-for-picture-of-bomb. *Bomberman 64* is a video game in which the main character “must collect bombs and power-ups” in order to save his world. Doug Perry, *Bomberman 64*, IGN (Dec. 2, 1997), www.ign.com/articles/1997/12/03/bomberman-64. The protagonist uses bombs to complete puzzles and mazes in order to beat each individual level or boss character. *Id.*

113. *Id.*

Some of his older classmates reported the drawing to school administrators, and the school suspended Rhett.¹¹⁴ While the school district eventually lifted Rhett's suspension, it insisted that it "acted in accord with applicable laws, policies and procedures."¹¹⁵

In October 2013, a Scottsdale, Arizona school threatened to punish an eight-year-old boy "for drawing highly disturbing pictures."¹¹⁶ The boy's drawings consisted of a soldier with a rifle strapped to his back, a ninja holding a scoped rifle, and a *Star Wars* character wielding dual pistols: his possible Halloween costumes.¹¹⁷ The school board's policy permitted expulsion for "[a]ny behavior that is deemed threatening such as . . . drawings depicting weapons."¹¹⁸

Perhaps most egregious of all is the 2012 story out of Nebraska about Hunter Spanjer, a three-year-old deaf boy who communicates using the Signing Exact English Standard.¹¹⁹ In order to sign his name, he "crosses his index and middle fingers and waves them slightly."¹²⁰ However, because the way he signs his name resembled a gun, his school told his family he would need to find a new way to convey his name.¹²¹ The local school board's weapons policy prohibits "any instrument . . . that is a firearm, weapon, or looks like a weapon."¹²²

A common theme runs through all of these examples: acting within the laws and policies in place, school officials crack down on normal childhood behaviors—like drawing pictures or playing on the playground—under the guise of preventing school violence. But criminalizing innocent actions conditions developing children into "expect[ing] that adult life portends restricted accesses, security,

114. *Drawing of Cartoon Bomb Gets Special-Needs Student Suspended*, FOXNEWS.COM (Oct. 16, 2013), www.foxnews.com/us/2013/10/16/drawing-cartoon-bomb-gets-special-needs-student-suspended/.

115. Dellinger & Alcorn, *supra* note 112.

116. Rebecca Thomas, *8-Year-Old Threatened with Expulsion for Drawings*, KPHO.COM (Nov. 14, 2013, 11:17 PM), www.kpho.com/story/23847600/8-year-old-threatened-with-expulsion-for-drawings.

117. *Id.*

118. Scottsdale Country Day School Student and Parent Handbook 2013–2014, at 5, www.scdsaz.com/ParentHandbook.pdf (last visited Jan. 24, 2016).

119. Ron Dicker, *Hunter Spanjer, 3-Year-Old Deaf Boy, Told by Preschool to Change Way He Signs His Name (VIDEO)*, HUFFINGTON POST (Aug. 28, 2012, 12:25 PM), www.huffingtonpost.com/2012/08/28/hunter-spanjer-3-year-old_n_1836159.html (video no longer available).

120. *Id.*

121. Philip Caulfield, *Family: Nebraska School Says Our Deaf 3-Year-Old's Sign-Language Gesture for His Own Name Looks Like 'Weapons,' Must Change*, NY DAILY NEWS (Aug. 28, 2012, 9:56 AM), www.nydailynews.com/news/national/nebraska-school-3-year-old-deaf-boy-sign-language-gesture-guns-change-video-article-1.1146024.

122. Grand Island Public Schools § 8470, Weapons in Schools, www.gips.org/about-gips/policies/section-8000-students/8470-%E2%80%93weapons-in-school.html.

and control.”¹²³ Such defeatist attitudes about life hardly conform to the goals of American public education.¹²⁴ But as long as schools have broad discretion in whom to punish and for what actions, these narratives will persist.¹²⁵

There is no doubt that firearms are a part of American history and tradition.¹²⁶ When it comes to guns and schools, however, legislators and school administrators would rather bury their heads in the sand than responsibly discuss the topic with students. The GFSA and similar legislation stretch the words *school safety* so that they lose all meaning.¹²⁷ By equating Pop-tart pistols and finger guns with actual gun possession, school administrators continue to punish student speech while becoming desensitized to more obvious cries for help.¹²⁸

B. No Help from the Courts—The True Threat Test Is Too Demanding

In the instances where schools do not soon cave to public pressures over excessive punishments, students can still have trouble finding relief through the courts.¹²⁹ Rather than stand as

123. Daniel Hillyard & M. Joan McDermott, *Ecological, Peacemaking, and Feminist Considerations*, in *RESPONDING TO SCHOOL VIOLENCE: CONFRONTING THE COLUMBINE EFFECT* 173, 176 (Glenn W. Muschert, et al. eds., 2014) [hereinafter Hillyard & McDermott, *Considerations*].

124. See Mission Statement, U.S. DEPT EDUC., www2.ed.gov/about/overview/mission/mission.html (last visited Nov. 13, 2014) (stating the U.S. Department of Education’s mission as “promot[ing] student achievement and preparation for global competitiveness”).

125. See Hillyard & McDermott, *Considerations*, *supra* note 123, at 178 (arguing that well-meaning policies designed to prevent harm sweep up too many innocent individuals).

126. U.S. CONST. amend. II; *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 768 (2010). In deciding whether the Second Amendment applies to local governments, the Court heavily explored the history behind the right to keep and bear arms. *McDonald*, 561 U.S. at 767–69.

127. Cf. Greg Lukianoff, *Freedom From Speech*, in *ENCOUNTER BROADSIDE* NO. 39, 40 (Encounter Books, 2014) (arguing that college campuses “water[] down” the term *safety* by “conflat[ing] it with *comfort* or even *reassurance*.”).

128. Greg Lukianoff sums up the problem nicely:

Our society appears to have forgotten the moral of the fable ‘The Boy Who Cried Wolf.’ When there is confusion as to whether safety refers to physical harm or to mere discomfort, how can professors and administrators quickly assess the danger of a situation and make appropriate decisions to safeguard the physical security of their students?

Id. at 40–41.

129. See, e.g., *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 274 (2d Cir. 2011) (finding the principal’s actions in removing a student who wrote about his last hours on earth ending in suicide warranted “unusual deference”); *Ponce*, 508 F.3d at 772 (finding student’s speech threatening, and therefore,

the last bastion of student speech, courts instead offer school administrators wide deference in punishing students, citing “a well-known pattern of . . . mass, systematic school-shootings” as the reason.¹³⁰ But, as Part III.C will address, that argument is not an accurate assessment of the current school environment.¹³¹

A large part of the problem comes from how courts determine the nature of a student’s actions.¹³² Whether the courts use the objective speaker or the reasonable recipient test, neither accounts for the student’s *intent* when speaking.¹³³

The objective speaker test puts the reasonable person in the speaker’s shoes to determine if another person could feel threatened by the speech.¹³⁴ Using this test, the judge or juror would assume the role of Joshua Welch to determine if he should foresee another student feeling threatened when facing a pistol made of dough and strawberry filling. While the reasonable person should consider the contextual facts surrounding the speech,¹³⁵ an adult judge or juror will not have the same perspective as a student.¹³⁶ A student speaker would have less experience with knowing what type of speech could cause the recipient to feel fear. Or, more generally, adult judges and jurors might find more threats in particular speech than a child would.

Therefore, the objective speaker test fails to protect student speech because it requires placing an adult in the shoes of a kid, who often times might not fully know what he or she is doing.¹³⁷ The

unprotected).

130. *Ponce*, 508 F.3d at 771.

131. See discussion *infra* Part III.C.

132. See Fiona Ruthven, *Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, 88 IOWA L. REV. 931, 944 (2003) (comparing the objective speaker test and the reasonable recipient test that courts often use in evaluating student speech for true threats).

133. See Stanner, *supra* note 91, at 410 (arguing that scholars have criticized the objective tests for years because of the lack of mens rea).

134. *Lovell*, 90 F.3d at 372.

135. *Id.* (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

136. See, e.g., *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007) (stating that a student sent an instant message picture to fifteen friends, none of whom seemed to find the picture threatening, before his teacher eventually found out about it and became worried).

137. See Dellinger & Alcorn, *supra* note 112 (reporting that an autistic boy was suspended after showing a drawing of a cartoon bomb to classmates). Swiss psychologist Jean Piaget determined that children’s development is closely tied to their maturation. VAL BROOKS, IAN ABBOTT & PRUE HUDDLESTON, *PREPARING TO TEACH IN SECONDARY SCHOOLS: A STUDENT TEACHER’S GUIDE TO PROFESSIONAL ISSUES IN SECONDARY EDUCATION* 44 (McGraw-Hill Education, 2012). As they mature, children must pass through multiple stages of cognitive development that steadily provides the basis for “a logical and systematic way of thinking.” *Id.* at 45. Until at least adolescence, children do not develop the ability to reason abstractly. *Id.* But even after reaching adolescence, children tend to

objective speaker test places the onus on the student to understand and recognize when his or her speech could be taken as threatening.¹³⁸ This standard could be difficult for students to comprehend, though, and without a full understanding, they may choose not to speak at all.¹³⁹ Alternatively, public awareness of an onerous policy could result in even more disruptive speech.¹⁴⁰

Unfortunately, the reasonable recipient test places even more responsibility on students to control their speech.¹⁴¹ The go-to standard for the reasonable recipient test in student speech is *Doe v. Pulaski County Special School District*.¹⁴² Citing its decision in *United States v. Dinwiddie*,¹⁴³ the Eighth Circuit in *Doe* puts the reasonable person in the shoes of the speech recipient to determine its threatening nature.¹⁴⁴ While the Court in *Doe* stated that “[m]ost, if not all thirteen-year-old girls would be frightened by the message,” it took for granted that the recipient would even receive the message.¹⁴⁵ The reasonable recipient test stifles speech because the focus is on transmission of the message rather than the actual speech.¹⁴⁶

“assume that everyone else shares their concerns.” *Id.*

138. Ruthven, *supra* note 132, at 944.

139. See Liz Klimas, *Texas Dad Not Happy After He Says School Slapped His Son With In-School Suspension for Wearing This ‘Intolerable’ T-Shirt*, THEBLAZE.COM (Oct. 23, 2013, 5:28 PM), www.theblaze.com/stories/2013/10/23/father-claims-god-guns-country-t-shirt-landed-his-son-in-school-suspension/ (reporting that after wearing to school a shirt depicting guns, the student was told “he would face increasing punishments” if he wore it again).

140. See Nona Willis Aronowitz, *School Spirit or Gang Signs? ‘Zero Tolerance’ Comes Under Fire*, NBC NEWS (Mar. 9, 2014, 8:41 AM), www.nbcnews.com/news/education/school-spirit-or-gang-signs-zero-tolerance-comes-under-fire-n41431 (reporting that after a fifteen-year-old boy was suspended for allegedly flashing a gang sign, the boy’s brother and twenty other students were suspended for showing the same symbol in solidarity). Dontadrian Bruce held up his thumb, forefinger, and middle finger to signify the number 3—his football jersey number—in a picture. The assistant principal suspended the boy because the sign resembled that of the Vice Lords, a Chicago-based gang. *Id.*

141. See Ruthven, *supra* note 132, at 962 (arguing that too loose an application of the reasonable recipient test gives administrators even wider breadth to punish student speech as threatening).

142. *Doe*, 306 F.3d 616. After an intense breakup with K.G., J.M. wrote two letters reflecting the style of rappers Eminem, Juvenile, and Kid Rock. *Id.* at 619. The letters contained a string of expletives, and J.M. expressed a desire to “sodomize, rape, and kill K.G.” *Id.* at 625. While staying the night at J.M.’s house, D.M., a mutual friend of both, swiped one of the letters unbeknownst to J.M. and delivered it to K.G. The students’ school subsequently investigated and expelled J.M. *Id.* at 619–20.

143. *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996).

144. *Doe*, 306 F.3d at 622.

145. See *id.* at 625 (finding that although “J.M. did not personally deliver the letter to K.G. [that] did not dispel its threatening nature.”).

146. Compare *Doe*, 306 F.3d at 624 (finding that even though D.M. stole the letter to deliver to K.G., J.M. intended to communicate the message by telling D.M. about the letter’s existence); with *Porter*, 393 F.3d at 617 (finding that

Using the reasonable recipient test, a juror would place him or herself in the shoes of Joshua Welch's teacher or second grade classmates. The reasonable recipient test requires a student speaker to anticipate *all* listeners' potential reactions.¹⁴⁷ A student cannot know how a teacher's reaction will differ from a fellow student's, or how both may differ from the vice principal's response.¹⁴⁸ Such broad deference to the listener often leads to courts upholding the school's punishment.¹⁴⁹ Courts grant this additional deference to schools when evaluating student speech because they mistakenly perceive school violence as an epidemic.¹⁵⁰

C. *The Myth of the School Violence "Epidemic"*

Joshua Welch's case is not the first time that a school has severely punished a student for having an overactive imagination.¹⁵¹ For the last two decades, schools have been cracking down on perceived threats of violence with uniform punishments meant for more serious threats.¹⁵² State and local governments have combined zero tolerance for guns with zero tolerance for disruptive behavior to create an almost impossible maze for students to navigate.¹⁵³ Add to that mix the over-sensationalized idea that an epidemic of school shootings and mass killings exists in the United

Adam Porter did not intend to communicate a threat because he showed the picture only to a few people in his home two years before it "serendipitously reached the EAHS campus").

147. For what exactly is a reasonable listener? Everyone's perspective differs, and one student's threat is another student's rap lyric, which in turn could be another student blowing off steam. *See Doe*, 306 F.3d at 631 (noting that student thought channeling rapper Eminem would be the best way to express himself); *Jones v. State*, 347 Ark. 409, 414 (2002) (quoting the student as telling principal and police officer that he modeled his writing after Eminem).

148. *See Stanner, supra* note 91, at 411 (arguing that "a reasonable person and a reasonable adolescent might have very different ideas about what constitutes a true threat.").

149. *E.g., Riehm v. Engelking*, 538 F.3d 952, 964 (8th Cir. 2008) (finding it reasonable that a student's creative writing teacher would feel threatened by the student's essay); *Ponce*, 508 F.3d at 771 (finding student's speech threatening because it involved a possible attack on a school).

150. *See Ponce*, 508 F.3d at 771 (citing America's "recent history [of attacks in schools]" as a sufficient justification for punishing all alleged threats); *see generally Morse*, 551 U.S. at 408 (finding the danger of promoting illegal drug use to be sufficient justification of proscribing student speech).

151. *See discussion supra* Part III.A.

152. *See Mongan & Walker, supra* note 18, at 233 (mandating zero tolerance policies in schools in 1994 with the passage of the GFSA and continuing since).

153. *See generally Kang-Brown et al., supra* note 9, at 2-3 (increasing the number of zero tolerance infractions has led to a surge in the number of suspensions and expulsions in schools). A vast majority of the suspensions handed out have nothing to do with weapon possession. *Id.* at 4.

States.¹⁵⁴ Subsequently, any mention or indication of guns or violence receives immediate attention and usually the harshest penalties.¹⁵⁵

Even though the number of school shootings remains low,¹⁵⁶ schools and legislators across the country have been subscribing to something known as the *Columbine Effect* for nearly twenty years.¹⁵⁷ On April 20, 1999, two Colorado students carried out one of the deadliest attacks at a school in United States history.¹⁵⁸ With twelve students and a teacher killed in the attack, the Columbine shootings shot to the forefront of social commentary the idea that American schools are rife with violence.¹⁵⁹

The heightened media attention of this isolated event gave the American public a semi-identifiable bogeyman to vanquish.¹⁶⁰ The American public demanded answers for school shootings.¹⁶¹ The public clamored for stricter punishments for any perceived threats; thus, the zero tolerance policies from the early 1990s gained new popularity.¹⁶²

154. See Paul Bedard, *Crime Study: Handguns, Not "Assault Rifles," Used in Most Mass Shootings*, WASH. TIMES (Jan. 14, 2014, 12:00 AM), <http://washingtonexaminer.com/crime-study-no-rise-in-mass-shootings-despite-media-hype/article/2542118> (reporting that despite increased attention from the media, the number of mass shootings has stayed around twenty per year over the last thirty-four years).

155. See Alan Wang, *SF Student Suspended Over Connecticut Poem*, ABC7NEWS.COM (Dec. 27, 2012, 12:00 AM), <http://abc7news.com/archive/8934233/> (writing a poem about the school shooting at Sandy Hook Elementary gets a girl suspended).

156. See ROBERS, ET AL., INDICATORS, *supra* note 13, at 6 (finding that less than two percent of all school-age youth homicides (children aged 5–18) occurred at school); see also MARY ELLEN O'TOOLE, FED. BUREAU INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 4 (2000) (correcting common misconceptions that school shootings are an epidemic).

157. See generally RESPONDING TO SCHOOL VIOLENCE: CONFRONTING THE COLUMBINE EFFECT, (Glenn Muschert, Stuart Henry, Nicole Bracy, Anthony Peguero, eds., 2014) (defining *Columbine Effect* as the build-up of policies based on fear of school shootings). On April 20, 1999, two Columbine High School students in Littleton, Colorado, shot thirty-four people at school, killing thirteen. *Columbine High School Shootings Fast Facts*, CNN.COM, www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/ (updated May 6, 2015, 12:11 PM).

158. *Columbine High School Shootings Fast Facts*, *supra* note 157.

159. See Glenn W. Muschert, *The Columbine Victims and the Myth of the Juvenile Superpredator*, 5 YOUTH VIOLENCE & JUVENILE JUST. 351, 351 (2007) [hereinafter Muschert, *Myth of the Juvenile Superpredator*] (explaining that the media blasted the story into the living rooms of Americans).

160. See *id.* at 352 (finding that the public combined the school shooter problem with the myth that youth crime was on the rise).

161. John Cloud, *The Columbine Effect*, TIME, Nov. 28, 1999, <http://content.time.com/time/magazine/article/0,9171,35098,00.html>. In the mid-1990s, Americans wanted a crackdown on school violence, and zero tolerance led the way as the preferred method. *Id.*

162. See *id.* (reporting that many Americans wanted a "tough on crime"

Because of the shock a school shooting causes, any news coverage highlights not only the spontaneity of the event but also draws increased attention, making it seem more prevalent.¹⁶³ The media, playing catch-up to a sudden event, often fills in the gaps with preconceived myths as it develops its coverage.¹⁶⁴ Much of the narrative gets caught up in circular logic: the media reports on a school shooting; the public sees the endless coverage and assumes that school shootings are on the rise; and the media reports that Americans believe that an epidemic of school shootings afflicts the nation.¹⁶⁵ This moral panic¹⁶⁶ envelops the nation and creates a populist wave that seeks an end to school violence no matter the costs.¹⁶⁷ Unfortunately, elected officials ride the populist wave to

approach brought to schools).

163. Muschert, *Myth of the Juvenile Superpredator*, *supra* note 159, at 354.

164. *Id.*

165. See Scott Chenault, *An Overview of the Relationship Between Juvenile School Shootings, And the Media*, 2004 J. INST. JUST. & INT'L STUD. 101, 105 (arguing that a moral panic requires a consensus between media reporting and public perception); Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 CRIME, L. & SOC. CHANGE 147, 159–60 (1999) [hereinafter Burns & Crawford, *Ingredients for Moral Panic*] (describing how the media, the public, and politicians all feed off one another to create a moral panic). To complicate matters more, when it comes to guns in general, the media favors pro-gun-control over anti-gun-control arguments. *Guns, Bias, and the Evening News*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION (1994), *as reprinted in* THE GUN CONTROL DEBATE 198, (Marjolijn Bijlefeld, ed. 1997).

A similar moral panic can be seen more generally when it comes to “mass shootings.” Oliver Roeder, *The Phrase “Mass Shooting” Belongs to the 21st Century*, FIVETHIRTYEIGHT.COM (Jan. 21, 2016, 7:00 AM), <http://fivethirtyeight.com/features/we-didnt-call-them-mass-shootings-until-the-21st-century/> (diagramming the proliferation of the phrase “mass shooting” in media reporting). A search and catalog of all the instances and iterations of the phrase “mass shooting” in printed news showed an exponential increase from “exactly two mentions” in 1980 to over 17,000 uses in 2015. *Id.* All of this increased attention comes in spite of data that shows mass shootings have remained relatively constant over the last 15 years, no matter what metric is being used. See WILLIAM J. KROUSE & DANIEL J. RICHARDSON, CONG. RESEARCH SERV., MASS MURDER WITH FIREARMS: INCIDENTS AND VICTIMS, 1999–2013 at 13 (2015) (finding an average of 20.8 mass shootings incidents per year from 1999–2003, 20.4 incidents per year from 2004–2008, and 22.4 incidents per year from 2009–2013); *id.* at 16 (finding an average of 4.2 mass *public* shootings per year from 1999–2003 and 2004–2008, and 4.8 incidents from 2009–2013); *id.* at 24 (showing a chart measuring the Mass Public Shooting Murder Victim Rate as wildly fluctuating between 1998 and 2013, but still only ranging between 0.4 and 2.1 victims per 10 million people).

166. See Burns & Crawford, *Ingredients for Moral Panic*, *supra* note 165, at 149 (finding that a “moral panic” occurs when “a substantial portion of society feels that particular evildoers pose a threat to the moral order of society.”).

167. See *id.* at 152–53 (listing the variety of punitive measures taken in attempts to reduce school shootings).

enact a multitude of misguided, knee-jerk solutions that are in desperate need of a problem.¹⁶⁸

Despite the sensationalism of school shootings by the media, the statistics do not support the idea that another school shooting lurks right around the corner.¹⁶⁹ From the 1992–1993 school year to 2011–2012, the total number of violent deaths per year among students, teachers, and staff at all schools across the nation showed a downward trend from fifty-seven to forty-five.¹⁷⁰ Proponents of zero tolerance attribute this decrease to the effect of zero tolerance policies.¹⁷¹ However, many empirical studies have shown that zero tolerance policies have no effect on school safety.¹⁷² Rather than any particular policy, such as zero tolerance, contributing to the decline

168. See ROBERS, ET AL., INDICATORS, *supra* note 13, at 16–17 (finding that the number of reported victimizations in schools decreased in all measured categories between 1995 and 2013 (the last year of the study)).

169. Cf. Annie Linskey, *Mass Shootings Fuel Fear, Account for Fraction of Murders*, BLOOMBERG.COM (Sept. 16, 2013, 11:02 PM), www.bloomberg.com/news/2013-09-17/mass-shootings-fuel-fear-account-for-fraction-of-murders.html (reporting that in the three decades leading up to 2012, mass murders accounted for less than one-tenth of one percent of all murders).

170. ROBERS, ET AL., INDICATORS, *supra* note 13, at 7 fig.1.1. Although the data does show upward spikes for certain years (including the most recent year), the overall number of homicides trends downward. Because the data charts only the raw number of school homicides, the homicide *rates* would likely show an even sharper decrease over the periods studied. Cf. *id.* at 11 fig.2.1 (showing the rates of nonfatal victimization against students trending downward both at and away from school).

171. *Contra* Scott Neuman, *Violence in Schools: How Big a Problem Is It?*, NPR.ORG (Mar. 16, 2012, 1:25 PM), www.npr.org/2012/03/16/148758783/violence-in-schools-how-big-a-problem-is-it (reporting researchers' findings that zero tolerance policies have shown to have no effect on decreases in school violence). See also U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT 196 Table 306 (2012), www.census.gov/prod/2011pubs/12statab/law.pdf (last visited on Oct. 23, 2014) (showing a steady drop in the number of offenses as well as the overall rate in violent crimes in the United States); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE U.S. 2014: EXPANDED HOMICIDE DATA TABLE 8, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_8_murder_victims_by_weapon_2010-2014.xls (showing a decreasing trend in the overall number of murder victims by weapons).

172. See Skiba, *supra* note 16, at 9 (“Of schools with no reported crime, only 5% of principals reported moderate or stringent security measures; in contrast, 39% of schools with serious violent crimes reported using moderate to stringent security.”); see also Kang-Brown et al., *supra* note 9, at 4 (claiming no studies show zero tolerance has a positive effect on disruption or safety in the classroom); APA ZT Task Force, *supra* note 55, at 853–54 (writing that the evidence does not support assumptions that school violence is increasing and zero tolerance helps maintain order).

in violent school deaths, the decrease in school homicides more likely reflects the national decline in violent deaths.¹⁷³

School safety should be taken seriously. Violent crime statistics, however, do not indicate schools are any less safe now than they were twenty years ago. Zero tolerance policies go too far in addressing a more narrowly defined problem. Additionally, the sensationalism surrounding school violence has swept up legislatures and courts alike, making it difficult to protect student speech without eradicating zero tolerance altogether.

IV. IF IT AIN'T FIXED, BREAK IT!

This comment proposes two steps to correct the follies of zero tolerance weapons policies and protect student speech. Part IV.A discusses some of the alternatives to zero tolerance and how they can protect student speech. Ultimately, Part IV.A concludes that none of these reforms will correct the problem absent a total repeal of GFSA. Part IV.B discusses the subjective-intent standard to true threats, and particularly why it best addresses the balance between evaluating threatening speech and protecting student speech.

A. Reforming School Discipline Requires Eliminating Zero Tolerance

Despite the grim outlook presented, all hope is not lost: people have begun to notice the failures of zero tolerance policies.¹⁷⁴ Perhaps some of these outlandish examples of zero tolerance gone awry have finally resonated with policy makers across the country.¹⁷⁵ Zero tolerance policies undermine the obvious goal they

173. Neuman, *supra* note 171.

174. See Mongan & Walker, *supra* note 18, at 237 (finding no conclusive empirical evidence that zero tolerance policies have been effective); see also Kang-Brown et al., *supra* note 9, at 6 (describing a shift in opinions on the effectiveness of zero tolerance).

175. E.g., Kelcie Pegher, *Board of Education Changes Suspension Policy*, CAPITAL GAZETTE (Aug. 21, 2014), www.capitalgazette.com/news/schools/ph-ac-cn-suspensions-0821-20140821.0,7164033.story (working to shift away from zero tolerance policies in Anne Arundel County, Maryland). Anne Arundel County is the same county where our protagonist, the breakfast bandit, attended school. While it is not entirely certain that Anne Arundel County officials adopted changes to their policies in light of the national media attention to Joshua Welch's story, it marks a larger shift nationwide away from such extreme punishments. See Ray Henry, *States Mull Dropping School "Zero Tolerance" Rules*, SOUTHEAST MISSOURIAN (Jun. 16, 2007), www.semissourian.com/story/1217689.html (reporting that numerous states have considered or are considering revising their policies on zero tolerance in schools).

were created to achieve: keeping kids safe in school so they may learn.¹⁷⁶

Since the mid-2000s, more people have taken notice of the negative effects of zero tolerance policies.¹⁷⁷ While not quite a populist movement, the shift away from zero tolerance has been gaining significant traction.¹⁷⁸ Studies continue to show that zero tolerance policies do not effectively address school violence, at best,¹⁷⁹ and cause severe harm to children at worst.¹⁸⁰

Notably, the zero tolerance reform movement includes even the Obama Administration, which has promoted a series of alternatives to zero tolerance.¹⁸¹ Citing studies showing that zero tolerance produces terribly adverse effects on minority students, the U.S. Department of Education created an array of alternative approaches that schools can implement in lieu of expelling or suspending students.¹⁸² The plan emphasizes the need for positive environments for learning rather than negative or intolerant environments.¹⁸³ The guidelines highlight three principles that will help promote a positive environment and best serve to protect the students' rights.¹⁸⁴

176. See Kang-Brown et al., *supra* note 9, at 2–3 (finding a forty-percent increase in student suspensions or expulsions since the 1972–73 school year); see also *supra* text accompanying note 36.

177. Henry, *supra* note 175.

178. Motoko Rich, *Administration Urges Restraint in Using Arrest or Expulsion to Discipline Students*, NY TIMES (Jan. 8, 2014), www.nytimes.com/2014/01/09/us/us-criticizes-zero-tolerance-policies-in-schools.html?_r=0 (reporting that the Obama Administration seeks alternatives to expulsion and arrests for students caught in the net of zero tolerance policies).

179. Kang-Brown et al., *supra* note 9, at 4.

180. *Id.* at 5–6.

181. See generally U.S. DEPT OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014) [hereinafter GUIDING PRINCIPLES], www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf (promoting positive learning environments and clear, definite codes of conduct will enable children to behave better and avoid discipline issues in the future). The Obama administration recognized the negative effects of zero tolerance and seeks to correct some of those issues. By encouraging all school districts to reevaluate their zero tolerance policies the debate can shift away from the failures of zero tolerance and back towards ensuring child safety in schools.

182. *Id.*

183. *Id.* at 2.

184. See *id.* at 2–4 (creating a positive environment requires (1) fostering positive climates so at-risk students are more readily identifiable, (2) using clear and consistent policies for student discipline, and (3) continuously reevaluating the disciplinary plan in place).

First, the plan recognizes the common adage of using “the carrot or the stick,”¹⁸⁵ and ultimately favors the carrot.¹⁸⁶ The Department of Education suggests a multi-tiered system of supports to create a safe and productive climate for students.¹⁸⁷ These supports include “universal” supports that set expectations for all students, “targeted” supports consisting of group interventions or mentoring, and “intensive” supports that involve individual interventions.¹⁸⁸ The level of support varies depending on the frequency with which a student acts out or misbehaves.¹⁸⁹ This selective support approach differs greatly from zero tolerance by providing various levels of education and intervention before punishing a student for misbehavior.¹⁹⁰

Following the warning system provided by the first principle, the Department’s second principle includes the establishment of clear and definite guidelines for school discipline.¹⁹¹ The plan places considerable emphasis on communication: between the school, the students, and even the students’ parents.¹⁹² The plan also states that removal from the classroom should only be used in the most severe of cases, and as a last resort.¹⁹³ In order to ensure that students can learn in the positive environment created for them, they have to

185. Paul Brians, “Carrot on a stick” vs. “the carrot or the stick,” <http://public.wsu.edu/~brians/errors/carrot.html> (last visited on Jan. 25, 2016). See also Kang-Brown et al., *supra* note 9, at 6–7 (highlighting studies and trial programs in school districts that look for positive alternatives to zero tolerance and show promise of success).

186. See GUIDING PRINCIPLES, *supra* note 181, at 5–6 (encouraging a return to community-based education and citing research that says positive reinforcement can lead to higher graduation rates and increased school safety).

187. *Id.* at 6.

188. *Id.*

189. See *id.* (assigning *universal* supports to “all students, prior to any display of disruptive behavior,” *targeted* supports to students who occasionally act out, and *intensive* supports “to students who display frequent, moderate, or severe forms of misbehavior, or to students who have experienced trauma or who display other risk factors.”).

190. See Mongan & Walker, *supra* note 18, at 239 (recommending the inclusion of *mens rea* and threat assessment in zero tolerance to reduce the number of expulsions). The one-strike feel of zero tolerance policies means students have no warning before being expelled for a violation they might not even realize they committed. Furthermore, the tiered support system provides a level of consistency in student misbehavior, the second principle recommended by the Department of Education. GUIDING PRINCIPLES, *supra* note 181, at 11.

191. GUIDING PRINCIPLES, *supra* note 181, at 11–12.

192. See *id.* at 12–13 (encouraging the involvement of families to drive home the important parts of the school’s disciplinary policies).

193. *Id.* at 14–15. Considering the research on students removed from the classroom setting, this caveat comes as little surprise in a strategy meant to reform school discipline. Boccanfuso & Kuhfeld, *Multiple Responses*, *supra* note 14, at 2.

actually *be present*. The second principle would allow students to remain in the classroom when they simply behave like children.¹⁹⁴

Finally, to maintain the positive environment and student supports created by the first two principles, school administrators must constantly follow-up and evaluate the policies they put in place.¹⁹⁵ The consistent feedback from teachers, students, and families should help to eliminate any unintended consequences from the discipline policy.¹⁹⁶ A steady flow of communication and feedback between school officials and students will also provide students an appropriate framework when speaking. One of the major drawbacks to zero tolerance comes from the rigid, yet shifting, boundaries imposed by the laws.¹⁹⁷

Like the Department of Education, legislative bodies across the country have begun reining in zero tolerance laws.¹⁹⁸ Some of the proposed legislation likely seeks political points more than anything.¹⁹⁹ But the legislation also reflects that people are fed up with how far zero tolerance has spiraled out of control.²⁰⁰

In Illinois, students in Chicago Public Schools have called on the school board and the governor to fix the problems caused by zero

194. See Boccanfuso & Kuhfeld, *Multiple Responses*, *supra* note 14, at 3 (finding that the vast majority of suspensions and expulsions have nothing to do with the most serious offenses).

195. See GUIDING PRINCIPLES, *supra* note 181, at 16 (establishing a data-driven assessment system is crucial to improvement).

196. *Id.* at 18.

197. See Hillyard & McDermott, *Considerations*, *supra* note 123, at 186 (arguing that zero tolerance policies discharge administrators from taking “responsibility for their decisionmaking [sic].”).

198. *E.g.*, H.B. 1058, 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013) (moving away from expulsion and law enforcement referrals as the primary ways of handling infractions); H.R. 795, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (requiring school districts to create “standards for intervention” that provide an array of alternatives to mandatory expulsion or suspension); S.B. 167, 130th Gen. Assemb., Reg. Sess. 2013-14 (Ohio 2014) (“eliminat[ing] any policy of zero tolerance for violent, disruptive, or inappropriate behavior”).

199. See H.R. 2625, 113th Cong. (1st Sess. 2013) (withholding funds from any educational institution that punishes a student for a very specific group of actions). The proposed bill seeks to protect students like Joshua Welch, along with countless other students whose punishments stem from overzealous enforcement of zero tolerance. *Id.* The bill would provide protection to students for “using a finger or hand . . . [or] writing utensil to simulate a firearm” and other punished actions that have garnered media attention. *Id.*

200. See Randy Ellis, *Oklahoma Lawmaker Files Bill to Protect Students Creating Imaginary Weapons*, THE OKLAHOMAN (Jan. 9, 2014), <http://newsok.com/oklahoma-lawmaker-files-bill-to-protect-students-creating-imaginary-weapons/article/3921999> (quoting Oklahoma state representative Sally Kern as wanting to “let children be children.”).

tolerance policies.²⁰¹ The students sought support for HB 4655²⁰² and SB 3004 which would limit expulsions to a “significant threat of imminent serious harm” and suspensions to a “serious act of misconduct.”²⁰³ The bill replaces the language in Illinois law allowing schools to expel or suspend students for gross disobedience or misconduct.²⁰⁴ The proposed legislation grants schools the additional power to suspend for up to three days any student who poses a threat to the safety of other students or school staff.²⁰⁵ The Illinois Senate Bill, however, leaves the weapons policy mandated by GFSA untouched.²⁰⁶ The revisions to the school discipline policies are certainly encouraging, but the addition of the “threat suspension” shows that legislation by fear still rules the day.

Without repealing the Gun Free Schools Act or similar legislation mandating expulsion for weapons possession, schools will retain their broad discretion to punish students for harmless actions.²⁰⁷ Implementing alternatives to threat assessment in the

201. See Ellyn Fortino, *CPS Students Want State Lawmakers to Fix “Broken” School Discipline Policies*, PROGRESSILLINOIS.COM (Apr. 17, 2014, 11:59 AM), www.progressillinois.com/quick-hits/content/2014/04/17/cps-students-want-state-lawmakers-fix-broken-school-discipline-policie (calling for support of proposed legislation SB 3004 and HB 4655).

202. H.B. 4655, 98th Gen. Assemb., 2nd Reg. Sess. (Ill. 2014).

203. S.B. 3004, 98th Gen. Assemb., 2nd Reg. Sess. (Ill. 2014). The two versions of the bill passed through committee and have no current differences, so this comment will refer to the Senate bill for discussion purposes.

204. 105 ILL. COMP. STAT 5/10-22.6(a),(b).

205. S.B. 3004, 98th Gen. Assemb., 2nd Reg. Sess. 5.

206. See generally S.B. 3004, 98th Gen. Assemb., 2nd Reg. Sess. (making no changes to the language defining prohibited weapons, including “any other object if used or attempted to be used to cause bodily harm”).

207. Some people might counter that the GFSA is entirely necessary to prevent violent deaths. See Patrick Kachur, et al., *School-Associated Violent Deaths in the United States, 1992 to 1994*, 275 JAMA 1729 (1996), as reprinted in THE GUN CONTROL DEBATE 226 (Marjolijn Bijlefeld, ed. 1997) (identifying 105 school-associated violent deaths in the two years immediately preceding the passage of GFSA). The 1992–94 study indicates that “school-associated violent deaths were more common than previously thought,” and it suggests “a comprehensive approach that addresses violent injury and death among young people at school.” *Id.* However, the rarity of a school shooting does not warrant such an expansive solution that sweeps up and punishes student speech in the process. See *id.* (finding that the “estimated incidence of school-associated violent deaths was 0.09 per 100,000 student-years); discussion *supra* Part III.C. In addition, no studies in the twenty years since the passage of GFSA indicate that it worked. *Supra* note 36 and accompanying text.

Furthermore, repealing the GFSA will not open the floodgates for an increase in school violence. Teachers will still retain the authority to control classroom discipline. Discussion *supra* Part I.B. In fact, repealing GFSA would return even more authority to teachers. Cf. *Tinker*, 393 U.S. at 513 (returning discipline to a simpler, discretionary disruption standard rather than a mandatory expulsion). Teachers would actually possess the authority to determine the danger a student poses. See generally Morton, *supra* note 8, at 782, 784 (arguing that returning flexibility to student punishment as an

classroom²⁰⁸ while leaving the underlying problem in place is functionally equivalent to throwing a new coat of paint over a peeling wall. The new layers do not actually address the problem: zero tolerance leaves no room for alternatives.²⁰⁹

Additional training for teachers on how to respond to student disruption does not magically replace the prerequisite to expel someone who may be considered a threat. Moreover, the conditional spending hook tied to the Gun Free Schools Act realistically prevents states and individual schools from eliminating zero tolerance weapons policies on their own.²¹⁰ Therefore, the Gun Free Schools Act must be repealed before the Department of Education's multi-tiered plan or state alternatives to zero tolerance can even take effect.

B. Judge the Speaker, Not the Speech—Courts Need to Use the Subjective-Intent Test

Because *Virginia v. Black* did not address whether an objective or subjective intent test is appropriate in true threat cases, most courts continue to apply an objective test.²¹¹ Instead, the only times intent has been stressed is when evaluating whether a person *intended to communicate* a threat, as in *Doe v. Pulaski County Special School District*.²¹² But unlike school administrators, who may need to make a decision on student speech hastily, a judge has little excuse for stopping the analysis of intent at communication. Innocent students escape from the broad trappings of the true threat doctrine only when courts apply the intent element to the speech itself.

Adding a subjective-intent requirement to student speech protects innocent students in three ways. First, the subjective-intent test would eliminate much of the chilling effect the other tests have on speech.²¹³ Attaching the intent requirement to the communication only—instead of the message itself—removes true threats from the narrowly proscribed space of intimidation that it

alternative to zero tolerance could result in fewer absurd stories about students punished for speech).

208. See generally Salgado, *supra* note 10 (arguing for a particular threat assessment model to be used when evaluating student speech).

209. See Teske, *supra* note 17, at 89 (citing studies that show the uniform punishment dealt by zero tolerance policies make problems worse for students).

210. GFSA, 20 U.S.C. § 7151(b)(1).

211. See *Elonis*, 730 F.3d at 330 (finding a majority of courts did not see *Black* as “requir[ing] a subjective intent to threaten.”).

212. *Doe*, 306 F.3d at 624–25.

213. See Salgado, *supra* note 10, at 1390 (indicating the objective speaker test chills speech because a student must consider the reactions of teachers, parents, or fellow students before speaking).

occupies.²¹⁴ But the subjective-intent test would require a judge to differentiate between child's play and an actual threat.²¹⁵ Joshua Welch clearly intended to show off his pastry pistol once he determined it resembled a gun.²¹⁶ But despite saying "bang" when he pointed the pastry, nothing indicates he was doing anything more than playing with his food—hardly an offense worth punishing. The subjective-intent test would protect students like Joshua from the hypersensitive audience public school engenders.²¹⁷

Second, students whose speech may have been misunderstood by a reasonable recipient receive protection from a subjective-intent requirement.²¹⁸ A student's case would require more than a mere showing that someone *could feel* threatened by the speech.²¹⁹ The subjective-intent test forces the school to argue why Joshua's actions were a threat, and thus punishable, instead of just taking that for granted.²²⁰

Finally, the subjective-intent test more appropriately exonerates wrongly punished students.²²¹ This does not provide a get-out-of-punishment-free card to students who genuinely endanger others.²²² But when school officials classify every instance of gun-related speech as a threat, applying this standard will

214. See *Black*, 538 U.S. at 359–60 (stating that even though a "speaker need not actually intend to *carry out a threat*[,] the test hangs on his "intent [to] plac[e] the victim in fear of bodily harm or death." (emphasis added)).

215. Cf. Stanner, *supra* note 91, at 412 (countering potential arguments that an intent requirement would let the guilty go free).

216. See Joe Burris, *Jennings Says Bill Responds to Student's Gun-Shaped Pastry Incident*, BALTIMORE SUN (Mar. 20, 2013), http://articles.baltimoresun.com/2013-03-20/news/bs-md-pastry-bill-20130320_1_gun-b-j-welch-jennings (quoting Joshua's father as saying his son knew he had done something wrong to play with the pop-tart, but also stating "it was just a pastry. I couldn't hurt anyone with it.").

217. *Supra* text accompanying note 128.

218. See Brief for Petitioner at 51, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (arguing that "the negligence standard poses a very real risk of criminalizing 'poorly chosen words.'). Petitioner classified the objective test as the "negligence standard" because without the mens rea requirement, negligent speech cannot be protected from true threat prosecution. See *generally id.* at 34–52 (summarizing the history of criminalizing negligent speech and arguing that focusing on third party reactions "impermissibly chills speech").

219. See Stanner, *supra* note 91, at 410 (noting that the subjective-intent test shifts the government's burden of proof away from the reaction of the listener and onto the intention of the speaker).

220. See *id.* at 411 (arguing that simply asserting the state of school violence would no longer suffice in establishing a threat).

221. *Contra* Salgado, *supra* note 10, at 1389–92 (writing that administrators' reactions to supposed threats in three cases resulted in three different rulings). The objective tests, while similar on the surface, ultimately fails based on the capriciousness of individual justices each channeling their interpretation of reasonable listeners in a school.

222. Stanner, *supra* note 91, at 412.

provide relief to students who never intended to threaten others. As an added benefit, the subjective-intent standard incentivizes administrators to have legitimate proof of intent to threaten, rather than a general discomfort from a student's speech.²²³

If prosecutors must prove intent in a criminal case against a child defendant, the same standard should apply to student speakers in zero tolerance cases with parallel punishments.²²⁴ The subjective-intent test sufficiently protects most students whose speech may alarm some people but was never intended as a threat. Additionally, it still contains enough bite to apply to truly threatening speech, while generally allowing kids to be kids.

V. CONCLUSION

In the twenty-two years since the passage of GFSA, one thing obviously stands out: zero tolerance weapons policies have resulted in more harm than good. Too often, these policies punish innocent children for behaving like children. While schools certainly want to maintain school safety and discipline, zero tolerance policies prevent schools from effectively accomplishing either. In order to effect positive change on school discipline, the Gun Free Schools Act must be repealed, allowing states to successfully pass meaningful reforms. Additionally, courts must apply a subjective-intent test to cases of allegedly threatening student speech so that those still caught in the crosshairs can find relief.

223. *Contra* Salgado, *supra* note 10, at 1392 (noting that “[in applying the objective test(s)] administrators are prone to classify virtually everything as a threat, regardless of its actual nature, and then allow the courts to sort it out later at the expense of taxpayers.”); *cf.* Lukianoff, *supra* note 127, at 46–47 (writing about a college professor who assaulted an abortion protestor and tried to excuse her illegal actions because of her emotional discomfort).

224. See Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned Into a Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded In Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 320–21 (2005) (arguing that the punishments rendered on a child in a school setting—expulsion or suspension—mirror adult punishments).