STATE LEGISLATION MANDATING SCHOOL CYBERBULLYING POLICIES AND THE POTENTIAL THREAT TO STUDENTS' FREE SPEECH RIGHTS

Darryn Cathryn Beckstrom[*][†]

INTRODUCTION

Megan Meier was a thirteen-year-old girl, living in a quiet subdivision outside of St. Louis, Missouri.[1] Though she had faced troubles with depression, attention deficit disorder, and her weight, she was a typical teenager who "loved swimming, boating, fishing, dogs, rap music and boys."[2] When Megan created a MySpace account, she soon received a friend request from a sixteen-year-old boy named Josh Evans, and with this request, she thought her life was slowly changing for the better.[3] Josh had recently moved from Florida to Missouri.[4] He was a cute boy who was home-schooled, played music, and seemed to express an interest in Megan.[5] The two had exchanged messages back and forth over the course of several weeks.[6] However, as the weeks progressed, the messages became increasingly hostile.[7] On October 15, 2006, Josh began to write a series of hurtful messages to Megan, including a message that read: "I don't know if I want to be friends with you anymore because I've heard that you are not very nice to your friends."[8] Megan was confused about why Josh would write such a thing.[9]

Megan received another message from Josh, which was probably the most devastating. Josh wrote: "Everybody in O'Fallon knows how you are. You are a bad person and everybody hates you. Have a [expletive] rest of your life. The world would be a better place without you."[10] Shortly

---

* J.D. candidate, University of Minnesota; Ph.D. candidate, Department of Political Science, University of Wisconsin-Madison; B.A., University of Minnesota; M.A., M.P.A., University of Wisconsin-Madison. The author is currently a Graduate Fellow in the Institute for Legal Studies, University of Wisconsin Law School, and an instructor with the University of Wisconsin Division of Continuing Studies. The author has previously taught constitutional law at UW-Madison.

† I would like to thank my parents for their love and support.

1. Steve Pokin, *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, SUBURBAN JOURNALS, Nov. 13, 2007, http://suburbanjournals.stltoday.com/articles/2007/11/13/news/sj2tn20071110-1111stc_pokin_1.ii1.txt.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* (quotation marks omitted).
9. *Id.*
10. *Id.* (quotation marks omitted).

thereafter, Megan went to her room, and that would be the last time anyone would see her alive.[11] Megan hung herself in her closet with a belt, and she died the following day.[12] Unfortunately, Megan died without knowing the truth about her sixteen-year-old friend.[13] Josh Evans did not exist.[14] Six weeks after her death, Megan's parents were finally informed about the true identity of "Josh."[15] Megan had been receiving messages not from an adolescent boy, but from a neighbor in the same subdivision.[16] Josh had been created by Lori Drew, a forty-seven-year-old neighbor and the mother of Megan's former friend.[17] Drew has been charged by federal prosecutors "with conspiracy and three counts of accessing a computer without authorization via interstate commerce to obtain information to inflict emotional distress" as a result of creating the fake MySpace account.[18]

Cyberbullying has gained an extensive amount of attention since the release of Megan's story and the recent deaths of other teens as a result of such conduct.[19] Given the increasing use of social-networking sites such as Facebook, MySpace, and Friendster, as well as greater access to cell phones and instant-messaging services, children are now using electronic mediums to perpetuate the age-old practice of bullying. School districts are

11. Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23, *available at* 2007 WLNR 23464030.

12. Pokin, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id*.

18. Jennifer Steinhauer, *Woman Who Posed as Boy Testifies in Case That Ended in Suicide of 13-Year-Old*, N.Y. TIMES, Nov. 21, 2008, at A18, *available at* 2008 WLNR 22234679. As of the writing of this Article, Drew's trial was underway and her guilt undetermined. *Id.* Some states are considering legislation that would make cyberbullying a crime; this Article merely considers states' efforts to curtail cyberbullying among students.

19. The media has also noted the death of thirteen-year-old Ryan Halligan, another victim of cyberbullying. *Frontline: Growing Up Online: Interviews: John Halligan*, (PBS television broadcast Jan. 22, 2008) (transcript available at http://www.pbs.org/wgbh/pages/frontline/kidsonline/interviews/halligan.html). Ryan committed suicide in 2003, and his parents believe that this was the result of Ryan's repeated bullying both offline and online. *Id*. Ryan's father, John Halligan, noted that part of the reason why the Internet contributed to Ryan's suicide is because the bullying never stopped when Ryan came home from school. Specifically:

> [Children are] coming home, and they're getting right onto the computer, and the drama continues right into the evening. Nobody is taking a break. And they're acting out and behaving in a way that they would never in person, especially in front of adults. . . . There's just no check and balances occurring online.

Id.

Further, fifteen-year-old Jeff Johnston was a victim of cyberbullying and eventually committed suicide by "hang[ing] himself by his book-bag strap in 2005." Jonathan Turley, Op-Ed, *How to Punish a Cyber-bully*, L.A. TIMES, Nov. 21, 2007, at A25, *available at* 2007 WLNR 23024450.

examining ways to prevent children from engaging in bullying via electronic means,[20] and state legislatures have recently responded to the increasing prevalence of cyberbullying by enacting legislation requiring school districts to enact cyberbullying policies.[21] However, as this Article will discuss, such legislation varies in its approach to decreasing cyberbullying in our nation's schools.[22] Further, current state cyberbullying legislation is disparate in its sensitivity towards students' free speech rights.[23]

This Article will review the current law regarding student speech, including off-campus cyberspeech. Further, this Article will examine the recent emergence of state legislation requiring school districts to adopt policies prohibiting cyberbullying and the possible implications of this legislation on students' free speech rights. Finally, this Article proposes a model that avoids interference with students' constitutional rights to free speech. State legislatures should enact cyberbullying legislation allowing school administrators to discipline students for on-campus, but not off-campus, cyberbullying, unless the off-campus cyberbullying constitutes an objective threat of violence to students, teachers, or school administrators.[24] Although this approach to off-campus cyberbullying may seem to leave

---

20. Cyberbullying is not only prevalent in secondary schools, but also law schools. *See* Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51 (2005). Dickerson discusses cyberbullying in a law-school setting. The article "introduce[s] the law school community to the problem of cyberbullies, and to alert deans, administrators, and professors to the risks associated with this form of bullying—so that the problem can be acknowledged and addressed." *Id.* at 51.

21. *See infra* Part I.C (providing an overview of state cyberbullying legislation). Further, some of this legislation comes in response to the increasing incidents of cyberbullying and the subsequent suicides of adolescents. In response to the death of Jeff Johnston in 2005, several lawmakers in the Florida State Legislature introduced the "Jeffrey Johnston Stand Up for All Students Act," which would prohibit "bullying or harassment during education programs or activities, on school buses, or through use of data or computer software accessed through computer systems of certain educational institutions." S.B. 114, 2007 Leg., Reg. Sess. (Fla. 2007). The bill died in committee. *Id.* Nonetheless, cyberbullying legislation has recently had a large amount of success in state legislatures. In 2007, eight states adopted such legislation requiring school districts to adopt cyberbullying policies and, as of the writing of this Article, at least one state has passed cyberbullying legislation in 2008. Nat'l Conference of State Legislatures, Enacted Cyberbullying Legislation, http://www.ncsl.org/programs/educ/SchBullyingEnactLeg.htm (last visited Nov. 26, 2008) [hereinafter Enacted Cyberbullying Legislation].

22. *See infra* Part I.C (noting differences in legislation among states).

23. *See infra* Part III (evaluating current cyberbullying statutes).

24. Previous commentary on state legislation requiring school districts to adopt cyberbullying policies that effectively punish students for conduct that constitutes "cyberbullying" is extremely limited. However, there has been some general discussion of cyberbullying in schools. With regard to public schools, Renee L. Servance argues that "[n]ot all off-campus negative speech should be subject to school authority. Rather, schools and courts should assess the negative impact of off-campus cyber-speech on the targeted individual and determine whether the impact interferes with the school's educational mission." Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216 (2003). This approach to off-campus speech, as this Article will discuss, is too broad, and gives schools a significant amount of discretion in determining when to punish students for entirely off-campus conduct.

students vulnerable to the wrath of bullies resorting to electronic means, this Article also provides several policy alternatives that effectively protect students from cyberbullying while respecting students' free speech rights.

Part I of this Article provides background on the definition of cyberbullying, the prevalence of cyberbullying in schools, and the current state of legislation requiring schools to adopt cyberbullying policies. Part II analyzes and evaluates the standards of student speech created by the U.S. Supreme Court. Further, this Part will also discuss the lower federal courts' interpretation of these standards in relation to off-campus student cyberspeech. Part III will evaluate the effectiveness of enacted cyberbullying legislation through the use of two hypothetical scenarios. Finally, Part IV recommends policy alternatives that school districts and state legislatures should consider in an effort to curtail student cyberbullying while preventing lawsuits resulting from infringement on students' free speech rights.[25]

I. BACKGROUND

A. Basics of Cyberbullying

Cyberbullying, unlike traditional bullying, "involves the use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging, defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behavior by an individual or group, that is intended to harm others."[26] Cyberbullying can also employ media such as PDAs, blogs, and social networks. The following is an example of cyberbullying on a social network site. In a focus group conducted by the Pew Internet and American Life Project, a sixteen-year-old girl stated:

> There's this boy in my anatomy class who everybody hates. He's like the smart kid in class. Everybody's jealous. They all want to be smart. He always wants to work in our group and I hate it. And we started this thing, some girl in my class started this I Hate

---

25. *See* Tresa Baldas, *As 'CyberBullying' Grows, So Do Lawsuits*, NAT'L LAW J., Dec. 10, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1197281074941. Recently, students have settled with school districts for violating their First Amendment right to free speech after the school districts punished them for off-campus cyberspeech. *Id.* These settlements include a $117,500 settlement with a school district in New Jersey and a $90,000 settlement with a school district in Pennsylvania. *Id*.

26. Dickerson, *supra* note 20, at 56 (citing Bill Belsey, *Explanation of Cyberbullying*, http://www.cyberbullying.ca/ (last visited Sept. 7, 2008)).

> [Name] MySpace thing. So everybody in school goes on it to comment bad things about this boy.[27]

MySpace and other social networks are popular with cyberbullies because of the ability to post embarrassing pictures of other students online:

> One 17-year-old boy explained "I'm not a big fan of MySpace. Well, I got in trouble from one of them at my school . . . I had one and they [other friends] put a bad picture up there [on her page] and I got in a little trouble at school . . . Some girl just put up like pictures of us on New Year's Eve and the Dean saw it."[28]

Cyberbullying can also take place when e-mail conversations are subsequently distributed. For example, a middle-school girl described her experience of talking online to another student: "I was in a fight with a girl and she printed out our conversation, changed some things that I said, and brought it into school, so I looked like a terrible person."[29] Another example, taken from a middle-school girl:

> I know a lot of times online someone will say something about one person and it'll spread and then the next day in school, I know there's like one of my friends, something happened online and people started saying she said something that she never said, and the next day we came into school and no one would talk to her and everyone's ignoring her. And she had no idea what was going on. Then someone sent her the whole conversation between these two people.[30]

The aforementioned examples are merely illustrations of the general nature of cyberbullying and how adolescents use the Internet to bully others. Cyberbullying frequently occurs because cyberbullies can remain anonymous, cyberbullying is easy to engage in, and the effects of cyberbullying can be more powerful than traditional bullying.[31]

---

27. Pew Internet & Am. Life Project, *Parents and Teens 2006 Survey: Data Memo* 2 (June 27, 2007), http://www.pewinternet.org/pdfs/PIP Cyberbullying Memo.pdf (alteration in original).

28. *Id*. at 4.

29. *Id*. at 5.

30. *Id*. at 3.

31. *Id*. at 5. The focus group conducted by the Pew Internet and American Life Project found that many individuals engage in cyberbullying because of the ease: "The simplicity of being able to replicate and quickly transmit digital content makes bullying quite easy. 'Just copy and paste whatever somebody says,' a middle school girl explains as she describes online bullying tactics." *Id.* The Pew survey reports:

> Bullying has entered the digital age. The impulses behind it are the same, but the effect is magnified. In the past, the materials of bullying would have been

B. Characteristics of Cyberbullying

Cyberbullying is a prevalent problem among pre-adolescents and adolescents alike. A nationwide survey conducted by Opinion Research Corporation for Fight Crime: Invest in Kids, found that cyberbullying occurs frequently.[32] The study, conducted in July 2006, found that 31% of 12–14-year-olds and 40% of 15–17-year-olds reported that in the last year "mean, threatening or embarrassing things [were] said about [them] through email, instant messages, websites such as MySpace, Friendster, etc., chat rooms or text messages."[33] Other national surveys have uncovered similar results.[34] The aforementioned results suggest that cyberbullying is becoming a prevalent problem among young people. This Subpart describes those who engage in cyberbullying, where they access digital media, and the types of cyberbullying employed.

1. Who Engages in Cyberbullying?

Contrary to the traditional roles of the schoolyard bully and their victims, in which boys are often the perpetrators, girls tend to engage in cyberbullying more frequently than boys. A 2006 national survey conducted by the Opinion Research Corporation found that 5% of boys aged 12–14 and 8% of boys aged 15–17 reported having "ever sent or posted any mean, threatening or hurtful messages about someone else online or through other messages[.]"[35] Conversely, 16% of girls aged 12–14 and 11% of girls aged 15–17 reported engaging in this same conduct.[36]

> whispered, shouted or passed around. Now, with a few clicks, a photo, video or a conversation can be shared with hundreds via email or millions through a website, online profile or blog posting.

Id.

32. OPINION RESEARCH CORP., CYBER BULLY TEEN 3 (2006), *available at* http://www.fightcrime.org/cyberbullying/cyberbullyingteen.pdf [hereinafter CYBER BULLY TEEN].

33. *Id.* Similar results were found in a 2006 survey conducted by the Pew Internet and American Life Project, in which 32% of teenagers surveyed reported being cyberbullied. Pew Internet and American Life Project, *supra* note 27, at 1.

34. *See, e.g.,* Press Release, i-SAFE, National i-SAFE Survey Finds Over Half of Students are Being Harassed Online (June 28, 2004), *available at* http://www.isafe.org/imgs/pdf/outreach_press/internet_bullying.pdf (reporting the results of a 2004 national survey of fourth- through eighth-grade students to determine the frequency of cyberbullying). The survey found that overall, 42% of students within this age group reported ever being bullied online, and 7% reported that the bullying occurs frequently. *Id.* Additionally, 58% of students reported that they had "not told their parents or an adult about something mean or hurtful that happened to them online." *Id.*

35. CYBER BULLY TEEN, *supra* note 32, at 9.

36. *Id.*

Further, girls are more likely than boys to be the victims of cyberbullying.[37] In 2006, the Pew Internet and American Life Project found that among 12–14-year-olds, 34% of girls had experienced cyberbullying compared to 22% of boys.[38] Additionally, among 15–17-year-olds, 41% of girls had experienced cyberbullying compared to 29% of boys in this same age cohort.[39] A 2006 national survey conducted by the Opinion Research Corporation uncovered similar results.[40]

In an effort to decrease the amount of cyberbullying among adolescents, especially among girls, the National Crime Prevention Council and the Ad Council produced a series of commercials addressing the problem. The Ad Council states that "[t]he cyberbullying prevention campaign targets 12 and 13-year-olds, particularly girls, urging them to put an end to the cyberbullying chain."[41] The commercials highlight the negative behavior that girls can engage in when talking online. Specifically, one of the commercials shows a girl at a talent show reading a "story" that she wrote.[42] Instead of sharing a story, though, the girl shares with the audience a list of hurtful and mean-spirited comments about another presumed classmate. She says her classmate has "greasy hair" and "dirty nails" and makes reference to her classmate's unemployed father.[43] Another commercial illustrates a girl studying in the kitchen with a group of her friends, and what appears to be her mother listening to the conversation.[44] The girl tells her "friend" that she is a "slut," a "desperate girl" and that her "makeup makes [her] look like a clown."[45] Both commercials conclude with the following message: "If you wouldn't say it in person, why say it online? Delete Cyberbullying. Don't write it. Don't forward it."[46]

---

37. Pew Internet & Am. Life Project, *supra* note 27, at 2.

38. *Id*.

39. *Id*.

40. CYBER BULLY TEEN, *supra* note 32, at 3. The survey found that 39% of girls between ages 12–14 and 48% of girls between ages 15–17 reported within the past year having "mean, threatening or embarrassing things been said about [them] through email, instant messages, websites such as MySpace, Friendster, etc., chat rooms or text messages." *Id*. Comparatively, 24% of boys aged 12–14 and 33% of boys aged 15–17 reported being cyberbullied in this manner within the same time period. *Id*.

41. Ad Council, *Cyberbullying Prevention*, http://www.adcouncil.org/default.aspx?id=42 (last visited Nov. 29, 2008) (providing links to the commercials and other material produced for the campaign).

42. National Crime Prevention Council, *Delete Cyberbullying*, http://www.ncpc.org/cyberbullying/ (last visited Nov. 29, 2008) (scroll to commercial titled "Talent Show").

43. *Id*.

44. *Id*. (scroll to commercial titled "Kitchen").

45. *Id*.

46. *Id*.

2. Where Does Cyberbullying Take Place?

Like its traditional counterpart, cyberbullying among adolescents can take place both at school and off-campus. The previously discussed 2006 study conducted by the Opinion Research Corporation found that most cyberbullying occurs off-campus.[47] Specifically, among 12–14-year-olds, 63% reported being cyberbullied at home within the past year, 30% at school, 26% at a friend's home, and 5% somewhere else.[48] Further, among 15–17-year-olds, 75% reported being cyberbullied at home within the past year, 30% at school, 24% at a friend's home, and 5% somewhere else.[49] These results suggest that a substantial amount of cyberbullying takes place away from the school setting, for both pre-adolescents and adolescents alike.

3. What Form Does Cyberbullying Take?

Cyberbullying occurs in several forms of electronic communication, including flaming, harassment, denigration, impersonation, outing, trickery, exclusion, and cyberstalking.[50] Moreover, cyberbullying occurs through the use of various electronic mediums. The 2006 survey, discussed previously, found that instant messaging was the most frequently used medium in which cyberbullying occurred.[51] Among 12–14-year-olds, 38% reported that cyberbullying occurred in an instant-messaging conversation within the past year, 30% in an e-mail, 24% on a website, 15% in a photo sent in an e-mail or posted on a website, 14% in a text message, and 12% in a chat room.[52] The form of cyberbullying was similar for 15-17-year-olds.[53] Forty-eight percent reported that such bullying occurred in an instant-messaging conversation within the past year, 36% in an e-mail, 35% on a website, 22% in a text message, 15% in a chat room, and 11% in a photo sent in an e-mail or posted on a website.[54]

---

47. CYBER BULLY TEEN, *supra* note 32, at 6.
48. *Id*.
49. *Id*.
50. Nancy E. Willard, *Parent Guide to Cyberbullying and Cyberthreats* 1–2, *available at* http://www.cyberbully.org/cyberbully/docs/cbctparents.pdf, *in* NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS (2007), *excerpts available at* http://www.cyberbully.org/cyberbully/.
51. CYBER BULLY TEEN, *supra* note 32, at 5.
52. *Id*.
53. *Id*.
54. *Id*.

C. Cyberbullying Legislation

Although more than half of the states in the nation have enacted legislation targeting traditional bullying,[55] cyberbullying is a recent trend among adolescents. Therefore, cyberbullying statutes are not as prevalent as bullying statutes. Currently, nine states have enacted legislation requiring school districts to create policies aimed at preventing cyberbullying,[56] and several states are currently considering such legislation.[57] Recent legislative actions mandating that school districts create cyberbullying policies are similar; however, there are variations among these statutes. These variations have implications for students' free speech rights. This Subpart provides an overview of this legislation.

1. Arkansas

In 2007, Arkansas amended its bullying statute to reflect the increasing amount of bullying taking place by means of an "electronic act."[58] This legislation requires school districts to augment their current bullying policies with language to include cyberbullying.[59] Further, schools must include language in their bullying policies to cover off-campus acts that are "electronic." Cyberbullying is punishable if it:

> results in the substantial disruption of the orderly operation of the school or educational environment . . . whether or not the electronic act originated on school property or with school equipment, if the electronic act is directed specifically at students or school personnel and maliciously intended for the purpose of disrupting school, and has a high likelihood of succeeding in that purpose.[60]

---

55. Nat'l Conf. of State Leg., School Bullying, http://www.ncsl.org/programs/educ/bullyingoverview.htm (last visited Nov. 25, 2008).

56. Enacted Cyberbullying Legislation, *supra* note 21.

57. These states include Florida, H.R. 669, 2008 Leg., Reg. Sess. (Fla. 2008) (requiring school districts to implement district policies prohibiting bullying and cyberbullying); Kentucky, H.B. 91, 2008 Leg., Reg. Sess. (Ky. 2008) (requiring school districts to adopt school policies that would prohibit bullying and cyberbullying); Maryland, H.B. 199, 2008 Leg., Reg. Sess. (Md. 2008) (requiring school districts to enact district policies disciplining bullying and cyberbullying); Missouri, Mo. S. 646, 94th Gen. Assem., (Mo. 2007) (amending current bullying statute requiring school districts to adopt bullying policies to include the following: "Bullying may consist of physical actions, including gestures, or oral, cyberbullying, or written communication, and any threat of retaliation for reporting of such acts."); and Rhode Island, R.I. GEN. LAWS § 16–21–26 (Supp. 2008) (adding "electronic communications" to current statutory requirements for schools' anti-bullying policies).

58. ARK. CODE ANN. § 6-18-514(a)(3)(B) (2007).

59. *Id.* § 6-18-514(a)(2).

60. *Id.* § 6-18-514(b)(2)(B).

The statute does not define "off-campus" conduct, although it does define "substantial disruption." An electronic communication made off-campus creates a substantial disruption if it causes a "[n]ecessary cessation of instruction or educational activities," or "[s]evere or repetitive disciplinary measures are needed in the classroom or during educational activities," or when "[e]xhibition of other behaviors by students or educational staff . . . substantially interfere[s] with the learning environment."[61]

2. Delaware

The Delaware State Legislature passed the School Bullying Prevention Act in 2007, which requires school districts to enact policies prohibiting both cyberbullying and traditional forms of bullying.[62] This statute requires school districts to create "a statement prohibiting bullying of any person on school property or at school functions or by use of data or computer software that is accessed through a computer, computer system, computer network or other electronic technology of a school district or charter school from kindergarten through grade 12."[63]

Additionally, the school board's statement on bullying must contain a definition of bullying that is at least as inclusive as the statement provided by the legislature.[64] Under this statute, students may be punished for off-campus cyberbullying. Specifically, the statute states that "[t]he physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action by the school district or charter school initiated under this section provided there is sufficient school nexus."[65]

61. *Id*. § § 6-18-514(a)(3)(D).

62. DEL. CODE. ANN. tit. 14, § 4112D(b) (2007).

63. *Id*. § 4112D(b)(2)(a).

64. *Id*. § 4112D(b)(2)(b). The legislation defines bullying as follows:

> [A]ny intentional written, electronic, verbal or physical act or actions against another student, school volunteer or school employee that a reasonable person under the circumstances should know will have the effect of:
>
> (1) Placing a student, school volunteer or school employee in reasonable fear of substantial harm to his or her emotional or physical well-being or substantial damage to his or her property.
>
> (2) Creating a hostile, threatening, humiliating or abusive educational environment due to the pervasiveness or persistence of actions or due to a power differential between the bully and the target; or
>
> (3) Interfering with a student having a safe school environment that is necessary to facilitate educational performance, opportunities or benefits; or
>
> (4) Perpetuating bullying by inciting, soliciting or coercing an individual or group to demean, dehumanize, embarrass or cause emotional, psychological or physical harm to another student, school volunteer or school employee.

Id. § 4112D(a).

65. *Id*. § 4112D(f)(1).

Finally, the statute also states that, among other requirements, school districts must "develop a school-wide bullying prevention program."[66]

3. Iowa

In 2007, the Iowa State Legislature passed legislation requiring all school districts and accredited nonpublic schools to "adopt a policy declaring harassment and bullying in schools, on school property, and at any school function, or school-sponsored activity regardless of its location, in a manner consistent with this section, as against state and school policy."[67] The statute does not specifically state whether off-campus cyberbullying could be punishable conduct under the adopted school-district policy.[68]

The statute defines "bullying" or "harassment" as "any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that meets one or more" of the conditions listed in the statute.[69] The statute defines a "[t]rait or characteristic of the student" as "includ[ing] but not limited to age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status."[70]

4. Minnesota

In May 2007, Minnesota enacted legislation requiring school districts to create cyberbullying policies: "Each school board shall adopt a written policy prohibiting intimidation and bullying of any student. The policy shall

---

66. *Id*. § 4112D(b)(2)(c).
67. IOWA CODE ANN. § 280.28(3) (West Supp. 2008).
68. *Id*.
69. *Id*. § 280.28(2)(B). The conditions are as follows:

> (1) Places the student in reasonable fear of harm to the student's person or property.
> (2) Has a substantial detrimental effect on the student's physical or mental health.
> (3) Has the effect of substantially interfering with a student's academic performance.
> (4) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

Id.

70. *Id*. § 280.28(2)(c).

address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use."[71] The legislation provides school districts with a substantial amount of deference in creating their bullying policies.

5. Nebraska

The Nebraska State Legislature passed legislation in February 2008 requiring school districts to include bullying through "electronic abuse" in existing bullying policies.[72] The Legislature noted that the legislation was needed because "[b]ullying disrupts a school's ability to educate students" and "[b]ullying threatens public safety by creating an atmosphere in which such behavior can escalate into violence."[73] The statute defines bullying as "any ongoing pattern of physical, verbal, or electronic abuse on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose by a school employee or his or her designee, or at school-sponsored activities or school-sponsored athletic events."[74] School districts have until July 1, 2009 to "adopt a policy concerning bullying prevention and education for all students."[75] The legislation does not apply to off-campus bullying through electronic means.[76]

6. New Jersey

In August 2007, the New Jersey State Legislature passed legislation requiring school districts to amend their district bullying policies to include bullying accomplished through "[e]lectronic communication."[77] The statute defines "electronic communication" as "communication transmitted by means of an electronic device, including, but not limited to, a telephone, cellular phone, computer, or pager."[78] Further, the statute defines "bullying" broadly, and the policy must extend to conduct that occurs on "school property, at a school-sponsored function or on a school bus."[79] In response

71. MINN. STAT. ANN. § 121A.0695 (West 2008).
72. 2008 Neb. Laws 205.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. N.J. STAT. ANN. § 18A:37-15.1 (West Supp. 2008).
78. *Id.* § 18A:37-14.
79. *Id.* The statute defines "bullying" as:

> [A]ny gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national

to this statute, the New Jersey Department of Education has produced guidelines that allow school districts to discipline off-campus cyberbullying which "substantially interferes" with the school's operation.[80]

7. Oregon

Oregon recently passed legislation requiring school districts to create cyberbullying policies.[81] The law requires that "each school district shall adopt a policy prohibiting harassment, intimidation or bullying and prohibiting cyberbullying. School districts are encouraged to develop the policy after consultation with parents and guardians, school employees, volunteers, students, administrators and community representatives."[82] Although the statute provides guidance to school districts in developing policies, it does not state that specific requirements must be included in district policies.[83] Therefore, school districts are given discretion in determining how to create a cyberbullying policy.

8. South Carolina

In 2006, South Carolina enacted the Safe School Climate Act.[84] Under this Act, "local school district[s] shall adopt a policy prohibiting harassment, intimidation, or bullying at school. The school district shall involve parents and guardians, school employees, volunteers, students,

---

> origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function or on a school bus and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of harming a student or damaging the student's property, or placing a student in reasonable fear of harm to his person or damage to his property; or
>
> b. has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.

Id.

80. N.J. DEP'T OF EDUC., MODEL POLICY AND GUIDANCE FOR PROHIBITING HARASSMENT, INTIMIDATION AND BULLYING ON SCHOOL PROPERTY, AT SCHOOL-SPONSORED FUNCTIONS AND ON SCHOOL BUSES 8–9 (rev. Nov. 2008), *available at* http://www.state.nj.us/education/parents/bully.pdf; Abbott Koloff, *States Push for Cyberbully Controls, But Efforts to Go Beyond Schools Raise Concerns Over Freedom of Speech, Privacy*, USA TODAY, Feb. 7, 2008, at 3A, *available at* 2008 WLNR 2313485.

81. OR. REV. STAT. § 339.356 (2007).

82. *Id.*

83. *See id.* (outlining distinct policy on bullying and harassment but not providing specific requirements).

84. Safe School Climate Act, S.C. CODE. ANN. § 59-63-110 (Supp. 2007).

administrators, and community representatives in the process of creating the policy."[85]

The law defines bullying as "a gesture, an electronic communication, or a written, verbal, physical, or sexual act that is reasonably perceived to have the effect of . . . harming a student physically or emotionally or damaging a student's property, or placing a student in reasonable fear of personal harm or property damage."[86] Further, bullying is prohibited when it has the effect of "insulting or demeaning a student or group of students causing substantial disruption in, or substantial interference with, the orderly operation of the school."[87] It is unclear how the law defines or interprets "substantial disruption."

9. Washington

The Washington State Legislature recently amended its definition of bullying to include "electronic" means.[88] In 2007, the Legislature passed legislation that requires the Washington State School Directors' Association to assemble an advisory committee to draft a model policy upon which schools may base their bullying policies.[89] Specifically, the statute requires that the "policy . . . include a requirement that materials meant to educate parents and students about the seriousness of cyberbullying be disseminated to parents or made available on the school district's web site."[90] School districts must adopt a bullying policy, which would include cyberbullying, by August 1, 2008.[91] The statute does not specifically state that school administrators are prevented from disciplining cyberbullying that takes place exclusively off-campus.[92]

---

85. *Id.* § 59-63-140. The statute defines "school" as "in a classroom, on school premises, on a school bus or other school-related vehicle, at an official school bus stop, at a school-sponsored activity or event whether or not it is held on school premises, or at another program or function where the school is responsible for the child." *Id.*

86. *Id.* § 59-63-120(1)(a).

87. *Id.* § 59-63-120(1)(b).

88. WASH. REV. CODE ANN. § 28A.300.285 (West 2008).

89. *Id.* § 28A.300.285(5).

90. *Id.*

91. *Id.*

92. *See id.* (outlining harassment, bullying, and intimidation-prevention policies, but not specifically stating under what conditions disciplining off-campus cyberbullying is permitted by school administrators).

II. THE COURTS AND STUDENTS' FIRST AMENDMENT RIGHTS

Throughout the past several decades, the U.S. Supreme Court has attempted to define the parameters of student speech in school in three landmark cases. Frequently referred to as the *Tinker*, *Fraser*, and *Hazelwood* trilogy, the standards enumerated from these cases are discussed below. Further, this Part discusses the lower courts' attempts to apply these standards to student speech, specifically cyberspeech taking place off-campus.

A. Standards of Student Free Speech

1. *Tinker*, *Fraser*, and *Hazelwood*

The U.S. Supreme Court considered student speech rights under the First Amendment for the first time in *Tinker v. Des Moines School District*.[93] Several students decided to wear armbands during school hours to show their opposition to the violence taking place in Vietnam, and when school officials became aware of the students' plan to protest the war, a policy was enacted "that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[94] Despite knowledge of the policy, some students went through with the plan of wearing the armbands.[95] The students were subsequently disciplined for their actions.[96]

In *Tinker*, Justice Fortas penned the famous phrase: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[97] However, unlike adults, students do not enjoy the full protection of the First Amendment. Under the *Tinker* standard, student speech may be suppressed if it amounts to a (1) substantial or material disruption[98] or (2) invades the rights of other students.[99] Specifically, the Court noted that in regard to student speech, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the

93. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507 (1969).
94. *Id*. at 504.
95. *Id*.
96. *Id*.
97. *Id*. at 506.
98. *Id*. at 509.
99. *Id*. at 513.

prohibition cannot be sustained."[100] Further, students may engage in speech so long as it does not "collid[e] with the rights of others."[101]

After *Tinker*, the High Court remained silent on student speech for thirty years until *Bethel School District No. 403 v. Fraser*.[102] In *Fraser*, Matthew Fraser "delivered a speech nominating a fellow student for student elective office."[103] The speech was delivered at a voluntary school assembly.[104] Those who declined to attend were required to attend study hall.[105] "During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[106] Prior to the assembly, two of Fraser's teachers told him that he should not deliver the speech because "the speech was 'inappropriate['] . . . and that his delivery of the speech might have 'severe consequences.'"[107] After delivering the speech, "Fraser was . . . informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises."[108]

Choosing not to follow the standard established in *Tinker*, the Court instead relied on the principle that although "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[109] students are nonetheless not entitled to the same latitude of First Amendment protections as adults.[110] Specifically, the Court noted that "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."[111] More generally, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[112]

Concluding that public schools have the right to determine what words are deemed offensive and therefore prohibited in schools, the Court noted:

---

100. *Id*. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
101. *Id*. at 513.
102. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
103. *Id*. at 677.
104. *Id*.
105. *Id*.
106. *Id*. at 677–78.
107. *Id*. at 678.
108. *Id*.
109. *Id*. at 680 (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969)).
110. *Bethel*, 478 U.S. at 682.
111. *Id*.
112. *Id*.

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, 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. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. . . . The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.[113]

Finally, in *Hazelwood School District v. Kuhlmeier*, the Court once again examined the constitutionality of restrictions placed on the content of student speech by school administrators.[114] In *Hazelwood*, a group of students who were staff members of the student newspaper, *Spectrum*, sued the school district.[115] The students argued "that school [administrators] violated their First Amendment rights by deleting two pages of articles" after the advisor of the newspaper believed they were not appropriate for the student newspaper.[116] Instead of relying on the *Tinker* "substantial disruption" standard, the Court used a public-forum analysis to determine whether the students' First Amendment rights were violated.[117] The Court held that the students' First Amendment rights were not violated when the school censored the content of the student newspaper because the newspaper was part of the school curriculum, funded by the school district, and supervised by a teacher.[118] As such, the newspaper was not a public forum, but rather a non-public forum, and therefore the speech could be censored.[119] Notably:

> School officials did not evince either "by policy or by practice," . . . any intent to open the pages of Spectrum to "indiscriminate use," . . . by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," . . . as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any

113. *Id*. at 683 (citation omitted) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).
114. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
115. *Id*. at 262.
116. *Id*.
117. *Id*. at 270.
118. *Id*. at 262, 270.
119. *Id*. at 270.

> reasonable manner. . . . It is this standard, rather than our decision in *Tinker*, that governs this case.[120]

The aforementioned cases suggest there is no clear standard for analyzing students' rights under the First Amendment and the current jurisprudence in this area is still evolving.

2. Revisiting Student Speech: *Morse v. Frederick*

After the *Tinker*, *Fraser* and *Hazelwood* trilogy, the Court once again remained silent on the subject of content-based restrictions of student speech until *Morse v. Frederick*.[121] In 2002, high school senior Joseph Frederick, along with his high school classmates were allowed to watch the Olympic Torch Relay pass their school in Juneau, Alaska.[122] Students lined up on a sidewalk across from the school.[123] The school district noted that this was part of the school principal's decision "to permit staff and students to participate in the Torch Relay as an approved social event or class trip."[124] Further, "[t]eachers and administrative officials monitored the students' actions."[125] While the students were lined up on the sidewalk, and "[a]s the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: 'BONG HiTS 4 JESUS.' . . . The large banner was easily readable by the students on the other side of the street."[126] After refusing to take the banner down, Frederick was suspended for ten days.[127]

Instead of revisiting *Tinker*'s "substantial disruption" standard, as some legal scholars suggested as a motive for granting certiorari in the case, the Court answered the case narrowly.[128] Specifically, the Court stated that the issue was "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[129] The Court

---

120. *Id.* (alteration in original) (citations omitted) (citing Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 46–47 (1983)).

121. Morse v. Frederick, 127 S.Ct. 2618 (2007).

122. *Id.* at 2622.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (citations omitted) (quoting Pet. for Cert. app. 70a, *Morse*, 127 S.Ct. 2618 (No. 06-278)).

127. *Id.*

128. *See generally* Martha McCarthy, *Student Expression Rights: Is a New Standard on the Horizon?*, 216 EDUC. L. REP. 15 (2007) (discussing possible motives for granting certiorari and probable outcomes of *Morse v. Frederick*).

129. *Morse,* 127 S.Ct. at 2625.

answered in the affirmative.[130] The Court reasoned that given the dangers of drug usage and the prevalence of drugs in society today,[131] schools have the right to prevent speech that can be "reasonably [viewed] as promoting illegal drug use."[132]

The Court's holding in *Morse* marks a shift away from the *Tinker* and *Fraser* standards for determining the First Amendment protection afforded to the content of a student's speech.[133] The majority did not rely on the essential holding of *Fraser*, in which schools have the right to restrict speech that is deemed to be "offensive." Notably, the Court stated that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive.'"[134] Further, although *Morse* did not modify or rely on *Tinker*, the Court explained that "*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker* . . . ."[135] In sum, *Morse* is another deviation from the *Tinker* standard.

B. Treatment of Off-Campus Student Cyberspeech by Lower Federal Courts

The question plaguing courts today is to what extent school districts can punish students for cyberspeech made off-campus. The U.S. Supreme Court recently declined to define the boundaries of student protection for off-campus speech in *Morse v. Frederick*, holding that this case was purely within the realm of on-campus speech.[136] However, the Court did state that "[t]here is some uncertainty at the outer boundaries as to when courts

---

130. *Id*.

131. *Id*. at 2628.

132. *Id*. at 2629.

133. Joanna Nairn, *Free Speech 4 Students?* Morse v. Frederick *and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 247 (2008). "The Court's decision in *Morse* represents a significantly different approach to content-based regulation. The majority, in holding that all pro-drug speech may be prohibited, explicitly targeted a particular viewpoint as undeserving of First Amendment protection." *Id.*

134. *Morse*, 127 S.Ct. at 2629.

135. *Id*. at 2627 (citation omitted) (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 514 (1969)).

136. *Id*. at 2629. Some speculated that the Court, by granting certiorari in the case, would revisit *Tinker*, possibly to offer guidance in defining the "substantial interference" standard. Specifically, it was noted that "[c]larification is needed as to when student expression has to be disruptive to be censored and whether expression that conflicts with the school's mission can be curtailed in the absence of a threat of disruption." McCarthy, *supra* note 128, at 30. However, the Court did not create a new standard or modify the *Tinker* standard.

should apply school-speech precedents."[137] Further highlighting the ambiguity in student free speech jurisprudence, legal scholarship has noted:

> Due to these conflicting standards, there is a lack of uniformity amongst the decisions rendered by the lower courts [regarding students' free speech rights]. Whereas one court might hold that a student's Internet-related speech should be restricted, another court, looking at the same set of facts but using a different standard, might decide that the same student's Internet speech should be protected. As a result, schools and students have very little guidance when trying to determine what type of speech is protected.[138]

Lower-court decisions suggest that student speech exists primarily in three contexts: speech conducted entirely on-campus; speech conducted entirely off-campus; and speech that is conducted off-campus but affects student behavior on-campus. Although schools have the right to discipline students for on-campus conduct, the rights of schools to discipline student conduct in the latter two categories remain unclear, as lower courts have taken different approaches.[139] The following Subpart of this Article discusses the primary approaches taken by lower courts in addressing student cyberspeech—the "material and substantial disruption" standard and the "true threat" doctrine.

1. Application of the *Tinker* Standard

When lower courts have applied the *Tinker* standard to off-campus cyberspeech, they have not uniformly held that school discipline violates the First Amendment.

Recently, some courts have found that off-campus cyberspeech caused a "substantial disruption" in school, and therefore, such speech was not protected by the First Amendment. In *J.S.* ex rel. *H.S. v. Bethlehem Area School District.*, J.S., a student, created a website titled "Teacher Sux," and posted it on the Internet using a home computer.[140] The website "consisted of a number of web pages that made derogatory, profane, offensive and

---

137. *Morse*, 127 S.Ct. at 2624 (citation omitted) (citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (5th Cir. 2004).

138. Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 67 (2005) (footnote omitted) (citing Erwin Chemerinsky, *Students Do Leave Their First Amendments Rights at Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 542 (2000)).

139. *Id.*

140. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850–51 (Pa. 2002).

threatening comments, primarily about the student's algebra teacher, Mrs. Kathleen Fulmer and Nitschmann Middle School principal, Mr. A. Thomas Kartsotis."[141] Further, the website included "written words, pictures, animation, and sound clips."[142] Upon learning about the website, Mr. Kartsotis informed Mrs. Fulmer, who "suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well being as a result of viewing the web site."[143] Taking a medical leave, she was not able to return to teaching for the rest of the school year.[144]

At the end of the school year, the school suspended J.S. for three days and later increased the punishment to a ten day suspension.[145] The school eventually brought expulsion proceedings against him.[146] J.S.'s parents sued the school district for violating his First Amendment rights.[147] The Supreme Court of Pennsylvania first analyzed whether the speech was on-campus or off-campus speech.[148] The court determined that "there [was] a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[149] As the speech was "on-campus" in nature, the court applied the *Tinker* standard.[150] The court found that the website caused a "substantial disruption" on campus, affecting both staff and students.[151] This disruption was demonstrated by the emotional toll the website took on the affected staff and the discussion of the website by students.[152]

In *Layshock v. Hermitage School District*, Justin Layshock, a senior at Hickory High School created a "parody profile" on MySpace of the high school's principal, Eric Trosch.[153] The profile included "vulgar" material describing Trosch and a picture of him obtained from the high school's website.[154] Layshock "created the parody by using his grandmother's computer during non-school hours; [and] no school resources were used to

---

141. *Id*. at 851.
142. *Id*.
143. *Id*. at 852.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*. at 853.
148. *Id*. at 864.
149. *Id*. at 865. In determining that there was a "sufficient nexus" between the speech and campus, the court noted that the website was accessed by students at school, and "faculty members and the school administration also accessed the web site at school. Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District . . . ." *Id*.
150. *Id*. at 869.
151. *Id*.
152. *Id*.
153. Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 504 (W.D. Pa. 2006).
154. *Id*. at 504–05.

create the parody but for the photo."[155] Although Layshock used off-campus resources to create the parody profile, most students at the high school became aware of the site.[156] The school subsequently disciplined Layshock for creating the parody.[157]

Applying the *Tinker* standard, the court found that the parody profile "substantially disrupted school operations" on campus because students continuously accessed it over the course of a week in December 2005.[158] As a result, "the school . . . shut down its computer system to student use from December 16 through December 21, 2005. The lack of access to the computer system caused the cancellation of several classes and interfered with students' ability to use the computers for their school-intended purposes."[159] Further, the site caused disciplinary problems among students, and Layshock "attempt[ed] to access the parody numerous times while using a computer in his Spanish teacher's classroom (after the ban on student computer use was in effect)."[160] Given this substantial disruption on campus, the court concluded that the school did not violate Layshock's First Amendment rights by punishing him for his off-campus speech.[161]

Although the *J.S.* and *Layshock* courts found that off-campus Internet speech caused a "substantial disruption" on-campus, several other cases applying the *Tinker* test have found that certain off-campus cyberspeech did not cause a substantial or material disruption on-campus.

In *Coy* ex. rel. *Coy v. Board of Education*, the school district punished Jonathan Coy for creating a "website [that] contained pictures and biographical information of Coy and his friends, quotes attributed to Coy and his friends, and a section entitled 'losers.' The 'losers' section contained the pictures of three boys who attended the North Canton Middle School."[162] The court found that even though the website was "somewhat crude and juvenile, the website contain[ed] no material that could remotely be considered obscene."[163] Additionally, the website had been created on his home computer, on his own time, and "[n]o part of his website was created using school equipment or during school hours."[164] However, he was caught accessing the website on a school computer during school hours

155. *Id*. at 505.
156. *Id*.
157. *Id*.
158. *Id*. at 508.
159. *Id*.
160. *Id*.
161. *Id*.
162. Coy *ex rel.* Coy v. Board of Educ., 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002).
163. *Id*. (footnote omitted) (citing OHIO REV. CODE ANN. § 2907.01(F))
164. *Id*.

and was subsequently expelled.[165] The court, applying the *Tinker* standard, found that the school violated Coy's First Amendment right to free speech by disciplining him with "no evidence [to] suggest[] that Coy's acts in accessing the website had any effect upon the school district's ability to maintain discipline in the school."[166]

Similarly, in *Killion v. Franklin Regional School District*, Zachariah Paul, a high school student, "compiled a 'Top Ten' list about the athletic director, Robert Bozzuto . . . [which] contained . . . statements regarding Bozzuto's appearance, including the size of his genitals."[167] The list was created on a home computer, from which Paul e-mailed the list to his friends.[168] Further, "Paul did not print or copy the list to bring it on school premises because . . . he had been warned that he would be punished if he brought another list to school."[169] Eventually, copies of the list made their way into the faculty lounge and around the middle school, and "[a]n undisclosed student had reformatted Paul's original e-mail and distributed the document on school grounds."[170] Paul eventually received a ten-day suspension and subsequently sued the school district for violating his First Amendment right to free speech.[171]

The court applied the *Tinker* standard, and found that Paul's speech was conducted off-campus and did not cause a "substantial disruption" on campus.[172] Specifically, the court noted that "[t]here [was] no evidence that teachers were incapable of teaching or controlling their classes because of the Bozzuto Top Ten list."[173] Further, "the list was on school grounds for several days before the administration became aware of its existence, and at least one week passed before defendants took any action."[174] Given these findings, the court held that the school district violated Paul's First Amendment rights when issuing the suspension.[175]

---

165. *Id*. at 795–96.
166. *Id*. at 801.
167. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001) (footnote omitted) (itemizing the complete top-ten list).
168. *Id*.
169. *Id*.
170. *Id*. at 448–49.
171. *Id*. at 449.
172. *Id*. at 455.
173. *Id*.
174. *Id*.
175. *Id.*

2. "True Threat" Doctrine

Rather than apply *Tinker's* substantial disruption test, some courts have applied the "true threat" doctrine to student speech. In *Watts v. United States*, the U.S. Supreme Court held that a "true threat" is not protected by the First Amendment, noting that "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[176] As one scholar notes, "[t]he doctrine applies equally whether the threats are made inside or outside the classroom" by students.[177] When determining the proper boundaries for disciplining students for off-campus student speech, recent legal scholarship has focused on *Doe v. Pulaski County Special School District*,[178] a decision handed down by the Eighth Circuit, and *Lovell v. Poway Unified School District*,[179] decided by the Ninth Circuit.[180]

a. "Reasonable Recipient" Standard

The Eight Circuit applied the "objective person" standard in determining whether student speech constituted a "true threat."[181] In *Pulaski*, J.M., a boy, and K.G., a girl, began dating each other in the seventh grade, and their relationship was marked by frequent breakups.[182] The couple eventually broke up during the summer before their eighth-grade year because K.G. wanted to pursue a relationship with another boy.[183] J.M. was devastated by the break-up:

> J.M. drafted two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder K.G. . . . J.M.

---

176. Watts v. United States, 394 U.S. 705, 705–08 (1969) (quoting 18 U.S.C. § 871(a) (1962) (holding that defendant's First Amendment rights were violated when he was "convicted of violating a 1917 statute which prohibits any person from 'knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States'").

177. Andrew P. Stanner, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385, 388 (2006).

178. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002).

179. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).

180. *See* William Bird, *True Threat Doctrine and Public School Speech—An Expansive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus,* Doe v. Pulaski County Special School District, *306 F.3d 616 (8th Cir. 2002)*, 26 U. ARK. LITTLE ROCK L. REV. 111, 112 (2003) (noting that the use of the "true threat" doctrine in *Pulaski* amounts to a "seemingly unlimited authority to discipline student speech arising off campus"); Jonnie Macke, *The True Threat Doctrine as Misapplied in* Doe v. Pulaski County Special School District, 57 ARK. L. REV. 303, 346 (2004) (arguing that the "true threat" doctrine should not have been applied in *Pulaski*, and the letters were protected speech under the First Amendment).

181. *Pulaski*, 306 F.3d at 625.

182. *Id*. at 619.

183. *Id*.

> ultimately penned the documents as letters, signing them at their conclusion. J.M. prepared both letters at his home, where they remained until [his] best friend . . . discovered one of them approximately a month before the youths were to begin their eighth-grade year . . . .[184]

Eventually, K.G. was notified of the letters, and after an investigation by the school, administrators expelled J.M. for the school year.[185]

The Eighth Circuit applied the "true threat" doctrine to determine whether the content of J.M.'s letters, which contained violent language and threats, was protected by the First Amendment.[186] The court, following its previous decision in *United States v. Dinwiddie*, stated that courts, when engaging in a "true threat inquiry," must examine "whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'"[187] To determine if the recipient could have reasonably believed that the speech constituted an injurious threat, the Eighth Circuit stated that courts may consider several factors, including the reaction of the recipient, whether the threat was conditional, how the threat was communicated, and the context of the threat.[188]

When applying the true-threat inquiry to student speech, courts must first determine whether the speaker had the intent to communicate the "purported threat" to the recipient.[189] Notably, "there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence."[190] Further, the threat could have been communicated to either "the object of the purported threat or to a third party."[191] The court determined that J.M. had intended to communicate the threat, as he allowed his friend to read the letter.[192] Upon establishing that J.M. had communicated the threat, the court proceeded to the second part of the analysis to determine whether a "reasonable person" in the position of the recipient would have perceived the communication as a threat.[193]

---

184. *Id*.
185. *Id*. at 619–20.
186. *Id*. at 622.
187. *Id*. (quotation marks omitted) (quoting United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996)).
188. *Id*. at 623 (citing *Dinwiddie*, 76 F.3d at 925).
189. *Id*. at 624.
190. *Id*. (citing Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002)).
191. *Id*. at 624.
192. *Id*.
193. *Id*. at 625.

The court determined that a reasonable person would have viewed the letters as a threat.[194] In addition to the vulgar and abusive language, the court noted that "[t]he most disturbing aspect of the letter . . . [was] J.M.'s warning in two passages, expressed in unconditional terms, that K.G. should not go to sleep because he would be lying under her bed waiting to kill her with a knife."[195] Finally, there was no attempt by J.M. to explain to K.G. that the letters should not be perceived as an actual threat to her life.[196]

b. "Reasonable Speaker" Standard

Similar to the Eighth Circuit, the Ninth Circuit, when engaging in a true-threat inquiry, applies an objective standard to determine whether the communication is an unprotected "true threat."[197] However, unlike the Eighth Circuit, the Ninth Circuit determines "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[198] Therefore, the test examines the speech from the viewpoint of the speaker rather than from the viewpoint of the recipient. The Ninth Circuit applied this test in *Lovell v. Poway Unified School District*.[199] Sarah Lovell, a high school student, met with Linda Suokko, the high school guidance counselor, who told Lovell that she could not register for all of her requested classes.[200] Lovell became visibly upset and threatened to shoot Suokko if she did not get her into the classes.[201] The school disciplined Lovell for the remark with a three-day suspension.[202] Lovell claimed that the school violated her First Amendment right to free speech, and the Ninth Circuit applied a true-threat inquiry to determine whether the school's disciplinary action was unconstitutional.[203]

The court determined "that the ultimate inquiry is whether a reasonable person in Lovell's position would foresee that Suokko would interpret her statement as a serious expression of intent to harm or assault."[204] The court found that the statement made by Lovell was indeed

194. *Id*.
195. *Id*.
196. *Id*.
197. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996).
198. *Id*.
199. *Id*.
200. *Id*. at 368.
201. *Id*.
202. *Id*.
203. *Id*. at 368, 372.
204. *Id*. at 372.

a threat.[205] Given the recent history of school violence, Lovell should have foreseen that her statement would have been perceived as a threat by Suokko, and therefore, her First Amendment rights were not violated when the school issued the suspension.[206]

III. EFFECT OF RECENT CYBERBULLYING LEGISLATION ON STUDENTS' FREE SPEECH RIGHTS

Current cyberbullying legislation varies in its treatment of off-campus student speech. Under the U.S. Supreme Court's holding in *Tinker*, schools have a substantial amount of discretion in punishing on-campus student speech.[207] However, the lower courts have provided less guidance for schools in determining when students should be punished for off-campus cyberspeech. Cyberbullying legislation will only magnify this problem.

Presently, nine states have adopted some form of cyberbullying legislation. Arkansas, Delaware, and New Jersey specifically allow school districts to discipline students for off-campus cyberbullying.[208] Other states, including Iowa, Nebraska, and South Carolina, specifically require the cyberbullying to have occurred on school property, at a school function or a school-sponsored event, or on a school bus.[209] Finally, Minnesota, Oregon, and Washington do not explicitly prevent schools from punishing for off-campus student speech.[210] This section evaluates current cyberbullying statutes, using hypothetical situations to demonstrate the likely application of such statutes to off-campus student cyberspeech.

A. Application of Current Cyberbullying Legislation

Consider the following hypothetical situation involving cyberbullying: Alexia was upset with a fellow classmate, Monica, because Monica had been spreading nasty rumors about Alexia to other students. Monica did not know that Alexia knew about the rumors. Alexia decided to contact Monica via instant message ("IM") while she was at home, and during the conversation Monica shared a lot of personal things with Alexia. The IM

205. *Id*. at 373.
206. *Id*.
207. *See supra* Part II.B.3 (describing the *Tinker* standard as applied to on- and off-campus speech).
208. ARK. CODE ANN. § 6-18-514 (2007); DEL. CODE. ANN. tit. 14, § 4112D(f) (2007); N.J. DEP'T OF EDUC., *supra* note 80, at 8–9.
209. IOWA CODE ANN. § 280.28(3) (West Supp. 2007); 2008 Neb. Laws 205; S.C. CODE ANN. 59-63-120 and 140 (Supp. 2007).
210. MINN. STAT. ANN. § 121A.0695 (West 2008); OR. REV. STAT. § 339.356 (2007); WASH. REV. CODE ANN. § 28A.300.285 (West Supp. 2008).

conversation contained statements about Monica's relationship history, her feelings toward other students, and her other life struggles. Alexia used this information against Monica by sending it to everyone on her IM Buddy List—most of whom are students at Alexia's school. Eventually, Monica realized that the IM conversation had been shared, and she was devastated. Monica missed a week of school because she was too embarrassed to attend classes. Although the conversation was conducted entirely off-campus, students talked about the IM conversation at school and some students printed the conversation and passed it around during school hours. Monica's parents want to know if Alexia can be disciplined by the school for spreading the IM conversation.

Depending on the cyberbullying statute used, the likely fate of Alexia would differ. In Arkansas and Delaware, laws prohibiting cyberbullying in schools would allow school districts to punish students for off-campus cyberbullying. Under the Arkansas law, which has incorporated the *Tinker* standard, Alexia may be punished for her off-campus speech. First, there must be a sufficient nexus between the speech and the school. In this case, a nexus is likely to be found because Alexia targeted a classmate who attended her school and sent the IM conversation to other students who attended her school. Further, students discussed the conversation at school, and some students printed out the conversation and distributed it to other students on campus.

Given that a sufficient nexus is likely to be established, it must be determined whether Alexia's speech resulted in a "substantial disruption" of the operation of the school. The Arkansas statute defines when speech creates a "[s]ubstantial disruption," including "exhibition of . . . behaviors by students or educational staff that substantially interfere with the learning environment."[211] Unfortunately, Alexia's fate hangs in a gray area. School administrators could determine that Alexia's speech substantially interfered with Monica's learning environment, as evidenced by Monica's absence from school for a week. They could also find that the disruption interfered with the overall learning environment of the school. Finally, the school might reasonably believe no substantial disruption occurred. Alexia is likely to face a similar fate under New Jersey's cyberbullying law.

Delaware's cyberbullying law leaves Alexia even more vulnerable to school discipline than the cyberbullying laws of Arkansas and New Jersey. Under Delaware law, "[t]he physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action by the school district or charter school . . . provided there is sufficient

211. ARK. CODE ANN. § 6-18-514(D)(iv) (2007).

school nexus."[212] As discussed previously, Alexis's speech likely has a sufficient school nexus. However, the law does not state that a "substantial disruption" test should be used. This omission is troubling because without sufficient legal counsel, school districts may not incorporate such a standard when developing their cyberbullying policies.

In contrast, under the cyberbullying statutes of Iowa, Nebraska, and South Carolina, Alexia is not likely to face school discipline for the off-campus cyberbullying because the communication did not take place on school property, at a school function or a school-sponsored event, or on a school bus. Alexia's communication and subsequent forwarding of the IM conversation was limited to off-campus, after-school hours on Alexia's home computer.

This hypothetical demonstrates that current bullying statutes are disparate in their sensitivity towards students' free speech rights, and depending on which state Alexia is a student in, the school may or may not be able to punish her for her speech. If Alexia resided in Arkansas, Delaware, or New Jersey, she could be disciplined by the school for her off-campus cyberbullying. However, the school could be vulnerable to a lawsuit by Alexia and her parents for violating her First Amendment right to free speech, and rightfully so given the previously discussed decisions of *Coy* ex rel. *Coy v. Board of Education*[213] and *Killion v. Franklin Regional School District*.[214] Given the disparity in the lower courts' treatment of off-campus cyberspeech, cyberbullying legislation should only allow school administrators to punish cyberbullying occurring on-campus. The only exception should be if off-campus speech constitutes a threat of violence to students, teachers, or staff by a reasonable objective person.[215] Given that

---

212. DEL. CODE. ANN. tit. 14, § 4112D(f) (2007).

213. Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791 (N.D. Ohio 2002); *see* discussion *supra* Part II.B.3.

214. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001); *see* discussion *supra* Part II.B.3.

215. Previous scholarship argues that given the U.S. Supreme Court's silence on the issue of First Amendment protection of off-campus student speech, schools should not punish students for off-campus conduct. Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 141 (2003).

> [Lower-court] decisions fail to recognize that the substantial disruption test is an easily manipulated standard with vague guidelines that provide little direction for courts, students, and administrators. While the test may be appropriate for evaluating attempts to punish on-campus speech, it is not sufficiently rigorous to ensure that the expression of off-campus speakers will not be curtailed. As the internet [sic] becomes more pervasive in schools, any controversial statement posted on the internet [sic] by a student could reasonably be expected to cause a disruption at school. Inhibiting speech that could potentially cause an on-campus disruption, however, would run afoul of the First Amendment rights of students and impermissibly chill student expression outside of the school setting.

students must now deal with the reality of school violence and shootings, school administrators must have the means to address "real" threats in the interest of student safety.[216] In light of these concerns, how should schools address off-campus threats?

Consider another hypothetical situation, this time involving a threat: Mark was being picked on by some students at school. He decided to write about some of these students on a MySpace profile that other students could view. On the profile, Mark wrote about wanting to physically hurt some of these students at school. Although he never stated how he would specifically harm them, he did state that he had the means to make them regret what they had done to him, and that they should fear him. Mark also posted a hit list on his personal website with the students' names listed. Other students, including those to whom the threats were directed, saw the MySpace profile and his personal website. These students quickly notified the school principal of the threats because they were concerned about their safety and the recent aggressive behavior that Mark had exhibited. Mark never discussed his profile or website at school, and there is no evidence that either was accessed by students or Mark using any school computer. However, Mark was subsequently expelled from school.

In this hypothetical, Mark could be punished for his off-campus statements because they amount to a true threat. Therefore, the statements do not warrant First Amendment protection, regardless of existing cyberbullying legislation. A true-threat inquiry utilizes an objective person standard. First, did Mark intend to communicate the purported threat to the recipients? When determining whether the speaker intended to communicate the "threat, there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence."[217] Further, the

---

Id.

216. Several articles have discussed the issue of students' free speech rights after Columbine. *See generally* Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739 (2000) (discussing the state of students' free speech rights after Columbine); David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. MICH. ST. U. DET. C.L. 199, 219–21 (2000) (setting forth factors that courts should consider when determining whether student speech is on-campus or off-campus speech); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1096–1109 (2003) (observing that although schools are taking reign of student expression in light of Columbine, students still have some First Amendment free speech rights in public schools); Richard Salgado, *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 (2005) (arguing that a "bright-line" standard is needed to determine whether speech is on-campus or off-campus; also needed is better clarification of when speech arises to the level of a substantive threat).

217. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (citing

threat could have been communicated to either "the object of the purported threat *or* to a third party."[218] Mark, even though he may not have been able to carry out the threat, intended for his comments to be known because he posted them on public sites—both his MySpace page and his website. Moreover, these statements were read by both the intended parties and third parties.

Having found an intended communication, a reviewing court would address the second question concerns whether Mark's statements constituted a true threat. From the viewpoint of a *reasonable recipient* under the circumstances, the intended recipients of these statements had reason to fear bodily harm. Students had a strong reaction to the comments, as demonstrated by their reporting the comments to the school principal. Further, the statements were not conditional, and the students stated that Mark had engaged in violent behavior before he posted the statements online. Mark's statements constituted a true threat. Given the recent history of school shootings and his creation of a hit list with no effort to retract the statements, a reasonable speaker would foresee that these statements would constitute a threat to the intended recipients.

This hypothetical suggests that even if school districts are not able to discipline students for off-campus cyberbullying, they will still be able to protect students from harm by punishing students for off-campus speech if the cyberbullying amounts to an actual threat.

IV. POLICY ALTERNATIVES TO CYBERBULLYING LEGISLATION

State legislation requiring school districts to adopt bullying and cyberbullying policies rests on the premise that students will notify parents, teachers, or school staff and administrators when they are being cyberbullied. However, children are unlikely to tell parents and teachers when they are being cyberbullied because of fear of retaliation from the bully and other students, and the potential loss of Internet privileges.[219] It has also been suggested that traditional bullying statutes are not particularly effective in preventing bullying.[220] Similarly, cyberbullying statutes may not be particularly effective in reducing cyberbullying.

Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002)).

218. *Id*. at 624.

219. Willard, *supra* note 50, at 4.

220. *See generally* Kathleen Hart, Note, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1146 (2005) ("[C]onstitutional antibullying and antiharassment statutes are largely ineffective in dealing with the verbal and psychological bullying that can lead to more deadly school violence.").

Given that cyberbullying policies are most effective when school administrators become aware of the cyberbullying,[221] other policy alternatives are needed to curtail cyberbullying among adolescents. This Part discusses several policy alternatives, highlighting their respective strengths and weaknesses. These alternatives include: parental influence and awareness; use of Internet safeguards provided by Internet Service Providers ("ISPs") and websites; criminal penalties for cyberbullying; tort actions against cyberbullies; and changes to currently enacted federal legislation.

A. Parental Influence and Awareness

Intuitively, increasing parents' awareness of the prevalence and harm of cyberbullying is likely to decrease cyberbullying among adolescents. Children engage in cyberbullying partly because they are able to do so without fear of parents, teachers, or other adults "catching" them in the act.[222] Unlike traditional bullying, cyberbullies are able to harass by using anonymous screen names, secretly posting photos and comments online, and sending text messages.[223] Parents need to discuss the use of technology with their children and determine for themselves whether access to the Internet, cell phones, and other electronic communication devices is necessary for their children. To become better informed of their children's activities, parents also need to familiarize themselves with the Internet, including social-networking sites and IM "lingo."[224]

Parents must also be willing to set boundaries for their children. Parents can do several things to decrease the likelihood their child will become a victim of cyberbullying. These actions include placing the computer in a public area of the home where it can be easily monitored by an adult, using passwords on both the computer and the Internet to prevent unauthorized access, and limiting the time spent on the Internet.[225] If children have limited access to the Internet, they are substantially less likely to be cyberbullied.[226] Cell phones also create a significant problem for victims of cyberbullying. Parents should consider placing limits on text messaging, creating a cell-phone provider plan that would limit who the child

---

221. Even if the proper individuals are not notified of a bullying incident, the legislation still serves a pedagogical function of educating and raising awareness about cyberbullying.

222. Willard, *supra* note 50, at 6.

223. *Id*.

224. For information about social-networking sites for parents, see FED. TRADE COMM'N, SOCIAL NETWORKING SITES: A PARENT'S GUIDE (2007), available at http://www.ftc.gov/bcp/edu/pubs/consumer/tech/tec13.pdf.

225. Willard, *supra* note 50, at 7–8.

226. Pew Internet & Am. Life Project, *supra* note 27, at 4.

can call and what calls the child can receive, and not providing their child with a cell phone. If there are no limitations on the account, parents should also monitor it to see who is calling the child and who the child is calling.

Finally, some legislation mandating schools to create bullying policies requires school districts to provide parents with information about cyberbullying and suggestions for decreasing their children's risk of becoming a cyberbullying victim.[227] Legislators should force school districts to create policies that would require parents to receive copies of the school's cyberbullying policy along with information about how to prevent their child from being cyberbullied and, if their child is being cyberbullied, how to address the problem.

Although increasing parental awareness of cyberbullying is likely to have some demonstrable effect on cyberbullying, there are limitations to this policy alternative. First, some parents may be reluctant to limit their child's exposure to the Internet or cell phones, claiming that such limitations could decrease their child's privacy and autonomy. Second, even though parents are able to monitor their children's activities while under their supervision, parents are not always able to monitor their children when their children are away from home. Nonetheless, any level of parental involvement and awareness is likely to be better than none.

B. Parental-Control Software and Online "Security" Controls

ISPs and other companies offer parental-control software, which allows parents to monitor their children's activity online without having to be present in the room.[228] Parents should strongly consider investing in this software. In addition to offering parental-control software, ISPs such as America Online (AOL) provide online "security controls" for parents.[229]

Parental security controls provided by ISPs are useful because they allow parents to monitor their children's activity online. Parents can determine whether or not their children are cyberbullying or being cyberbullied. Such controls offered by AOL include an "activity report."[230]

---

227. *See* Enacted Cyberbullying Legislation, *supra* note 21 (describing the Washington senate bill mandating that schools adopt bullying-prevention policies that include "a requirement that materials be made available to educate parents and students about the seriousness of cyberbullying" and an Iowa bill requiring schools to adopt anti-harassment and anti-bullying policies that include "a description of the type of behavior expected from . . . parents or guardians").

228. Karen Diro, *Parental Control Basics*, SAFETYCLICKS, July 23, 2008, http://SafetyClicks.com (search for "Parental Controls"; then follow "Parental Controls Basics" hyperlink).

229. *See generally* America Online, *Parental Controls*, https://parentalcontrols.aol.com/ (last visited Nov. 25, 2008) (providing the procedure to create an account and download the software needed for parental controls).

230. America Online, *How to Use AOL® Activity Reports from AOL® Parental Controls?*,

The activity report allows parents to view websites their children have visited, websites their children attempted to access but were denied entry because of privacy controls, and detailed information regarding the e-mails and IMs their children have sent.[231] Further, AOL provides parents with the opportunity to limit their children's usage of the Internet without having to watch their activity online.[232] The "online timer" allows parents to control their children's Internet use, including the amount of time their children can spend online each day, when during the day they can access the Internet, and which days during the week they can go online.[233] Finally, other parental controls offered by AOL allow parents to control the IMs and e-mails that their children receive.[234] Other ISPs and web browsers aside from AOL offer services similar to those mentioned above.[235] Parents should take the time to learn how to "childproof" their computer before allowing their children to use the Internet alone.

Even if parents create boundaries for their children while online in their own home, parents must still address the problem of how their children will use the Internet when outside of their home. When children are at friends' houses, parents often do not have control over their child's access to the Internet, and as such, parents must set boundaries for their children before allowing them to access the Internet away from home. Further, parents should not hesitate to discuss Internet usage with other parents.

C. Criminal Penalties

Most states have laws prohibiting cyberharassment and cyberstalking,[236] although the content of these laws varies by state.[237] These laws target conduct that is more severe than that of an average cyberbully. Often, these laws require that the cyberbullying rise to the level of stalking

---

http://help.aol.com/ (search for "activity report"; then follow "How to Use AOL® Activity Reports from AOL® Parental Controls?" hyperlink) (last visited Nov. 25, 2008).

231. *Id*.

232. America Online, *About the Online Timer*, http://help.aol.com/ (search for "online timer"; then follow "About the Online Timer" hyperlink) (last visited Nov. 29, 2008). AOL promotes the feature as allowing parents to stay in "control." *Id.*

233. *Id*.

234. Diro, *supra* note 228.

235. *Id*.

236. *See* National Conference of State Legislatures, *State Computer Harrassment or "Cyberstalking" Laws*, http://www.ncsl.org/programs/lis/cip/stalk99.htm (last visited Nov. 25, 2008) (noting that forty-five states have enacted laws on stalking or harassment through electronic communications).

237. Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 141 (2007).

or harassment and create a fear of bodily harm in the recipient.[238] Common cyberbullying likely results in hurt feelings rather than fear. Nonetheless, criminal penalties exist for those instances when cyberbullying crosses the line from "schoolyard" bullying to substantial threats.

D. Tort Liability

Parents can file a civil lawsuit in an attempt to stop cyberbullying. Defamation would be the likely cause of action. Defamation is a common-law cause of action that allows those who have been defamed through words and writings to sue the publisher of the remarks for damages to the individual's reputation.[239] When students engage in cyberbullying, they frequently share untruthful and harmful remarks about other students that tend to damage the defamed students' character.

The U.S. Supreme Court has attempted to define when defamatory remarks are protected under the First Amendment and when such remarks create a cause of action in tort law. In *New York Times Co. v. Sullivan*, the Court held that the First Amendment requires:

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[240]

However, in *Gertz v. Robert Welch, Inc*., the Court, revisiting *Sullivan*, held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[241]

The reason for the dichotomous treatment between public officials and private individuals was explained in *Gertz*:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private

---

238. *Id*. at 134–35 (citing a list of state anti-stalking statutes that use a reasonable-person standard for fear of harm).

239. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

240. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

241. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

> individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[242]

The traditional cause of action for defamation is defined in the Restatement (Second) of Torts:

> (a) a false and defamatory statement concerning another;
> (b) an unprivileged publication to a third party;
> (c) fault amounting at least to negligence on the part of the publisher; and
> (d) either actionability of the statement irrespective of special harm or the existence of special harm or the existence of special harm caused by the publication.[243]

Further, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[244]

There are drawbacks, though, to defamation lawsuits. First, there is the cost disincentive associated with litigation. Litigation is a highly cost-prohibitive endeavor, and as such, defamation claims are not likely to be used against the average cyberbully. However, students who have been defamed can still resort to small-claims courts within their state in an effort to gain some compensation and to deter the cyberbully from continuing the defamation. Second, in addition to litigation costs, recent scholarship suggests that the *Restatement* definition of defamation may not be adequate for Internet defamation.[245] Given that publication of online material is in

---

242. *Id*. at 344 (footnote omitted).

243. RESTATEMENT (SECOND) OF TORTS § 558 (1976).

244. *Id.* § 559.

245. *See generally* James R. Pielemeier, *Choice of Law for Multistate Defamation—The State of Affairs as Internet Defamation Beckons*, 35 ARIZ. ST. L.J. 55, 116 (2003).

> There has never been a consensus in the United States on appropriate choice of law rules for multistate defamation. Early courts and commentators never had agreement on an appropriate territorialist rule. The American conflicts revolution opened the door for more issue by issue determinations based on examination of relevant policies. Yet in the context of multistate defamation, the revolution has yet to get us very far.

Id. *See also* Philip Adam Davis, *The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier*, 54 FED. COMM. L.J. 339, 342 (2002) (arguing that traditional choice-of-law rules are adequate to address defamation disputes arising from the Internet); John D. Faucher, *Let the Chips Fall Where They May: Choice of Law In Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1051 (1993) (arguing for the use of federal common law, rather than choice-of-law rules, in cyber-defamation disputes); Barry J. Waldman, Comment, *A Unified Approach to Cyber-Libel: Defamation on the Internet, A Suggested Approach*, 6 RICH. J.L. & TECH. 9, 2 (1999), *available at*

cyberspace, publication of the material may not be in the same state or nation in which the victim of such defamation resides.

Third, unlike traditional bullying, it is not always easy to ascertain the "bully" because children frequently hide behind anonymous screen names and websites to shield their identity.[246] It may be possible to obtain the identity of these anonymous cyberbullies by serving a subpoena on the ISP of the "bully";[247] however, this could possibly raise First Amendment issues.[248] Finally, although individuals may have recourse against the individual who made the specific defamatory communication, federal legislation may provide immunity against defamation suits to ISPs[249] and social-networking sites.[250]

E. Changes in Congressional Legislation

Finally, another policy alternative may be to revisit the Communications Decency Act (CDA).[251] The CDA, specifically section 230, was enacted in 1996 to provide ISPs with some immunity from defamation suits.[252] Legal scholarship suggests, though, that the CDA may

---

http://law.richmond.edu/jolt/v6i2/note1.html (suggesting an all-encompassing, alternate approach for resolving cyber-libel disputes).

246. Jennifer O'Brien, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2745–46 (2002).

> The ability of Internet users to remain anonymous by using "screen names" or other imaginary identities to identify themselves online has created a significant issue within the field of defamation. Although the anonymous user may have submitted his true identity to an Internet Service Provider ("ISP") when he signed up for its service, by using a screen name he is able to create an entirely new persona for his Internet communications, based on the distinction that "[u]nlike real space, cyberspace reveals no self-authenticating facts about identity."

Id. (footnotes omitted) (citing MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 522 (2001); quoting LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 33 (1999)).

247. *Id*. at 2746.

248. *Id*. *See also* Abbey L. Mansfield, *Cyber-Libeling the Glitterati: Protecting the First Amendment for Internet Speech*, 9 VAND. J. ENT. & TECH. L. 897, 898–900 (2007) (discussing First Amendment implications of an Australian court exercising jurisdiction over an American publisher because material was accessed online in Australia).

249. *See* Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1304 (2007) (noting that the Communications Decency Act has at times been interpreted to "give[ ] ISPs absolute immunity from civil litigation for content posted by third parties").

250. *See* Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007) (granting immunity to MySpace, Inc. under the Communications Decency Act of 1996).

251. Communications Decency Act, 47 U.S.C. § 230 (2000).

252. *Id.*

need to be "clarified" to recognize its true intent, which was to encourage ISPs to "self-regulate content posted online without fear of liability."[253] Clarification is needed because "current judicial interpretation of [section] 230 of the CDA has provided ISPs with absolute immunity from all civil liability for statements posted by third party users."[254] Further, a federal district court in Texas recently extended immunity to social-networking sites.[255] Therefore, an amendment to the CDA may be needed to "instruct courts to return to the traditional common law of defamation and interpret the CDA as providing only a qualified immunity to ISPs."[256] Such an amendment would allow victims of cyberbullying to sue ISPs who fail to engage in "good faith self-regulation[.]"[257]

CONCLUSION

Cyberbullying, compared to "traditional" bullying, is a recent phenomenon among school children, and with the continual development of new technologies, it is likely here to stay. This Article has discussed the basics of cyberbullying, recent state legislative efforts to curtail such behavior, and the constitutional hurdles such legislation must face when applied to school children. This Article concludes that several currently enacted cyberbullying laws could potentially create problems for school districts when disciplining students for off-campus cyberbullying. In an effort to protect students' First Amendment rights and shield school districts from potential lawsuits, state legislatures should enact cyberbullying legislation allowing school administrators to discipline students for on-campus cyberbullying but not off-campus conduct, unless the off-campus cyberbullying constitutes an objective threat of violence to students, teachers, or school administrators. Further, school boards and policymakers alike should consider the policy alternatives discussed in this Article when searching for other ways to decrease cyberbullying.

POSTSCRIPT:
ADDITIONAL CYBERBULLYING LEGISLATION (SINCE MARCH 2008)

Since March 2008, three other states have enacted legislation requiring school districts to either create cyberbullying policies or amend existing

253. Ottenweller, *supra* note 249, at 1304.
254. *Id.* at 1334.
255. *MySpace*, 474 F. Supp. 2d at 850.
256. Ottenweller, *supra* note 249, at 1326.
257. *Id.*

anti-bullying policies to include bullying through electronic communications. In Florida, the state legislature passed the "Jeffrey Johnston Stand Up for All Students Act,"[258] which was named after Johnston, a fifteen-year-old boy who committed suicide after being bullied through both electronic and traditional means.[259] The Act prohibits "[b]ullying or harassment of any student or employee of a public K-12 educational institution . . . [t]hrough the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 educational institution."[260] Despite the efforts to protect cyberbullying, the legislation still uses *Tinker*'s "substantial disruption" language when determining whether or not student cyberspeech can be disciplined.[261]

In Oklahoma, the legislature modified existing legislation requiring schools to adopt anti-bullying policies[262] to include "electronic communication," which is defined as "the communication of any written, verbal, or pictorial information by means of an electronic device, including, but not limited to, a telephone, a cellular telephone or other wireless communication device, or a computer."[263]

Like Florida and Oklahoma, Idaho recently passed legislation prohibiting cyberbullying in schools. The legislation prohibits cyberbullying among students stating that "[a]n act of harassment, intimidation or bullying may also be committed through the use of a land line, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network."[264] Unlike the majority of cyberbullying statutes, though, this statute also makes cyberbullying an infraction under state law.[265]

---

258. H.B. 669, 2008 Leg., Reg. Sess. (Fla. 2008) (to be codified at FLA. STAT. § 1006.147).
259. Turley, *supra* note 19, at A25.
260. Fla. H.B. 669.
261. *Id.*
262. OKLA. STAT. ANN. tit. 70, § 24-100.4 (West 2005 & Supp. 2009).
263. *Id.* § 24-100.3.
264. IDAHO CODE ANN. § 18-917A (Supp. 2008).
265. *Id.*