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Today's Paradigm of Bullying: Cyberbullying and the First Amendment

Fay L. Kogan
Seton Hall Law

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Fay L. Kogan

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I. Introduction

Traditional bullying has taken on a new form known as cyberbullying. As technology advances, the use of computers in the daily lives of adolescents has expanded geographically from the schoolyard to the bounds of one's home. In today's society, instead of facing their victims face-to-face, adolescents use the Internet to bully their peers, even after the school day has ended. Emerging technology allows for bullies to relentlessly, and even anonymously, attack their victims twenty-four hours a day. Adolescents are cyberbullying others through Internet and social networking sites such as YouTube, MySpace, Facebook and Twitter. Adolescents also use their cell phones to bully others by taking pictures and posting them online. The Internet is dangerous because it is a universe that can be accessed virtually anywhere. Although schools have instituted anti-bullying policies as precautionary measures, courts still struggle today to implement a uniform standard as to whether school districts have a right to regulate off-campus cyberspeech.

Cyberbullying is one of the top challenges educators face each year,¹ in addition to the many legal problems facing public schools on the horizon. This paper will first review and explain the characteristics of cyberbullying and the effects it has on young children. Further, this paper will analyze state cyberbullying legislation, particularly New Jersey's Anti-Bullying Bill of Rights, and the possible implications that this legislation has on students' free speech rights. Part five will discuss the standards of student speech created by the U.S. Supreme Court. Part six will evaluate recent lower federal court decisions regarding off-campus student speech and school district's authority to discipline such speech. Finally, this paper will present potential

¹ Mary Ellen Flannery, *Top Eight Challenges Teachers Face This School Year*, NEAToday (Sept. 13, 2010), <http://neatoday.org/2010/09/13/top-eight-challenges-teachers-face-this-school-year/> (“[N]early one in three teens say they've been victimized via the Internet or cell phones. A teacher's role--or a school's role--is still fuzzy in many places. What legal rights or responsibilities do they have to silence bullies, especially when they operate from home?”).

resolutions concerning off-campus online student speech and how far schools can go in disciplining their students for actions taking place off school grounds.

II. Fundamentals of Cyberbullying

A. Characteristics of Cyberbullying

Cyberbullying has recently emerged, both inside and outside the classroom, as a new phenomenon resulting from the advancement of electronic communication technologies. In order to understand the characteristics of cyberbullying, it will serve well to first discuss traditional bullying. For generations, students have engaged in traditional schoolyard bullying. Traditional bullying involves a person who is “bullied when he or she is exposed - repeatedly and over time - to negative actions on the part of one or more other persons, and he or she has difficulty defending himself or herself.”² Traditional bullying includes three components: 1) aggressive behavior that involves unwanted, negative actions; 2) a pattern of behavior repeated over time; and 3) an imbalance of power or strength.³

Unlike traditional bullying, cyberbullying is defined as willful or repeated harm through the use of personal computers or cellular telephones to express malicious or mean sentiments to another individual.⁴ In other words, it involves harassment or mistreatment carried out by an offender against a non-physically present victim.⁵ Cyberbullying employs technologies such as e-mail, cell phone, instant messaging, chat room exchanges, defamatory personal websites, and defamatory online personal polling websites, as well as various media outlets including, but

² Dan Olweus, What is Bullying?, <http://olweus.org/public/bullying.page> (last visited Sept. 24, 2011).

³ *Id.*

⁴ Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Emotional and Psychological Consequences*, Cyberbullying Research Center, http://www.ojp.usdoj.gov/cds/internet_safety/NCPC/Cyberbullying%20Research%20Statistics.pdf (last visited Sept. 24, 2011).

⁵ Olweus, *supra* note 2.

certainly not limited to, blogs, PDAs, and social networks.⁶ Although cyberbullying does not involve physical contact between the offender and the victim, it remains just as psychologically and emotionally damaging to the victim as the impact of traditional bullying would have.⁷

At first glance, traditional bullying and cyberbullying seem strikingly similar, however, research has shown that it is easier for children to partake in cyberbullying more so than traditional bullying. Cyberbullying, like traditional bullying, involves an imbalance of power, aggression, and a negative action that is often repeated; however, cyberbullying is generally easier to engage in.⁸ Cyberbullying differs from traditional bullying in the following ways: 1) anonymity; 2) accessibility; 3) punitive fears; 4) bystanders; and 5) disinhibition.⁹ Children are less inhibited and more impulsive when online, whereas traditional bullies need the courage to physically bully another child and must interact with their victims face to face typically in a school setting.¹⁰ Cyberbullies can bully others at any time, as cell phones and computers are easily accessible both at home and at school, with home being the primary place where cyberbullying occurs.¹¹ This leaves no safe place for the targets of bullying to escape to as computers are essential nowadays for completing schoolwork and communicating with friends.¹² Further, cyberbullying is not easy to stop, due to the imminent potential for it to reach an unlimited number of people and the anonymous nature of the Internet, thus making the act of preventing cyberbullying next to impossible.¹³

⁶ Kelly Duncan, Holly Nikels, Michele Aurand & Gerta Bardhoshi, *Helping Kids and Families Stay Safe: Workshops on Cyberbullying and On-Line Safety*, <http://counselingoutfitters.com/vistas/vistas08/Duncan.htm> (last visited Sept. 24, 2011).

⁷ Olweus, *supra* note 2.

⁸ Dan Olweus, *What is Cyber Bullying?*, http://olweus.org/public/cyber_bullying.page (last visited Sept. 24, 2011).

⁹ *Id.*

¹⁰ Cybertron, *Cyber Bullying VS Traditional Bullying* (May 8, 2011), <http://www.cibertito.com/2011/05/cyber-bullying-vs-traditional-bullying/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

B. Who Engages in Cyberbullying?

Generally, cyberbullying is undertaken by the youth. A cyberbully may be a person that the target knows, either acquaintances from school or even friends or an online stranger.¹⁴ Cyberbullies can also be anonymous, making it impossible to positively determine one's identity.¹⁵ Further, a cyberbully may solicit involvement of other people who do not know the target, also known as cyberbullying by proxy.¹⁶

Cyberbullies may be the same people who engage in bullying within the schools; however, they may also be victims of school bullying who are retaliating online, perhaps sharing his or her anger or depression online as threats or distressing material.¹⁷ Often, cyberbullying involves personal relationships, while other times cyberbullying can involve former friends that may use it to “get back at” each other or use as a game to hurt others and their relationships.¹⁸ Cyberbullying may even be based on hate or bias – bullying others due to one's race, religion, physical appearance or sexual orientation.¹⁹ And sadly, adolescents use cyberbullying as a source of entertainment.²⁰ Youth use the Internet to do things they would never do in person because of the false sense of anonymity, as it is generally easier to be mean to someone when you are unable to see them and they are unable to see you.²¹

¹⁴ Jessica Lervik, *What is Cyberbullying?*, A Parent's Guide To Cyberbullying, https://wiki.uww.edu/other/childdevresource/images/e/e7/Cyberbullying_Wiki_for_Parents.pdf (last visited Sept. 25, 2011).

¹⁵ *Id.*

¹⁶ Nancy Willard, *Educator's Guide to Cyberbullying, Cyberthreats & Sexting*, Center for Safe and Responsible Use, <http://www.cyberbully.org/cyberbully/documents/educatorsguide.pdf> (last visited Sept. 25, 2011).

¹⁷ Lervik, *supra* note 14.

¹⁸ *Id.*

¹⁹ Willard, *supra* note 15.

²⁰ Lervik, *supra* note 14.

²¹ *Id.*

C. Types of Cyberbullies

There are four types of cyberbullies, all of which are interconnected. The four basic types of cyberbullies are as follows: 1) vengeful angel; 2) power-hungry or revenge of the nerds; 3) mean girls; and 4) inadvertent cyberbully.²² A vengeful angel usually is a bully that does not see himself or herself as a bully, but more as righting a wrong or protecting themselves or others from the “bad guy” they are now victimizing.²³ The vengeful angel typically gets involved trying to protect a friend who is being cyberbullied, generally working alone but may share their motives with their friends they perceive as being victimized by the person they are cyberbullying.²⁴

Secondly, the power-hungry or revenge of the nerds cyberbully typically wants to show they are powerful enough to make others do as they want.²⁵ Power-hungry cyberbullies frequently need an audience and often the power they feel when cyberbullying is not enough to feed their need to be seen as intimidating or powerful.²⁶ Power hungry cyberbullies are referred to as “revenge of the nerds” because they are often the victim of offline bullying and are the ones picked on for not being popular enough, thus they are empowered by the internet’s anonymity to attack their victims on a one-on-one basis and keep their activities secret.²⁷

The third type of cyberbully is the mean girl. A mean girl cyberbully is customarily bored and looking for entertainment.²⁸ This category is largely comprised of ego-driven females and

²² *What Methods Work with the Different Kinds of Cyberbullies?*, STOP CYBERBULLYING, <http://www.stopcyberbullying.org/educators/howdoyouhandleacyberbully.html> (last visited Nov. 30, 2011).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

done in a group, either virtually or together in one room.²⁹ Mean girl cyberbullies typically want others to know who they are and that they have the power to cyberbully others.³⁰

Lastly, the inadvertent cyberbully usually does not at all believe they are one.³¹ This category of cyberbullies simply responds without thinking about the consequences of their actions, such as pretending to be tough online, role-playing or reacting to hateful or provocative messages they have received.³²

D. Where does Cyberbullying Take Place?

Cyberbullying occurs both on-campus as well as off-campus in a number of different ways. Sometimes students are using the on-campus Internet system during school hours and after hour school activities, while other times students may use personal digital devices such as cell phones, PDAs and personal computers at school to engage in cyberbullying.³³ In many cases, this causes disruption because these devices are brought in by students with the expectation that they will be used in the classroom for instructional activities rather than cyberbullying.³⁴ In addition to using personal digital devices while on campus, students may also engage in cyberbullying while using the district Internet system.³⁵

Cyberbullying often occurs at home, outside of school. Given the participants of cyberbullying often attend school together, this off-campus activity also impacts the school environment and can lead to school violence and negatively impact the students' abilities to

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Nancy Willard, *Where are the Boundaries of the "Schoolhouse Gate" in the New Virtual World?*, Center for Safe and Responsible Use of the Internet (March 2007), <http://www.cyberbully.org/cyberbully/docs/cblegislation.pdf>.

³⁴ *Id.*

³⁵ *Id.*

learn.³⁶ Cyberbullying happens in many of the most common places online activity occurs, including blogging on websites such as MySpace or Facebook, or in public chat rooms, instant messaging, emails and message boards.³⁷ Lastly, Cyberbullying occurs through several forms of electronic communication such as flaming, harassment, denigration, impersonation, outing, trickery, exclusion, and cyberstalking.³⁸

E. Effects of Cyberbullying

A considerable amount of research and evidence has shown that cyberbullying is associated with both psychological and emotional harm.³⁹ Such damaging intangible harm that can occur from cyberbullying includes low self-esteem, depression, anger, school failure and avoidance, and in some cases, acts of school violence or suicide.⁴⁰ According to a cyberbullying study by the Cyberbullying Research Center, students may fear for their safety offline due to harassment and threats that are conveyed online.⁴¹ As the threats and harassment continue, victims may become preoccupied with plotting to avoid certain peers while instant messaging or chatting with friends on the Internet.⁴² Victims of cyberbullying might be consumed with avoiding certain cyberbullies whom they actually know in person – either at school, at the bus stop, or in their neighborhood.⁴³ It has been shown that when adolescents and teens are constantly surveilling the landscape of cyberspace or real space to guard against problematic interpersonal encounters, their ability to focus on academics, family matters and responsibilities,

³⁶ Willard, *supra* note 15.

³⁷ *Where Does It Happen?*, online-bully.com, <http://www.online-bully.com/where-does-cyberbullying-happen.htm> (last visited Sept. 27, 2011).

³⁸ Olweus, *supra* note 8.

³⁹ Willard, *supra* note 15.

⁴⁰ *Id.*

⁴¹ Hinduja & Patchin, *supra* note 4.

⁴² *Id.*

⁴³ *Id.*

and pro-social choices is compromised to some extent.⁴⁴ Thus, the effects and consequences of cyberbullying can be far-reaching and damage the psyche of many adolescents.⁴⁵

The Cyberbullying Research Center conducted a study in February 2010 that surveyed a random sample of 4,441 youth between the ages of 10 and 18 from 37 large school districts in the southern United States.⁴⁶ One study showed that teens, based on weekly activities, used the following technology from greatest use to least: cell phones, sent text messages, internet for schoolwork, Facebook, console games (Xbox, PlayStation), cell usage at school, email, instant messaging, pictures with cell, online games, MySpace, gone online with cellphone, chatrooms, webcam, Youtube, Twitter, virtual worlds.⁴⁷

The study revealed that approximately 20% of the students in the sample admitted to cyberbullying others in their lifetimes, finding that posting mean or hurtful comments and spreading rumors online were the most commonly reported types of cyberbullying reported during the previous thirty days.⁴⁸ About 11% of the sample reported cyberbullying while using one or more of the nine types reported above, two or more times over the course of the previous 30 days.⁴⁹ On the other hand, approximately 20% of the students in the sample reported experiencing cyberbullying in their lifetimes.⁵⁰ When asked about specific types of cyberbullying in the previous thirty days, mean or hurtful comments and rumors spread online were among the most commonly cited.⁵¹ Seventeen percent of the sample reported being cyberbullied in one or more of the nine types reported above, two or more times over the course of the previous thirty

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Cyberbullying Research Center, *Summary of our Cyberbullying Research from 2004-2010* (Dec. 2, 2011), <http://www.cyberbullying.us/research.php>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

days.⁵² The results of this study are alarming and attest to the idea that cyberbullying is an unavoidable concern, that of which educators must be given guidance as to how and when they have the authority to step in.

III. State Legislation – Examining New Jersey Cyberbullying Legislation

Advancements in technology have not only allowed, but have also enabled cyberbullying in advancing to become a widespread and pervasive problem across the nation. In response to the cyberbullying epidemic, many states have enacted legislation to equip themselves with the skills and knowledge to intervene as necessary in order to combat virtual bullying behavior. Recently enacted cyberbullying legislation shows a trend toward making school districts the police of such misconduct.⁵³ These statutes typically establish the ways in which schools handle cyberbullying by amending existing anti-bullying policies to include cyberbullying or electronic harassment between or among students in the school.⁵⁴ The majority of state laws establish sanctions for all forms of cyberbullying on school property, school busses and school-sponsored activities.⁵⁵ Other states have extended sanctions to include cyberspeech that originates and is received off-campus. The idea behind this legislation is the belief that off-campus activities can have a disturbing and disruptive effect on student's learning environments.⁵⁶ Among the varying state cyberbullying laws, sanctions can range from school/parent interventions to misdemeanors and

⁵² *Id.*

⁵³ National Conference of State Legislatures, *State Cyberstalking, Cyberharrassment and Cyberbullying Laws* (January 26, 2011), <http://www.ncsl.org/default.aspx?tabid=13495>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

felonies with detention, suspension, and expulsion in between.⁵⁷ Some anti-cyberbullying laws promote Internet safety education or curricula that covers cyberbullying.⁵⁸

Although some states have invoked legislative action in effort to stop cyberbullying, more must be done. There have been far too many recent cyberbullying cases that have ended in tragedies. One of these tragedies includes Tyler Clementi, a freshman at Rutgers University. Tyler leaped to his death at the ripe age of eighteen after his roommate secretly taped and posted an online video of Clementi having a sexual encounter with another young man.⁵⁹ Even more troubling are the online cases that involve younger children in middle school and high school. Megan Meier was thirteen years old when she hung herself after being cyberbullied by a classmate's parent who adopted a false identity on MySpace as a boy.⁶⁰ The classmate's parent wooed Megan and then turned against her to see if Megan would criticize the parent's daughter.⁶¹ Another example is Phoebe Prince, who was relentlessly cyberbullied by her classmates for three months before she hung herself at age fifteen.⁶²

Inspired in part by Tyler Clementi's suicide, New Jersey passed the Anti-Bullying Bill of Rights.⁶³ The bill is currently considered the toughest legislation in the nation.⁶⁴ Governor Christie approved the New Jersey Anti-Bullying Bill of Rights on January 6, 2011 to be effective

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to His Death*, ABC News (Sept. 29, 2010), <http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716#.TtK04xyEf8M>

⁶⁰ Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, The New York Times (Nov. 28, 2007), <http://www.nytimes.com/2007/11/28/us/28hoax.html>.

⁶¹ *Id.*

⁶² Helen Kennedy, *Phoebe Prince South Hadley High School's 'new girl,' driven to suicide by teenage cyber bullies*, NY Daily News.com (March 29, 2010), http://articles.nydailynews.com/2010-03-29/news/27060348_1_facebook-town-hall-meetings-school-library.

⁶³ New Jersey Education Association, *Anti-Bullying*, <http://www.njea.org/issues-and-political-action/anti-bullying> (last visited Nov. 22, 2011).

⁶⁴ *Id.*

beginning the 2011-2012 school year.⁶⁵ The law defines "Harassment, intimidation or bullying" to mean:

“any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents ... that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that: a) a reasonable person should know, under the circumstances, will have the effect of a physically or emotionally harming a student or damaging the student’s property, or placing a student in a reasonable fear of physical or emotional harm to his person or damage to his property; b) has the effect of insulting or demeaning any student or group of students; or c) creates a hostile environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.”⁶⁶

The act defines “electronic communication” to mean “a communication transmitted by means of an electronic device, including, but not limited to, a telephone, cellular phone, computer, or pager.”⁶⁷

The law requires that each school district adopt a policy concerning harassment, intimidation or bullying on school property, at school sponsored functions or on a school bus, as well as certain incidents that occur off school grounds in cases a school employee is made aware of such actions.⁶⁸ While the law includes off-campus incidents, the legislation does not provide straightforward guidelines regarding what constitutes off school grounds. Among other things, the mandated policy requires schools to include a definition and statement prohibiting harassment, intimidation or bullying of a student, consequences and appropriate remedial action, a procedure for reporting and prompt investigation of violations and complaints, a statement of how the policy is to be publicized, a link of the policy on the school district’s website, and finally

⁶⁵ *Id.*

⁶⁶ N.J. Stat. Ann. § 18A:37-14 (West 2011).

⁶⁷ § 18A:37-14.

⁶⁸ § 18A:37-15(a).

the contact information of the district anti-bullying coordinator and specialist on the school district's website.⁶⁹

The bill also established a list of requirements and procedures that all schools in New Jersey must adhere to. Under the Anti-Bullying Bill of Rights, principals are required to appoint one of their staff members as the school's anti-bullying specialist.⁷⁰ The commissioner of education is directed to establish in-service programs to train selected public school employees to serve as school anti-bullying specialists and district anti-bullying coordinators.⁷¹ At the district level, the superintendent must appoint a district anti-bullying coordinator.⁷² The district coordinator must work with the school coordinators to coordinate district bullying prevention policies, and file reports with the state Department of Education.⁷³

A school district shall form a school safety team in each school in the district for the purpose of developing, fostering, and maintaining a positive school climate.⁷⁴ The school anti-bullying specialist is required to chair a school safety team composed of the principal and a teacher in the school, a parent of a student in the school, and other members determined by the principal.⁷⁵ Such teams are required to identify and address patterns of harassment, intimidation, or bullying, as well as policy revision and training responsibilities that fall on the team.⁷⁶

The New Jersey Anti-Bullying Bill of Rights also enforces rigorous investigation and reporting requirements. Some of these investigation and reporting requirements include detailed procedures and timelines for reporting incidents of bullying, which all school employees and

⁶⁹ § 18A:37-15(b)(1)-(12).

⁷⁰ § 18A:37-20(a).

⁷¹ *Id.*

⁷² § 18A:37-20(b).

⁷³ § 18A:37-20(b)(1)-(4).

⁷⁴ § 18A:37-21(a).

⁷⁵ § 18A:37-21(b).

⁷⁶ § 18A:37-21(c)(3), (c)(4), (c)(6).

contracted service providers are required to comply with.⁷⁷ The law states that an initial verbal report must be given to the school principal on the same day a school employee witnesses or receives reliable information regarding any incident, followed up by a written report filed with the principal within two days of the incident.⁷⁸ The principal, along with the anti-bullying specialist, must then initiate and conduct an investigation within one school day of the report to be completed no later than ten days after the principal received the initial written report of the incident.⁷⁹ The results of the investigation must be reported to the superintendent within two days of its completion, who then reports the results to the Board of Education.⁸⁰ The parents of the student involved are entitled to information about the investigation, in accordance with federal and state law and regulation, and may request a hearing before the Board of Education after receiving the information.⁸¹ The Board of Education must issue a written decision affirming, rejecting, or modifying the superintendent's decision, which the parents may appeal.⁸²

Twice annually, school districts are required to submit reports of all acts of violence, vandalism and harassment, intimidation, or bullying which occurred during the previous period to the public and Department of Education.⁸³ The department will use the data to assign a grade to the schools and districts.⁸⁴ The grade must be posted on the school and districts website within ten days of receipt of the grade.⁸⁵

⁷⁷ § 18A:37-16.

⁷⁸ § 18A:37-15(b)(5).

⁷⁹ § 18A:37-15(b)(6)(a).

⁸⁰ § 18A:37-15(b)(6)(b).

⁸¹ § 18A:37-15(b)(6)(d).

⁸² § 18A:37-15(b)(6)(e), (f).

⁸³ § 18A:37-13.2.

⁸⁴ § 18A:37-13.2.

⁸⁵ § 18A:37-13.2.

Lastly, the New Jersey Anti-Bullying Bill of Rights encourages professional development for public school staff members.⁸⁶ Specifically, the law requires training in suicide prevention and requires public school teachers to complete at least two hours of instruction on harassment, intimidation, or bullying prevention in each professional development period.⁸⁷ In turn, the school will be required to provide training on its policies to school employees, ensure that the training includes instruction on preventing bullying, and develop a process for discussing the district's harassment, intimidation or bullying policy with students.⁸⁸

Supporters of the New Jersey Anti-Bullying Bill of rights believe that school districts and their students, parents, teachers, principals and board of education members would benefit by the establishment of clearer standards on what constitutes harassment, intimidation and bullying, as well as standards on how to prevent, report, investigate, and respond to incidents of harassment, intimidation and bullying.⁸⁹ Supporters believe that things and times have changed and as a result, bullying today is more pervasive due to social media such as Facebook, Twitter and text messaging.⁹⁰ On the other hand, critics attack the law as being too demanding and costly. The complaint is that the new law imposes excessive requirements while not providing the necessary resources.⁹¹ Many critics believe that schools are already tasked with doing many things that have almost nothing to do with their educational mission, and that adding a new anti-bullying regime would only distract teachers and administrators from their primary task – education.⁹² They fear the New Jersey school system will be clogged with bullying complaints, and

⁸⁶ § 18A:37-22.

⁸⁷ § 18A:37-13.2; § 18A:37-22(d).

⁸⁸ § 18A:37-13.2.

⁸⁹ § 18A:37-13.1(e).

⁹⁰ Doug Mataconis, *The Absurdity Of Anti-Bullying Laws*, Outside the Beltway (Sept. 3, 2011), <http://www.outsidethebeltway.com/the-absurdity-of-anti-bullying-laws/>.

⁹¹ Adam Cohen, *Why New Jersey's Antibullying Law Should Be a Model for Other States*, TIME (Sept. 6, 2011), <http://ideas.time.com/2011/09/06/why-new-jerseys-antibullying-law-should-be-a-model-for-other-states/>.

⁹² Mataconis, *supra* note 87.

administrators will find they are spending more of their time satisfying the dictates of this legislation than they do actually educating students.⁹³

Although the New Jersey law is purported to be the toughest in the nation and goes far beyond what most other states require, the law is broad and contains a significant amount of language that may be vague and difficult to interpret. For example, how would a student know whether their speech will have the effect to physically or emotionally harm another student or place a student in reasonable fear of physical or emotional harm? The New Jersey statute has left it up to students and school officials to define and interpret what is or is not permissible speech. Perhaps it would be more beneficial to concentrate on conflict resolution than on conflict prevention. If a school is dedicating all of its effort to prevent the inevitable it is in many ways inefficient and a failure on their part to do what may minimize the damage of real-life conflicts.

Additionally, the bullying jurisdiction claimed by the school is unreasonably broad. The New Jersey statute includes conduct that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds, provided that conduct substantially disrupts or interferes with the orderly operation of the school or the rights of other students.⁹⁴ By including conduct that occurs off-campus, this extends the reach of school authority to virtually everywhere, including the privacy of one's home. If the school has the authority to discipline conduct that occurs both in and outside of school, what is left for parents to regulate? The New Jersey law pushes schools into a complicated area of policing student expression, particularly speech that occurs off school grounds.

Conflicting decisions by lower federal courts have given scant guidance to school districts. The New Jersey law requires that schools monitor and regulate certain types of speech,

⁹³ James Hill, *Cyber-Bully Hysteria: New Jersey Adopts New Anti-Bullying Legislation*, *Intentionous* (Sept. 8, 2011), <http://intentionous.com/2011/09/08/cyber-bully-hysteria-new-jersey-adopts-new-anti-bullying-legislation/>.

⁹⁴ N.J. Stat. Ann. § 18A:37-14 (West 2011).

rather than respecting the free-speech rights of their students. With this virtually limitless authority, extended beyond the schoolyard, students will no longer be able to write about controversial topics of concern without worrying that it may be disruptive or interfere with the school environment. Students will essentially be punished for off-campus speech based on how people react to it. The result of this uncertainty will inescapably lead to an over-reaction as well as an influx of lawsuits as to how much schools can be responsible for actions beyond their control.

IV. Supreme Court Precedent

The Supreme Court has issued decisions regarding how far schools have the authority to go in regulating student speech. However, none of these decisions have considered the role of technology. The decisions by the Supreme Court may be useful to schools when students challenge their actions when regulating online speech.

A. Four Landmark Cases

Long before the explosion of the digital age, student free speech rights were first considered in the U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District*.⁹⁵ In *Tinker* students were suspended for disobeying school policy when wearing black armbands in protest to ongoing hostilities in Vietnam.⁹⁶ The Court explained that students may express opinions, even on controversial subjects, if done without “materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.”⁹⁷ Thus, under the *Tinker* standard, student speech

⁹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁹⁶ *Id.* at 504.

⁹⁷ *Id.* at 513.

may be suppressed if it amounts to a substantial or material disruption or it invades the rights of other students.⁹⁸

Thirty years following the *Tinker* decision, the Supreme Court ruled on student speech in *Bethel School District No. 403 v. Fraser*, approving punishment of students for “vulgar, lewd and indecent speech.”⁹⁹ Matthew Fraser, a high-school student, delivered a speech nominating a classmate for an elected office in the student government.¹⁰⁰ Fraser’s speech referred to his classmate “in terms of an elaborate, graphic, and explicit sexual metaphor.”¹⁰¹ Prior to giving his speech, two teachers told Fraser that he should not deliver the speech because “the speech might have ‘severe consequences.’”¹⁰² After disregarding the advice of his teachers, Fraser was suspended for three days and was told that his name would be removed from the list of candidates for graduation speaker at the school’s commencement exercises.¹⁰³

The *Fraser* Court chose not to follow the *Tinker* standard and held that the school was correct in punishing Fraser for the speech, recognizing that schools have an interest in promoting civil discourse that may act as a counterweight to First Amendment concerns.¹⁰⁴ The Court held that public schools have the right to determine what words are deemed offensive and therefore prohibited in school, which in turn, follows that a court will likely be very differential toward actions of the school accused of a constitutional violation.¹⁰⁵ The Court relied on the principle that although “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,’” students are nonetheless not entitled to the same latitude of First

⁹⁸ *Id.*

⁹⁹ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

¹⁰⁰ *Id.* at 677.

¹⁰¹ *Id.* at 677-78.

¹⁰² *Id.* at 678.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 685.

¹⁰⁵ *Id.* at 680.

Amendment protections as adults.¹⁰⁶ The Court noted “the constitutional rights of students in public school are not automatically coextensive with the right of adults in other settings”.¹⁰⁷

Once again, the Court in *Hazelwood School District v. Kuhlmeier* examined restriction on student speech by school officials.¹⁰⁸ In *Hazelwood*, members of a high school newspaper filed suit against the school district for deleting two pages that included articles on teen pregnancy and the impact of divorce on school students.¹⁰⁹ Instead of relying on the *Tinker* “substantial disruption” standard, the Court used a public-forum analysis and held that the students’ First Amendment rights were not violated when the school censored the newspaper’s content because the newspaper was part of the school curriculum, it was funded by the school district, and supervised by a teacher.¹¹⁰ The Court held that the newspaper was not a public forum, but rather a non-public forum, or school-sponsored, and thus the speech could be censored and regulated by the school.¹¹¹

After the *Tinker*, *Fraser* and *Hazelwood* trilogy, the Court remained silent regarding the subject of content-based restrictions on student speech until *Morse v. Frederick*.¹¹² In *Morse*, a high school senior, Joseph Frederick, along with his high school classmates were allowed to watch the Olympic Torch Relay pass their school in Juneau, Alaska on the sidewalk across from school.¹¹³ The school district noted that this was part of the school principal’s decision “to permit staff and students to participate in the Torch Relay as an approved social event or class trip” and the teachers and administrative officials monitored the students during this event.¹¹⁴ While the

¹⁰⁶ *Id.* at 682.

¹⁰⁷ *Id.*

¹⁰⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁰⁹ *Id.* at 262-63.

¹¹⁰ *Id.* at 262, 270.

¹¹¹ *Id.* at 270.

¹¹² *Morse v. Frederick*, 551 U.S. 393 (2007).

¹¹³ *Id.* at 397.

¹¹⁴ *Id.*

students were lined up on the sidewalk, Frederick and his friends held up a 14-foot banner bearing the phrase: ‘BONG HITS 4 JESUS,’ which was easily read by students across the street.¹¹⁵ After refusing to take the banner down, Frederick was suspended for ten days.¹¹⁶

The Court did not revisit the *Tinker* analysis or classify the speech as offensive as in *Fraser*, instead the Court made another exception to the First Amendment rights enjoyed by students, applicable when schools are acting to quash speech they reasonably interpret as promoting drug use.¹¹⁷ The Court held that the First Amendment does not prevent educators from suppressing student speech, at a school-supervised event, that is reasonably viewed as promoting illegal drug use.¹¹⁸ The Court reasoned that given the dangers of drug usage and the prevalence of drugs in society today, schools have the right to prevent speech that can be “reasonably viewed as promoting illegal drug use.”¹¹⁹

V. Lower Federal Court Decisions Regarding Off-campus Student Cyberspeech – The Struggle For a Uniform Standard

In determining whether student speech can be disciplined, a court will begin by addressing the question of where the speech occurred. However, as technology continues to evolve, the Internet muddles the on-campus/off-campus dichotomy because of its accessibility. While the four landmark Supreme Court cases pertain to expression that occurred while students were on-campus, the more recent emergence of cyberspeech as a central means of student expression has led to a number of conflicting decisions among lower courts that are called upon to decide the extent of school authority to discipline students for such off-campus conduct.¹²⁰

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 398.

¹¹⁷ *Id.* at 393, 397.

¹¹⁸ *Id.* at 409.

¹¹⁹ *Id.* at 408-409.

¹²⁰ There are four landmark Supreme Court cases regarding student free speech. *Tinker*, 393 U.S. at 513 (holding that schools can regulate speech that “materially disrupts classwork or involves substantial disorder or invasion of

Lower courts have struggled to formulate a uniform standard and have implemented different methods to determine where the speech occurred. While it is true that administrators have greater authority to discipline a student who engages in speech at school, if a student engages in speech off-campus, the bounds of administrative authority are considerably more ambiguous.

A. Cases Upholding the School District's Right to Regulate Cyberspeech

One common cyberbullying scenario entails student speech directed toward school personnel. For example, in *Wisniewski v. Board of Education of the Weedsport Central School District* and *Doninger v. Niehoff*, the Second Circuit applied the *Tinker* standard to off-campus online conduct, reasoning that the schools showed that the conduct would materially and substantially disrupt the work and discipline of the school.¹²¹ In *Wisniewski*, an eighth grade student, Aaron Wisniewski, instant messaged several of his fellow students from his home computer with an image icon of a “pistol firing a bullet at a person’s head, above which were dots representing splattered blood.”¹²² Underneath the icon was the message “Kill Mr. VanderMolen,” a reference to the school’s English teacher.¹²³

Several weeks after the icon circulated, school officials discovered it and conducted a superintendent’s hearing, which resulted in a determination that Wisniewski be suspended for an entire semester.¹²⁴ The court determined that although Wisniewski’s creation and transmission of

the rights of others”); *Fraser*, 478 U.S. 683 (holding that lewd, vulgar, or plainly offensive speech that takes place on-campus is punishable); *Hazelwood*, 484 U.S. at 271 (holding that schools can regulate student speech which may be perceived to “bear the imprimatur of the school,” such as a school-sponsored newspaper); *Morse*, 551 U.S. at 397 (holding that schools may regulate student speech that promotes illegal drug use and that takes place during a school-sponsored event).

¹²¹ *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

¹²² *Wisniewski*, 494 F.3d at 36.

¹²³ *Id.*

¹²⁴ *Id.* at 36-37.

the icon occurred off school grounds, it did not necessarily shield him from school discipline.¹²⁵ The court applied the *Tinker* standard uniquely, holding that the message and icon “crossed the boundary of protected speech and posed a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.”¹²⁶ The potentially threatening content of the icon and its extensive distribution made the risk at least foreseeable to a reasonable person that the icon, once made known to school officials, would create a foreseeable risk of substantial disruption within the school.¹²⁷

The Second Circuit followed the standard enunciated in *Wisniewski* in *Doninger v. Neihoff*.¹²⁸ In *Doninger*, the court ruled in favor of school administrators in a case that involved a publicly accessible blog entry made by a high school student from her home.¹²⁹ As the junior class secretary and member of the student council, Avery Doninger was largely responsible for coordinating Jamfest, an annual battle of the bands concert held at the school.¹³⁰ Due to various conflicts and the possible cancellation of the event altogether, Doninger and three other students sent a mass e-mail, encouraging recipients to contact the school officials and urge the district to hold the event as scheduled.¹³¹ Upset with the potential cancellation of the event, Doninger posted an entry to her blog from her home computer that referred to the administration as “douchebags” and encouraged fellow students either to write or call the superintendent “to piss

¹²⁵ *Id.* at 39-40.

¹²⁶ *Id.* at 38-39 (stating that the messages created a “reasonably foreseeable risk that it would come to the attention of school authorities” is not based on any preceding case law and under *Tinker* school officials have authority to discipline to prevent harmful impacts at school).

¹²⁷ *Id.* at 39-40.

¹²⁸ *Doninger*, 527 F.3d at 41.

¹²⁹ *Id.* at 43.

¹³⁰ *Id.* at 44.

¹³¹ *Id.*

her off more.”¹³² After the administration found out about Doninger’s blog, she was barred from running for senior class secretary.¹³³ The court held that barring a student from running for the class secretary position was not a constitutional violation because, as in *Wisniewski*, a student may be disciplined for expressive off-campus conduct 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.¹³⁴ The court reasoned that the post could have materially or substantially disrupted the work and discipline of the school because there it was “reasonably foreseeable that other . . . students would view the blog and that school administrators would become aware of it.”¹³⁵ Additionally, the court noted there was evidence that the post caused students to plan a sit-in and school officials to receive excessive calls from the community.¹³⁶

The *Doninger* holding presents noteworthy concerns. The court focused on Doninger’s language, referring to it as “plainly offensive” and “potentially incendiary.”¹³⁷ However, putting aside the language the court deemed offensive, Doninger’s blog entry did not advocate any form of disruption other than an objection to the actions of her school officials and a recommendation for her fellow classmates to contact the superintendent to express their displeasure for the cancelled event. With this extremely broad authority, extended beyond the schoolyard, it is likely that no student will be able to write about controversial topics of concern to him or her, even within the confines of one’s home, without worrying that it may be disruptive or interfere with the school environment.

¹³² *Id.* at 45.

¹³³ *Id.* at 46.

¹³⁴ *Id.* at 50.

¹³⁵ *Id.* (internal quotation marks omitted).

¹³⁶ *Id.* at 51.

¹³⁷ *Id.* at 50-51.

One could also certainly argue that Doninger's post was not a significant cause of any disruption because the post was only discovered after the time the sit-in was threatened and the flood of calls and emails to school administration, and most importantly after the school's meeting that resolved the dispute over Jamfest's scheduling.¹³⁸ Thus, the causation factor in this case did not necessarily follow the "reasonably foreseeable" portion of the *Tinker* standard and subsequently allowed the school to apply the less protective substantial disruption standard.¹³⁹

A second common cyberbullying scenario entails student speech directed toward fellow students. In *Kowalski v. Berkeley County Schools*, the Fourth Circuit upheld a school's discipline of a student for engaging in off-campus cyberbullying of another student.¹⁴⁰ Kara Kowalski created a MySpace profile called "S.A.S.H.," which she said was short for "Students Against Sluts Herpes," referring to a student named Shay.¹⁴¹ Students that were invited to join the page posted comments and images making fun of Shay.¹⁴² After a complaint by Shay and an investigation, school officials determined that Kowalski created a "hate website" that violated school policy.¹⁴³ Kowalski was disciplined in the form of a five-day suspension, a social suspension for ninety days, and her inability to participate in various school social events.¹⁴⁴

¹³⁸ *Id.* at 46.

¹³⁹ See Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 BYU Educ. & L. J. 75, 99 (2011) ("There were many potential causes of any actual disruption around the time Doninger's comments were posted. A school staff member, who was scheduled to manage the technical aspects of a scheduled event that was important to the students and the community, backed out four days before the event, thus requiring the event to be cancelled or postponed for the third time.").

¹⁴⁰ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

¹⁴¹ *Id.* at 567.

¹⁴² *Id.*

¹⁴³ *Id.* at 568-569. The school's policy on Harassment, Bullying, and Intimidation 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." Bullying, Harassment and/or Intimidation is defined in the policy as "any intentional gesture, or any intentional written, verbal or physical act that: 1) A reasonable person under the circumstances should know will have the effect of: a) Harming a student or staff member; and 2) Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student."

¹⁴⁴ *Id.* at 569.

Although Kowalski argued that the speech took place at her home and should be outside the school's power to regulate, the court held that the school was justified in imposing discipline under *Tinker's* substantial disruption test.¹⁴⁵ The court was satisfied that the nexus of Kowalski's speech to the school's pedagogical interests was sufficiently strong to justify the action taken by school and it was foreseeable that Kowalski's conduct would reach the school through electronic devices and thus, it created a reasonable foreseeable substantial disruption in the school.¹⁴⁶

Much of the legal precedent regarding off-campus cyberspeech deals with student speech directed at school officials, in which courts appear to afford less protection to school officials than to students. An argument can be made for a tougher standard when students target other students. While online speech may be harmful and potentially disruptive when directed toward school officials, the students are in no position to prevent abuse due to lack of resources and are certainly less knowledgeable than school officials in a position of power. School officials, acting as both adult and professional in the educational context, have a special obligation to protect students from cyberbullying. School officials are far more prepared to deal with such abuse and better understand the risk of criticism than students within the school. Thus, the court should construct a stricter standard in a student on student cyberbullying context.

B. Cases Rejecting the School District's Right to Regulate Cyber Speech

Other lower Federal courts have held that schools have exceeded their administrative authority when regulating off-campus cyberspeech, thus producing a body of conflicting precedents in the area of student speech. The Third Circuit found that a school district violated a student's free speech rights when it disciplined him for creating an offensive parody MySpace

¹⁴⁵ *Id.* at 567, 570.

¹⁴⁶ *Id.* at 573; *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002) (indicating that administrators may regulate student speech any time they have a "particular and concrete basis" for forecasting future substantial disruption).

profile of his high school principal.¹⁴⁷ In *Layshock v. Hermitage School District*, Justin Layshock created a parody MySpace profile of his high school principal off-campus, after school hours, and on a home computer.¹⁴⁸ When students in the school learned of the profile, they began accessing it on the computers at school.¹⁴⁹ School officials discovered Layshock was responsible and suspended him for ten days, placed him in an alternative education program, and banned him from participating in graduation.¹⁵⁰

The Third Circuit held that there was an insufficient nexus between Layshock's posting and the school to establish a foreseeable and substantial disruption of school operations.¹⁵¹ Additionally, the court held that the Layshock's copying of the principal's photograph from the website did not qualify as on-campus expressive conduct. Therefore, the school district had exceeded its authority in disciplining the student.¹⁵² Chief Judge Theodore McKee wrote, "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."¹⁵³ While the court did not decide whether *Tinker* is applicable to off-campus conduct, the concurring opinion stated that *Tinker* is applicable to off-campus expressive conduct, but agreed with the majority regarding the ultimate resolution in this case.¹⁵⁴

The Third Circuit similarly held, in *J.S. v. Blue Mountain School District*, that school administrators are limited in their ability to restrict student speech that occurs outside of

¹⁴⁷ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3rd Cir. 2011).

¹⁴⁸ *Id.* at 207.

¹⁴⁹ *Id.* at 207-208.

¹⁵⁰ *Id.* at 210.

¹⁵¹ *Id.* at 205.

¹⁵² *Id.* at 219.

¹⁵³ *Id.* at 216 (noting that "allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent...").

¹⁵⁴ *Id.* at 220.

school.¹⁵⁵ J.S., with the help of another student, created a parody MySpace profile on a home computer of the school's principal that contained vulgar, lewd and false statements.¹⁵⁶ The profile included a photograph of the principal taken from the school district's website and used profanity depicting him as a pedophile and sex addict.¹⁵⁷ When word of the profile's existence spread, many viewed the fake profile; however, the profile could only be viewed off-campus because the students were not able to access the page while at the school.¹⁵⁸ The principal determined that J.S. had violated the school discipline code and suspended J.S. for ten school days.¹⁵⁹ The court concluded that the school district violated the First Amendment right of the student to criticize her principal in an imposter post on MySpace, acknowledging that the school district could not show a substantial disruption from the posting, nor could the school establish how the posting led to a reasonable forecast of substantial disruption occurring at a later point.¹⁶⁰

As in *Layshock*, the majority in *J.S.* avoided the question of whether *Tinker* is the appropriate standard to govern off-campus speech, but did note that extending actions and their effects beyond schoolhouse walls "would vest school officials with dangerously overbroad censorship discretion."¹⁶¹ The concurrence, in this case, made up of five judges, stated that *Tinker* should never be applied to off-campus speech because it could be argued that a substantial disruption was caused by almost any kind of speech, even the most protected.¹⁶²

¹⁵⁵ *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3rd Cir. 2011).

¹⁵⁶ *Id.* at 920-21.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 921, 929.

¹⁵⁹ *Id.* at 922.

¹⁶⁰ *Id.* at 931.

¹⁶¹ *Id.* at 933.

¹⁶² *Id.* at 936 (Smith, J., concurring) (stating that the First Amendment protects speech regardless of whether it is disruptive, offensive vulgar, or insulting).

However the dissent, comprised of six judges,¹⁶³ believed that it was unclear whether the profile constituted off-campus speech.¹⁶⁴ The dissent believed that the rule adopted in *Tinker* can and should be used to govern the off-campus student speech.¹⁶⁵ Judge Fisher wrote, "today, students commonly carry cell phones with internet capabilities onto school grounds . . . with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment."¹⁶⁶ The dissent argued two forms of disruption were foreseeable: the MySpace page posed a reasonably foreseeable threat of interference to the educational process and the page posed a reasonable foreseeable threat of disruption the operations of the classroom and the ability of administrators and educators to perform their jobs.¹⁶⁷

VI. Potential Resolutions

The issue of off-campus student online speech is not going away. In today's society, many teenagers possess relatively inexpensive electronic communication devices, such as cell phones, handheld video cameras, iPhones and iPads, most of which easily connect to the Internet. With swift, ever-evolving technology coupled with vague and inconsistent school

¹⁶³ *J.S. v. Blue Mountain School District*, Jolt Digest (June 21, 2011 10:40AM), <http://jolt.law.harvard.edu/digest/internet/j-s-v-blue-mountain-school-district> (*Laychock* and *J.S.* were initially decided on the same day in the Third Circuit, but came to opposite conclusions, resulting in both being vacated and a new hearing en banc, both released on June 13, 2011. In *J.S.*, the Third Circuit, sitting en banc (consisting of 14 Judges total; 6 dissenting and 5 concurring) reversed and remanded the Middle District of Pennsylvania's ruling that suspension was an appropriate punishment for the student. The Third Circuit held that the fake MySpace profile, while vulgar and offensive, did not cause the type of "substantial disruption" (using the *Tinker* framework) that would have justified the student's ten-day suspension).

¹⁶⁴ *J.S.*, 650 F.3d at 942. (Fisher, J., dissenting) (stating it is unclear if "in class or out of it" means to distinguish the classroom from the world beyond the schoolhouse gates, or if it simply means out of class but in the cafeteria, schoolyard, or other areas on school grounds).

¹⁶⁵ *Id.* at 943 (Fisher, J., dissenting) (stating that authorities need not wait until the disruption actually occurs if they are able to demonstrate facts that may lead them to forecast a substantial disruption or material interference with school activities); *Tinker*, 393 U.S. at 514.

¹⁶⁶ *Id.* at 951-952 (Fisher, J., dissenting).

¹⁶⁷ *Id.* at 945. (Fisher, J., dissenting).

district policies, both administrators and students continue to express doubt with regard to the authority schools have when it comes to disciplining students for actions that take place outside of the schoolyard.

One possible solution is to eliminate the on-campus/off-campus dichotomy in student cyberspeech cases. With much credit given to the Internet, the line between on-campus and off-campus speech is not as clear as it once was. The difficulty in distinguishing on-campus speech from off-campus speech and the complicated analysis of Internet related speech is largely because the Internet is a “borderless medium.”¹⁶⁸ Today, the Internet can be accessed virtually anywhere. With this in mind, perhaps the distinction should not apply to student cyberspeech cases. The states that have enacted anti-bullying policies may be better off eliminating the on-campus/off-campus distinction. Instead of encompassing all speech, regardless of being on or off-campus, it should more clearly define the type of school disruption that the harmful speech creates. The on-campus/off-campus distinction is unnecessary because the judicial analysis should focus more on the harmful effects imposed on the cyberbullying victims and the disruption it creates to the school’s educational and social environment.

Courts have also struggled with applying the *Tinker* standard to speech originating off school grounds. After much inconsistent guidance, the question then becomes – disregard *Tinker*, apply *Tinker* to off-campus speech, or limit *Tinker* to on-campus speech. Perhaps the better standard for the Supreme Court to adopt would be to leave *Tinker* the way it was designed,¹⁶⁹ and create a uniform standard that governs exclusively student cyberspeech, whether originating in or out of school. Student cyberspeech requires a different analysis because “the concept of the

¹⁶⁸ Sandy Li, *The Need For A New, Uniform Standard: The Continued Threat To Internet-Related Student Speech*, 26 Loy. L.A. Ent. L. Rev. 65, 93 (2005).

¹⁶⁹ *Morse*, 551 U.S. at 418-19 (Thomas, J., concurring) (stating “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators.”).

Internet is unlike the armbands in *Tinker*, the school assembly in *Fraser*, the school newspaper in *Hazelwood*, or the school activity in *Morse*.¹⁷⁰ The standard should not only ensure a balance between protecting a student's free speech rights, but it should also recognize protecting students from abusive behavior. It should not be aimed at prohibiting students' free speech rights, but instead should recognize the protection of students and schools from disruptive speech.

VII. Conclusion

Neither school administrators nor judges can forecast what future advances in technology will bring into school and the lives of adolescents. The daily use of computers in the lives of young children has expanded with the explosion of the digital age. As such, digital youth culture is continuously changing, permitting cyberbullying to remain one of the top challenges educators face every year. Cyberbullying continues to be a vexing topic and courts today still struggle to establish and implement a uniform standard as to whether school districts have a right to regulate off-campus cyberspeech. For this reason, it is imperative the Supreme Court develop and enforce a standard for regulating cyberbullying speech. Doing so would significantly alleviate the problem and would provide school districts firm guidance on how to deal with cyberbullying that occurs off school grounds.

¹⁷⁰ Emily K. Kerkhof, *Myspace, Yourspace, Ourspace: Student Cyberspeech, Bullying, and Their Impact On School Discipline*, 2009 U. Ill. L. Rev. 1623, 1649-50 (2009).