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Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying

Philip Lee
St. John's University School of Law

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Philip Lee*

INTRODUCTION

In a tragic case that received international attention, 15-year-old Phoebe Prince killed herself after being bullied—both physically and online—by some of her classmates.[1] Phoebe had moved to Massachusetts from a small town in Ireland, enrolling as a freshman at South Hadley High School.[2] After a brief relationship with a popular boy in the senior class, the taunting by her classmates began. Some students called her an "Irish slut" and a "whore," knocked things out of her hands, and sent her threatening texts.[3] Some of the students used Facebook and Twitter to speak badly about her.[4] Phoebe suffered this treatment for three months and then hung herself on the stairwell of her home on January 14, 2010.[5] Stories like this led the Massachusetts legislature to create and implement a comprehensive anti-bullying law.[6]

 Associate Professor of Law, David A. Clarke School of Law, University of the District of Columbia; B.A., Duke University, 1996; J.D., Harvard Law School, 2000; Ed.M., Harvard Graduate School of Education, 2012; Ed.D., Harvard Graduate School of Education, 2013. I am grateful to Bob O'Neil and Sue Lee for their insightful comments on earlier drafts of this article, to John Brittain for stimulating discussion on First Amendment issues in schools, and to Stephanie Kawamura for her helpful research assistance.

[1] *See* Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged after Classmate's Suicide*, N.Y. TIMES (Mar. 29, 2010), http://www.nytimes.com/2010/03/30/us/30bully html? pagewanted=all&_r=0 [https://perma.cc/7SAD-TRBX]. *See also* Donal Lynch, *Bullied to Death*, IRISH INDEPENDENT (Mar. 14, 2010), http://www.independent.ie/lifestyle/bullied-to-death-26640656 html [https://perma.cc/2UPR-JS9K] (describing what happened to Phoebe Prince).

[2] Eckholm & Zezima, *supra* note 1.

[3] *Id.*

[4] *See* Emily Bazelon, *What Really Happened to Phoebe Prince? The Untold Story of Her Suicide and the Role of the Kids Who Have Been Criminally Charged for It*, SLATE (July 20, 2010, 10:13 PM), http://www.slate.com/articles/life/bulle/features/2010/what_really_ happened_to_phoebe_prince/the_untold_story_of_her_suicide_and_the_role_of_the_kids_ who_have_been_criminally_charged_for_it html [https://perma.cc/W8C4-33GH].

[5] *Id.*

[6] *See* Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law*, SLATE (Apr. 30, 2010, 4:13 PM), http://www.slate.com/articles/life/bulle /2010/04/bullies_beware html [https://perma.cc/FM5D-7C3P] ("In response to the suicides of two of its own kids—Phoebe Prince, 15, from South Hadley and Carl Joseph Walker-Hoover, 11, from Springfield—lawmakers unanimously passed a bullying prevention law on Thursday that is probably the most comprehensive one in the country.").

Phoebe Prince was the victim of bullying and cyberbullying. Bullying refers to "a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one."[7] The aggression can be verbal (e.g., persistent name-calling), physical (e.g., hitting), or psychological (e.g., spreading humiliating rumors).[8] In differentiating bullying from other forms of harmful behavior, Sameer Hinduja and Justin W. Patchin, observe the following distinctions:

- When someone says or does something unintentionally hurtful and they do it once, that's *rude*.
- When someone says or does something intentionally hurtful and they do it once, that's *mean*.
- When someone says or does something intentionally hurtful and they keep doing it—even when you tell them to stop or show them that you're upset—that's *bullying*.[9]

Cyberbullying is similar to traditional bullying, but it involves the use of electronic devices and social media platforms to commit this intentional and repeated aggression—namely verbal and psychological attacks[10]—against weaker

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[7] Tonja R. Nansel et al., *Bullying Behaviors Among U.S. Youth: Prevalence and Association with Psychological Adjustment*, 285 JAMA 2094, 2094 (2001); *see also* George M. Batsche & Howard M. Knoff, *Bullies and Their Victims: Understanding a Pervasive Problem in the Schools*, 23 SCH. PSYCHOL. REV. 165, 165 (1994) ("'Bullying' is defined as a form of aggression in which one or more students physically and/or psychologically (and more recently, sexually) harass another student repeatedly over a period of time. Typically, the action is unprovoked and the bully is perceived as stronger than the victim.") (citations omitted); Christina Salmivalli, *Bullying and the Peer Group: A Review*, 15 AGGRESSION & VIOLENT BEHAV. 112, 112 (2010) ("Bullying is a subtype of aggressive behavior, in which an individual or a group of individuals repeatedly attacks, humiliates, and/or excludes a relatively powerless person.").

[8] *See* Nansel et al., *supra* note 7, at 2094.

[9] SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 8 (2014). The authors further note that "just because something doesn't necessarily qualify as bullying doesn't mean that it isn't harmful or important to stop." *Id.*

[10] Insofar as there exists a distinction between speech and action—in that the First Amendment applies to speech, not action—cyberbullying in most cases (e.g., posting messages to a social media platform) would be more speech than action. This distinction between speech and action was suggested in *United States v. O'Brien*, a case in which the Court upheld the criminal conviction of a protestor for burning his draft card. 391 U.S. 367, 381–82 (1968) ("For this noncommunicative impact of his conduct, and for nothing else, [O'Brien] was convicted."). On the other hand, some forms of offline bullying, like assaults, theft, or destruction of property would be more action than speech—even if the action meant to express an idea. *See id.* at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends to thereby to express an idea.").

victims.[11] For reasons I give in this Article, cyberbullying has some unique characteristics that make it much more dangerous than offline bullying.[12] Indeed, cyberbullying is so harmful that it should be given diminished First Amendment protection as schools seek ways to regulate it.

In dealing with cases of bullying and cyberbullying, public primary and secondary schools—that is, kindergarten through twelfth grade (K–12)[13]—are caught in the horns of a dilemma. On the one hand, if they do nothing, they face potential liability under federal civil rights laws that prohibit discrimination based on sex,[14] "race, color, or national origin,"[15] and disability.[16] On the other hand, if

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[11] *See* HINDUJA & PATCHIN, *supra* note 9, at 11 (defining "cyberbullying" as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."). Note that these scholars omit the power imbalance element from their definition. In this Article, I argue that an expanded definition of this element should be included in the definition. *See infra* Part V.A.

[12] *See infra* Part IV.A.

[13] This Article is about the regulation of cyberbullying at public schools (K-12). It does not address cyberbullying at private schools because First Amendment protection is generally not available to their students, unless it can show that these private entities were acting as state actors. Further, this Article does not address cyberbullying at public colleges and universities because, as adults, these students are afforded more First Amendment protection. As I will discuss later, children are treated differently for purposes of the First Amendment.

[14] Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2012). School boards may face liability under Title IX in cases of student-on-student harassment where: (1) the funding recipient has substantial control over both the harasser and the context in which the known sexual harassment occurs; (2) the funding recipient is deliberately indifferent to the harassment; (3) of which the recipient has actual knowledge; and (4) that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 638–52 (1999).

[15] Title VI of the Civil Rights Act of 1964 prohibits a recipient of federal funds from discriminating on the basis of race, color, or national origin. *See* 42 U.S.C. § 2000d (2012). The "deliberate indifference" standard for Title VI cases is the same as for Title IX cases. *See* Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 665 (2d Cir. 2012).

[16] Both Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012) and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–34. (2012), prohibit discrimination on the basis of disability. Courts have imposed liability under these laws based on the "deliberate indifference" standard. *See e.g.*, Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 345–48 (11th Cir. 2012) (applying deliberate indifference standard in determining liability under Section 504); Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011) (applying deliberate indifference to Title II and Section 504 claims); Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) ("To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional

schools overreact, they face potential liability for violating their students' free speech rights.[17] In this Article, I argue that schools should have the authority to regulate cyberbullying, even if it originates off campus and during nonschool hours. I contend that this is not an overreaction; indeed, it is a necessary tool to fight the unique and serious dangers of cyberbullying.[18]

This Article proceeds in five parts. Part I outlines the relevant framework for regulating student speech in public school settings. Part II explores our current age of digital expression and its implications for school authority to regulate cyberbullying—a type of bullying that typically originates off campus using personal computers and smart phones. Part III describes the five approaches that courts and legislatures have taken to analyze student speech rights in the digital age when students use electronic devices off campus to attack or threaten others associated with campus. Part IV analyzes why schools should be able to regulate off-campus speech in cases of cyberbullying, focusing on the particular harm that cyberbullying causes, the inadequacy of other legal remedies to address this harm, and the reasons why schools are uniquely situated to address this form of student-on-student aggression. Finally, Part V offers three suggestions on how schools should regulate cyberbullying without running afoul of the First Amendment, including a clear definition of the term that is consistent with the social science literature, a clear statement of school jurisdiction to regulate cyberbullying when it originates off campus, and a proposal for how the *Tinker* test[19] should be thought about and applied in cases of cyberbullying.

I. STUDENT FIRST AMENDMENT RIGHTS AT PUBLIC SCHOOLS (K–12)

Cyberbullying involves a student using electronic devices to post or send content intentionally and repeatedly in order to harm a weaker student.[20] However, when a student posts expressive content to social media or sends messages electronically, that student's speech rights are implicated. In cases where students have challenged their school-imposed punishments for attacking others online, they consistently use First Amendment law as the primary basis for their lawsuits.[21] In this section, I outline the legal framework for student free speech rights at public schools (K–12).

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discrimination on the part of the defendant . . . . We now determine that the deliberate indifference standard applies.") (citations omitted).

[17] See *infra* Part III.B–E for analysis of cases in which students bring First Amendment claims in court after schools discipline them for their speech.

[18] *See infra* Part IV.A.

[19] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that schools cannot regulate the content of student speech unless the speech "would substantially interfere with the work of the school or impinge on the rights of other students.").

[20] *See infra* notes 122–123 and accompanying text.

[21] *See infra* Part III.B–E.

A. Tinker v. Des Moines

The landmark case on student free speech rights at public schools, *Tinker v. Des Moines Independent Community School District*, was decided by the Supreme Court in 1969.[22] *Tinker* involved junior and senior high school students in Iowa who wore black armbands to school in a peaceful political protest of the conflict in Vietnam.[23] These students were suspended in violation of a school policy that prohibited students from wearing these armbands.[24] The Court noted, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[25] The Court recognized that the symbolic act of wearing black armbands to school was protected as a form of "pure speech," which "is entitled to comprehensive protection under the First Amendment."[26]

As such, the *Tinker* Court held that "to justify prohibition of a particular expression of opinion," school officials must prove that the expression "would substantially interfere with the work of the school or impinge upon the rights of other students."[27] This first test has come to be known as the "substantial disruption test."[28] Later in the opinion, the Court noted that this test could be satisfied with "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[29] In other words, school officials do not have to wait until substantial disruption or material interference actually occurs before acting; they just need a reasonable belief that it may occur.[30] However, the

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[22] *Tinker*, 393 U.S. at 505 n.1. (relying on two Fifth Circuit cases that involved high school students in Mississippi who wore buttons to school protesting the denial of voting rights to African Americans); s*ee* Burnside v. Byars, 363 F.2d 744, 746 (5th Cir. 1966); Blackwell v. Issaquena Cty Bd. of Educ., 363 F.2d 749, 750 (5th Cir. 1966). *See* Kristi L. Bowman, *The Civil Rights Roots of Tinker's Substantial Disruption Tests*, 58 AM. U. L. REV. 1129, 1141 (2009), for a fascinating analysis of these two cases.

[23] *Tinker*, 393 U.S. at 504.

[24] *Id.* at 504.

[25] *Id.* at 506. *Tinker*'s view of a "schoolhouse gate," presupposes a physically bound school and does not contemplate online spaces of communication that are linked to schools in various ways. In this Article, I aim to expand what "schoolhouse gate" means in our digital age and recommend school authority to regulate such spaces within certain limits. *See infra* Parts IV.B and IV.C.

[26] *Tinker*, 393 U.S. at 505–06.

[27] *Id.* at 509.

[28] The *Tinker* Court articulated this test in a number of ways, including conduct that would (1) "substantially interfere with the work of the school," *id.* at 509; or (2) cause "material and substantial interference with schoolwork or discipline," *id.* at 511; or (3) "materially and substantially disrupt the work and discipline of the school," *id.* at 513.

[29] *Id.* at 514.

[30] Subsequent cases have demonstrated that applying *Tinker's* "reasonable forecast of substantial disruption" is a highly context-specific inquiry. *See e.g.*, LaVine v. Blaine Sch.

Court warned that school officials must demonstrate something "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[31] The second *Tinker* test regarding interference with the rights of others has not been heavily relied on by courts.[32]

In describing the scope of free speech rights in schools, the *Tinker* Court did not restrict it to the classroom, but also included other areas on school grounds by observing:

> A student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.[33]

Applying these principles, the Court found that school officials failed to justify its prohibition on armbands with a showing of either substantial interference with school activities or impingement on the rights of other students.[34] Thus, the students'

Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("In applying *Tinker,* we look to the totality of the relevant facts. We look not only to James' actions, but to all of the circumstances confronting the school officials that might reasonably portend disruption.") (citation omitted); J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638, 673 (Pa. 2002) ("Keeping in mind the unique nature of the school setting and the student's diminished rights therein, while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required for a school district to punish student speech.") (citations omitted).

[31] *Tinker*, 393 U.S. at 509.

[32] *See* Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) ("The precise scope of Tinker's 'interference with the rights of others' language is unclear."). *But see* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated* 127 S. Ct. 1484, 1484 (2007) (holding that school's prohibition of a student from wearing a T-shirt that stated "HOMOSEXUALITY IS SHAMEFUL" was constitutional because the message contained on the shirt interfered with "the rights of other students.") The Supreme Court vacated the judgment and remanded the case to the Ninth Circuit for dismissal of the appeal of the preliminary injunction as moot because the district court had entered final judgment dismissing plaintiff's claims for injunctive relief. The Ninth Circuit subsequently dismissed the appeal. Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013) (applying Tinker's "interference with the rights of others" test); Harper v. Poway Unified Sch. Dist., 485 F.3d 1052, 1052 (9th Cir. 2007).

[33] *Tinker*, 393 U.S. at 512–13.

[34] *Id.* at 508 ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."). Note the school officials, in their brief,

free speech rights in wearing their armbands to school were protected by the First Amendment.[35]

B. Fraser, Hazelwood, and Morse

Other cases further defined the contours of free speech rights at public schools. Three subsequent Supreme Court cases, in particular, have created exceptions to the application of *Tinker* in student free speech cases.[36]

First, in *Bethel School District v. Fraser*,[37] a public high school student in the state of Washington was suspended for giving a speech in a school assembly attended by 600 students.[38] The speech was replete with "an elaborate, graphic, and explicit sexual metaphor."[39] The student was suspended and removed from the list of graduation speakers at the school's commencement exercises.[40] The student, by

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unsuccessfully argued for a reasonableness standard to be applied in their actions:

> The law . . . gives school authorities the right to adopt reasonable rules and regulations governing the conduct of the pupils. If the regulation is reasonable in the light of existing facts and circumstances the Court may not question the discretion vested in the school authorities. It is not for the courts to consider whether the rule in retrospect was wise or expedient so long as it was a reasonable exercise of the discretion vested in the school authorities.

Brief for Respondents at 30, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (No. 21), 1968 WL 94384, at *30 (citations omitted).

[35] *Tinker*, 393 U.S. at 514 ("[The students] neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.").

[36] Lower courts have also created exceptions to *Tinker*. *See, e.g.*, Guzick v. Drebus, 431 F.2d 594, 597–98 (6th Cir. 1970) (upholding a content-neutral prohibition of students from wearing *any* buttons at school in a context of racial conflict, as distinguishable from *Tinker*).

[37] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[38] *Id.* at 678.

[39] *Id.* The content of the speech was provided in Justice Brennan's concurring opinion:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687. (Brennan, J., concurring).

[40] *Id.* at 678.

his father, challenged his discipline on free speech grounds.[41] The *Fraser* Court upheld the school officials' actions against the student and held it was not a violation of the First Amendment. The Court observed that part of the educational mission of public school was "educating our youth for citizenship" and teaching "the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."[42] It also recognized the *in loco parentis*[43] role of schools "to protect children—especially in a captive audience—from exposure to 'sexually explicit, indecent, or lewd speech.'"[44] As such, the Court held, "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."[45] It noted that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[46] With a nod to *Tinker's* concern about infringing on the rights of others, the *Fraser* Court also acknowledged the harm the student's speech would have on both teachers and students.[47] It noted:

> The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.[48]

For these reasons, the school had the legal authority to prohibit "sexually explicit, indecent, or lewd speech" at school events.[49]

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[41] *Id.* at 679.

[42] *Id.* at 683.

[43] *In loco parentis* means "in the place of a parent" and describes the early legal relationship between schools and their students. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *441 (observing that a parent "may delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and had such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed").

[44] *Fraser*, 478 U.S. at 684.

[45] *Id.* at 685.

[46] *Id.* at 685–86.

[47] *Id.* at 683–84.

[48] *Id.* (citation omitted).

[49] *Id.* at 684. Even though *Fraser* arose at an on-campus event, based on the educational mission rationale, the Court's holding should apply to all school events, meaning both events on school property and off-campus events sanctioned by the school. The educational mission of public schools would be relevant to both of these contexts.

Second, in *Hazelwood School District v. Kuhlmeier*,[50] Missouri high school students challenged the principal's removal of two articles regarding the impact of divorce on students and the experiences of students with pregnancy from a school-sponsored newspaper.[51] The principal claimed that he removed the articles because he was concerned about the privacy of some of the people interviewed for the stories and thought that the sexual content was inappropriate for some of the younger students in the school.[52] The Court, in ruling for the school officials, held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[53] Thus, the Court acknowledged that educators are able to prohibit school-sponsored speech to a greater extent than nonschool sponsored speech.[54]

Third, in *Morse v. Frederick*,[55] a number of high school students in Alaska, while watching torchbearers run past their school on their way to the Olympic winter games, displayed a 14-foot banner bearing the phrase "BONG HiTS 4 JESUS."[56] The students, who were part of this school-sponsored event, were holding the banner across the street from the school and could be seen by students on the school side of the street.[57] The principal believed that the banner encouraged illegal drug use, so she demanded the banner be taken down.[58] The only student who refused to comply with the principal's demand was subsequently suspended.[59] This student challenged his suspension as a violation of his free speech rights.[60] The Supreme Court held that "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."[61] Although this student was engaged in off-campus expression, it did not

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[50] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[51] *Id.* at 263–64.

[52] *Id.* at 263.

[53] *Id.* at 273.

[54] *Id.* at 271 ("Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself,' *Fraser,* 478 U.S., at 685, 106 S.Ct., at 3165, not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' *Tinker,* 393 U.S., at 509, 89 S.Ct., at 738, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.").

[55] Morse v. Frederick, 551 U.S. 393 (2007).

[56] *Id.* at 397.

[57] *Id*. at 398.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 399.

[61] *Id.* at 403. In his concurring opinion, Justice Alito agreed with the majority's holding,

matter for the Court's analysis.[62] The Court emphasized that all school-sponsored and school-supervised activities off campus grounds—such as field trips—were subject to the school's rules of conduct.[63] In refusing to protect the student's expression, the *Morse* Court noted that the dangers of drug use are "serious and palpable" and students needed to be protected from such harm.[64]

In sum, these three cases have carved out exceptions to *Tinker*. Based on these exceptions, schools can prohibit student speech in certain situations even if they cannot demonstrate substantial disruption or interference with the rights of others. *Fraser* allows school officials to restrict "lewd, indecent, or offensive speech and conduct" at school events.[65] *Hazelwood* permits school officials to prohibit school-sponsored speech on the basis of legitimate pedagogical concerns.[66] Finally, *Morse* allows school officials to regulate speech at school-sanctioned activities that is reasonably viewed as promoting illegal drug use.[67]

It is important to note that all four of these landmark cases—*Tinker* and its three exceptions—arose on school grounds or at school-sanctioned events. Specifically, *Tinker* occurred at high school and junior high campuses, and the Court grounded its holding in "the special characteristics of the school environment"[68] recognizing that constitutional protections extend within "the schoolhouse gate."[69] *Fraser* took place in a high school auditorium, and rested its decision on the understanding that children had less First Amendment rights at public school than adults do in other settings.[70] *Hazelwood* was at a high school where students were working on a school-sanctioned newspaper.[71] The *Hazelwood* Court described *Tinker* as "address[ing] educators' ability to silence a student's personal expression that happens to occur on the school premises."[72] Finally, *Morse* took place across the street from a high school during a school-sanctioned event.[73] By allowing the school to regulate the

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but with his understanding that "it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id.* at 422 (Alito, J., concurring) (quoting *Id.* at 445 (Stevens, J., dissenting)). Alito cautioned against a broad reading of the majority's opinion that "endorse[s] the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Id.* at 423.

[62] *Id.* at 400–01.

[63] *Id.*

[64] *Id.* at 408.

[65] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675–83 (1986).

[66] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[67] Morse v. Frederick, 551 U.S. 393, 403.

[68] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[69] *Id.*

[70] *Fraser*, 478 U.S. at 682.

[71] *Hazelwood*, 484 U.S. at 262.

[72] *Id.* at 271.

[73] Morse v. Frederick, 551 U.S. 393, 397.

expression, the *Morse* Court emphasized that the field trip "occurred during normal school hours," "was sanctioned by [the principal] 'as an approved social event or class trip,'" "[t]eachers and administrators were interspersed among the students and charged with supervising them," and the "high school band and cheerleaders performed."[74]

C. Off-Campus Speech and General First Amendment Law

Under general First Amendment principles, and most relevant to this Article, the Court has decided that certain categories of speech receive either diminished or no First Amendment protections: (1) "fighting words;"[75] (2) certain types of defamation;[76] (3) incitement to imminent lawless action;[77] (4) "true threats;"[78] and (5) obscenity.[79] If private student speech—i.e., neither sanctioned nor supervised by the school—occurs off campus, then courts typically apply these categories in deciding whether or not speech is protected by the First Amendment.[80] For example, in *Thomas v. Board of Education*,[81] a public high school suspended students for publishing an underground newspaper that the school officials thought distasteful.[82] Although the students had written "an occasional article" in the school after classes, the rest of the publication process, including printing and distribution, had occurred after school hours and off campus.[83] The Second Circuit held that *Tinker* did not control because the newspaper was off-campus speech.[84] The court applied general First Amendment law and held the students' suspensions unconstitutional because the speech did not fall into any exception to First Amendment protection.[85] Also, in *Porter v. Ascension Parish School Board*,[86] a high school student drew a picture of

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[74] *Id.* at 400–01.

[75] Chaplinksy v. New Hampshire, 315 U.S. 568, 573 (1942).

[76] *See* NY Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

[77] *See* Bradenburg v. Ohio, 395 U.S. 444, 447 (1969).

[78] Watts v. United States, 394 U.S. 705, 707–08 (1969); *see also* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (analyzing true threats).

[79] *See* Miller v. California, 413 U.S. 15, 23 (1973).

[80] *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 617–18 (5th Cir. 2004) (refusing to apply *Tinker* and analyzing facts under general First Amendment principles); Thomas v. Bd. of Educ., 607 F.2d 1043, 1050–53 (2d Cir. 1979) (same).

[81] 607 F.2d 1043 (2d Cir. 1979).

[82] *Id.* at 1045.

[83] *Id.*

[84] *Id.* at 1050 ("The case before us . . . arises in a factual context distinct from that envisioned in *Tinker* and its progeny. While prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate.").

[85] *Id.* at 1050–53. *But see* Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) (holding that *Tinker* does apply to a student-published underground newspaper distributed on school grounds).

[86] *Porter*, 393 F.3d 608 (5th Cir. 2004).

his school being attacked by missiles, helicopters, and armed assailants.[87] The student placed the drawing in his closet and the school learned of it when the student's younger brother inadvertently brought it to school.[88] Applying general First Amendment principles instead of *Tinker*, the Fifth Circuit determined that the picture did not fall into the free speech exception of "true threat,"[89] and therefore was protected expression.[90]

However, unlike the physical drawings at issue in *Thomas* and *Porter*, many free speech cases arise in an electronic and digital context, and it is becoming increasingly difficult for courts to draw clear lines between on-campus expression, where *Tinker* applies, and off-campus expression, where general First Amendment law applies.[91] In the next Part, I analyze how social media is changing the student speech landscape and how courts have struggled to keep up.

II. SCHOOLS IN THE AGE OF DIGITAL EXPRESSION

A. Expanding the Schoolhouse Gate

Over the last fifty years since *Tinker* was decided, technology has altered the landscape of communications in such a way that the Supreme Court's concept of "at the schoolhouse gate"[92] is becoming difficult to demarcate with physical boundaries. *Tinker* presupposed that students' rights continued as they entered into the physical space of a school. It, thus, placed First Amendment limits on school speech regulation in this context. However, the Court did not contemplate the ways in which

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[87] *Id.* at 611.

[88] *Id.*

[89] *Id.* at 616 ("Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.' The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person.") (emphasis in original) (citations omitted) (quoting Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002)).

[90] *Id.* at 617–18.

[91] Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 265–66 (2008) ("[I]n most jurisdictions, even if the 'intended audience was undoubtedly connected to [the school],' courts will refuse to address incidents of cyberbullying. Even in the few jurisdictions applying the 'sufficient nexus' test, school districts will struggle to establish the nexus in the numerous circumstances where the web site content negatively impacts the life of a student on campus but where it is not accessed at school or carried onto campus.") (alterations in the original) (citations omitted) (quoting Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000)).

[92] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

technology would permit schools to transcend the boundaries of any geographic location.

Indeed, the way both schools and their students are utilizing this technology is expanding what the "schoolhouse gate" means. For example, many public schools are employing virtual classrooms in which classes are being taught online.[93] These virtual classrooms are not bounded by physical walls. For example, in some Florida schools, "e-learning labs" allow "[s]tudents [to] log on to a Web site to gain access to lessons, which consist mostly of text with some graphics, and they can call, e-mail or text online instructors for help."[94] If these classrooms exist in cyberspace and the teachers are located off site, but can be reached by electronic devices, it makes little sense to think about the "schoolhouse gate" as bounded by the geographic boundaries of the school. School extends far beyond these boundaries.

Moreover, when students use social media, such as Facebook, Instagram, and Twitter, to communicate outside of school, their ideas may be viewed by anyone both inside and outside the schoolhouse gate. In *Reno v. ACLU*,[95] Justice John Paul Stevens presaged the implications of these new technologies, observing almost twenty years ago, that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[96]

Social media creates this expansive communicative reach for three main reasons. First, the Internet is widely available and constantly accessed by young people. Sherry Turkle, in writing about how people engage with technology, observes:

> Teenagers tell me they sleep with their cell phone . . . . The technology has become like a phantom limb, it is so much a part of them. These young people are among the first to grow up with an expectation of continuous connection: always on, and always on them.[97]

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[93] Trip Gabriel, *More Pupils Are Learning Online, Fueling Debate on Quality*, N.Y. TIMES (Apr. 5, 2011), http://www.nytimes.com/2011/04/06/education/06online.html [[https://perma.cc/F92Q-BAB5]; *see also* Anya Kamenetz, *Study in Your PJs? What a High School 'Work from Home Day' Looks Like*, NPR (Feb. 23, 2016, 6:37 AM), http://www.npr.org/sections/ed/2016/02/23/466460375/study-in-your-pjs-what-a-high-school-work-from-home-day-looks-like [https://perma.cc/4ACH-TJ24] ("Nationwide, about 400,000 K-12 students are taking or have taken at least one fully online course, and far more schools are using platforms like Schoology to provide online assignments outside of traditional school hours.").

[94] Laura Herrera, *In Florida, Virtual Classrooms With No Teachers*, N.Y. TIMES, (Jan. 17, 2011), http://www nytimes.com/2011/01/18/education/18classrooms html [https://perma.cc/XTR2-RR7T].

[95] Reno v. ACLU, 521 U.S. 844 (1997).

[96] *Id.* at 870.

[97] SHERRY TURKLE, ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY

According to a recent study from the Pew Research Center that was published in April 2015, 92% of teenagers—defined in the report as those people between 13 to 17—report going online daily and 24% report going online "almost constantly."[98] According to the study, this "frenzy of access" is facilitated by the widespread use of smartphones.[99] The Pew study finds that 73% of teens have access to smartphones, which enable access to various social media platforms.[100] Facebook is currently the most popular platform, used by 71% of teenagers, followed by Instagram (used by 52%), Snapchat (used by 41%), and Twitter (used by 33%).[101]

Second, social media, with the click of a button, allows a user to quickly send messages to a large number of people.[102] This access is not open for all to see, unless the user decides that is what she or he wants. The social media audience is typically defined by the user through invitation-only entry points, such as "friend" requests, and a number of user-controlled privacy settings.[103] Nonetheless, many social media platforms can greatly enhance a student's ability to publicize her views to many people. For example, Facebook enables its users to post messages, pictures, and videos onto sections of their online profiles called "timelines," which generally can be viewed by the user's Facebook "friends."[104] Facebook further permits users to interact with each other by sharing information on their timelines.[105] This application also lets users send personal messages to each other,[106] tag each other so that users

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AND LESS FROM EACH OTHER 16–17 (2011).

[98] Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RES. CTR. (Apr. 9, 2015), http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/ [https://perma.cc/4BPZ-HHXH].

[99] *Id.*

[100] *Id.*

[101] *Id.* At the time of this study, these social media platforms were reported to be the most popular. *Id.* However, with the continual invention of new platforms, the most frequently used ones are constantly changing. For the purposes of this Article, I have focused on the most popular forms of social media reported both in the Pew Study and in court cases centering on school discipline for social media usage.

[102] Paris S. Strom & Robert D. Strom, *When Teens Turn Cyberbullies*, EDUCATION DIGEST, Dec. 1, 2005, at 35, 36 ("Instead of remaining a private matter or event known by only a small group, text or photographs can be communicated to a large audience in a short time.").

[103] For example, Facebook users can currently adjust their privacy settings to restrict who can see their posts, who can contact them, and who can search for them. *See Basic Privacy Settings & Tools,* FACEBOOK.COM: HELP CENTER, https://www facebook.com/help/325807937506242/ https://perma.cc/AJ7P-MVRY. Facebook also allows user to block specific users from viewing their content. *Id.*

[104] *See How Do I Post to My Timeline?*, FACEBOOK.COM: HELP CENTER, https://www.facebook.com/help/1462219934017791 [https://perma.cc/8K8S-9WDN].

[105] *Id.*

[106] *See Who Can I Send Messages To?*, FACEBOOK.COM: HELP CENTER, https://www.facebook.com/help/438779846195810 [https://perma.cc/WXD8-UFW3].

are notified when something is posted about them,[107] and start online chats with single or multiple users.[108] Another application, Snapchat, allows its users to take a photo or video, add a caption, and send it to other users.[109] This "Snap" disappears from the screen unless the recipient takes a screenshot of it.[110] Finally, Twitter allows its users to send and read short 140-character messages, called "tweets."[111] Twitter users register for accounts and can follow other users' accounts.[112] The tweets from the followed accounts populate the followers' Twitter home pages in a live message feed.[113] Twitter also enables users to "retweet" other users' tweets.[114] Based on these capabilities, Twitter messages can quickly reach large numbers of people.

Third, social media facilitates mass participation in collective dialogues in virtual communities of interest. As mentioned, Facebook allows users to "friend" each other, and the posts of Facebook friends will appear on their respective news feeds,[115] thereby creating an online community of people updating each other with all types of information. Moreover, Instagram allows its users to:

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[107] *See Tagging*, FACEBOOK.COM: HELP CENTER, https://www.facebook.com/help/232620513462357 [https://perma.cc/UK7V-85K4].

[108] *See How Do I Start Chatting with a Friend?*, FACEBOOK.COM: HELP CENTER, https://www.facebook.com/help/193822797331287 [https://perma.cc/9QJT-U6GY].

[109] *See Create and Send Snaps*, Subtopic in *Snapchat Support*, SNAPCHAT, https://support.snapchat.com/en-US/article/create (on file with Utah Law Review).

[110] *Id.*

[111] *See Using Twitter: The Basics: Posting a Tweet,* TWITTER.COM: HELP CENTER, https://support.twitter.com/articles/15367-posting-a-tweet# [https://perma.cc/F9C4-VDH6]. In addition to text, tweets can contain photos and videos as well. *See id.*

[112] An account on Twitter is designated: "@[username]." *See Using Twitter: The Basics: Signing Up,* TWITTER.COM: HELP CENTER, https://support.twitter.com/articles/100990# [https://perma.cc/95L6-Y9YH]. Note that users can currently block other users from following them if they so choose. *See Using Twitter: The Basics: Customizing Your Experience,* TWITTER.COM: HELP CENTER, https://support.twitter.com/articles/117063-blocking-users-on-twitter# [https://perma.cc/MG2D-4QXN].

[113] *See Using Twitter: The Basics: Tweeting: Posting a Tweet,* TWITTER.COM: HELP CENTER, https://support.twitter.com/articles/15367# [https://perma.cc/2LBN-4PJP].

[114] *Using Twitter: The Basics: Tweeting: Retweeting Another Tweet,* TWITTER.COM: HELP CENTER, https://support.twitter.com/articles/20169873# [https://perma.cc/W453-ABZ9].

[115] *How Does News Feed Decide Which Stories to Show?*, FACEBOOK.COM: HELP CENTER, https://www.facebook.com/help/166738576721085 [https://perma.cc/GX99-MN4R] ("The stories that show in your News Feed are influenced by your connections and activity on Facebook. This helps you to see more stories that interest you from friends you interact with the most. The number of comments and likes a post receives and what kind of story it is (ex: photo, video, status update) can also make it more likely to appear in your News Feed.").

> Take a picture or video, then customize it with filters and creative tools. Post it on Instagram and share instantly on Facebook, Twitter, Tumblr and more—or send it directly as a private message. Find people to follow based on things you're into, and be part of an inspirational community.[116]

Additionally, Twitter is known for its hashtags that can bring attention to various issues and engage people in online communication around common themes.[117] A hashtag is a word or phrase preceded by the hash or pound sign (#) that social media users can use to identify messages on specific topics.[118] Hashtags were created organically by Twitter users as a means to search for tweets based on message content.[119] When social media users tweet and retweet messages with the same hashtags, these hashtags start to trend, and the issues that these messages are connected to become more visible to the public.[120]

For these reasons, social media is an incredibly powerful tool for student expression. Also for these reasons, when social media is being used by students, the distinction between on-campus and off-campus speech is not easily made. As one judge has noted, digital communication appears to be "everywhere at once."[121] This is particularly problematic when students abuse social media to bully their fellow students.

B. Bullying in the Digital Age

The increasing societal awareness of bullying and cyberbullying—particularly after a number of highly publicized suicides of young students across the

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[116] *Instagram App of the Day*, CITRUSBITS: BLOG (Aug. 18, 2015), https://citrusbits.com/instagram-app-of-the-day/ [https://perma.cc/5GPX-84HP].

[117] *See Using Twitter: The Basics: Tweeting: Using Hashtags on Twitter,* TWITTER.COM: HELP CENTER, https://support.twitter.com/articles/49309-using-hashtags-on-twitter# [https://perma.cc/9794-FQPY].

[118] *See id.*

[119] *See id.*

[120] *Using Twitter: Beyond the Basics: More about Twitter: FAQS about Trends on Twitter,* TWITTER.COM: HELP CENTER, https://support.twitter.com/groups/53-discover/topics/216-trends/articles/101125-faqs-about-trends-on-twitter# [https://perma.cc/6WSF-FA82] ("Trends are determined by an algorithm and, by default, are tailored for you based on who you follow and your location. This algorithm identifies topics that are popular now, rather than topics that have been popular for a while or on a daily basis, to help you discover the hottest emerging topics of discussion on Twitter that matter most to you.").

[121] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

country[122]—has spurred state lawmakers to act.[123] Indeed, as of January 2016, all fifty states, along with the District of Columbia, have enacted anti-bullying laws.[124] The requirements of anti-bullying laws differ by state.[125] Common elements of these laws require or encourage schools to develop an anti-bullying policy, implement anti-bullying training programs, and report bullying to authorities and institute appropriate disciplinary action when it occurs.[126] Most statutes incorporate *Tinker's* "substantial disruption" and "interference with the rights of others" tests along with

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[122] *See, e.g.*, Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES (Sep. 13, 2013), http://www nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html [https://perma.cc/PM4U-7AEB] (discussing 12-year-old Rebecca Ann Sedwick's suicide after being cyberbullied); John Halligan, *Death by Cyber-Bully,* BOS. GLOBE (Aug. 17, 2005), http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/08/17/death_by_cyber_bully/ [https://perma.cc/YJL7-G524] (Ryan Halligan's father discussing his 13-year-old son's suicide after enduring online bullying and lauding Massachusetts for adopting a pilot program to prevent all forms of student harassment in the commonwealth's schools); Helen Kennedy, *Phoebe Prince, South Hadley High School's 'New Girl,' Driven to Suicide by Teenage Cyberbullies*, DAILY NEWS (March 29, 2010), http://www nydailynews.com/news/national/phoebe-prince-south-hadley-high-school-new-girl-driven-suicide-teenage-cyber-bullies-article-1.165911 [https://perma.cc/PJ7M-J2S9] (discussing 15-year-old Phoebe Prince's suicide after she was cyberbullied); Felicia R. Lee, *The Rough-and-Tumble Online Universe Traversed by Young Cybernauts*, N.Y. TIMES (Jan. 22, 2008), http://www nytimes.com/2008/01/22/arts/television/22front.html [https://perma.cc/Q9P4-AVCA] (discussing Ryan Halligan's suicide after enduring online bullying); Yvonne Wenger, *Teen's Suicide Raises Long-Standing Concerns about Cyber-Bullying* (April 17, 2012), BALTIMORE SUN, http://articles.baltimoresun.com/2012-04-17/news/bs-md-ho-cyber-suicide-20120417_1_cyber-bullying-deb-poquette-cyberbullying-research-center [https://perma.cc/687Y-43QA] (discussing 15-year-old Grace McComas's suicide after being cyberbullied); Yalanda Young, *Online Teasing Leads to Teen's Suicide* (Nov. 24, 2009), http://www.kait8.com/story/11566204/online-teasing-leads-to-teens-suicide [https://perma.cc/3AD2-CMQG] (discussing 12-year-old Sarah Lynn Butler's suicide after being bullied on MySpace).

[123] See Kevin P. Brady, *Criminal State Anti-Bullying Statutes: Does Legislative Zeal Outweigh Constitutional Considerations*, 298 EDUC. L. REP. 21, 28–35 (2013), for a multi-state overview of how high profile teen suicides created the impetus for new anti-bullying legislation. As of the writing of this article, federal anti-bullying laws have been proposed but not enacted. *See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009), https://www.govtrack.us/congress/bills/111/hr1966/text [https://perma.cc/MD64-SND9]; Safe School Improvement Act of 2010, S. 3739, 111th Cong. (2010), https://www.govtrack.us/congress/bills/111/s3739/text/is [https://perma.cc/R97C-5RWG].

[124] *See* SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE CYBERBULLYING RESEARCH CENTER, STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES 1 (2016), http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf [https://perma.cc/JBA3-6KY5] [hereinafter STATE CYBERBULLYING LAWS].

[125] I have not attempted a survey of every state's law, but will use examples from certain states to highlight different approaches. *See infra* Part III.A–D.

[126] STATE CYBERBULLYING LAWS, *supra* note 124, at 2–20.

the "hostile educational environment" standard arising from federal antidiscrimination statutes such as Title VI and IX.[127] Fourteen states extend school authority to regulate speech that originates off campus.[128]

Forty-eight states have enacted laws that restrict harassment using electronic media, and twenty-three states have passed laws that specifically prohibit cyberbullying.[129] While some anti-bullying statutes criminalize bullying,[130] most of these laws put the onus on schools to develop policies to address the problem.[131]

Courts have also differed in their analysis of First Amendment principles in cases of bullying, cyberbullying, and other peer-on-peer attacking. I will highlight some of the different approaches in the Part III.

III. FIVE APPROACHES TO SCHOOL REGULATION OF HARMFUL OFF-CAMPUS SPEECH

In determining whether or not schools can regulate off-campus speech under *Tinker*, courts and legislatures have adopted five analytic approaches: (1) finding no authority to regulate off-campus speech;[132] (2) making no distinction between on-campus and off-campus speech;[133] (3) requiring a sufficient nexus between the off-campus speech and the campus;[134] (4) mandating that the off-campus speech reaching campus be reasonably foreseeable by its creator;[135] and (5) limiting school authority to regulate off-campus speech to situations where there is an identifiable threat of school violence.[136]

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[127] STATE CYBERBULLYING LAWS, *supra* note 124, at 2–20.

[128] STATE CYBERBULLYING LAWS, *supra* note 124, at 1.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *See e.g.*, ALA. CODE § 16-28B-3 (2015); OR. REV. STAT. § 339.351 (2015); S.C. CODE ANN. § 59-63-140 (2014).

[133] *See e.g.*, J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011); *see also* CAL. EDUC. CODE § 48900 (West 2015); FL. STAT. § 1006.147 (2015); VT. STAT. ANN. tit. 16 §11 (2015).

[134] *See e.g.,* Killion v. Franklin Regional Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1178—1179 (E.D. Mo. 1998); J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638, 667 (Pa. 2002); *See also* NJ STAT. ANN. § 18A:37-15.3 (West 2015).

[135] *See e.g.*, S.J.W. v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012); D.J.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754, 766 (8th Cir. 2011); Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008); Wisniewski v. Bd. of Educ. Of Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008). *See also* N.Y. EDUC. LAW § 11 (McKinney 2015).

[136] *See e.g.*, Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1071 (9th Cir. 2013).

A. The No Authority Approach

The first approach, which I call the "no authority approach," views a school's regulatory authority under *Tinker* as limited to on-campus or school-sanctioned speech. Under this approach, a school has no authority to prohibit off-campus speech that occurs at nonschool-sanctioned activities, apart from using general First Amendment principals (e.g., regulating fighting words, obscenity, true threats, incitement, etc.).

Although scholars have argued for this approach,[137] most courts have refused to apply it in their *Tinker* analysis.[138] Many state legislatures, however, have adopted this approach in their anti-bullying laws.[139] For example, Alabama defines "harassment" for purposes of its anti-bullying law as "[a] continuous pattern of intentional behavior that takes place on school property, on a school bus, or at a school-sponsored function."[140] Further, Oregon defines "bullying" as a certain act that "[t]akes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus

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[137] *See e.g.*, Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 430 (2011) ("When student speech occurs outside of school supervision, the speech should receive the same First Amendment protection as a non-student's speech. Speech outside school supervision does not implicate the 'essential characteristics' of the school environment that justify special First Amendment treatment of student speech."); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1102 (2008) ("The application of Tinker's materially disruptive standard—regardless of whether it is preceded with an inquiry into whether the speech is properly labeled 'on-campus' or 'off-campus' speech—provides little protection to students' expressive rights. First, many courts are far too deferential to schools' assertions that the challenged expressive activity was substantially and materially disruptive to schoolwork or discipline. Second, and more importantly, the Tinker test is ill-suited to speech in the digital media. Many off-campus events and activities can distract students from their work, but it would make no sense to permit schools to serve as a cultural censor.").

[138] See *infra* Part III.B-E for cases that hold that schools, in certain situations, have authority to regulate online speech that originates off campus. *But see* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("Plaintiff's [mock website obituaries created off campus] was not at a school assembly, as in *Fraser,* and was not in a school-sponsored newspaper, as in *Kuhlmeier.* It was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control.").

[139] *See e.g.*, ALA. CODE § 16-28B-3 (2016); OR. REV. STAT. § 339.351 (West 2016); S.C. CODE ANN. § 59-63-140 (2014).

[140] ALA. CODE § 16-28B-3 (2016).

stop."[141] Finally, South Carolina requires "each local school district shall adopt a policy prohibiting harassment, intimidation, or bullying at school."[142] The statute provides the following definition:

> "School" means 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.[143]

In sum, under the laws of such states as Alabama, Oregon, and South Carolina, schools do not have the authority to regulate student speech that occurs off campus at nonschool-sponsored activities.[144] Even if the speech substantially disrupts school activities, schools are powerless to regulate it under their states' anti-bullying statutes. Most states' anti-bullying laws follow this "no authority" approach and limit school jurisdiction to regulate bullying only if it occurs on-campus or at school-sponsored events.[145]

B. The No Distinction Approach

The second approach, which I call the "no distinction approach," assumes that *Tinker* equally applies to both on-campus and off-campus speech. Courts that apply this approach go directly to the "substantial disruption" analysis regardless of where the speech originated.[146] State legislatures that adopt this approach assume that schools have jurisdiction over online speech that is created off campus.[147]

For example, in *J.S. v. Blue Mountain School District*,[148] a middle school student in Pennsylvania created a fake profile on MySpace—a social networking site—that made fun of her principal.[149] When she created the profile, it was neither during school hours nor on school grounds.[150] The profile was presented as a self-portrayal of an unnamed bisexual middle school principal, but displayed the

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[141] OR. REV. STAT. § 339.351 (West 2016).

[142] S.C. CODE ANN. § 59-63-140 (2016).

[143] *Id.* at § 59-63-120.

[144] *See* ALA. CODE § 16-28B-3 (2016); OR. REV. STAT. § 339.351 (West 2016); S.C. CODE ANN. § 59-63-140 (2016).

[145] STATE CYBERBULLYING LAWS, *supra* note 124, at 1 (noting that 36 out of 50 states do not include off-campus behaviors in their definitions of bullying).

[146] *See e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011).

[147] *See e.g.*, CAL. EDUC. CODE § 48900 (West 2016); FLA. STAT. ANN. § 1006.147 (West 2016); VT. STAT. ANN. tit. 16, § 11 (West 2016).

[148] 650 F.3d at 920.

[149] *Id.*

[150] *Id.*

photograph of the student's principal that the student obtained through the School District's website.[151] It contained "crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."[152] The student was suspended and her parents brought a legal challenge to this discipline on First Amendment grounds.[153] The Third Circuit "assume[d], without deciding," that *Tinker* applied to the student's off-campus speech.[154] It then turned to the "substantial disruption" test, and held that the profile neither caused a substantial disruption nor created a reasonable forecast of a substantial disruption.[155] The court noted that "the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did."[156]

Some states' anti-bullying laws have adopted a "no distinction" approach in dealing with off-campus student expression created online.[157] These laws explicitly include off-campus acts in their definitions of "bullying." For example, California defines "bullying" as certain types of "physical or verbal act or conduct, including communications made in writing or by means of an electronic act."[158] It further defines "[e]lectronic act" as "the creation or transmission originated on or off the schoolsite, by means of an electronic device."[159] Similarly, Florida prohibits "bullying or harassment" in a number of ways, including "[t]hrough the use of data or computer software that is accessed at a nonschool-related location, activity, function, or program or through the use of technology or an electronic device that is not owned, leased, or used by a school district or school."[160] Finally, Vermont provides, that "bullying" can include an act that "does not occur during the school day on school property, on a school bus, or at a school-sponsored activity and can be shown to pose a clear and substantial interference with another student's right to access educational programs."[161]

In short, states such as California, Florida, and Vermont make no distinction between on-campus and off-campus speech for purposes of regulating

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[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* at 926.
[155] *Id.* at 928.
[156] *Id.* at 929.
[157] *See e.g.*, CAL. EDUC. CODE § 48900 (West 2016); FLA. STAT. ANN. § 1006.147 (West 2016); VT. STAT. ANN. tit. 16, § 11 (West 2016).
[158] CAL. EDUC. CODE § 48900 (West 2016).
[159] *Id.*
[160] FLA. STAT. ANN. § 1006.147 (West 2016).
[161] VT. STAT. ANN. tit. 16, § 11 (West 2016).

cyberbullying.[162] Many states that allow for school regulation of off-campus speech do it in ways similar to these states.[163]

C. The Nexus Approach

The third approach, which I call the "nexus approach," treats online expression as on-campus speech when it is made off campus, but either aimed at a specific school or subsequently brought to or accessed on campus.

For example, in *J.S. ex. rel. H.S. v. Bethlehem Area School District*,[164] a middle school student in Pennsylvania created a personal website, titled "Teacher Sux," on a home computer that contained threatening and derogatory comments about his algebra teacher and the school's principal.[165] On one of the web pages, the student listed reasons why the teacher must die and asked for twenty dollars to help pay for the hitman.[166] Another page contained a drawing of the teacher's severed head.[167] J.S. told other students about this website and accessed it at school to show another student.[168] The school subsequently expelled the student.[169] The student's parents challenged their son's expulsion on First Amendment grounds.[170] The first issue for the court was whether this website that was created from home was on-campus or off-campus speech.[171] If it was on-campus speech, *Tinker* would apply, but if it was off-campus, only general First Amendment law would apply. The court found "a sufficient nexus between the website and the school campus to consider the speech as occurring on-campus."[172] It held, "[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[173] The court then

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[162] *See* CAL. EDUC. CODE § 48900 (West 2016); FLA. STAT. ANN. § 1006.147 (West 2016); VT. STAT. ANN. tit. 16, § 11 (West 2016).

[163] *See e.g.*, CONN. GEN. STAT. ANN. § 10-222d (West 2016) (authorizing schools to "prohibit bullying . . . outside of the school setting . . ."); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West 2016) (defining one form of bullying as "through the transmission of information from a computer that is accessed at a non-school-related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district"); 24 PA. CONS. STAT. ANN. § 13-1303.1-A (West 2016) (stating that "a school entity shall not be prohibited from defining bullying in such a way as to encompass acts that occur outside a school setting"); S.D. CODIFIED LAWS § 13-32-15 (2016) (defining one form of bullying "as any threatening use of data or computer software").

[164] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 849 (2002).

[165] *Id.* at 851.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 852.

[169] *Id.* at 852–53.

[170] *Id.* at 853.

[171] *Id.*

[172] *Id.* at 865.

[173] *Id.*

applied *Tinker*, and found that the school made an adequate showing that the website caused actual substantial disruption of the work of the school.[174] It noted that the most significant disruption was the emotional and physical injuries suffered by the algebra teacher that forced her to take a medical leave of absence.[175] It further noted the disruption to the students' educational environment and parents' weakened sense of school safety.[176] Other courts have expanded the nexus and applied the *Tinker* analysis where off-campus speech makes its way to campus, even if by some other student.[177]

Few state legislatures have incorporated a nexus approach, but New Jersey's anti-bullying statute has come close.[178] It provides that schools should have jurisdiction over "harassment, intimidation, or bullying . . . that occurs off school grounds, in cases in which a school employee is made aware of such actions."[179] Illinois is another example.[180] The Illinois law provides that the use of electronic devices for bullying shall be prohibited "only in cases in which a school administrator or teacher receives a report that bullying through this means has occurred."[181] Both New Jersey's and Illinois's laws are looser than a nexus approach because the expression does not have to be aimed at or actually reach campus. A school employee's knowledge of the content would satisfy both states' requirements.[182]

D. The Foreseeability Approach

The fourth approach, which I call the "foreseeability approach," makes *Tinker* applicable to instances in which social media expression is made off campus, but only when it is reasonably foreseeable that the expression would reach campus.

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[174] *Id.* at 868–69. The court also found, under general First Amendment law that the website did not rise to the level of "true threat." *Id.* at 859–60.

[175] *Id.* at 869.

[176] *Id.*

[177] *See, e.g.*, Killion v. Franklin Regional Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) ("[B]ecause the [off-campus e-mail] list was brought on campus, albeit by an unknown person, *Tinker* applies."); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1178–79 (E.D. Mo. 1998) (applying the *Tinker* analysis to student's personal webpage when other students accessed it at school).

[178] N.J. STAT. ANN § 18A:37-15.3 (2016).

[179] *Id.*

[180] 105 ILL. COMP. STAT. 5/27-23.7(a)(4) (2016).

[181] *Id.*

[182] At the time of the writing of this article, administrators at a New Jersey high school were investigating a bullying complaint under the State's anti-bullying law after a student's Twitter posts came to the attention of school officials. *See* Liam Stack, *Tweets About Israel Land New Jersey Student in Principal's Office*, N.Y. TIMES (Jan. 7, 2016), http://www.nytimes.com/2016/01/07/nyregion/anti-israel-tweets-land-new-jersey-student-in-principals-office html?smid=fb-nytimes&smtyp=cur&_r=0 [https://perma.cc/4SFM-5DBJ].

For example, in *Wisniewski v. Board of Education of Weedsport Cent. School Dist.*,[183] a middle school student in upstate New York sent instant messages ("IMs") from his home computer to 15 members of his "buddy list."[184] The student's IM icon showed a small drawing of a pistol firing a bullet at a person's head, above which were red dots representing blood, and beneath which were the words, "Kill Mr. VanderMolen," who was the student's English teacher.[185] The icon was not sent to the teacher or any school official, but was viewable for three weeks by the student's "buddies," some of which were fellow students at the school.[186] The school subsequently suspended the student for a semester and the student's parents challenged the discipline in court as a violation of their son's First Amendment rights.[187] In determining that the speech at issue was on-campus speech, the Second Circuit held that *Tinker* applies to digital communications as long as there is a "reasonably foreseeable risk that the icon would come to the attention of school authorities."[188] Due to "[t]he potentially threatening content of the icon and the extensive distribution of it," the court concluded that the risk of the speech coming to the attention of school authorities was "at least foreseeable to a reasonable person, if not inevitable."[189] The court further held that once the icon was made known to school officials, it would "foreseeably create a risk of substantial disruption within the school environment."[190]

The Second Circuit again adopted this foreseeability approach in *Doninger v. Niehoff*.[191] In *Doninger*, a high school student in Connecticut was upset with school officials' decision to postpone a battle-of-the-bands concert that she helped organize, so she blogged about it on her personal website during nonschool hours.[192] On this publicly accessible site, she called school officials "douchebags," mischaracterized the school's decision to change the date as a cancellation, and

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[183] 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

[184] *Id.* at 36. The student "was using AOL Instant Messaging ('IM') software on his parents' home computer. Instant messaging enables a person using a computer with Internet access to exchange messages in real time with members of a group (usually called 'buddies' in IM lingo) who have the same IM software on their computers. Instant messaging permits rapid exchanges of text between any two members of a 'buddy list' who happen to be on-line at the same time. . . .The AOL IM program, like many others, permits the sender of IM messages to display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender's name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two 'buddies,' and each can copy the icon of the other and transmit it to any other 'buddy' during an IM exchange." *Id.* at 35–36.

[185] *Id.* at 36.

[186] *Id.*

[187] *Id.* at 37.

[188] *Id.* at 38.

[189] *Id.* at 39–40.

[190] *Id.* at 40.

[191] 527 F.3d 41, 43 (2d Cir. 2008).

[192] *Id.* at 44–45.

encouraged students and parents to voice their complaints to the school.[193] Students and parents subsequently called and emailed the school to protest the cancellation.[194] After learning about the blog post, the school's principal concluded that the student's conduct "had failed to display the civility and good citizenship expected of class officers."[195] On this basis, the school prohibited the student from running for senior class secretary.[196] This student's parents challenged this discipline as a violation of their daughter's First Amendment rights.[197] Citing to *Wisniewski*, the Second Circuit held, "We have determined . . . that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[198] In applying this rule, even though the blog post was created off campus, the court held that "it was reasonably foreseeable that [the student's] posting would reach school property."[199] Indeed, the court noted, it was "purposely designed" to do so.[200] In applying the *Tinker* test, the court also found that the student's "post created a foreseeable risk of substantial disruption to the work and discipline of the school."[201] Thus, the school's disqualification of the student for running for student office was upheld.[202]

The Eighth Circuit also follows the foreseeability approach. In *D.J.M. v. Hannibal Public School District #60*,[203] a high school student in Missouri sent instant messages from his home computer to a classmate in which he talked about obtaining a handgun and shooting some other students at the school.[204] A criminal investigation resulted from these messages, and the student was placed in juvenile detention.[205] The school subsequently suspended the student for the rest of the school year because the messages had a disruptive impact on the school.[206] The student's parents challenged the suspension on constitutional grounds.[207] The Eighth Circuit held that the student's speech was not protected speech under *Tinker's* substantial

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[193] *Id.* at 45.
[194] *Id.*
[195] *Id.* at 46.
[196] *Id.*
[197] *Id.* at 47.
[198] *Id.* at 48 (citation omitted) (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir.2007), *cert. denied,* 552 U.S. 1296 (2008)).
[199] *Doninger*, 527 F.3d at 50.
[200] *Id.*
[201] *Id.* at 53.
[202] *Id.*
[203] 647 F.3d 754 (8th Cir. 2011).
[204] *Id.* at 757–58.
[205] *Id.* at 759.
[206] *Id.*
[207] *Id.* at 757.

disruption analysis.[208] In applying *Tinker* to this online speech that was created from home, the court cited to *Wisniewski*, holding that it was "reasonably foreseeable that the instant messaging icon would come to the attention of the school authorities and the teacher," and that it would also "create a risk of substantial disruption within the school environment."[209]

Similarly, in *S.J.W. v. Lee's Summit R-7 School District*,[210] two Missouri high school students, who were twin brothers, created a personal website that contained a blog.[211] The blog posts "contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name. The racist posts discussed fights at [the school] and mocked black students."[212] The school district suspended the students for 180 days, but allowed them to enroll in another school for the duration of their suspensions.[213] The students' parents challenged the suspensions in court on First Amendment grounds.[214] The Eight Circuit found that *Tinker* applied to the students' off-campus blog posts because the posts were "targeted at" the school and, therefore, "could reasonably be expected to reach the school or impact the environment."[215] It then found that the blog posts easily met *Tinker's* "substantial disruption" standard.[216]

Some overlap may exist between the "nexus" approach and the "foreseeability" approach. For example, it could easily be foreseeable that certain off-campus speech aimed at a specific school will reach that school. However, the overlap is only partial. In some situations, where off-campus speech is not aimed at a particular school, it may nonetheless be foreseeable that such speech would reach the campus. For example, a student can create social media content not aimed at a particular school, but be on a platform where the student has many connections. In such a situation, it may well be reasonably foreseeable that this content could spread to a large number of people and reach the school anyway. Although this would also satisfy the "nexus" approach by creating a link through on-campus access, the process of arriving at the outcome would be different. Therefore, the "nexus" and "foreseeability" approaches can provide distinct methods of determining whether or not *Tinker* applies to cyberbullying that originates off campus. Like the "nexus" approach, the "foreseeability" approach has not yet been incorporated into many states' anti-bullying laws. New York's anti-bullying statute is an exception. It allows

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[208] *Id.* at 764–66.
[209] *Id.* at 766 (citation omitted).
[210] 696 F.3d 771 (8th Cir. 2012).
[211] *Id.* at 773.
[212] *Id.*
[213] *Id.* at 774.
[214] *Id.* at 774–75.
[215] *Id.* at 778 (quoting Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011)).
[216] *Id.*

schools to have jurisdiction over off-campus speech "where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property."[217]

E. The Identifiable Threat Approach

The final approach, which I call the "identifiable threat" approach, allows schools to regulate off-campus speech if they are faced with an identifiable threat of school violence.

For example, in *Wynar v. Douglas County. School District*,[218] a high school student in Nevada sent violent messages to some of his friends from school in which he threatened to commit a mass shooting on a specific date.[219] He wrote these messages from his home using MySpace.[220] The student's friends became increasingly concerned and reported these message to a football coach, who together with the students, met with the school principal.[221] The student was subsequently suspended for ten days and, after a formal hearing, was expelled for 90 days.[222] The student's father challenged the expulsion on First Amendment grounds.[223] The Ninth Circuit discussed the nexus and foreseeability approaches to determine how they would apply to these facts.[224] The court observed:

> Given the subject and addressees of [the student's] messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to [the student] that his messages would reach campus. Indeed, the alarming nature of the messages prompted [the student's] friends to do exactly what we would hope any responsible student would do: report to school authorities.[225]

But instead of adopting either approach, the Ninth Circuit articulated a new rule that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."[226] In finding that the substantial disruption test had been met, the court held that "the school district officials reasonably could have predicted that they would have to spend 'considerable time dealing with [parents' and students'] concerns and

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[217] N.Y. EDUC. LAW § 11 (McKinney 2016).

[218] 728 F.3d 1062 (9th Cir. 2013).

[219] *Id.* at 1065–66.

[220] *Id.* at 1065 (describing MySpace as "a social networking website that allows its members to set up online 'profiles' and communicate via email, instant messages, and blogs") (quoting Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 208 (3d Cir. 2011)).

[221] *Id.* at 1066.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 1069.

[225] *Id.*

[226] *Id.*

ensuring that appropriate safety measures were in place.'"[227] It also applied *Tinker*'s "interference with the rights of others" test, finding that since the messages "represent the quintessential harm to the rights of other students to be secure" since they "threatened the student body as a whole and targeted specific students by name."[228]

States with anti-bullying laws that have allowed for school regulation of off-campus speech have not relied on this approach, mostly opting for the "no distinction" approach.

Before turning to which approaches states and their public schools should adopt to reach off-campus cyberbullying, Part IV explores why schools should have authority to regulate such speech in the first place.

IV. WHY SCHOOLS SHOULD REGULATE CYBERBULLYING

Some courts have expressed serious concerns about regulating their students' off-campus speech.[229] For example, in a case involving the off-campus creation of a fake profile of a school principal, one judge noted, "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[230] As a general matter, this is true. However, there are three reasons that actual cases of cyberbullying require a different analysis: (1) the nature of the harm is unique; (2) other legal remedies are inadequate to protect victims; and (3) schools are in the best position to protect their students.

A. Cyberbullying Is Particularly Harmful

Cyberbullying has some distinctive features from offline bullying that makes it much more harmful. First, since cyberbullying occurs through electronic devices, cyberbullies can reach their young victims at any time, whether or not they are in the same physical space.[231] This feature makes any rigid distinction between on-campus and off-campus speech almost inapplicable to cyberbullying. Cyberbullies can access their targets at any time and place. Due to the ubiquity of computers, smart phones, and social media, there is no safe haven for cyberbullying victims.[232]

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[227] *Id.* at 1071 (alteration in the original) (quoting D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766 (8th Cir.2011)).

[228] *Id.* at 1072. Even though it applied this test, the court noted, "[f]ew circuit cases address the 'invasion of the rights of others' prong of *Tinker*." *Id.* at 1071.

[229] *See e.g.*, Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–21 (3d Cir. 2011) (Jordan, J., concurring).

[230] *Id.*

[231] Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148, 148–50 (2006).

[232] *See supra* notes 97–121 and accompanying text.

Second, the unprecedented speed in which cyberbullying content reaches people allows for the harm to quickly reach the public without any time for the sender to reflect on whether the content should be modified or not sent at all.[233] This speed is made possible by social media, such as Facebook and Twitter, and electronic communication, such as email and texts. At the click of a button, harmful content can be quickly posted online for people to see or sent directly to intended recipients.

Third, in cyberbullying, harmful messages can reach a large audience.[234] The viewers can easily share this content with others, and the material can quickly go "viral"—i.e., spread to a large number of users.[235] The distribution of harmful content can also be orchestrated through social media. Certain platforms, such as Twitter, enable cyberbullies to engage in organized campaigns against a particular person, which involve many other people—a phenomena that has been referred to as "cyber-mobbing."[236]

Fourth, bullying through social media can be viewed repeatedly. In contrast to words uttered a single time in a physical encounter, cyberbullying's words and images have the potential to be viewed over and over again. Each time the victim is confronted with the content, the victim is reinflicted with the harm.

Fifth, since many people who know the victim also know the cyberbully through school, the cyberbully's audience is likely to have overlapping social media connections with the victim's social network.[237] This interconnectedness increases

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[233] John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 322–23 (2004) ("In e-mail and message boards, communication is asynchronous. People don't interact with each other in real time. Others may take minutes, hours, days, or even months to reply. Not having to cope with someone's immediate reaction disinhibits people.").

[234] *See supra*, notes 97–121 and accompanying text.

[235] *See e.g.*, Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 208 (3d Cir. 2011) ("[The student] afforded access to the profile to other students in the School District by listing them as 'friends' on the MySpace website, thus allowing them to view the profile. Not surprisingly, word of the profile 'spread like wildfire' and soon reached most, if not all, of Hickory High's student body.").

[236] *See* DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE 61–62 (2014); *see also Officials: Suicidal Teen Was Cyber-Bullied*, CBSNEWS (Jan. 27 2010, 9:24 AM), http://www.cbsnews.com/news/officials-suicidal-teen-was-cyber-bullied/ [https://perma.cc/4K9N-E5LB]; *cf.* Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES (June 27, 2010), http://www.nytimes.com/2010/06/28/style/28bully html?_r=0 [https://perma.cc/WQ87-VWEL] ("A Facebook page had sprung up about the man's son, who was new in town. The comments included ethnic slurs, snickers about his sexuality and an excruciating nickname. In short order, nearly 50 children piled on, many of them readily identifiable.").

[237] Some cyberbullies follow their victims online and integrate their victim's new social media connections into their own to continue their attacks. For example, 12-year-old Amanda Todd killed herself after she continued to be cyberbullied even after she changed schools. Her mother explained:

the potential for humiliation because the harmful content will not just be consumed by strangers; people who know the victim will view it as well.

Sixth, the content of social media is mostly unsupervised. Users of these platforms feel emboldened because there is no one directing them on how to behave online.[238] Sherry Turkle writes, "These days, on social networks, we see fights that escalate for no apparent reason except that there is no physical presence to exert a modulating force."[239]

Seventh, social media can provide a cloak of anonymity and comfort of physical distance that encourages some young people to say things they would not normally say when they are face-to-face with a victim.[240] Moreover, when a social media user does not have to respond to the real-time reactions of his or her audience members, it is much easier to act out with more frequency or intensity.[241] John Suler has used the term "online disinhibition effect" to describe this phenomenon.[242]

Eighth, the content of cyberbullying can be enduring. Even if the content is taken down from a website or social media platform, it may still survive through individual viewers saving the content electronically or printing out physical copies. Further, viewers can also use websites such as WayBack Machine[243] that allow users to access old versions of websites, even if they have been taken down.

> Every time she moved schools [the cyberbully] would go undercover and become a Facebook friend. What the guy did was he went online to the kids who went to (the new school) and said that he was going to be a new student — that he was starting school the following week and that he wanted some friends and could they friend him on Facebook. He eventually gathered people's names and sent Amanda's [topless] video to her new school.

Gillian Shaw, *Amanda Todd's Mother Speaks Out About Her Daughter, Bullying*, VANCOUVER SUN (Mar. 13, 2013), http://www.vancouversun.com/technology/Amanda+Todd+speaks+about+daughter+death/7384521/story.html [https://perma.cc/2KLT-GRWS].

[238] *See, e.g.*, Hoffman, *supra* note 236 (quoting an eighth grade student as saying "[i]t's easier to fight online, because you feel more brave and in control" . . . "[o]n Facebook, you can be as mean as you want").

[239] TURKLE, *supra* note 97, at 235–36.

[240] *See, e.g.*, Jonathan Mahler, *Who Spewed that Abuse? Anonymous Yik Yak App Isn't Telling*, N.Y. TIMES (Mar. 8, 2015), http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse html?_r=0 [https://perma.cc/ZFE5-2KSY] (detailing how the social media platform Yik Yak, which can be used anonymously, has spread from colleges to high schools and how students can abuse such a medium hidden by a veil of anonymity).

[241] Suler, *supra* note 233, at 321.

[242] *Id.* John Suler states six explanations for the online disinhibition effect: dissociative anonymity, invisibility, asynchronicity, solipsistic introjection, dissociative imagination, and minimization of authority. *Id.* at 322–324.

[243] WAYBACK MACHINE, http://archive.org/web/ [https://perma.cc/NLS3-BTGB].

Based on these special characteristics, cyberbullying is particularly harmful. Social science research has shown that cyberbullying has significant impact on adolescents' depression, anxiety, self-esteem, emotional distress, substance use, and suicidal behavior.[244] Some studies show that young cyberbullying victims are about twice as likely to attempt suicide compared to those who have never experienced cyberbullying.[245]

In comparing offline bullying with cyberbullying, Patricia S. Strom and Robert D. Strom argue, "Harmful [electronic] messages intended to undermine the reputation of a victim can be far more damaging than face-to-face altercations."[246] Indeed, some studies show that students who report being cyberbullied are more fearful of harm and avoid school more than those students who report being verbally or physically bullied while at school.[247] Data from the 2013 Crime Supplement of the national Crime Victimization Survey show that students who report being cyberbullied anywhere are more likely than those students who report being bullied at school to fear attack or harm.[248] They are also more likely to skip school, skip class, avoid school activities, and avoid a specific place at school.[249] Finally, they are more likely than those reporting being bullied offline to carry a weapon to school.[250]

Due to the unique and serious harm of online bullying, cyberbullying should be given less protection than other forms of off-campus student speech. This approach is not without precedent.[251] The Supreme Court has acknowledged, "There are

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[244] *See* Charisse L. Nixon, *Current Perspectives: The Impact of Cyberbullying on Adolescent Health*, 5 ADOLESCENT HEALTH, MED. & THERAPEUTICS 143, 154 (2014).

[245] *See, e.g.*, SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CENTER, CYBERBULLYING RESEARCH SUMMARY: CYBERBULLYING AND SUICIDE 1–2 (2010), http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf [https://perma.cc/SQ2K-S48H] [hereinafter CYBERBULLYING RESEARCH SUMMARY].

[246] Strom & Strom, *supra* note 102, at 36.

[247] *See, e.g*, U.S. DEP'T OF EDUC., STUDENT REPORTS OF BULLYING AND CYBER-BULLYING: RESULTS FROM THE 2013 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY T-39 (2015), http://nces.ed.gov/pubs2015/2015056.pdf [https://perma.cc/FX66-5AG9].

[248] *Id.* The report defines "bullying" as including "students being made fun of, called names, or insulted; being the subject of rumors; being threatened with harm; being pushed, shoved, tripped, or spit on; being pressured into doing things they did not want to do; being excluded from activities on purpose; and having property destroyed on purpose." *Id.* at T-3. "Cyber-bullying" is defined to include "having another student post hurtful information about the respondent on the Internet; make unwanted contact by threatening or insulting the respondent via email, instant messaging, text messaging, or online gaming; purposefully exclude the respondent from an online community; or purposely share private information about the respondent on the Internet or mobile phones." *Id.* at T-21.

[249] *Id.* at T-39.

[250] *Id.* The only outcome that is higher for students reporting to be bullied at school than students reporting to be cyberbullied anywhere is "engaged in a physical fight." *Id.*

[251] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see also*

certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[252] For example, the Court has not protected or given less protection to "fighting words," certain types of defamation, incitement to imminent lawless action, "true threats," and obscenity.[253] Similarly, for the reasons given here, cyberbullying is so harmful that it should not be given full free speech protection. To clarify, I am not arguing for cyberbullying regulation to incorporate other categories of constitutionally unprotected or less protected speech in order to be held permissible.[254] Instead, I am arguing that cyberbullying is so harmful in and of itself that it should be considered a separate category of speech that is not fully protected by the First Amendment. This lesser protection entails giving public schools the authority to regulate cyberbullying when it originates off campus.[255]

B. Other Legal Remedies Are Inadequate

Courts have held that internet service providers and online interactive service companies are not responsible for the harmful content posted by their users.[256] Therefore, liability falls with the individual creators of the cyberbullying content. A number of legal remedies can be pursued against cyberbullies. For example, many states provide civil causes of action such as defamation; however, some legal scholars contend that these remedies are lacking in cases of cyberbullying, mostly because the traditional elements of these remedies fail to acknowledge the unique nature of the digital world.[257] In addition, many states also provide criminal law

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Beauharnais v. Illinois, 343 U.S. 250, 255–56 (1952).

[252] *Chaplinsky*, 315 U.S. at 571–72.

[253] *See supra* notes 75–79 and accompanying text.

[254] *But see* Brady, *supra* note 123, at 41 (arguing that legislatures should define "cyberbullying" in a way "that is both narrowly and specifically crafted to meet one of the current 'unprotected' classes of free speech and expression, including defamation, fighting words, obscenity, speech that incites others to lawless action, and true threats") (citations omitted).

[255] See *infra* Part IV.C where I argue that the regulations should primarily take the form of restorative practices.

[256] *See, e.g.,* Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997) (holding that § 230 of the Communications Decency Act (CDA) "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."); Carafano v. Metrosplash.com, 339 F.3d 1119, 1125 (9th Cir. 2003) (holding that, under the CDA, Matchmaker.com cannot be liable for the actions of its users).

[257] *See* Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 276–80 (2008) (analyzing the insufficiency of civil remedies such as defamation to redress cyberbullying). *But see* Papandrea, *supra* note 137, at 1100 ("Restricting the authority of schools to punish online speech does not mean that the student speech goes unpunished; instead, students still would face possible criminal prosecution and civil liability."); Goldman, *supra* note 137, at 409

protections, such as traditional stalking laws and new cyberstalking and cyberbullying statutes.[258] Some scholars have also taken issue with these laws, mostly on First Amendment grounds.[259] Thus, an adequate remedy in the courts is uncertain, time-consuming, and expensive.[260] In sum, due to the murkiness of the legal issues involved and the high costs of litigation, these remedies seem out of reach for most victims. On the other hand, for the reasons addressed in the next section, schools themselves are in a better position to deal with cyberbullying than the courts.

C. Schools Are Uniquely Situated to Regulate Cyberbullying

Schools should be given broad discretion to regulate cyberbullying for a number of reasons. First, schools are in the best position to mediate these situations. To be clear, I am not arguing for a return to some golden age of *in loco parentis*[261] à la Justice Clarence Thomas in *Morse*.[262] I have a more modest argument. I simply

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("[A]doption of the *Tinker* test for speech outside of school supervision is not necessary to protect against the most troubling problems created by student speech. Speech that a reasonable person would interpret as a threat to student or teacher safety may be disciplined under the 'true threat' doctrine.").

[258] *See* Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 140–47 (2007) (analyzing how different state statutes deal with cyberstalking).

[259] *See id.* at 135–39 (critiquing stalking and cyberstalking laws, many of which require a "credible threat" of violence, as insufficient to address the unique problem of online stalking); *see also* John O. Hayward, *Anti-Cyberbullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 121 (2011) (arguing that the majority of criminal anti–cyberbullying laws are a legal threat to student free speech because they ban student speech based solely on content or viewpoint); Lyrissa Barnett Lidsky and Andrea Garcia, *How Not to Criminalize Cyberbullying,* 77 MO. L. REV. 693 (2012) (analyzing the First Amendment infirmities of current cyberbullying criminal statutes and suggesting improved ways forward).

[260] *See* CITRON, *supra* note 236, at 122 ("Victims bear the costs of bringing tort . . . claims, and those costs can be heavy. . . . Even if victims can afford to sue their attackers, they may be reluctant to do so if their attackers have few assets."); Erb, *supra* note 257, at 279 ("Since civil laws that are not likely to punish speech between adults would also not likely punish derogatory speech posted on students' web sites about other students, what are parents supposed to do to protect their children from the emotional wreckage that such comments can cause in the life of an adolescent? Civil lawsuits are expensive, and parents have had little success using the Communications Decency Act in convincing Internet service providers to shut down cyberbullying web sites.").

[261] *See supra* note 43.

[262] *See* Morse v. Frederick, 551 U.S. 393, 419 (2007) ("In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students.") (Thomas, J., concurring).

contend that schools are in a better position to identify and remediate incidents of cyberbullying than courts. If cyberbullying is criminalized in a state,[263] then courts would have a role in its regulation. However, most states put the main onus on schools to come up with and implement anti-bullying policies, which include disciplinary procedures and centralized reporting requirements.[264] This legislative choice to delegate enforcement to schools is motivated by the fact that, unlike courts, schools know who their students are, have contact with students' parents, and therefore have a basis for understanding the social contexts in which they are operating. These community connections are manifested in parent-teacher meetings, Parent Teacher Associations (PTAs),[265] parent volunteer opportunities, and other forms of shared educational process between teachers, staff, students, and parents.[266] Given this knowledge of the community and individuals within it, schools should be given the discretion to deal with those who use social media to repeatedly attack weaker students. They are in the best position to do so.

Further, public schools should regulate cyberbullying because one of the main purposes of these institutions is to teach students how to respectfully interact with each other in order to preserve democratic ideals.[267] The Supreme Court has acknowledged that schools exist to "prepare pupils for citizenship in the Republic . . . [and] inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[268] In short, the Court has emphasized that the purpose and function of schools is not just academic training, but also the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."[269]

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[263] *See, e.g.*, LA. STAT. ANN. § 14:40.7 (2016) (defining "cyberbullying" as a crime consisting of "the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen").

[264] STATE CYBERBULLYING LAWS, *supra* note 124, at 1.

[265] For a history of Parent Teacher Associations in America, see generally WILLIAM W. CUTLER, III, PARENTS AND SCHOOLS: THE 150-YEAR STRUGGLE FOR CONTROL IN AMERICAN EDUCATION 4 (2000).

[266] *See generally* Diana B. Hiatt, *Parent Involvement in American Public Schools: A Historical Perspective 1642—1994*, 4 SCH. COMMUNITY J. 27, 27–28 (1994) (tracing the devolvement of control over public education from parents to the state); Gwendolyn L. Watson et al., *Understanding Parental Involvement in American Public Education*, 2 INT'L J. HUMAN. & SOC. SCI. 41 (2012) (reviewing the literature on parental involvement in schools in the United States).

[267] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

[268] *Id.*

[269] *Id. See also* Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is

Also, schools should be given the authority to regulate cyberbullying because they are shifting toward meaningful solutions to heal the community, and not just excluding the wrongdoer from the learning environment.[270] For example, the Minnesota Department of Education encourages restorative justice practices in its schools when bullying occurs.[271] The Minnesota Department of Education's website explains, "Restorative Measures is a discipline intervention to hold students accountable for harm, and address the needs of students or staff harmed as well as the school community."[272] A study conducted by the Minnesota Department of Education found that principals relied heavily on restorative justice to address bullying behavior in their schools.[273] One principal observed:

> We had repeated bullying incidents on the playground perpetrated by a small group of kids. Each class of fifth graders came to the gym where the phy(sical) ed(ucation) teacher and I conducted a circle with the classroom teacher. As each student used the talking piece, they were able to explain to the kids who were causing the problems how they felt about what they

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the very foundation of good citizenship."); *cf.* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM (2010) ("The central purpose of education [is] to shape good human beings, good citizens, people of good character with the knowledge and skills to make their way in the world and to join with others to sustain and improve our democracy.").

[270] This is a promising approach that stands in stark contrast to the focus on harsh punitive outcomes under the increasingly defunct "zero tolerance" policies. *See* W. DAVID STEVENS, ET AL., UCHICAGO CONSORTIUM ON SCHOOL RESEARCH, DISCIPLINE PRACTICES IN CHICAGO SCHOOLS: TRENDS IN THE USE OF SUSPENSIONS AND ARREST 6, 29 (2015), http://ccsr.uchicago.edu/publications/discipline-practices-chicago-schools-trends-use-suspensions-and-arrests [https://perma.cc/9GSG-WFKL] (analyzing how Chicago public schools are moving away from "zero tolerance" by doing a better job at resolving disciplinary problems without excluding children from school); Carly Berwick, *Zeroing Out Zero Tolerance*, THE ATLANTIC (March 17, 2015), http://www.theatlantic.com/education/archive/2015/03/zeroing-out-zero-tolerance/388003/ [https://perma.cc/YL5X-6ULN] (discussing "a shift away from zero-tolerance school discipline toward less punitive strategies that emphasize talking it out and resolving disputes among students to keep them in school").

[271] *Restorative Practices,* MINN. DEP'T EDUC., http://education.state.mn.us/MDE/dse/safe/clim/prac/ [https://perma.cc/K6UA-7LKN]. For more detailed explanations of restorative practices in schools, see JEANNETTE HOLTHAM, TAKING RESTORATIVE JUSTICE TO SCHOOLS: A DOORWAY TO DISCIPLINE 1–3 (2009); MARGARET THORSBORNE, IMPLEMENTING RESTORATIVE PRACTICE IN SCHOOLS: A PRACTICAL GUIDE FOR TRANSFORMING SCHOOL COMMUNITIES 11–17 (2013); HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 42–59 (2002).

[272] *Toolkit,* MINN. DEP'T EDUC., http://education.state mn.us/MDE/dse/fsce/mod/div/Tool/ [https://perma.cc/83UQ-6EYY].

[273] MINN. DEP'T OF EDUC., RESTORATIVE MEASURES IN SCHOOLS SURVEY, 2011 1 (2012), http://education.state mn.us/MDE/dse/safe/clim/prac/index.htm [https://perma.cc/L3J5-7ECE]. The study consisted of a 21-question survey, with 417 elementary, middle school, and high school principals returning the survey. *Id.* at 2.

> were doing. We also discussed what the expectations are for student[-]to[-]student and student[-]to[-]adult interactions—respect, appropriate, responsible, etc.
>
> The severe behavior has stopped, I think because students were empowered to let the kids who were bullying know how they felt about it—it was out in the open—a great place to be. Victims also realized they were not alone—so isolation was no longer an issue either. Parents responded very well to this intervention—and suspension was not used as a result.[274]

Other states have applied restorative practices in culturally specific ways. For example, the Hawaii Department of Education has opted to encourage school communities to "Grow Pono" in order "to create a more welcoming and safe environment for everyone at their school."[275] *E Ola Pono* is a Hawaiian term that means "to live with respect for and in harmony with everyone and everything around you."[276] The Hawaii Department of Education's website explains why it adopted this approach: "Student[-]led projects and campaigns have proven to be the most effective and powerful initiatives to reduce harassment and bullying in schools. Addressing this need in a culturally relevant way based on Hawaii's host culture provides a foundation that can benefit all people who call Hawaii home."[277]

In the aftermath of bullying or cyberbullying, the Hawaii Department of Education urges schools to find ways for the injured community to heal.[278] The website explains, "Community-wide strategies can help identify and support children who are bullied, redirect the behavior of children who bully, and change the attitudes of adults and youth who tolerate bullying behaviors in peer groups, schools, families and communities."[279] This is one state's culturally-specific application of restorative justice principles. It addresses a serious problem with solutions that are relevant to the people who live there. Some scholars argue that restorative justice is so much more effective than suspension and expulsion that it should be incorporated into anti-bullying legislation.[280] For now, schools have the

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[274] *Id.* at 2.

[275] *Beyond the Classroom: Safe Schools: Anti-Bullying Work*, HAW. STATE DEP'T OF EDUC., http://www hawaiipublicschools.org/BeyondTheClassroom/SafeSchools/Anti BullyingWork/Pages/home.aspx [https://perma.cc/BD3R-JCTM].

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *See, e.g.*, Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation, and a New Approach to Conflict Resolution in Our Schools*, 9 NEV. L. J. 545, 574–78 (2009) (arguing for the incorporation of restorative practices in schools' implementation of anti-bullying policies); Susan Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 267, 269 (2011) (arguing "that restorative justice practices offer a better long-term solution

discretion to implement such principles in an attempt to address bullying and cyberbullying in a holistic way.[281]

Moreover, schools should be the primary institutions that deal with cyberbullying because school-age children often make bad choices that can influence their futures and because part of the schooling process at this age is to learn from these mistakes without being permanently penalized.[282] Thus, reasonable school discipline with a focus on restorative justice would be a much better outcome in these situations than a juvenile criminal record or protracted civil litigation followed by a potential settlement or civil damages award paid by a student's family.

Finally, schools should have the power to regulate cyberbullying because potential liability arises from civil rights laws and tort law when schools fail to protect their students.[283] Without the power to regulate, schools are put in an impossible position, a position where they are exposed to liability for failure to protect their students, notwithstanding the lack of discretion to adequately provide that protection.

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than criminal charges or civil actions for effectively addressing bullying").

[281] *See, e.g.*, Patricia Leigh Brown, *Opening Up, Students Transform a Vicious Cycle*, N.Y. TIMES (April 3, 2013), http://www nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools html?_r=0 [https://perma.cc/D8QF-A79X] (noting the effectiveness of restorative justice practices adopted by some New York City public schools); Eric Westervelt, *An Alternative to Suspension and Expulsion: "Circle Up!"*, NPR (Dec. 17, 2014, 3:42 AM), http://www.npr.org/sections/ed/2014/12/17/347383068/an-alternative-to-suspension-and-expulsion-circle-up [https://perma.cc/WRM4-C3NB] ("[T]he Oakland Unified School District [is] at the forefront of a new approach to school misconduct and discipline. Instead of suspending or expelling students who get into fights or act out, restorative justice seeks to resolve conflicts and build school community through talking and group dialogue.").

[282] A serious consequence of excessive school punishment is students being funneled into the school-to-prison pipeline. *See generally* DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 1–4 (Sofia Bahena et al. eds., 2012) (describing how the pipeline works and how to disrupt it); CATHERINE L. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1–8 (2012) (same).

[283] *See, e.g.*, Sheli Muniz, *Mother of Cyberbullying Victim to File Wrongful Death Lawsuit*, CLICKORLANDO.COM (Nov. 25, 2013, 6:24 PM), http://www.clickorlando.com/news/mother-of-cyberbullying-victim-to-hold-news-conference/23143300 [https://perma.cc/B8PW-V6T9] (reporting that the mother of Rebecca Sedwick "plans to file a wrongful death lawsuit against those responsible for her daughter's death."); Carri Greer Thevenot, *Parents Sue School District Over Bullied Daughter's Suicide*, L.V. REV.-J. (Oct. 21, 2014, 5:21 PM), http://www.reviewjournal.com/news/las-vegas/parents-sue-school-district-over-bullied-daughter-s-suicide [https://perma.cc/M7XB-GMCE] (reporting that parents of 13-year-old Hailee Lamberth, who killed herself after being bullied, are suing her middle school for wrongful death); *see also Failure to Prevent Bullying Can Prove Costly to School Districts*, LEXISNEXIS LEGAL NEWSROOM (May 8, 2013, 4:09 PM), https://www.lexisnexis.com/legalnewsroom/litigation/b/jverdicts/archive/2013/06/28/failure-to-prevent-bullying-can-prove-costly-to-school-districts.aspx [https://perma.cc/RX5N-ELFP] (detailing settlements and jury awards in school bullying cases across the country).

For these reasons, schools should be given broad authority to regulate cyberbullying, even when it originates off school grounds and is not part of any school-sanctioned activities. However, this authority should not be limitless. Part V outlines how schools can exercise this authority to protect their students in a way that effectively balances students' free speech concerns.

V. THREE SUGGESTIONS FOR SCHOOL REGULATION OF CYBERBULLYING

When states create anti-bullying laws, they need to do so in a way that effectively balances the safety of their students with their students' free speech rights. This tension can be seen in a recent case that was decided by the Court of Appeals of New York.

In *People v. Marquan*,[284] a sixteen-year-old high school student in Albany, New York anonymously posted, on a publicly-accessible Facebook page, descriptions of his classmates' alleged sexual practices and preferences, sexual partners, and other types of personal information.[285] He was criminally prosecuted for cyberbullying under a local law, and he brought a First Amendment challenge to the statute claiming that the law was overbroad[286] and vague.[287] In 2010, the Albany County Legislature adopted a new crime for "cyberbullying," which it defined as "any act of communicating or causing a communication to be sent by mechanical or electronic means, including . . . disseminating embarrassing or sexually explicit photographs . . . or sending hate mail . . . with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person."[288]

While acknowledging that the law "was motivated by the laudable public purpose of shielding children form cyberbullying," the court nonetheless struck it down as unconstitutionally overbroad.[289] It noted that "the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on school-aged children."[290] In sum, the court held that the text of Albany County's law was overbroad because it covered much more speech

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[284] 19 N.E.3d 480 (N.Y. 2014).

[285] *Id.* at 484.

[286] *Id.* at 485 ("A regulation of speech is overbroad if constitutionally-protected expression may be 'chilled' by the provision because it facially 'prohibits a real and substantial amount of' expression guarded by the First Amendment.") (citations omitted) (quoting People v. Barton, 8 N.Y.3d 70, 75 (N.Y. 2006)).

[287] *Id.* at 486 ("[A] statute is seen by the courts as vague if it fails to give a citizen adequate notice of the nature of proscribed conduct, and permits arbitrary and discriminatory enforcement.") (citations omitted) (quoting People v. Shack*,* 86 N.Y.2d 529, 538 (N.Y. 1995)).

[288] *Id.* at 489 (Smith, J., dissenting).

[289] *Id.* at 488.

[290] *Id.* at 486.

than was needed to regulate cyberbullying.[291] The court also noted that the County conceded that certain terms in the statute such as "embarrassing" and "hate mail" were vague.[292] In other words, the statute failed to give a citizen adequate notice of what was prohibited by the law. Therefore, based on both overbreadth and vagueness grounds, the law was struck down as facially invalid under the Free Speech Clause of the First Amendment.[293]

The constitutional issues in *Marquan* are relevant to the issues involved when schools seek to regulate cyberbullying. Specifically, state lawmakers and school officials must pay special attention to overbreadth and vagueness concerns when regulating cyberbullying—particularly in (1) defining the concept; (2) defining the school's reach in regulating off-campus speech; and (3) applying *Tinker* to cyberbullying. I will address how they should avoid some constitutional pitfalls in the following sections.

A. Defining Cyberbullying

Most states treat cyberbullying as a subset of bullying—that is, cyberbullying is typically defined as bullying through electronic communication or devices.[294] The definition of "bullying" has had three major components in social science literature: (1) intent to harm; (2) repetition; and (3) an imbalance in power between the bully and the victim.[295] Some states, like Virginia, incorporate all of these elements into their definition.[296] But most states adopt only some of these elements into their anti-

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[291] *Id.* ("[T]he provision pertains to electronic communications that are meant to 'harass, annoy . . . taunt . . . [or] humiliate' any person or entity, not just those that are intended to 'threaten, abuse . . . intimidate, torment . . . or otherwise inflict significant emotional harm on' a child. In considering the facial implications, it appears that the provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult.") (alteration in original) (quoting Local Law No. 11 [2010] of County of Albany § 2).

[292] *Id.* at 489 (Smith, J., dissenting).

[293] *Id*. at 488.

[294] *See, e.g.*, CAL. EDUC. CODE § 48900(r)(1) (West 2015) (prohibiting bullying by "means of an electronic act"); FL. STAT. § 1006.147(2)(d) (West 2015) (prohibiting bullying "through the use of technology or an electronic device"); VA. CODE ANN. § 22.1-276.01(A) (West 2015) ("'Bullying' includes cyber bullying.").

[295] *See* Nansel et al., *supra* note 7, at 2094.

[296] Virginia's anti-bullying law provides:

> "Bullying" means any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma. "Bullying" includes cyber bullying. "Bullying" does not include ordinary teasing, horseplay, argument, or peer conflict.

bullying laws.[297] However, to avoid unconstitutional overbreadth and vagueness issues specifically in relation to regulating cyberbullying, I contend that the first two elements, along with an expanded version of the third element, should be applied to cyberbullying.

First, states should include an intent requirement for cyberbullying. Some states, like Louisiana[298] do, while others like California,[299] do not incorporate an intent requirement. A recent Supreme Court case that dealt with the level of proof that is sufficient for a conviction for threatening another person through social media is instructive insofar as it provides guidance in thinking about the proper level of intent for criminalizing online speech. In *Elonis v. U.S.*,[300] Anthony Elonis was convicted for violating 18 U.S.C. § 875(c).[301] This federal statute provides, "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."[302] Elonis was prosecuted for posting violent rap lyrics on Facebook about his estranged wife.[303] He was subsequently convicted and sentenced to 44 months in prison.[304] The issue before the Supreme Court was whether 18 U.S.C. § 875(c) required proof of subjective intent to threaten, or whether it was enough to show a negligence standard—that is, show that a "reasonable person" would regard the statement as threatening.[305] The Court held that the trial court's instruction that required only negligence with respect to the communication of a threat was not sufficient to support a conviction under 18 U.S.C. § 875(c).[306] Although the Court

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VA. CODE ANN. § 22.1-276.01 (West 2016).

[297] Note that some states include an intent requirement, but the intent is not linked to the harm; instead, it is linked to the behavior itself—that is, a person must have had the intent to send the communication. *See, e.g.,* ALA. CODE § 16-28B-3 (2016) (defining "harassment" as "[a] continuous pattern of intentional behavior that takes place on school property, on a school bus, or at a school-sponsored function"); 24 PA. CONS. STAT. § 1303.1-A (2016) ("For purposes of this article, 'bullying' shall mean an intentional electronic, written, verbal or physical act, or a series of acts . . . ."). I argue that the intent requirement should be linked to the harm, and not just the act of communicating. *Compare* LA. STAT. ANN. § 14:40.7 (2016) (intent required), *and* VA. CODE ANN. § 22.1-276.01 (West 2016) (intent required), *with* CAL. EDUC. CODE § 48900 (West 2016) (intent not required).

[298] LA. STAT. ANN. § 14:40.7 (2016) ("Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.").

[299] *See, e.g.*, CAL. EDUC. CODE § 48900 (West 2016) ("'Bullying' means any severe or pervasive physical or verbal act or conduct . . . .").

[300] Elonis v. United States, 135 S.Ct. 2001 (2015).

[301] *Id.* at 2007.

[302] 18 U.S.C. § 875 (c) (2012).

[303] *Elonis*, 135 S. Ct. at 2005.

[304] *Id.* at 2007.

[305] *Id.*

[306] *Id.* at 2012.

did not specify what level of proof would be sufficient—for example, recklessness or intentional conduct—it clarified that negligence was not enough to support Elonis's criminal conviction.[307]

In states that have criminalized cyberbullying, this case suggests that negligence is not a sufficient standard. Instead, the proof should be higher. To be consistent with *Elonis*, the crime of cyberbullying should include a standard higher than negligence. As one example, Maryland makes cyberbullying a criminal misdemeanor, which includes "intent to harass, alarm or annoy" as an element.[308] Maryland's law is consistent with the holding of *Elonis* in that it requires a higher standard than negligence in criminalizing online speech.[309]

Definitions of cyberbullying for school-regulation purposes should also include an intent requirement—namely, to serve as an important limitation on schools from regulating too much speech. For example, in Virginia, bullying, which includes cyberbullying, means "any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim."[310] Virginia's intent requirement makes

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[307] *Id.*

[308] The elements of the crime of cyberbullying in Maryland are:

> (1) A person may not maliciously engage in a course of conduct, through the use of electronic communication, that alarms or seriously annoys another:
>
> (i) with the intent to harass, alarm, or annoy the other;
>
> (ii) after receiving a reasonable warning or request to stop by or on behalf of the other; and
>
> (iii) without a legal purpose.
>
> (2) A person may not use an interactive computer service to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury with the intent:
>
> (i) to kill, injure, harass, or cause serious emotional distress to the minor; or
>
> (ii) to place the minor in reasonable fear of death or serious bodily injury.

MD. CODE ANN., CRIM. LAW § 3-805 (West 2016).

[309] *See Elonis*, 135 S. Ct. at 2012.

[310] VA. CODE ANN. § 22.1-276.01 (West 2016).

sense because it separates speech that is intended to harm from speech that is not intended to harm[311] This distinction allows Virginia to only regulate speech that is intended to harm.

Second, the repetition element should be a required component of cyberbullying. Like the intent element, some states require repetition in their definitions of "bullying" and "cyberbullying," while other states do not.[312] For example, Massachusetts defines "bullying" as "the repeated use . . . of a written, verbal or electronic expression."[313] Similarly, "bullying" in Florida "means systematically and chronically inflicting physical hurt or psychological distress on one or more students."[314] Furthermore, South Dakota provides that "[b]ullying is a pattern of repeated conduct."[315] On the other hand, in states like Oregon[316] and California,[317] a single act, if severe enough, can constitute bullying and cyberbullying. However, if a law does not include a repetition element, then it is not distinguishing cyberbullying with single-incident "cyberattacking."[318] This distinction is important because it has constitutional implications insofar as broadening a school's jurisdiction over cyberattacking and would allow schools to regulate too much speech. Ari Ezra Waldman explains that cyberbullying should receive different legal treatment from cyberattacking because cyberattacking is

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[311] Hinduja and Patchin cite an example of an unintentional act that is outside the scope of cyberbullying:

> [F]riends of a teen girl set up an online profile on Instagram where people are asked to comment or vote for the prettiest girl among four shown. The idea is to show their friend that she is very pretty. The profile creators stuff the virtual ballot box so that their friend emerges victorious, not realizing that by doing so the other three girls involved in the vote have had their feelings hurt.

HINDUJA & PATCHIN, *supra* note 9, at 15.

[312] *Compare* MASS. GEN. LAWS ANN. ch. 71, § 370 (a) (West 2015) ("repeated"); FLA. STAT. ANN. § 1006.147 (West 2016) ("systematically and chronically"), *and* S.D. CODIFIED LAWS § 13-32-15 (2016) ("pattern of repeated conduct"), *with* OR. REV. STAT. ANN. § 339.351 (2) (West 2016) (including a single act), *and* CAL. EDUC. CODE § 49800 (West 2016) (including "an act").

[313] MASS. GEN. LAWS ANN. ch. 71, § 370 (West 2016).

[314] FLA. STAT. ANN. § 1006.147 (West 2016). Florida's statute gives the following examples of bullying: "1. Teasing; 2. Social exclusion; 3. Threat; 4. Intimidation; 5. Stalking; 6. Physical violence; 7. Theft; 8. Sexual, religious, or racial harassment; 9. Public or private humiliation; or 10. Destruction of property." *Id*.

[315] S.D. CODIFIED LAWS § 13-32-15 (2016).

[316] OR. REV. STAT. § 339.351 (2016) (defining "harassment, intimidation or bullying" as satisfied by "any act").

[317] CAL. EDUC. CODE § 48900 (West 2016) (defining "bullying" as "one or more acts" that meet certain statutory requirements).

[318] *See* Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 711–15 (2012) (differentiating cyberbullying from cyberattacking).

much more common—and much less harmful—than cyberbullying, and treating these two concepts the same would allow schools to have authority over too much speech.[319] Therefore, a repetition element, in conjunction with an intent element, is important to address overbreadth and vagueness concerns.

Third, although social scientists have incorporated a power imbalance between bully and victim as one of the defining elements of "bullying," when applied to the concept of "cyberbullying," this element should take into account the special context of online communication. For offline bullying, this power imbalance is usually based on physical size and strength. A bully is typically a bigger and stronger student who preys on physically weaker students.

But state legislatures have recognized that the power imbalance can also be based on social status categories. For example, Maryland enumerates specific groups with lower levels of power in its definition of "bullying."[320] Maryland defines "bullying, harassment, or intimidation" as certain conduct that is "[m]otivated by an actual or a perceived personal characteristic including race, national origin, marital status, sex, sexual orientation, gender identity, religion, ancestry, physical attribute, socioeconomic status, familial status, or physical or mental ability or disability."[321] California prohibits "bullying based on the actual or perceived characteristics . . . [of] disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics."[322] New Hampshire's law is more general in that it provides "'[b]ullying' shall include actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs."[323] However,

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> [C]yberbullying should receive different legal treatment [because] some single-incident cyberattacks are too common to merit a departure from free speech values. When assessing the frequency and effects of cyberbullying on their test subjects, social scientists distinguish between single incidents and repeated patterns. Their data show that supermajorities of certain student populations have experienced single-incident cyberattacking, but significantly fewer report the kind of negative effects that activists and legislators have said merit a strong state or legal response. This suggests that if single-incident cyberattacking were crowded under the cyberbullying umbrella, there would be little conduct left outside the reach of anti-cyberbullying regulations.

Id. at 715 (citations omitted).

320 MD. CODE ANN., EDUC. § 7-424.1 (West 2016).

321 *Id.*

322 CAL. EDUC. CODE § 234.1 (West 2016).

323 N.H. REV. STAT. ANN. § 193-F:3 (2016). Note that some states eschew the creation of status-based categories based on the idea that they want to prevent certain classes of students from receiving "special treatment." *See, e.g.*, MO. ANN. STAT. § 160.775(3) (West 2016) ("Each district's antibullying policy shall be founded on the assumption that all

due to the nature of online bullying, both physical size and strength differences and traditional status categories hold less sway.

For online bullying, other types of factors can create power imbalances. For example, a cyberbully's power can arise from certain possessions, attributes, and skills—such as possessing embarrassing information about another student, obtaining unauthorized access to another student's Facebook or Twitter account, or having particular savvy with social media. A statute that narrows the categories of power imbalance to certain status categories excludes the most relevant characteristics that lead to the power imbalances in cases of cyberbullying.

Few states have broad enough power imbalance language to sufficiently address the unique online context. Texas is one example of a state that does this, and defines certain conduct as "bullying" if it "exploits an imbalance of power between the student perpetrator and the student victim."[324] In applying this language, things like possessing embarrassing photos of a fellow student or hacking another student's Facebook account, could meet this definition. In addition, with such an inclusive definition, other potentially relevant sources of power imbalance could also be factored in such as age, popularity, and social competence.

Other states omit the power imbalance element from their bullying regulations altogether.[325] However, I argue that states should include this element because it creates a distinction between cyberbullying and speech that does not rise to that level, such as peer-on-peer teasing or name-calling.[326] When two students with similar levels of power (access to information, computer skills, etc.) attack each other online, this is not cyberbullying. This is what the Virginia anti-bullying law

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students need a safe learning environment. Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment.").

[324] TEX. EDUC. CODE ANN. § 37.0832 (West 2016) (defining "bullying" as "written or verbal expression, expression through electronic means, or physical conduct that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district"). However, Texas's anti-bullying law restricts school authority to on campus behaviors. *See id.*

[325] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 71, § 370 (West 2016).

[326] In a Title IX liability context, the Court has noted:

> Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. *Damages are not available for simple acts of teasing and name-calling among school children*, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651–52 (1999) (emphasis added).

refers to as "ordinary teasing, horseplay, argument, or peer conflict."[327] Further, according to my proposed definition, students who target and attack teachers or administrators online are not engaging in cyberbullying. When the attack is against authority figures, instead of cyberbullying, Renee Servance refers to this as "cyber-harassment," which she defines as "the targeting of adult members of the school community on the Internet."[328] Teachers and administrators, given their position of authority in relation to their students, will inherently have more power than their students. Even if there are status differences between students and teachers that favor the students,[329] the fact that school employees can discipline students necessarily puts teachers in a position of greater power. Thus, when students attack teachers and administrators, it is cyberharassment, not cyberbullying. In my framework, cyberharassment occurs without regard to any power imbalances. Equally powerful peers can cyberharass each other, less powerful peers can cyberharass more powerful ones, and students can cyberharass teachers. While these behaviors can still be harmful, they do not arise to cyberbullying.

Instead of combining the concepts of cyberattacking, cyberharassment, and cyberbullying, as many states do,[330] these concepts should be treated as distinct. While cyberattacking and cyberharassment can cause harm, due to the higher degree of injury that cyberbullying presents,[331] anti-bullying laws and policies should limit their scope to this specific form of intentional student-on-student repetitive aggression based on power imbalances when regulating off-campus speech.

In an analysis of state anti-bullying laws, a report sponsored by the U.S. Department of Education emphasized the distinction between harassment and bullying by noting, "Harassment . . . is generally viewed as a subset of more broadly defined bullying behavior. Harassment also violates federal civil rights laws as a

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[327] *See* VA. CODE ANN. § 22.1-276.01 (West 2016).

[328] Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1219 (2003).

[329] For example, a male student and a female teacher or a white student and an African American teacher.

[330]

> Many bullying laws enacted since 1999 were originally modeled on existing civil rights legislation that protects groups from various forms of harassment under the law. The legislative language used in crafting bullying laws often borrows directly from harassment statutes. This has frequently led to a conflation of terms used to define prohibited conduct, with 'bullying' and 'harassment' often used interchangeably in laws, despite their important legal distinctions.

VICTORIA STUART-CASSEL ET AL., DEPT. OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 17 (2011), https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf [https://perma.cc/A6LM-PTRQ].

[331] *See supra*, Part IV.A. Schools should also have authority to regulate on campus cyberattacking and cyberharassment. However, a normative analysis of such regulation is beyond the scope of this Article.

form of unlawful discrimination."[332] Therefore, a clear separation of cyberbullying and cyberharassment can provide better guidance on how schools can comply with the separate requirements of federal civil rights laws[333] and *Tinker*. Of particular note, different rules apply to a school's off-campus liability under the civil rights statutes than would apply under *Tinker*. For example, Title IX would allow for damages in cases of sexual harassment that occurs off campus if a school had substantial control over both the harasser and the context in which the known sexual harassment occurred—a standard that would not likely be met in most cases of cyberbullying that take place off campus.[334] On the other hand, both courts and state legislatures are divided as to whether schools have any jurisdiction—and legal responsibility—over cyberbullying that originates off campus—applying the "no authority," "no distinction," "nexus," "foreseeability," or "identifiable threat" approaches.

The distinction between harassment and bullying is also important because some state antiharassment statutes have already been analyzed by courts, and they have been found unconstitutional.[335] For example, the Third Circuit in *Saxe v. State College Area School District*[336] struck down a public school district's antiharassment policy as unconstitutionally overbroad.[337] Justice Alito, then a circuit judge writing for the majority, noted, "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[338] Even though some courts refuse to recognize less constitutional protection for harassment,[339] cyberbullying should be treated differently. If defined as a form of speech not fully protected by the First Amendment due to the special harm associated with it, schools would be enabled to protect their most vulnerable students from intended and repeated attacks that originate off campus while balancing the free speech rights of their students.

In summary, schools should have the authority to regulate cyberbullying that originates off campus, but not other categories of off-campus online speech unless it falls under another exception to the First Amendment.[340]

After states and schools define what "bullying" means, state laws and school policies should be clear about what is meant by "cyberbullying," including nonexclusive examples of what constitutes "bullying." For example, Massachusetts law after defining "bullying,"[341] explicitly defines "cyber-bullying" as:

> [B]ullying through the use of technology or any electronic communication, which shall include, *but shall not be limited to*, any

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[332] STUART-CASSEL ET AL., *supra* note 330, at 17 (citation omitted).
[333] *See supra* notes 14–16.
[334] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 645 (1999).
[335] *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214–18 (3d Cir. 2001).
[336] *Id.*
[337] *Id.* at 217.
[338] *Id.* at 204.
[339] *See id.*
[340] *See supra* note 13–18 and accompanying text.
[341] *See supra* note 313.

> transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.[342]

Massachusetts's law is effective in that it includes a definition of "cyberbullying" with specific examples of what types of activities that can comprise it, without limiting the definition to only those examples.[343] This language can guide schools in creating their anti-bullying policies.[344]

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[342] MASS. GEN. LAWS ch. 71, § 370 (2016) (emphasis added).

[343] *See also* FLA. STAT. ANN. § 1006.147 (West 2016) ("'Cyberbullying' means bullying through the use of technology or any electronic communication, which includes, *but is not limited to*, any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, including, but not limited to, electronic mail, Internet communications, instant messages, or facsimile communications. Cyberbullying includes the creation of a webpage or weblog in which the creator assumes the identity of another person, or the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in the definition of bullying. Cyberbullying also includes the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in the definition of bullying.") (emphasis added). Other states' laws are less clear. Indiana law, for example, prohibits "cyberbullying," but does not define this term. *See* IND. CODE §§ 20-30-5.5-3, 20-33-9-0.2 (2016). Maryland law does not mention "cyberbullying," but prohibits "bullying, harassment, or intimidation" by "intentional electronic communication." MD. CODE ANN., EDUC. §7-424.1 (West 2016).

[344] The Massachusetts statute mandates schools, both public and private, to "develop, adhere to and update a plan to address bullying prevention and intervention . . . ." MASS. GEN. LAWS ch. 71, § 370 (2016).

Furthermore, anti-bullying policies should focus on regulating children's speech in order to protect other children.[345] Not all do.[346] This distinction also has constitutional significance. The Supreme Court has yet to define the contours of school authority for off-campus cyberbullying. However, the Court has acknowledged that children generally have less free speech protection than adults.[347] For example, the Court in *Fraser* noted that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. . . . '[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.'"[348] The Court also recognized an "obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children."[349] In light of the special relationship between First Amendment protections and children, schools should be given broad authority to regulate cyberbullying when perpetuated by their students against other students, even when it occurs off campus. The "nexus" and "foreseeability" approaches framed as threshold inquiries provide limits on school authorities from regulating too much speech.

B. Defining the School's Reach in Regulating Cyberbullying

State laws and school policies should also contain the parameters of when schools can regulate off-campus speech. The opposite sides of the spectrum are the "no distinction" and "no authority" approaches. As we have seen, some states' anti-

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[345] *See, e.g.*, 24 PA. CONS. STAT. § 1303.1-A (2016) ("bullying" means an act "directed at another student or students").

[346] *See, e.g.*, KAN. STAT. ANN. § 72-256 (2016) (defining bullying as "[a]ny intentional gesture or any intentional written, verbal, electronic or physical act or threat either by any student, staff member or parent towards a student or by any student, staff member or parent towards a staff member").

[347] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 215 (2003) ("The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling . . . .") (Kennedy, J., concurring); FCC v. Pacifica Foundation, 438 U.S. 726, 749–50 (1978) (upholding regulation protecting children from broadcast indecency); Ginsberg v. New York, 390 U.S. 629, 640 (1968) ("[T]he State has an interest to 'protect the welfare of children' and to see that they are 'safeguarded from abuses . . . .'") (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944)).

[348] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F. 2d 1043, 1057 (2d Cir. 1979) (Neuman, J., concurring). "Cohen's jacket" is a reference to a Supreme Court case in which the Court overturned a man's conviction for the crime of disturbing the peace for wearing a jacket that displayed the phrase "Fuck the Draft" at a courthouse. Cohen v. California, 403 U.S. 15, 26 (1971).

[349] *Fraser*, 478 U.S. at 684. *See also* New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.") (Powell, J., concurring).

bullying statutes provide very broad authority for schools.[350] Massachusetts law, for example, prohibits bullying that originates off campus "if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school."[351] This statute takes the "no distinction" approach and treats off-campus activity the same as on-campus activity, as long as *Tinker* is satisfied or the federal civil rights law standard of "hostile educational environment" is met.[352]

In contrast to Massachusetts, Texas defines "bullying" as certain expression or conduct "that occurs on school property, at a school-sponsored or school-related activity, or in a vehicle operated by the district."[353] Unlike the Massachusetts law, this statute only restricts speech that occurs on-campus or at school-sanctioned activities (e.g., at a field trip or riding on a school bus).[354] The legislature adheres to the "no authority" approach and assumes that schools do not have jurisdiction to regulate off-campus or nonschool-related speech. The problem with Texas's law is that schools are deemed powerless to act in the face of cyberbullying that is created on social media platforms off campus.[355] One judge highlighted the problem with the following hypothetical situation:

> With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student.[356]

Although courts have generally not applied the "no authority" approach to the *Tinker* test,[357] a number of courts have applied it to *Fraser's* "lewd and vulgar speech" analysis.[358] Three cases are illustrative.

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[350] *See supra* Part III.B.

[351] MASS. GEN. LAWS. Ch. 71, § 370 (2016).

[352] *Id.*

[353] TEX. EDUC. EDUC. CODE ANN. § 37.0832 (West 2016).

[354] *Id.*

[355] *See* Julieta Chiquillo, *Bullying Proves a Vexing Problem for Texas Schools*, DALLAS MORNING NEWS (April 26, 2015, 10:40 PM), http://www.dallasnews.com/news/metro/20150426-bullying-proves-a-vexing-problem-for-schools.ece [https://perma.cc/QZ78-LM9E] (noting the problems with Texas's anti-bullying law because it "doesn't address expressions made off campus—such as videos or social media posts—that seep into school life.").

[356] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 (3d Cir. 2011) (Jordan, J., concurring).

[357] *See supra* Part III.B–E for cases that hold that schools, in certain situations, have authority to regulate online speech that originates off campus.

[358] *See, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011); *Layshock*, 650 F.3d at 212 n.12, 216–17 nn.16–17.

First, in *Layshock v. Hermitage School District*, a high school student in Pennsylvania created a "parody profile" of his principal on MySpace.[359] The profile consisted of the principal's official picture copied from the School District's website and a number of bogus answers to profile survey questions that were based on a theme of "big," because the principal is a large man.[360] The student made the profile at his grandmother's house, while he was on her computer during nonschool hours.[361] The student gave access to the profile to other students in the school district by listing them as "friends" on MySpace.[362] The profile soon "spread like wildfire" and "reached most, if not all, of [the school's] student body."[363] The school subsequently suspended the student for ten days and imposed a number of other sanctions including banning the student from all extracurricular activities and prohibiting the student from participating in his graduation ceremony.[364] The student's parents filed suit in court to challenge this discipline on constitutional grounds.[365]

The Third Circuit noted that the unchallenged holding of the district court was that the student's speech was not likely to cause a substantial disruption under *Tinker*.[366] It, therefore, focused its attention on whether or not this off-campus speech was covered by *Fraser*.[367] The school made the following arguments: (1) a sufficient nexus exists between the vulgar profile and the school; (2) the speech initially began on campus because the student was enrolled in school and copied the principal's photograph from a school website; and (3) it was reasonably foreseeable

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[359] *Layshock*, 650 F.3d at 207–08.

[360] *Id.* at 208.

> For example, Justin answered "tell me about yourself" questions as follows:
> Birthday: too drunk to remember
> Are you a health freak: big steroid freak
> In the past month have you smoked: big blunt
> In the past month have you been on pills: big pills
> In the past month have you gone Skinny Dipping: big lake, not big dick
> In the past month have you Stolen Anything: big keg
> Ever been drunk: big number of times
> Ever been called a Tease: big whore
> Ever been Beaten up: big fag
> Ever Shoplifted: big bag of kmart
> Number of Drugs I have taken: big.
>
> *Id.*

[361] *Id.* at 207.

[362] *Id.* at 208.

[363] *Id.*

[364] *Id.* at 210.

[365] *Id.*

[366] *Id.* at 214.

[367] *Id.* at 216–217.

that the profile would come to the attention of the school.[368] Rejecting all three arguments, the Third Circuit then held that under *Fraser*, the school did not have the authority to punish the student for this off-campus speech, even if it was lewd and vulgar.[369]

Second, in *J.S. v. Blue Mountain School District*, even though the Third Circuit applied *Tinker* to a student's off-campus creation of a fake profile of the school's principal under the "no distinction" approach, it did not extend the same reach to *Fraser*.[370] The court noted, "Fraser's 'lewdness' standard cannot be extended to justify a school's punishment of [a student] for use of profane language outside the school, during non-school hours."[371] The court cautioned, "Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark 'offensive.'"[372]

Finally, in *J.S. v. Bethlehem Area School District*, the Court applied *Tinker* because it found a "sufficient nexus" between the "Teachers Sux" website and the school,[373] and the Court refused to apply *Fraser* because "the circumstances before us are also not on all fours with *Fraser*."[374] The Court noted, "Certainly, the speech at bar could be considered lewd, vulgar and offensive. It was not, however, expressed at any official school event or even during a class, subjecting unsuspecting listeners to offensive language."[375]

In explaining the difference between *Tinker* and *Fraser* as applied to off-campus speech, Mary-Rose Papandrea contends that courts are reluctant to apply *Fraser* because a school would only have to show, under *Fraser*, that the speech was lewd or offensive, and this would give schools too much regulatory authority.[376] However, *Tinker*'s analysis—i.e., proving a forecast of substantial disruption or interference with the rights of others—creates a significant check against the almost

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[368] *Id.* at 214.
[369] *Id.* at 216.
[370] *Id.* at 932.
[371] *Id.*
[372] *Id.* at 933.
[373] *Id.* at 865.
[374] *Id.* at 866.
[375] *Id.*
[376] Papandrea, *supra* note 137, at 1070 ("[C]ourts are more reluctant to apply *Fraser* to off-campus speech than *Tinker* because at least *Tinker* requires a showing that the expression disrupted or could reasonably be expected to disrupt school activities; *Fraser* does not. In other words, courts must recognize that even if they conclude that the *Tinker* test applies to off-campus speech, that test still requires schools to meet the substantial disruption standard prong of *Tinker*. . . . *Fraser*, in contrast, does not require the school to make any showing that the offensive language disrupted the school's activities; as a result, schools could restrict any indecent speech by a student, anywhere regardless of where he engages in it, without any additional showing. The idea that schools could regulate offensive speech on the Internet without showing any harm to the school would give school officials almost limitless authority to police their students' expression.") (citations omitted).

unlimited school authority that would be absent if *Fraser* applied to off-campus speech. In addition to this check, adding a "nexus" and/or "foreseeability" threshold requirement before applying the *Tinker* test would create another limitation on school power to regulate off-campus speech.[377]

In a recent case, *Kowalski v. Berkeley County Schools,*[378] the Fourth Circuit utilized the "nexus" and "foreseeability" approaches in a situation involving a student attacking another student online.[379] In *Kowalski*, a high school student in West Virginia was suspended for creating a MySpace webpage from her home that ridiculed a fellow student.[380] The webpage was called "S.A.S.H.," which the student claimed stood for "Students Against Sluts Herpes."[381] Another student testified during a deposition that the acronym really stood for "Students Against Shay's Herpes," referring to another student, Shay N.[382] The webpage's creator invited approximately 100 people on her Myspace "friends" list to join the discussion group and approximately two dozen students from her high school joined.[383] The members of the discussion group posted comments, accusing Shay N. of having herpes and being a "whore."[384] Shay N.'s father learned about this website and met with school officials to file a complaint. School officials concluded that the student had created a "hate website, in violation of the school policy against harassment, bullying, and intimidation."[385]

West Virginia's anti-bullying law, which was enacted in 2001 and in effect when the student created the website, required each county board to develop and implement an anti-bullying policy "prohibiting harassment, intimidation or bullying of any student on school property or at school sponsored events."[386] This state law adopted the "no authority approach." That is, it viewed schools without authority to regulate off-campus speech.

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[377] I do not advocate for the "identifiable threat" approach as a stand-alone option because I believe it would not allow schools to regulate most cases of cyberbullying, where verbal and psychological aggression are present, but do not rise to the level of identifiable threat of school violence. *See* Daniel Marcus-Toll, Note, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3432 (2014). However, it could be added to the legal framework that I advocate for in this Article to ensure that such threats are clearly covered under a school's regulatory authority.

[378] Kowalski v. Berkeley Cty. Schs., 652 F.3d 565 (4th Cir. 2011).

[379] *Id.* at 573.

[380] *Id.* at 567.

[381] *Id.*

[382] *Id.*

[383] *Id.*

[384] *Id*. at 568.

[385] *Id.* at 568–69.

[386] W. VA. CODE §18-2C-3 (West 2010) (amended 2011).

The student who created the website was suspended for ten days, which was later reduced to five days.[387] She was also given a ninety-day "social suspension," which prevented her from attending some school events.[388] Consistent with the legislature's mandate,[389] the high school adopted a "no authority" approach in its anti-bullying policy.[390] Specifically, the Student Handbook prohibited "any form of . . . sexual . . . harassment . . . or any bullying or intimidation by any student . . . *during any school-related activity or during any education-sponsored event, whether in a building or other property owned, use[d] or operated by the Berkeley Board of Education*."[391]

Relying on the language contained in the school's own policy, the student challenged her discipline on First Amendment grounds.[392] She argued that the school had no authority to regulate her online speech that took place at her home after school hours.[393] In upholding the school's discipline, the court imposed an additional threshold requirement in both the "nexus" and "foreseeability" approaches in determining whether *Tinker* applied to this off-campus speech.[394] The Fourth Circuit first applied the foreseeability analysis and observed that, although the student "pushed her computer's keys in her home, . . . she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment."[395] The court held: "To be sure, it was foreseeable in this case that [the student's] conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the 'S.A.S.H.' group's members and the target of the group's harassment were [students at the same school]."[396]

The court also applied the nexus approach, noting that it was "satisfied that the nexus of [the student's] speech to [the high school's] pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."[397] The court analyzed the nexus as between the speech and the school's interest in maintaining a safe learning environment. However, a physical connection between the speech and the campus itself was also present. First, the student directed her webpage to fellow students at her school.[398] Additionally, students accessed it at the school,[399] and the target's

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[387] *Kowalski*, 652 F.3d at 569.
[388] *Id.*
[389] *See supra* Part III.A.
[390] *See Kowalski*, 652 F.3d at 569.
[391] *Id.* (emphasis added).
[392] *See id.* at 567.
[393] *Id.* at 573.
[394] *See id.*
[395] *Id.*
[396] *Id.* at 574.
[397] *Id.* at 573.
[398] *Id.* at 567.
[399] *Id.* at 574 ("[T]he 'S.A.S.H.' webpage did make its way into the school and was

father brought a printed copy of the webpage onto the school.[400] The Fourth Circuit, after determining that *Tinker* applied, upheld the school's discipline because the student's expression "created 'actual or nascent' substantial disorder and disruption in the school."[401]

It is important to note that even though the state legislature enacted a "no authority" approach and the school adopted the same for its student handbook, a court enabled this school greater leeway in regulating cyberbullying speech created off campus. Specifically, it imposed an additional threshold—consisting of the nexus and foreseeability approaches—before applying *Tinker* in order to uphold school discipline for off-campus speech.[402] This highlights a promising direction that would allow schools to have an active role in regulating cyberbullying speech that is created off campus, while giving due consideration to students' constitutional rights. Some states' legislatures are moving in this direction.[403] More should follow.[404]

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accessed first by [high school] student Ray Parsons at 3:40 p.m., from a school computer during an after hours class.").

[400] *Id.* at 568.

[401] *Id.* at 574.

[402] *Id.* at 573.

[403] *See supra* text accompanying notes178–182 and 217 and accompanying text.

[404] Naomi Goodno proposes the following model language:

> The school shall have jurisdiction to prohibit cyberbullying that originates off the school's campus if:
>
> (i) it was reasonably foreseeable that the electronic communication would reach the school's campus; or
>
> (ii) there is a sufficient nexus between the electronic communication and the school which includes, but is not limited to, speech that is directed at a school-specific audience, or the speech was brought onto or accessed on the school campus, even if it was not the student in question who did so.

Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 697 (2011).

C. Applying Tinker to Cyberbullying

Once a court determines that *Tinker* applies because of a sufficient nexus to campus or a reasonable foreseeability of reaching campus, it should then apply at least one, and perhaps both, of the *Tinker* standards. Specifically, *Tinker* asks if the student speech: (1) "would substantially interfere with the work of the school" or (2) "impinge on the rights of other students."[405] If the answer to either question is in the affirmative, then a school can regulate the speech.

Under the first test, I contend that the way some courts have defined "substantial disruption" creates too high a standard for cases of cyberbullying. For example, a federal trial court in Missouri found no substantial disruption in a case where students accessed a student's webpage that used vulgar language to attack school officials in the school's library and during a computer class, but there was no disturbance in either the library or the class.[406] Additionally, a federal trial court in California, in a case involving a student who was punished for posting a video containing derogatory comments about a thirteen-year-old student to YouTube, overturned the student's two-day suspension noting that "to allow the School to . . . suspend a student simply because another student takes offense to her speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul of *Tinker*."[407] These lower courts view substantial disruption as something that must affect more than one student to be present. This high standard, however, would fail to protect a victim of cyberbullying. Todd Erb explains:

> Bullies naturally pick on weak individuals rather than large numbers of students. The effects of bullying may be excruciating to bear for that individual, but the rest of the student body may not even know about the bullying, much less feel its effects. Since bullying is often "individualized," there is a diminished chance that cyberbullying incidents will cause a "substantial or material disruption" to the school environment. It may cause a "substantial or material disruption" to one student's learning environment, but such a disruption would most likely fail the high standard . . . .[408]

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[405] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). Other cases haves suggested an expansive interpretation of Morse v. Frederick, 551 U.S. 393 (2007). *See, e.g.,* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007); Nuxoll v. Indian Prairie School District, 523 F.3d 668 (7th Cir. 2008). Such an interpretation could potentially create additional authority for public schools to regulate cyberbullying. However, this issue is beyond the scope of this Article.

[406] Beussink *ex rel* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177–78 (E.D. Mo. 1998).

[407] J.C. *ex rel R.C.* v. Beverley Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010).

[408] Erb, *supra* note 91, at 274.

In other words, in many cases of cyberbullying, a court looking for a student's speech to cause substantial disruption to an entire school building, classroom, or general school environment would not likely find it.

In contrast, I argue that substantial disruption should be defined in the context of cyberbullying as focusing on the disruption to the victim's educational experience. This is the better approach, and it is not without precedent. In *Kowalski v. Berkeley County Schools*, for example, the court focused on the disruption to the cyberbullied victim's educational experience in finding that substantial disruption occurred. It observed that she had to miss school in order to avoid further abuse and warned there might have been a "snowballing effect" of worsening harassment if the school had not intervened.[409] In an analogous case, *J.S. v. Bethlehem Area School District*, upholding the school's punishment of a student, the court described "the most significant disruption"[410] as the harm that the student caused to an algebra teacher by creating a webpage about her.[411]

Under the second test, which has not been heavily relied on by courts,[412] a school would need to show that student speech interfered with the rights of others in order to regulate it.[413] In one of the few cases that has applied this test, *Harper v. Poway Unified School District*,[414] a high school prohibited a student from wearing a T-shirt that had the words "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" handwritten on the front, and "HOMOSEXUALITY IS SHAMEFUL" handwritten on the back.[415] In upholding the school's authority to do this, the court relied on *Tinker's* second test.[416] It held:

> We conclude that [the student's] wearing of his T-shirt "colli[des] with the rights of other students" in the most fundamental way [citing *Tinker*, at 508]. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.[417]

The Ninth Circuit then cited research that showed the psychological and educational harm that young gay and lesbian students experienced as a result of verbal and

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[409] *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 574 (4th Cir. 2011).

[410] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002).

[411] *Id.* In this case, a teacher was targeted, so I would argue that it is a case of cyberharassment and not cyberbullying.

[412] *But see* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013) (applying the "interference with the rights of others" test).

[413] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[414] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

[415] *Id.* at 1170–71.

[416] *Id.* at 1178.

[417] *Id.*

physical abuse at school.[418] The court concluded that "the School had a valid and lawful basis for restricting [the student's] wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn."[419] In his dissenting opinion, Judge Alex Kozinski warned that such a broad application of *Tinker*'s second test could eliminate free speech rights at schools.[420] He argued that opposing homosexuality is just one side of a controversial debate and, thus, should be protected.[421] The majority, however, did not see it this way. Instead, it noted:

> Such disagreements may justify social or political debate, but they do not justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell.[422]

The court further noted:

> To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful. There are numerous locations and opportunities available to those who wish to advance such an argument. It is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.[423]

This application of the "interference with the rights of others" test should be applied to cases of cyberbullying, as either an alternative to the "substantial disruption" test or in conjunction with it. Just as the gay and lesbian students were harmed by the message on the shirts, the victims of cyberbullying are harmed by the messages of their attackers. Schools should not be forced to sit idly by while their most powerless students are being injured. The court in *Harper* recognized, "Those who administer

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[418] *Id.* at 1179 ("[I]t is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.").

[419] *Id.* at 1180.

[420] *Id.* at 1198 ("The 'rights of others' language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established. Surely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech.") (Kozinski, J., dissenting). *See also* Bonnie A. Kellman, Note, *Tinkering with Tinker: Protecting the First Amendment in Public Schools*, 85 NOTRE DAME L. REV. 367, 373–84 (2009) (criticizing the holding of *Harper*).

[421] *Harper*, 445 F.3d at 1196 (Kozinski, J. dissenting).

[422] *Harper*, 445 F.3d at 1181.

[423] *Id.*

our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development."[424] Cyberbullying victims are also vulnerable. By the definition of "cyberbullying" that I advocate for here, which includes a power imbalance element, this must be the case. Their educational rights should not be allowed to be interfered with by those with more power who intentionally try to harm them over and over again.

CONCLUSION

Cyberbullying has received increasing societal attention in the aftermath of the tragic suicides of some of its youngest and most vulnerable victims.[425] In this Article, I have argued that cyberbullying is so harmful, in and of itself, that it should be afforded diminished First Amendment protections. I have also advocated for a narrow definition of cyberbullying that incorporates the three elements of the prevailing social scientists' definition of "bullying" as it relates to cyberbullying: (1) intent to harm; (2) repetition; and (3) power imbalance between cyberbully and victim.

In addition, many cases of cyberbullying have involved harmful student expression created off campus—for example, a derogatory website or insulting Facebook posts made at home or threatening emails and texts sent from smartphones miles away from school. Most state laws do not allow their primary or secondary schools to regulate this type of expression because it did not occur at school or at a school-sanctioned event. These states adopt a "no authority" approach in regulating off-campus speech. However, this approach leaves schools powerless in the face of the serious harm created by cyberbullying that originates off campus. Some states adopt a "no distinction" approach, treating the regulation of on-campus and off-campus speech the same as long as they meet the substantial disruption test of *Tinker v. Des Moines*.[426] However, this approach does not adequately address students' free speech rights because there is no check on the school's power to regulate student speech when it occurs off campus.

In order to provide schools with the authority to protect their students from cyberbullying and also to incorporate a check on such power, I have proposed an alternative to the "no authority" and "no distinction" approaches. Specifically, I have urged that schools adopt a "nexus" or "foreseeability" approach to regulate cyberbullying that originates off campus. The Fourth Circuit has applied these two approaches in analyzing the constitutionality of the disciplinary actions of school officials in situations where students used social media to attack or threaten other students.[427] For this court, schools can regulate off-campus student speech if there is a nexus between the speech and the campus—for example, the creator of a website

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[424] *Id*. at 1179.
[425] *See* CYBERBULLYING RESEARCH SUMMARY, *supra* note 245, at 1–2.
[426] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
[427] *See* Kowalski v. Berkeley Cty. Schs., 652 F.3d 565 (4th Cir. 2011).

aims the site at a specific school by sending invites to the school's students to view it or someone accesses the site on campus. In the alternative, schools have regulatory authority if it is reasonably foreseeable that the off-campus speech will reach campus. The "nexus" and "foreseeability" approaches effectively balance the competing interests of protecting cyberbullying victims and protecting students' free speech rights.

Finally, I have urged that the *Tinker* analysis be tailored to cases of cyberbullying insofar as the "substantial disruption" test is focused on the victim and not the total school environment, and, in the alternative or along with the "substantial disruption" test, the "interference with the rights of others" test be applied in these situations.

In these ways, schools can effectively balance the protection of their most vulnerable students from a particular type of serious harm with their students' free speech rights.