FROM THE PLAYGROUND TO CYBERSPACE: THE EVOLUTION OF CYBERBULLYING

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I. INTRODUCTION

On September 19, 2010, Dharun Ravi, a student at Rutgers University, posted a Twitter message: "Roommate asked for the room till midnight. I went into molly's room and turned on my webcam. I saw him making out with a dude. Yay."[1] The roommate in question was Tyler Clementi, an eighteen-year-old violinist and freshman at Rutgers.[2] That night, Ravi videotaped Clementi having a sexual encounter with another man without Clementi's knowledge or consent and streamed it live over the Internet.[3] Clementi had yet to reveal his sexuality to friends and family, and this video served as his "coming-out party."[4] Three days later, Tyler Clementi ended his life by jumping off the George Washington Bridge in Piscataway Township, New Jersey.[5] Clementi's only message to friends and family was left on his Facebook page: "Jumping off the gw bridge sorry."[6]

Unfortunately, Clementi's story is not an isolated incident.[7] Over the past decade, several teenagers have taken their own

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1. Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?_r=1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. 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.

7. *See* SAMEER HINDUJA & JUSTIN PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 66–69 (2009).

lives after being the victims of harassment over the Internet.[8] Megan Meier, a thirteen-year-old girl, hanged herself after the mother of her friend created a MySpace profile pretending to be a boy who was interested in her, only to spurn her.[9] Fifteen-year-old Phoebe Prince moved with her parents from Ireland to a small town in Massachusetts.[10] Soon after beginning her new life, Prince was bombarded with hateful text and Facebook messages by a group of girls the media later dubbed the "Mean Girls" calling her a "slut" or an "Irish slut."[11] To escape the constant harassment, Prince ended her life on January 14, 2010.[12] While suicide is not a common result of everyday bullying, it certainly grabs the attention of the public.[13]

Bullying is a pervasive issue for pre-teens and teenagers, and its effects are manifested in many different ways. It "fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."[14] Bullying

8. *Id*. Hinduja and Patchin tell the stories of four teenagers who have committed suicide within the last ten years after being bullied online: Megan Meier, Ryan Halligan, Jeffery Johnston, and Rachael Neblett. *Id*.

9. Gordon Tokumatsu & Jonathan Lloyd, *MySpace Case: "You're the Kind of Boy a Girl Would Kill Herself Over,"* NBC LOS ANGELES (Jan. 26, 2009, 1:25 PM), http://www.nbclosangeles.com/news/local-beat/Woman-Testifies-About-Final-Message-Sent-to-Teen.html (describing the last electronic message sent by Megan Meier, the teenage victim of an infamous online cyberbullying incident, before she committed suicide by hanging herself in her closet).

10. Kealan Oliver, *Phoebe Prince "Suicide by Bullying": Teen's Death Angers Town Asking Why Bullies Roam the Halls*, CBS NEWS (Feb. 5, 2010, 6:00 AM), http://www.cbsnews.com/8301-504083_162-6173960-504083.html.

11. Helen Kennedy, *Phoebe Prince, South Hadley High School's 'new girl,' driven to suicide by teenage cyber bullies*, N.Y. DAILY NEWS, Mar. 29, 2010, http://articles.nydailynews.com/2010-03-29/news/27060348_1_facebook-town-hall-meetings-school-library. The "Mean Girls" are facing a litany of charges including "statutory rape, violation of civil rights with bodily injury, criminal harassment, and stalking." *Id*.

12. *Id*.

13. *See, e.g.*, Room for Debate*, Cyberbullying and a Student's Suicide,* N.Y. TIMES, Sept. 30, 2010, http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide [hereinafter Room for Debate] (exhibiting the public's interest in this issue with their online debate on cyberbullying).

14. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. to Schools, Harassment and Bullying (Oct. 26, 2010) [hereinafter Letter

is not a new issue for teenagers, but with the advent of the Internet and wireless communication devices, bullying others has become easier, more widespread, highly accessible, and as a result, more dangerous.[15] "It is difficult enough to support one's child through a siege of schoolyard bullying. But the lawlessness of the Internet, its potential for casual, breathtaking cruelty, and its capacity to cloak a bully's identity all present slippery new challenges to this transitional generation of analog parents."[16]

On October 26, 2010, a month after Clementi's suicide, the Department of Education responded to the event by sending a letter to thousands of school districts and universities urging them to monitor and, when necessary, punish bullying.[17] "At a minimum," the letter directed, "the school's responsibilities include making sure the harassed students and their families know to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems."[18] The Department of Education emphasized its support of school anti-bullying policies, and recognized the Internet as a new medium for bullying.[19] However, it provided little guidance as to how schools should address bullying incidents.[20] Instead, the letter focused on bullying that may amount to civil rights violations and possible school liability when these incidents go unaddressed.[21] It detailed steps to take with incidents that involve gender, religion or race-based harassment, but ignored

from Russlynn Ali]., *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

15. *See* Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound From Afar,* N.Y. TIMES, Aug. 26, 2004, http://query.nytimes.com/gst/fullpage.html?res=9E00E6D8133EF935A1575BC0A9629C8B63.

16. Jan Hoffman, *As Bullies Go Digital, Parents Play Catch-up*, N.Y. TIMES, Dec. 4, 2010, http://www.nytimes.com/2010/12/05/us/05bully.html?_r=1&pagewanted=all.

17. Letter from Russlynn Ali, *supra* note 14.

18. *Id*. at 3.

19. *Id*.

20. *See id*. at 3–4.

21. *Id*. at 4–10.

the realities and complexities of general bullying.[22] The letter concluded by pointing out that "[s]chool personnel who understand their legal obligations . . . are in the best position to prevent [bullying.]"[23] Therein, however, lies the problem.

A school's legal obligations to punish an incident of cyberbullying are unclear.[24] If the cyberbullying meets the federal definition of harassment, a federal prosecution may be possible.[25] The letter, however, did not address the legal obligations of schools when the bullying does not fall into one of the narrow federal categories of harassment.[26] Bullying based on a person's physical appearance, for example, must be addressed by an ambiguous state bullying statute, if there is one at all.[27]

This Note discusses cyberbullying from a criminal law perspective:[28] What are the current laws addressing cyberbullying? What are their limitations? What can schools do to combat episodes of bullying without violating students' First Amendment rights?[29] Should the State step in and shoulder the burden of punishing aggressors?[30]

Part II examines the Internet and cell phone phenomenon as it relates to teenagers and how that phenomenon has created a

22. *Id*. at 4.

23. *Id*. at 1.

24. *See infra* Parts III & IV.

25. Letter from Russlynn Ali, *supra* note 14, at 2.

26. *Id*.

27. *See infra* Part III; *see also* Shira Auerbach, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1663 n.134 (2009).

28. Victims of cyberbullying may also seek redress through civil suits. *See generally* Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41 (2007), http://thepocketpart.org/2007/09/08/areheart.html (arguing that the Communications Decency Act should be amended to allow victims of cyberbullying to sue Internet Service Providers for the hurtful content posted on their websites); Auerbach, *supra* note 27, at 1669–74 (discussing the various private causes of action available to a victim of cyberbullying and concluding the best to be intentional infliction of emotional distress); Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257 Part II.D (2008) (arguing that civil remedies are an inadequate method of addressing cyberbullying).

29. *See infra* Parts III & IV.

30. *See infra* Part V.

new venue for bullying. Additionally, Part II explores bullying and the negative physical and psychological effects it has on teens. Finally, Part II examines the ways in which cyberbullying differs from traditional bullying, making it more dangerous.

Part III discusses the legal framework in which school officials and law enforcement officials are operating currently. Specifically, Part III focuses on the state bullying statutes in place and how they are enforced. Part III then examines state cyberbullying statutes and identifies their weaknesses.

Part IV discusses the limitations the First Amendment imposes on schools and law enforcement when trying to punish bullies. Specifically, Part IV analyzes the Supreme Court decisions that have considered limits schools can impose on student speech. The test adopted to determine when speech can be limited without running afoul of the First Amendment is called the "substantial disruption" doctrine. By tracing this test's development through Supreme Court jurisprudence and its subsequent application in lower court cases, Part IV exposes the flaws of having such an ambiguous test serve as the basis for cyberbullying laws.

Part V examines whether criminalization of cyberbullying is the correct response to the problem. Focusing on what is the best solution for society as a whole, and not just the individual victim of a cyberbullying incident, Part V concludes that criminalizing cyberbullying is the appropriate response. However, the statutes need to be narrowly tailored in order to avoid criminalizing innocent behavior, or exposing schools to liability.

Finally, Part VI examines the limitations of the substantial disruption doctrine as it is currently incorporated into cyberbullying laws. Part VI argues that bullying statutes need to be amended, shifting their current focus from the substantial disruption test to instead concentrate on the mens rea of the aggressor.

II. THE RISE OF CYBERBULLYING

A. Problems Associated with Bullying

Bullying, whether done in person or over the Internet, can have serious consequences for the victim.[31] The term bullying is generally associated with repeated, unprovoked harassment directed toward another individual or a group of individuals.[32] Bullying has been defined as "aggressive behavior or intentional 'harm doing' by one person or a group, generally carried out repeatedly and over time and involving a power differential."[33] Researchers estimate that "at least five percent of [students] in primary and secondary schools (ages seven–sixteen) are victimized by bullies each day. . . ."[34] Bullying creates a wide range of psychological consequences, ranging from social anxiety, depression, and low self-esteem.[35] In most cases, the victim feels "lonely, humiliated, insecure, and fearful [of] going to school . . . ."[36] Students who are bullied at school often do not wish to return to that environment, leading to tardiness or absenteeism.[37] Truancy, consequently, interferes with the academic achievement of students by causing them to drop out.[38] Dropping out, in turn, has been linked with "vandalism, shoplifting . . . drug use, and fighting."[39] Most troubling, the victim of constant bullying experiences an increase in suicidal thoughts.[40]

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31. HINDUJA & PATCHIN, *supra* note 7, at 11–12.

32. *Id*.

33. *Id*. at 11.

34. *Id*. at 13 (emphasis omitted).

35. *Id*. at 13–14. ("[E]ating disorders and chronic illness have affected many of those who have been tormented by bullies, while other victims have run away from home.").

36. *Id*. at 14.

37. *Id*.

38. *Id*.

39. *Id*. Moreover, the authors of *Bullying Beyond the Schoolyard* remind us that it was bullying that led Eric Harris and Dylan Klebold to open fire at Columbine High School, killing fifteen and wounding twenty-four others before taking their own lives. *Id*.

40. *Id*. (explaining that "[g]enerally speaking, victims tend to consider suicide and attempt suicide more often than non-victims").

B. A New Medium for Bullying

The Internet provides teens with a virtual playground on which to bully their classmates.[41] With this new venue, traditional bullying has taken on a new form dubbed "cyberbullying."[42] Cyberbullying is defined as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[43] This definition requires that the behavior be deliberate, that it occur more than once, that the victim perceives the harm, and that it be done through an electronic device, such as a computer or cell phone.[44] Typically, the term cyberbullying has been used to describe a situation in which at least one of the parties is a minor.[45] Cyberbullying is distinguished from cyber harassment because the bullying is aimed at threatening one specific person for reasons other than gender, race, or religious beliefs.[46] Generally, the aggressor perceives victims of cyberbullying as a threat.[47] Cyberbullying can take place over a variety of highly accessible and highly visible mediums,[48] like Facebook, Myspace and YouTube.[49] Additionally, bullies can create their own websites,[50]

41. *See* Harmon, *supra* note 15.

42. HINDUJA & PATCHIN, *supra* note 7, at 5.

43. *Id.*

44. *Id.*

45. *Id.* at 5–6. However, in recent years the term has been expanded to include threatening conduct in the workplace. *See* Jacqueline D. Lipton, *Combating Cyber-Victimization,* EXPRESSO 8 n.26, *available at* http://works.bepress.com/jacqueline_lipton/11.

46. *See* Lipton, *supra* note 45, at 8 n.30. Cyber harassment includes incidents where the victim is threatened because of his race, gender, sexual orientation, etc. *Id.*

47. *See id.* at 9. Lipton suggests that "[t]his notion of bullying would cover the Megan Meier scenario where Lori Drew—the perpetrator of the 'Josh Evans' scam—perceived Meier as a potential threat to her own daughter. She targeted Meier because of this perceived threat, rather than because of Meier's gender or race, attributes that would be typically the subject of harassment law." *Id.*

48. *See* Harmon, *supra* note 15.

49. *See* Tokumatsu & Lloyd, *supra* note 9.

50. *See, e.g.*, BABE VS. BABE, http://www.babevsbabe.com (last visited Apr. 10, 2011) (pitting two women against each other in an attractiveness competition; users declare, in their opinion, who is "hotter" based on uploaded photos that stand side-by-side on the webpage); HOT OR NOT,

or attack a victim through text or instant messenger. Recent studies show that seventy-five percent of teenagers between twelve and seventeen have experienced cyberbullying.[51]

In the same way the telephone transformed people's ability to communicate with one another over great distances in the early Twentieth century, the Internet has altered and expanded this ability for modern society.[52] As of June 30, 2010, 1.9 billion people worldwide use the Internet.[53] Approximately 266 million of these users live in North America.[54] As a result of this rapid technological expansion, teenagers now grow up in a world where blogs[55] and social networking sites[56] are king, and face-to-face interactions are becoming as quaint as a handwritten letter.[57] Teenagers, even more so than adults, have embraced the Internet revolution.[58] According to studies, ninety-three percent

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http://www.hotornot.com (last visited Apr. 10, 2011) (*Hot or Not* is a website on which girls are categorized as "hot" or "not." A picture of a girl is uploaded and then users go on to the site and vote as to whether they think a particular girl is attractive or not.); HINDUJA & PATCHIN, *supra* note 7, at 35–41 (noting some of the most common forms of cyberbullying).

51. Press Release, Stuart Wolpert, Univ. Cal. L.A., Bullying of Teenagers Online Is Common, UCLA Psychologists Report (Oct. 2, 2008), http://newsroom.ucla.edu/portal/ucla/bullying-of-teenagers-online-is-64265.aspx.

52. HINDUJA & PATCHIN, *supra* note 7, at 7.

53. *World Internet Usage Statistics News and World Population Stats*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats.htm (last visited Apr. 10, 2011).

54. *Id*.

55. *See It's the Links, Stupid*, ECONOMIST, Apr. 20, 2006, http://www.economist.com/node/6794172. A blog (a blend of the words web and log) is a type of website or part of a website. Blogs are usually maintained by an individual with regular entries, or "posts," of commentary, descriptions of events, or other material such as graphics or video. *Id*. "Each post is stored on its own distinct archive page," also known as a perma-link. *Id*.

56. Social networking sites have been defined as "web based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system." danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008).

57. HINDUJA & PATCHIN, *supra* note 7, at 7.

58. *See id.; see also Teen and Young Adult Internet Use*, PEW RES. CENTER, http://pewresearch.org/millennials/teen-internet-use-graphic.php (last visited Jan. 8, 2011).

of teenagers between the ages of twelve and seventeen go online daily.[59] Teens in the same age bracket also have embraced social networking sites.[60] As of Fall 2009, eighty-two percent of teens have a profile page on a social networking site, such as Facebook or MySpace.[61] In addition to the Internet, teens stay connected through mobile devices.[62] As of April 2010, Approximately seventy-five percent of teens owned cell phones, up from forty-five percent in 2004.[63] Of the teens with cell phones, fifty-four percent text daily, with half of them sending approximately 1500 texts a month.[64] These statistics suggest that teens are immersed in an Internet culture that is often indistinguishable from their offline lives.[65]

C. Issues Specific to Cyberbullying

Besides the obvious venue change, cyberbullying differs from traditional bullying in other ways, making it more dangerous.[66] In their book, *Bullying Beyond the Schoolyard*, Sameer Hinduja and Justin Patchin lay out five issues specific to cyberbullying.[67] First, the ability to attack victims through the Internet lends the bully anonymity.[68] Bullies who attack in person are readily identifiable and can be avoided or punished if necessary.[69]

59. *See Teen and Young Adult Internet Use*, *supra* note 58.

60. Sameer Hinduja & Justin Patchin, *Cyberbullying Research Survey, The Changing Nature of Social Networking*, CYBERBULLYING RES. CENTER, http://www.cyberbullying.us/changes_in_teens_online_social_networking_2006_2009.pdf (last visited Mar. 27, 2011).

61. *See id*.

62. Amanda Lenhart, *Teens, Cell Phones and Texting: Text Messaging Becomes Centerpiece Communication,* PEW RES. CENTER (Apr. 20, 2010), http://pewresearch.org/pubs/1572/teens-cell-phones-text-messages.

63. *Id*.

64. *Id*.

65. HINDUJA & PATCHIN, *supra* note 7, at 8 ("Adults generally use computers and cell phones to accomplish a specific task . . . these devices have become an integral part of almost *all* of the day-to-day activities of many youth.").

66. Hoffman, *supra* note 16 ("[O]nline bullying can be more psychologically savage than schoolyard bullying.").

67. HINDUJA & PATCHIN, *supra* note 7, at 20–24.

68. *Id*. at 20–21.

69. *See id*.

Anonymity leaves the victim wondering who is attacking them and why.[70] Second, cyberbullying increases the bully's accessibility to the victim.[71] Traditional bullying takes place at school, on the bus, or some other social venue somewhat limiting the times in which a bully can strike.[72] When the venue is the Internet, accessibility to the victim is virtually unlimited.[73] Third, while any form of bullying creates fear of retribution for a tattletale, cyberbullying further discourages the reporting of incidents.[74] Because a typical parental response to threatening messages online is line is to cut off the victim's access, victims are fearful of losing their computer or cell phone privileges.[75] Fourth, the amount of bystanders to a bullying episode increases exponentially when done in cyberspace.[76] An audience at a traditional bullying incident is limited to a relatively few number of classmates, but once a message hits the cyber world, millions can view it, thereby exacerbating the embarrassment for victims.[77] Finally, the Internet creates disinhibition for bullies.[78]

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70. *See id*.

71. *Id*. at 24–25.

72. *Id*. "[B]ecause of the prominence of the school in the lives of youth," bullying often occurs "at or near that environment." *Id*. at 13. "A 16-year-old girl from Alabama writes: 'It's one thing when you get made fun of at school, but to be bullied in your own home via your computer is a disgusting thing for someone to do and I think anyone who gets kicks out of it is disgusting.'" *Id*. at 24.

73. *See* Harmon, *supra* note 15.

74. *See* Hinduja & Patchin, *Share Your Story,* CYBERBULLYING RES. CENTER, http://cyberbullying.us/shareyourstory.php.

75. *Id*. A 13-year-old girl after being cyberbullied commented, "I wanted to tell my parents but I was afraid that they would never let me chat again and I know that's how a lot of other kids feel." *Id*.*; see also* Hoffman, *supra* note 16 (reporting that two-thirds of parents take away their children's cell phones as punishment this is a quote).

76. HINDUJA & PATCHIN, *supra* note 7, at 23.

77. *Id*. For example, a teenage girl was photographed dancing at a concert. The photo was altered, placing the girl into embarrassing and offensive positions, some of which were sexually suggestive. The photos were subsequently posted on the Internet. Within a few weeks, the photos had spread to multiple message boards, some of which were attracting a quarter of a million hits and thirty responses a page. The girl, who became known as "Moshzilla," said: "[Y]ou can't help but realize that you are being humiliated across the country. In a nutshell, I feel sh***y." Leslie Katz, *When 'Digital Bullying' Goes Too Far*, CNET (June 22, 2005, 4:00 AM), http://news.cnet.com/

Because of the anonymity the Internet provides, bullies are free from restraints on their behavior, saying and doing things they normally would not do.[79] For example, a middle school guidance counselor was forced to intervene when a 12-year-old girl showed her an instant message exchange on which a male classmate wrote, "[m]y brother says you have really good boobs."[80] School guidance counselors point out that boys are much more sexually explicit with their advances when done online.[81] Moreover, without having to deal with immediate emotions or physical reactions that result from schoolyard bullying, cyberbullies post more hurtful messages without fear of immediate retribution.[82] When hurtful messages are expressed in person, a very real likelihood exists that the recipient will respond with either physical or verbal violence.[83] In cyberspace, however, the victim cannot immediately react. "Time, in fact, is . . . rendered completely irrelevant, because the offending act can be discovered by the victim anytime in the future. . .."[84] "[T]he spatial distance between the individuals insulates the aggressor from realizing the full meaning of what accompanies the typed-out words."[85] The bully, in effect, cannot see when he has crossed the line.[86]

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when-digital-bullying-goes-too-far/2100-1025_3-5756297.html.

78. HINDUJA & PATCHIN, *supra* note 7, at 21–22.

79. *Id.*; *see also* Hoffman, *supra* note 16 (quoting a cyber crimes specialist, "It's not the swear words . . . . They all swear. It's how they gang up on one individual at a time. 'Go cut yourself.' Or 'you are sooo ugly' — but with 10 u's, 10 g's, 10 l's, like they're all screaming it at someone.").

80. Harmon, *supra* note 15.

81. *Id.*

82. HINDUJA & PATCHIN, *supra* note 7, at 22.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* One 17-year-old boy commented, "I wasn't taking into consideration the fact that they might not think that my jokes were too funny. If they ask me to stop or showed signs of me wanting to stop, I do immediately. I was online and they didn't say for me to stop, so I had no way of knowing what mood they were in. I told them something that I regret now." *Id.*

III. REGULATING BULLYING IN SCHOOLS

A. Traditional Bullying Laws

Bullying is not a new problem, but the Internet has created new and more vicious ways for a bully to attack.[87] Historically, bullying has not been a topic of great public concern.[88] Many adults believe bullying to be a "rite of passage" that children must endure.[89] However, following the tragic events at Columbine High School in 1999, bullying was thrust into the limelight.[90] Beginning in 2001, states began to address bullying with legislation.

As of February 2011, forty-four states have passed an anti-bullying law.[91] Typically, these statutes require public school

87. *See infra* Part II.

88. HINDUJA & PATCHIN, *supra* note 7, at 7.

89. *Id*.

90. James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, http://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html?ref=columbinehighschool.

91. *See* ALA. CODE § 16-28B (West, Westlaw through 2010 Legis. Sess.); ALASKA STAT. § 14.33.200 (West, Westlaw through 2010 Legis. Sess.); ARIZ. REV. STAT. ANN. § 15-341 (2010); ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2010 Legis. Sess.); CAL. EDU. CODE § 32270 (West, Westlaw through 2010 Legis. Sess.); COLO. REV. STAT. ANN. § 22.32.109.1 (West, Westlaw through 2010 Legis. Sess.); CONN. GEN. STAT. ANN § 10-222d (West, Westlaw through 2010 Legis. Sess.); DEL. CODE ANN. tit., 14 § 4112D (West, Westlaw through 2010 Legis. Sess.); FLA. STAT. ANN. § 1006.147 (West, Westlaw through 2010 Legis. Sess.); GA. CODE ANN. § 20-2-751.4 (West, Westlaw through 2010 Legis. Sess.); IDAHO CODE ANN. § 18-917A (West, Westlaw through 2010 Legis. Sess.); 105 ILL. COMP. STAT. 5/27-23.7 (West, Westlaw through 2010 Legis. Sess.); IND. CODE ANN. § 20-33-8-0.2 (West, Westlaw through 2010 Legis. Sess.); IOWA CODE ANN § 280.28 (West, Westlaw through 2010 Legis. Sess.); KAN. STAT. ANN. § 72-8256 (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 525.080 (West, Westlaw through 2010 Legis. Sess.); LA. REV. STAT. ANN. § 17:416.13 (2001); ME. REV. STAT. ANN. tit., 20-A § 1001 (2010); MD. CODE ANN. EDU. § 7-424 (West, Westlaw through 2010 Legis. Sess.); MASS. GEN. LAWS ANN. ch. 71 § 37O (West, Westlaw through 2010 Legis. Sess.); MICH. COMP. LAWS § 380.1 (West, Westlaw through 2010 Legis. Sess.); MINN. STAT. ANN. § 121A.0695 (West, Westlaw through 2010 Legis. Sess.); MISS. CODE ANN. § 37-11-67 (West, Westlaw through 2010 Legis. Sess.); MO. ANN. STAT. § 160.775 (West, Westlaw through 2010 Legis. Sess.); NEB. REV. STAT. § 79-2, 137 (West, Westlaw through 2010 Legis.

districts to establish policies that define acts of bullying and prohibit it on school property or at school functions.[92] Many states have passed comprehensive legislation defining acts that constitute bullying, and what procedures schools should follow when an incident occurs. One of the best examples of an effective anti-bullying law comes from New Hampshire, passed in 2010.[93] New Hampshire's bill defines bullying as:

> [A] single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
>
> (1) Physically harms a pupil or damages the pupil's property;
>
> (2) Causes emotional distress to a pupil;
>
> (3) Interferes with a pupil's educational opportunities;
>
> (4) Creates a hostile educational environment; or
>
> (5) Substantially disrupts the orderly operation of the school.[94]

Sess.); NEV. REV. STAT. ANN. § 388.123 (West, Westlaw through 2010 Legis. Sess.); NEV. REV. STAT. ANN. § 388.132 (West, Westlaw through 2010 Legis. Sess.); N.H. REV. STAT. ANN. § 193-F:3 (2010); N.J. STAT. ANN. § 18A:37-14 (West, Westlaw through 2011 Legis. Sess.); N.M. STAT. ANN. § 22-2-21 (West, Westlaw through 2010 Legis. Sess.); N.Y. EDU. LAW § 2801 (McKinney's through 2010 Legis. Sess.); N.Y. EDU. LAW § 2801-a (McKinney's through 2010 Legis. Sess.); N.C. GEN. STAT. ANN. § 115C-407.15 (West, Westlaw through 2010 Legis. Sess.); N.D. CENT. CODE ANN § 12.1-17-07 (West, Westlaw through 2010 Legis. Sess.); OHIO REV. CODE ANN. § 3313.666 (West, Westlaw through 2010 Legis. Sess.); OKLA. STAT. tit., 70 § 24-100.3 (West, Westlaw through 2010 Legis. Sess.); OR. REV. STAT. ANN. § 339.351 (West, Westlaw through 2010 Legis. Sess.); 24 PA. STAT. ANN. § 13-1303.1-A (West, Westlaw through 2010 Legis. Sess.); R.I. GEN. LAWS ANN. § 16-21-26 (West, Westlaw through 2010 Legis. Sess.); S.C. CODE ANN. § 59-63-120 (2010); TENN. CODE ANN. § 49-6-1015 (West, Westlaw through 2010 Legis. Sess.); TEX. EDU. CODE ANN. § 37.0832 (West, Westlaw through 2010 Legis. Sess.); UTAH CODE ANN. § 53A-11a-102 (West, Westlaw through 2010 Legis. Sess.); VT. STAT. ANN. tit., 16, § 11 (West, Westlaw through 2010 Legis. Sess.); VA. CODE ANN. § 22.1-279.6; WASH. REV. CODE ANN § 28A.300.285 (West 2007); W. VA. CODE ANN. § 18-2C-3 (West 2001); WIS. STAT. ANN. § 118.46 (West 2010); WYO. STAT. ANN. § 21-4-312 (West, Westlaw through 2010 Legis. Sess.).

92. *See, e.g.,* S.C. CODE ANN. § 59-63-120 (2010).

93. N.H. REV. STAT. ANN. § 193-F:3 (2010).

94. *Id.*

On the other end of the spectrum, several states leave school districts in the dark by requiring schools to adopt policies prohibiting bullying, but do not clearly define bullying or what procedures should be taken should an incident arise.[95] For example, the Connecticut anti-bullying law requires schools to adopt a policy to address bullying, but it does not clearly define punishments nor explain what bullying means.[96] The Connecticut Act tells school districts to "[e]nable students to anonymously report acts of bullying to teachers and school administrators," but it does not define bullying.[97] The lack of consistency amongst states regarding bullying and exactly when schools can intervene is alarming, especially considering the First Amendment constraints on schools.[98] The problems with applying traditional bullying statutes have carried over to cyberbullying statutes.[99]

B. Cyberbullying Laws

Until recently, cyberbullying was essentially ignored as a problem for teens and adolescents. However, in the wake of the numerous high-profile cyberbullying incidents,[100] teachers, parents, school administrators, law enforcement officials, and state legislators have begun to seek understanding of this new form of youth violence.[101] The stories of Megan Meier and Tyler Clementi speak to the harmful nature of cyber attacks and serve as a warning to adults who previously failed to act, or did so inappropriately.[102]

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95. For an in-depth look at the various laws, see BULLY POLICE USA, http://www.bullypolice.org/. (last visited October 18, 2011). Bully Police USA is a bullying watchdog organization that grades each state's anti-bullying law based on twelve criteria the authors of the site feel are crucial to an effective bullying law. *Id.*

96. CONN. GEN. STAT. ANN § 10-222d (West, Westlaw through 2011 Legis. Sess.).

97. *Id.*

98. *See infra* Part III.

99. *See infra* Part III.B.

100. *See supra* note 8 and accompanying text.

101. HINDUJA & PATCHIN, *supra* note 7, at 7.

102. *See supra* Part I.

Most importantly, state legislatures recognized the problem and began amending their existing bullying statutes to include provisions for cyber attacks, or creating new statutes aimed at cyberbullying.[103] In 2007, for example, the governor of Oregon declared a "cyberbullying emergency."[104] As of February 2011, six states have amended their bullying statutes to include the term "cyberbullying,"[105] and thirty now include the term "electronic harassment" in their definition of bullying.[106] The South Carolina legislature, for example, amended the Safe School Climate Act in 2006 to extend its definition of bullying to reach

103. *See infra* Part III.B.

104. *See* Auerbach, *supra* note 27, at n. 111.

105. *See* ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2010 Legis. Sess.); KAN. STAT. ANN. § 72-8256 (West, Westlaw through 2010 Legis. Sess.); MASS. GEN. LAWS ANN. ch. 71 § 37O (West, Westlaw through 2010 Legis. Sess.); NEV. REV. STAT. ANN. § 388.132 (West, Westlaw through 2010 Legis. Sess.); N.H. REV. STAT. ANN. § 193-F:3 (2010); OR. REV. STAT. ANN. § 339.351 (West, Westlaw through 2010 Legis. Sess.).

106. *See* ALA. CODE § 16-28-B (2010); ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2010 Legis. Sess.); CAL. EDU. CODE § 32270 (West, Westlaw through 2010 Legis. Sess.); FLA. STAT. ANN. § 1006.147 (West, Westlaw through 2010 Legis. Sess.); GA. CODE ANN. § 20-2-751.4 (West, Westlaw through 2010 Legis. Sess.); IDAHO CODE ANN. § 18-917A (West, Westlaw through 2010 Legis. Sess.); 105 ILL. COMP. STAT. 5/27-23.7 (West, Westlaw through 2010 Legis. Sess.); IOWA CODE ANN § 280.28 (West, Westlaw through 2010 Legis. Sess.); KAN. STAT. ANN. § 72-8256 (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 525.080 (West, Westlaw through 2010 Legis. Sess.); MD. CODE ANN. EDU. § 7-424 (West, Westlaw through 2010 Legis. Sess.); MINN. STAT. ANN. § 121A.0695 (West, Westlaw through 2010 Legis. Sess.); MISS. CODE ANN. § 37-11-67 (West, Westlaw through 2010 Legis. Sess.); MO. ANN. STAT. § 160.775 (West, Westlaw through 2010 Legis. Sess.); NEB. REV. STAT. § 79-2, 137 (West, Westlaw through 2010 Legis. Sess.); NEV. REV. STAT. ANN. § 388.123 (West, Westlaw through 2010 Legis. Sess.); NEV. REV. STAT. ANN. § 388.132 (West, Westlaw through 2010 Legis. Sess.); N.H. REV. STAT. ANN. § 193-F:3 (2010); N.J. STAT. ANN. § 18A:37-14 (West, Westlaw through 2011 Legis. Sess.); N.M. STAT. ANN. § 22-2-2 (West, Westlaw through 2010 Legis. Sess.); N.C. GEN. STAT. ANN. § 115C-407.15 (West, Westlaw through 2010 Legis. Sess.); OKLA. STAT. tit., 70 § 24-100.3 (West, Westlaw through 2010 Legis. Sess.); OR. REV. STAT. ANN. § 339.351 (West, Westlaw through 2010 Legis. Sess.); 24 PA. STAT. ANN. § 13-1303.1-A (West 2008); R.I. GEN. LAWS ANN. § 16-21-26 (West 2008); S.C. CODE ANN. § 59-63-120 (2010); TENN. CODE ANN. § 49-6-1015 (West, Westlaw through 2010 Legis. Sess.); UTAH CODE ANN. § 53A-11a-102 (West, Westlaw through 2010 Legis. Sess.); VA. CODE ANN. § 22.1-279.6 (2010); WASH. REV. CODE ANN § 28A.300.285 (West, Westlaw through 2010 Legis. Sess.); WYO. STAT. ANN. § 21-4-312 (West, Westlaw through 2010 Legis. Sess.).

incidents of cyberbullying.[107] The Safe School Climate Act defines bullying as a "gesture, an *electronic communication*, or a written, verbal, physical, or sexual act."[108] Seven states now impose criminal sanctions for cyberbullying.[109] North Carolina House Bill 1261, ratified in 2009, makes cyberbullying a Class 1 misdemeanor if the defendant is 18 years of age or older, or a Class 2 misdemeanor if the defendant is under the age of 18.[110]

In addition to defining cyberbullying, most statutes specify when schools may intervene and punish a bully for his actions.[111] Typically, schools are told to intervene when the student's actions create a "substantial disruption" at the school.[112] South Carolina's statute, for instance, advises school districts to intervene when the student's conduct can be reasonably perceived to have the effect of, "insulting or demeaning a student or group of students causing substantial disruption in, or substantial interference with, the orderly operation of the school."[113] The key phrase in the statutory language is that the student's actions must cause a "substantial disruption" in the school's orderly operation.[114] The South Carolina Act, however, does not define what types of actions or reactions must be present for a substantial disruption to exist.[115] Similarly, the Arkansas cyberbullying statute requires every public school district to adopt policies to prevent bullying in which a student's conduct must create a "[s]ubstantial disruption of the orderly

107. S.C. CODE ANN. § 59-63-120 (2010).

108. *Id*. (emphasis added).

109. IDAHO CODE ANN. § 18-917A (West, Westlaw through 2010 Legis. Sess.); KY. REV. STAT. ANN. § 525.080 (West, Westlaw through 2010 Legis. Sess.); MO. ANN. STAT. § 160.775 (West, Westlaw through 2010 Legis. Sess.); NEV. REV. STAT. ANN. § 388.123 (West, Westlaw through 2010 Legis. Sess.); N.C. GEN. STAT. ANN. § 14.458.1(b) (West Supp. 2010) TENN. CODE ANN. § 49-6-1015 (West, Westlaw through 2010 Legis. Sess.); WIS. STAT. ANN. § 118.46 (West, Westlaw through 2010 Legis. Sess.).

110. N.C GEN. STAT. § 14.458.1(b) (West Supp. 2010.).

111. *See, e.g.*, ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2010 Legis. Sess.).

112. *See infra* Part IV.

113. S.C. CODE ANN. § 59-63-120(1)(b) (2010).

114. *Id*.

115. *Id*.

operation of the school or educational environment."[116] The Arkansas statute, unlike the South Carolina statute, defines substantial disruption.[117] The Arkansas statute provides that a substantial disruption has occurred when, as a result of bullying, one of the following exists:

> (i) [a] [n]ecessary cessation of instruction or educational activities; (ii) [an] [i]nability of students or [educators] to focus on learning or [to] function as an educational unit because of a hostile environment; (iii) [a need for] [s]evere or repetitive discipline. . .in the classroom or during educational activities; or (iv) [an] [e]xhibition of other behaviors by students or [educators] that substantially interfere[s] with the learning environment.[118]

That South Carolina declined to define a substantial disruption while Arkansas attempted to, illustrates the confusion that exists between states in how to properly address cyberbullying.

IV. THE FIRST AMENDMENT IN SCHOOLS

The substantial disruption language derives from a series of four Supreme Court cases.[119] It's relevant for cyberbullying purposes because Internet and phone communications are considered speech for First Amendment purposes. Because student speech is protected by the First Amendment, the Supreme Court has ruled that schools can punish or limit student speech only when that speech creates a substantial disruption on the school's property.[120] The substantial disruption test is ambiguous and a poor test on which to base criminal

116. ARK. CODE ANN. § 6-18-514 (West, Westlaw through 2010 Legis. Sess.).

117. § 6-18-514(D).

118. *Id*.

119. Morse v. Frederick, 551 U.S. ___, 127 S. Ct. 2618 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969).

120. *Morse*, 551 U.S. ___, 127 S. Ct. 2618; *Hazelwood*, 484 U.S. 260; *Fraser*, 478 U.S. 675; *Tinker*, 393 U.S. 503.

statutes.[121] Further, problems with the substantial disruption doctrine are exacerbated when a student's actions take place off-campus—as is the case with the majority of cyberbullying incidents.[122] In order to better understand the test, some background is necessary.

One of the biggest obstacles school districts face in trying to address incidents of bullying and cyberbullying is the First Amendment. As the Supreme Court has explained: "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[123] The Court, however, through a series of four cases, announced that schools may limit student speech when the speech creates a "substantial disruption" to the learning environment.[124] The true meaning of what constitutes a substantial disruption remains ambiguous, but the Court has laid down some guideposts.[125]

121. *See infra* Part VI.

122. *See infra* note 174–75 and accompanying text.

123. *Tinker*, 393 U.S. at 506.

124. *Morse*, 551 U.S. at ___, 127 S. Ct. at 2627; *Hazelwood*, 484 U.S. at 271 n.4; *Tinker*, 393 U.S. at 514; *see Fraser*, 478 U.S. at 675 (Brennan J., concurring).

125. Adding to the problem of the substantial disruption test's ambiguity is that school officials can be held liable for addressing or failing to address a bullying problem. *Compare* Patterson v. Hudson Area Sch., 551 F.3d 438, 443, 450 (6th Cir. 2009) (finding liability where officials failed to address the issue of bullying), *with* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180, 1182 (E.D. Mo. 1998) (finding liability where officials addressed abusive student speech). Moreover, Tyler Clementi's parents recently served a legal notice on Rutgers indicating their intention to sue. Clementi's parents claim Rutgers "failed to act, failed to put in place, and/or failed to implement, and enforce policies and practices that would have prevented or deterred such acts." Nathan Koppel, *Could Rutgers Face Liability over Student Suicide?*, WALL ST. J. (Dec. 23, 2010, 2:25 PM), http://blogs.wsj.com/law/2010/12/23/could-rutgers-face-liability-over-student-suicide.

A. The Creation of a Substantial Disruption

1. *Tinker v. Des Moines Independent Community School District*

In 1969, the Court established the substantial disruption doctrine in the landmark student speech case *Tinker v. Des Moines Independent Community School District*.[126] In *Tinker*, a high school in Des Moines "adopted a policy that any student wearing an armband to school" symbolizing protest over the Vietnam War "would be asked to remove it, and if [the student] refused[,] he would be suspended until he returned without the armband."[127] In spite of the policy, three students wore black armbands to school to voice their protest and consequently were sent home and suspended.[128] The students, through their parents, brought suit challenging their suspension as a violation of their First Amendment right to freedom of speech.[129] The Court overturned the students' suspension reasoning that public schools may not censor student speech unless it "materially and substantially interfere[s] with" the educational environment.[130] The speech at issue in *Tinker*, the Court noted, was "passive" political speech.[131] The students did not cause a commotion at school or otherwise substantially interrupt the learning environment.[132] Moreover, as the Court observed, the regulation against black armbands was motivated not for "fear of

126. 393 U.S. 503 (1969).

127. *Id*. at 504.

128. *Id*.

129. *Id*.

130. *Id*. at 509 (alteration in original). The First Amendment, however, only protects limitations on speech against state actors, which include public, but not private, school officials. Thus, private schools may have more leeway when it comes to restricting student speech. For example, in *Ubriaco v. Albertus Magnus High School*, a private school suspended a student for creating a website of which the school disapproved. No. 99 Civ. 11135, 2000 WL 1010568 (S.D.N.Y. July 21, 2000). The student brought suit based on First Amendment grounds, but the court dismissed his claim holding that "the school's action in expelling a student for what it considered to be inappropriate behavior cannot by any stretch of the imagination be considered state regulation of the [I]nternet." *Id*.

131. *Tinker*, 393 U.S. at 508, 514.

132. *Id*. at 514 ("[The students] neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.").

disruption," but rather "was directed against 'the principle of the demonstration' itself."[133] Because the silent protest was not shown to have caused a commotion or otherwise disrupted the orderly operations of the school, a substantial disruption had not occurred.[134] The Court, however, declined to further define what type of actions might constitute a substantial disruption, only ruling that wearing black armbands did not.[135]

2. *Bethel School District v. Fraser*

A few years later in *Bethel School District v. Fraser* the Court began to shape the contours of the substantial disruption doctrine.[136] In *Fraser*, the Bethel School District suspended a student for three days after he delivered a speech full of sexual innuendos in front of six hundred students at a school assembly.[137] The student delivered the speech to promote his fellow classmate for a student government position, and the assembly was part of a school-sponsored educational program in self-government.[138] Fraser stated: "[The candidate] 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."[139] A guidance counselor noted that during the speech many students responded by hooting, yelling or gesturing in a way that simulated the sexual activities alluded to in Fraser's speech.[140] Later that afternoon a teacher testified that she was forced to forgo part of her lesson plan to discuss the speech.[141] Fraser brought suit challenging his suspension as a violation of his First Amendment right to freedom of speech.[142] The Court upheld the

133. *Id*. at 509 n.3.
134. *Id*. at 514.
135. *Id*.
136. 478 U.S. 675 (1986).
137. *Id*. at 677–78.
138. *Id*.
139. *Id*. at 687 (Brennan, J., concurring).
140. *Id*. at 678 (majority opinion).
141. *Id*.
142. *Id*. at 679.

suspension because it found Fraser's speech interfered with the school's purpose of providing an educational program in self-government.[143] The Court distinguished between the protected political speech at issue in *Tinker* and Fraser's sexually explicit speech, holding that the school district "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."[144] The student protests in *Tinker*, the Court found, "did not concern speech or action that intrude[d] upon the work of the schools or the rights of other students."[145] The underlying principle that emerged from *Fraser* was that when a student's speech interferes with the school's purpose of providing an educational program in self-government, or a student's actions interferes with the right of other students, a substantial disruption likely has occurred.[146]

3. *Hazelwood School District v. Kuhlmeier*

Two years later, the Court considered *Hazelwood School District v. Kuhlmeier*.[147] In *Hazelwood*, a student-member of a school sponsored newspaper brought a First Amendment suit against the school district when a high school principal ordered the removal of certain articles.[148] Prior to the publication of each issue of the paper, the journalism teacher submitted the issue to the principal for final approval.[149] One issue contained articles regarding teen pregnancy and divorce, respectively.[150] The principal, disliking the articles and believing time to be insufficient to edit the articles before they went to press, ordered the teacher to remove the articles from the issue.[151] Kuhlmeier, along with two other staff members, brought suit against the

143. *Id.*
144. *Id.* at 685.
145. *Id.* at 680.
146. *See id.* at 686–87.
147. 484 U.S. 260 (1988).
148. *Id.* at 264.
149. *Id.*
150. *Id.* at 263.
151. *Id.*

school district alleging a violation of their right to free speech.[152] The Court sided with the school district holding that a school can exercise editorial control over school-sponsored expressive activities so long as their actions are "reasonably related to legitimate pedagogical concerns."[153]

Hazelwood is distinct from *Tinker* and *Fraser* because it considered whether schools can limit objectionable speech in school-sponsored activities that use school resources, notwithstanding the First Amendment.[154] The *Hazelwood* Court, in contrast to *Tinker* and *Fraser*, held that the school does not necessarily need to show a material and substantial disruption to regulate school-sponsored speech.[155] In so holding, the Court created yet another standard. The Court reasoned that because schools are entitled to control speech that could be reasonably attributed to the school, the First Amendment does not require the school to allow speech that conflicts with values held by the school.[156]

4. *Morse v. Frederick*

In 2007, the Court continued to expand the authority of schools to regulate student speech.[157] In *Morse v. Frederick*, a high school student displayed a large banner reading, "BONG HiTS 4 JESUS" during the Winter Olympics torch relay.[158] Students were released from school earlier in the day to watch the torch come through town.[159] Frederick, with the help of a few other students, unveiled the banner across the street from the school.[160] Fearful that the sign promoted drug use—which was against school policy—the school's principal grabbed the banner and later suspended Frederick, who brought suit under the First

152. *Id.*
153. *Id.* at 273.
154. *Id.* at 270–71.
155. *Id.* at 272.
156. *Id.*
157. Morse v. Frederick, 551 U.S. ___, 127 S. Ct. 2618 (2007).
158. *Id.* at ___, 127 S. Ct. at 2619.
159. *Id.* at ___, 127 S. Ct. at 2621.
160. *Id.* at ___, 127 S. Ct. at 2619.

Amendment.[161] The Court held that the principal's actions did not violate the First Amendment because Frederick's behavior violated school policy.[162] The Court held that the "First Amendment does not require schools to tolerate at school events student expression that contributes" to the dangers of illegal drug use.[163] The Court reasoned that because schools have a substantial interest in curbing the use of illegal drugs, "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[164]

In short,

> [u]nder *Fraser*, a school may categorically prohibit vulgar language or profanity on school property. Under [*Hazelwood]*, a school may regulate school-sponsored speech on the basis of any legitimate pedagogical concern. Otherwise, speech falling in neither of these categories is subject to the *Tinker* rule; it may only be regulated if it materially disrupts school operations.[165]

B. Off-Campus Actions

All of the cases discussed above concerned situations in which a student's challenged speech occurred on campus,[166] at a school activity,[167] or through the use of a school-sponsored medium.[168] Cyberbullying adds a new wrinkle to the substantial disruption doctrine because most cyberbullying attacks occur off-campus on personal electronic devices.[169] One school principal from Florida commented: "In our district, we are seeing . . . students bullying other students, resulting in the victims taking their own life. It seems we do not have any recourse for these

161. *Id*. at ___, 127 S. Ct. at 2621.
162. *Id*.
163. *Id*. at ___, 127 S. Ct. at 2629.
164. *Id*. at ___, 127 S. Ct. at 2621.
165. Auerbach, *supra* note 27, at 1651–52.
166. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
167. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
168. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
169. *See infra* Part VI.

online student behaviors that occur off-campus."[170] The Supreme Court has not directly addressed the issue of whether schools can discipline students for off-campus actions. However, many lower courts have held that schools are allowed to punish a student when his or her speech is clearly threatening or harassing to students or teachers, or when it disrupts the learning environment.[171] The cases emphasize the unreasonably high substantial disruption standard the Supreme Court has set to uphold school district disciplinary measures taken against cyberbullies.

1. *J.S. v. Bethlehem Area School District*

In 1998, a high school student in Pennsylvania created a website from home entitled "Teacher Sux."[172] The website referenced several of the school's teachers and its principal.[173] One of the pages contained a diagram of a teacher, Mrs. Fulmer, with her head cut off and blood dripping from her neck.[174] Mrs. Fulmer testified that she feared for her life, and eventually left school on a medical sabbatical.[175] The principal of the school testified that the website created an atmosphere of low morale throughout the school.[176] The "effect on the morale of the students and staff at Nitschmann Middle School was comparable to the death of a student or staff member," he said.[177]

In response, the school suspended the student, who appealed his suspension through his parents as a violation of his First Amendment rights.[178] The Supreme Court of Pennsylvania affirmed the suspension reasoning that "school officials [can]

170. HINDUJA & PATCHIN, *supra* note 7, at 111.

171. *E.g.,* Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1272 (W.D Wash. 2007); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 848 (E.D. Mo. 1998); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 848 (Pa. 2002).

172. *J.S.*, 807 A.2d at 851.

173. *Id.*

174. *Id.*

175. *Id.* at 852.

176. *Id.*

177. *Id.*

178. *Id.* at 852.

discipline students for conduct occurring off school premises [where it is established that] the conduct materially and substantially interferes with the educational process."[179] The court emphasized the negative effect the website had on the teachers who were referenced, particularly Mrs. Fulmer.[180] Concluding that the student, in creating the website, substantially disrupted the school's educational process, the court found that the principal did not violate the First Amendment by suspending the student.[181]

2. *Beussink v. Woodland R-IV School District*

Conversely, in *Beussink v. Woodland R-IV School District*,[182] the United States District Court for the Eastern District of Missouri held that a principal violated the First Amendment for suspending a high school student who created a website that was critical of the school's administration.[183] The student created the website at home and testified that he did not intend for it to be accessed at school.[184] Eventually, however, word of the website circulated around campus and students accessed it from school computers.[185] The school principal discovered the website and suspended the student for ten days.[186] Aside from a disciplinary notice being delivered to the student in class, the website created no other disruption.[187] The student, through his parents, sought to enjoin the school from enforcing his suspension based on First Amendment grounds.[188] The district court granted the injunction reasoning that the principal suspended the student solely because he was upset with the website, and further, that it did not create, or threaten to create, a substantial disruption.[189]

179. *Id*. at 853.
180. *Id*. at 859.
181. *Id*. at 868–69.
182. 30 F. Supp. 2d 1175 (E.D. Mo. 1998).
183. *Id*. at 1177, 1182.
184. *Id*. at 1178.
185. *Id*.
186. *Id*. at 1179.
187. *Id*.
188. *Id*. at 1177.
189. *Id*. at 1181–82.

"While speech may be limited based upon a fear or projection of such disruption, that fear must be 'reasonable' and not an 'undifferentiated fear' of a disturbance."[190] The district court reasoned that, "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*,"[191] because "it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment."[192] Finally, the court concluded that speech creating a substantial interference with the school may be limited, but not speech that is merely unpopular.[193]

3. *Requa v. Kent School District No. 415*

Further adding to the confusion as to when schools can limit student speech occurring off-campus is *Requa v. Kent School District No. 415*.[194] In *Requa*, a high school student posted a link from his MySpace page to a video on YouTube that made fun of a teacher's hygiene and weight, amongst other things.[195] The video was recorded surreptitiously in class and featured (1) footage of a student making 'rabbit ears' and a pelvic thrust behind her back, and (2) footage of her buttocks accompanied by graphics stating "Caution Booty Ahead."[196] The students responsible for the video were suspended for forty days.[197] Citing *Tinker* and *Fraser*, the district court upheld the suspension:

> The school district is not required to establish that an actual educational discourse was disrupted by the student's activity. The "work and discipline of the school" includes the maintenance of a civil and respectful atmosphere towards teachers and students alike—demeaning, derogatory, sexually suggestive behavior toward an unsuspecting teacher in a

190. *Id*. at 1180.
191. *Id*.
192. *Id*. at 1182.
193. *Id*.
194. 492 F. Supp. 2d 1272 (W.D. Wash. 2007).
195. *Id*. at 1274.
196. *Id*.
197. *Id*. at 1275.

classroom poses a disruption of that mission whenever it occurs.[198]

4. *Tinker*'s Limited Reach in Off-Campus Cases

While these cases are factually distinct from situations in which a student, not a school employee, is threatened or harassed, they highlight the problem in applying the substantial disruption test to issues of cyberbullying. When an administrator is attacked, the relationship between the bully and the school is much closer, and the possibility of a substantial disruption is stronger.[199] However, "[i]f courts are hesitant to allow schools to regulate student speech directed at school employees, the case for school regulation of cyberbullying directed at non-school employees may be even weaker, since the nexus to the school, and the opportunity for school disruption, is more attenuated."[200]

Moreover, these cases illustrate the difficulty schools encounter when applying the substantial disruption test. Although the courts in *J.S.* and *Requa* found that the students' speech sufficiently affected the on-campus atmosphere to justify disciplinary action by the school, they stand as an exception to the trend. Most courts addressing the issue of off-campus Internet speech have denied school districts power to punish students for what, many times, is vulgar, cruel, sexually explicit, or threatening speech.[201] Because the current trend has been to give off-campus Internet speech First Amendment protection, many school officials are frustrated and left wondering what can

198. *Id.* at 1280.

199. Auerbach, *supra* note 27, at 1654.

200. *Id.*

201. *See, e.g.*, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007). *Layshock* is another case in which a student created a website critical of his school's administration that many students viewed on campus. *Id.* at 590–92. The site caused students to congregate around school computers and laugh, resulting in the school technology coordinator spending twenty-five percent of his work-week handling issues related to the website. *Id.* at 592–93. The court, however, found that the disruption did not meet the *Tinker* standard because "no classes were cancelled, no widespread disorder occurred, [and] there was no violence or student disciplinary action." *Id.* at 600.

be done to address speech that does not cause enough problems on campus to rise to the level of a substantial or material disruption, but still negatively affects the school environment and the students who attend the school.[202]

The majority of states are choosing to incorporate the substantial disruption language into their bullying statutes.[203] Requiring schools to show a substantial disruption on campus for actions taking place off-campus places schools in an awkward "damned if you do, damned if you don't" position.[204] Schools that act without showing a substantial disruption can be held liable and be forced to pay damages to the bully.[205] On the other hand, school administrators, unclear on what constitutes a substantial disruption, may choose to not address a bullying incident and consequently may have to pay damages to the victim.[206] It is a difficult position to place school administrators in and begs the question: should bullying be a crime in the first place?

V. IS CRIMINALIZATION THE ANSWER?

Following so many high-profile incidents of cyberbullying,[207] the initial, and indeed seemingly righteous reaction, was to impose harsh punishments for those responsible. But what is the appropriate response? Following the Tyler Clementi incident, numerous professors and legal scholars commented on the proper reaction to cyberbullying.[208] Many urged caution in approaching the situation arguing that more criminal legislation would only

202. *See, e.g.*, *id.* at 606; *Beussink*, 30 F. Supp. 2d at 859 (emphasizing the negative effect on teachers who were referenced).

203. *See supra* Part III.

204. For example, one school was forced to pay $117,250 to an expelled student because it failed to show a substantial disruption at school. *See* Tresa Baldas, *As 'Cyber-Bullying' Grows, and So Do Lawsuits*, THE NAT'L L. J. (Dec. 10, 2007), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1196935473552&slreturn=1&hbxlogin=1 ("In New Jersey, a school district paid a $117,500 settlement in 2005 to a teenager after a court ruled that it had violated the student's First Amendment rights by suspending him over a [website] the teen had created criticizing his school and faculty.").

205. *Id.*

206. *See supra* note 129.

207. *See supra* Part I.

208. Room for Debate, *supra* note 13.

exacerbate the problem.[209] One law professor at Loyola Law School Los Angeles pointed out:

> Cyberbullying is growing and our legal system does not seem ready for it. With legitimate concerns about the First Amendment on one side, and equally legitimate concerns about the dangers of such conduct on the other, prosecutors are often left to shoehorn this new wave of behavior into laws created long before there was an Internet.
>
> Because it is difficult to draft a law that allows the full range of free speech, but also serves to deter the type of behavior recently in the news, the government is left to use statutes that [do not] quite fit, like false statements to Internet service providers or invasion of privacy or civil rights violations. All of these are weak substitutes for crimes that really involve psychological warfare.[210]

Paul Butler, a former federal prosecutor, argued that "[i]f prosecutors [cannot] find anything to charge a particular cyberbully with, that bully has not committed a crime. If simply being a jerk was a criminal offense, we would need many more prisons than the hundreds we already have."[211] He maintained that suicides, while tragic, are not the result of the bullying alone, but of much deeper seeded issues in society.[212] Societal homophobia, he proposed, was the underlying issue that led Clementi to commit suicide, not the cyberbullying.[213]

Alternatively, Justin Patchin, one of the co-authors of *Bullying Beyond the Schoolyard* argued that laws addressing cyberbullying could be "useful," but only "to the extent that they [call] attention to [the] problem."[214]

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209. *See, e.g.*, Paul Butler, *Not Every Tragedy Should Lead to Prison*, N.Y. TIMES, Sept. 30, 2010, http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/new-criminal-laws-arent-the-answer-to-bullying.

210. Laurie L. Levenson, *What Isn't Known About Suicides*, N.Y. TIMES, Sept. 30, 2010, http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/what-isnt-known-about-suicides.

211. Butler, *supra* note 209.

212. *Id.*

213. *Id.*

214. Justin W. Patchin, *Most Cases Aren't Criminal*, N.Y. TIMES, Sept. 30,

> [I]t is important that laws are crafted in a way that is informed by research, not singular high profile incidents.
>
> The vast majority of cyberbullying incidents can and should be handled informally: with parents, schools, and others working together to address the problem before it rises to the level of a violation of criminal law.[215]

On the other hand, another former prosecutor, Daniel Gelb, argued that the States should get involved and laws should be passed to address cyberbullying.[216] Gelb reasoned that a victim of cyberbullying cannot escape the Internet because it is such an integral part of modern life.[217] Consequently, Gelb asserts, the Internet provides the bullies with a new platform that is permanent and allows bullies to further exploit victims by ganging up on him or her.[218] "Abus[e] on these forums can lead to extreme emotional stress and mental anguish, even culminating in the victim committing suicide. The law must evolve to address how our society communicates, promoting proper conduct, and deterring future bullying with a legal means to punish those who cause harm."[219]

Criminal law is the best method of dealing with cyberbullying. An advantage of addressing cyberbullying with a criminal law is that it, unlike a civil action, does not require the victim to shoulder the burden of court costs.[220] Even though criminal trials, like civil suits, require victims to relive the embarrassment and humiliation of the incidents, they are a better venue than civil trials because "[c]losed criminal trials may be preferable in particularly sensitive cases."[221] Additionally, making a potential civil claim stick has obstacles of

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2010, http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/most-bullying-cases-arent-criminal.

215. *Id*.

216. *See* Daniel K. Gelb, *Privacy Invasions Last Forever*, N.Y. TIMES, Sept. 30, 2010, http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/privacy-invasions-now-last-forever.

217. *Id*.

218. *Id*.

219. *Id*.

220. Lipton, *supra* note 45, at 16.

221. *Id*.

its own.[222]

Moreover, while civil suits can be effective for personal justice, society as a whole is still left trying to deal with the issue.[223] Criminal law, on the other hand, "seeks to punish and deter wrongdoing while civil law seeks to provide remedies that make a plaintiff whole."[224] Moreover, as one commentator argues, not having a criminal statute directly on point may lead to over-criminalization.[225] Having unclear standards, the commentator observes, leads to two possibilities:

> [I]ndividuals will either successfully target their victims online without risking criminal liability, or they may face the potential to be charged with violating laws that do not truly pertain to their actions and intent. Neither outcome is desirable, and both serve as reasons that states should update their laws accordingly.[226]

Criminal laws, however, still need to be well-crafted. Overbroad statutes, like those based on the substantial disruption doctrine, can be challenged on First Amendment grounds.[227]

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222. *See supra* note 28 and accompanying text.

223. Lipton, *supra* note 45, at 17.

224. *Id.*; *see also* Kate E. Schwartz, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 427 (2009).

225. *Id.* at 424. Following the Megan Meier incident, Lori Drew—the mother responsible for the MySpace posts—was charged with conspiracy and three counts relating to the Computer Fraud and Abuse Act, which was passed to address hacking problems. *Id.* Specifically, the complaint alleged that Drew violated the MySpace terms of agreement that required truthful information be given when registering. *Id.* A jury convicted Drew of misdemeanor computer crimes, but she was eventually acquitted due to deficiencies in the statute. *Id.* "[W]hatever Drew intended to do, hacking MySpace was not it." *Id.* at 425 (quoting Andrew M. Grossman, *The MySpace Suicide: A Case Study in Overcriminalization*, 32 THE HERITAGE FOUND. 2, 6 (Sept. 17, 2008), http://www.heritage.org/Research/Reports/2008/09/The-MySpace-Suicide-A-Case-Study-in-Overcriminalization).

226. *Id.* at 426 (internal citations omitted).

227. *See* Leah Ward, *Suspended on Saturday? The Constitutionality of the Cyberbullying Act of 2007*, 62 ARK. L. REV. 783, 806 (2009). Ward analyzes Arkansas cyberbullying statute and concludes that its language is too overbroad and vague to withstand a First Amendment challenge. *Id.*

VI. FROM A SUBSTANTIAL DISRUPTION TO MENS REA

Current cyberbullying statutes are based on the substantial disruption doctrine.[228] Whether a school administrator can intervene is determined by whether or not the students' speech resulted in a substantial disruption at school.[229] Actual, material disruption to the school environment—irrespective of where the speech originated—is the touchstone to the majority of the cases considering the substantial disruption doctrine.[230] In the case of cyberbullying, most incidents originate off-campus,[231] and it seems clear that cyberbullying taking place off-campus would impact the learning environment, at least for the victim of the attack.[232] At what point, however, does the cyberbully substantially disrupt the school environment as a whole such that administrators can take action? As *J.S* teaches, the speech has to be vulgar and threatening enough that it essentially ends someone's career.[233] Otherwise, as *Hazelwood* illustrates, simply offensive speech does not rise to the level of a substantial disruption.[234] The immediate concern with what is essentially a school self-help method is that if legislators and the Supreme Court cannot seem to agree on what constitutes a substantial disruption, how can school administrators be expected to recognize one?[235]

228. *See supra* Part III.

229. *See supra* Part IV.

230. *See supra* Part IV.

231. *See supra* Part I & Part II.

232. *See supra* Part I & Part II.

233. *See* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 848 (Pa. 2002); *see also supra* Part IV.B.1.

234. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *see also supra* Part IV.A.3.

235. *See* Ward, *supra* note 227 (arguing that the vague and overbroad language codified within the Arkansas anti-bullying statute is likely to be challenged on First Amendment grounds).

A. Limitations of the *Tinker* Test for Cyberbullying Cases

The *Tinker* standard permits schools to punish cyberbullying incidents resulting in a substantial disruption to the entire school environment, but overlooks the fact that bullies generally target individuals, not the entire school.[236] Typically, bullies target weaker students rather than large groups of students.[237] The victim may feel the effect of the bullying incident, but the remainder of the school likely has no idea that the bullying is occurring, let alone feel its effects.[238] As one commentator points out:

> 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 required in cases like *J.S.*[239]

Thus, the existing statutes offer conflicting messages about cyberbullying. A bully who attacks his victim on school grounds or at a school function "will be subject to discipline."[240] However, a bully who sends threatening e-mails, text-messages, or broadcasts embarrassing images on the Internet, "face[s] no consequences for [these] actions."[241]

Moreover, *Tinker*'s ambiguity results in inconsistencies when trying to balance free speech with the interest of protecting bullying victims.[242] The substantial disruption standard may allow aggressors to escape any liability by invoking the First Amendment.[243] Some constitutional lawyers argue that schools are taking the issue too far, punishing students for comments that are protected by the First Amendment.[244] One commentator

236. *See* Erb, *supra* note 28, at 274.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *See supra* Part III.
243. *Supra* Part III.
244. *See* Baldas, *supra* note 204. A First Amendment attorney who has won

illustrates the inconsistency of *Tinker* by highlighting conflicting arguments by legal experts.[245] Two professors posit that, in *J.S.*, Mrs. Fulmer's reaction to the website was too sensitive,[246] and thus it should not have been considered a substantial disruption.[247] Another legal scholar shared this view commenting that "we all just have to remember that you need a thick skin. . . . It's a matter of common sense. You have to decide what's a real threat and what's a joke. If you take absolutely every threat seriously, you'll end up missing the serious ones because your resources will be exhausted."[248] Without a clear standard, courts will continue to misinterpret the *Tinker* standard, resulting in bullies going unpunished, and in some cases violating a student's First Amendment rights.[249]

With all the problems associated with the substantial disruption doctrine, basing anti-bullying statutes on it is not an effective means of addressing the issue. More than likely, most cyberbullying punishments will be challenged on First Amendment grounds, resulting in years of litigation and high court costs for all parties associated.[250] Incidents of cyberbullying are best dealt with not by educators, who are untrained and ill-prepared to recognize and address a substantial disruption, but rather the state should step in by criminalizing cyberbullying and thereby dedicate resources to the problem. This is not to say that the First Amendment does not also limit a state's ability to regulate speech, but there are certain categories

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four cyberbullying lawsuits says, "[t]he position that we have consistently taken is that speech that takes place at home is outside of the purview of the schools. They simply cannot punish for speech at home." *Id.* The attorney went on to state that the key to winning cyberbullying cases is to show that the school possesses "no evidence that the online posting caused a substantial disruption of the school day." *Id.*

245. *See* Sandy S. Li, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 89 (2005).

246. *Id.*; J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002); *supra* Part IV.B.1.

247. Li, *supra* note 245, at 89.

248. *Id.* (alterations in original).

249. *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see also supra* Part IV.A.1.

250. *See* Ward, *supra* note 227, at 806.

of speech recognized as beyond protection of the First Amendment.[251] Indeed, the Supreme Court has addressed the issue of offensive speech as it pertains to the First Amendment.

Although not an absolute rule, the Supreme Court has held that States generally may not regulate speech based on its content.[252] However, the Court has consistently recognized "certain well-defined and narrowly limited classes of speech" that may be constitutionally prohibited.[253] These classes of speech "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words,"[254] and "true 'threat[s].'"[255] "Fighting words" have been described by the Court as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" and words "plainly likely to cause a breach of the peace by the addressee."[256] Moreover, "personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[257] The Supreme Court has indicated two situations where speech constitutes fighting words: First, "[w]here it is likely to cause a violent response against the speaker," and second, "where it is an insult likely to inflict immediate emotional harm."[258] The latter situation, in particular, is applicable to cyberbullying. The Court has indicated that any statute prohibiting speech inciting violence in listeners must be limited to fighting words only.[259]

251. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY, 45–54 (1992).

252. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992).

253. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

254. *Id*. at 572.

255. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam). The "true threats" exception to the First Amendment is unlikely to yield positive results for cyberbullying statutes. *See* Michael R. Gordon, Recent Development, *The Best Intentions: A Constitutional Analysis of North Carolina's New Anti-Cyberbullying Statute*, 11 N.C. J.L. & TECH. 48, 62–65 (2009) ("Most of the speech targeted by the [North Carolina cyberbullying statute] . . . does not rise to the level of a true threat.").

256. *Chaplinsky*, 315 U.S. at 572–73.

257. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

258. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1347 (3d ed. 2009).

259. *Id*. at 1351.

Otherwise, it is likely to be unconstitutionally vague or overbroad.[260] "[F]ighting words law[s] will be upheld only if it is specific and narrowly tailored to apply just to speech that is not protected by the First Amendment."[261]

How then does harassing speech, such as that implicated in cyberbullying cases, withstand a First Amendment challenge? The Supreme Court has never considered the constitutionality of a criminal statute that prohibits harassing speech, but several State courts have upheld such statutes. In *Commonwealth v. Welch*,[262] for example, the Massachusetts Supreme Court upheld a state harassment statue, and in so doing offered some insight as to why certain harassment statutes are upheld while others are struck down.[263]

> Most commonly, statutes have been upheld that contain some combination of the following limiting characteristics: a "willful," "malicious," or specific intent element; a requirement that the conduct be "directed at" an individual; a reasonable person standard; a statutory limitation that the conduct have "no legitimate purpose"; and a savings clause excluding from the statute's reach constitutionally protected activity or communication.[264]

260. *Id*.

261. *Id*.

262. 825 N.E.2d 1005 (Mass. 2005).

263. *Id*. at 1018–19.

264. *Id*. at 1018; *see also, e.g*., State v. Brown, 85 P.3d 109, 111 (Ariz. Ct. App. 2004) (upholding a harassment statute because it prohibited verbal communications "directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person" but not "otherwise lawful demonstration, assembly or picketing"); Bouters v. State, 659 So.2d 235, 236–37 (Fla. 1995) (holding a stalking statute constitutional because "harasses" was defined as participating in a course of conduct that is directed at a specific person, is willful and malicious, causes substantial emotional distress, serves no legitimate purpose, and does not include constitutionally protected activity); State v. Button, 622 N.W.2d 480, 482 (Iowa 2001) (finding constitutional a harassment law that prohibited oral communications made with the intent "to threaten, intimidate, or alarm" because the "constitutional safety valve" that the harassing communications provide no "legitimate purpose"); State v. Asmussen, 668 N.W.2d 725, 729–31 (S.D. 2003) (upheld stalking statute that criminalized verbal communications because it directed that the communications be willful, malicious, directed at a particular person, and serve

It is clear from the above language that the "savings clause" is an attempt to stay within the fighting words doctrine by proscribing only those words. Following the advice of the court in *Welch*, legislators should adopt cyberbullying statutes focused on the bully's mens rea,[265] rather than the result of his action. Therefore, based on the criteria offered by the *Welch* court, the appropriate mens rea for a cyberbullying statute should be specific intent, with the best being knowingly. A consequence is "knowingly" caused if the defendant "is aware that it is practically certain that his conduct will cause such a result."[266] The causation element of a cyberbullying act should be satisfied if the actions taken by the defendant "would cause a reasonable person in [the victim's] position to suffer mental or emotional distress."[267] The standards for determining both the intent and causation elements should be both subjective and objective; a subjective approach for the bully's intent, and an objective approach for the victim's reaction. Combining the two standards is effective because each provides a protection that ensures that criminal liability is not improperly imposed.[268] "The inclusion of a subjective intent standard prevents punishment of innocuous speech misunderstood by a recipient . . . ."[269] On the other hand,

no legitimate purpose); Luplow v. State, 897 P.2d 463, 464–65, 467 (Wyo.1995) (finding a state statute constitutional that prohibits verbal communication but limits the prohibition to communications directed at a person, that would cause a reasonable person substantial emotional distress, does cause serious alarm, and does not include lawful demonstration, assembly, or picketing).

265. Mens rea is a Latin term used to describe criminal intent. *See generally* ELLEN S. PODGOR ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 104–10 (2d ed. 2009). Intent is used to separate crimes into different levels of culpability. *Id*. at 105–06. At common law, levels of intent were separated into general and specific intent crimes, with specific intent requiring the prosecution to prove that the accused had some conscious intention of completing the act he was charged with. *Id*. The Model Penal Code separated intent into four categories. *Id*. at 107–10. The first two, purposely and knowingly, are associated with specific intent crimes. *Id*. The next two, recklessly and negligently, are thought to be general intent crimes. *Id*.

266. MODEL PENAL CODE § 2.02(2)(b)(ii).

267. S.C. CODE ANN. §16-3-1700 (2009).

268. *See* Schwartz, *supra* note 229, at 432.

269. Scott Hammack, *The Internet Loophole: Why Threatening Speech Online Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 97–98 (2002).

"an objective test is far more predictable and results in less self-censorship than its subjective counterpart."[270] Therefore, cyberbullying statutes should gauge the harm to the victim through a reasonable person standard, thereby eliminating over-sensitive people from pressing charges.[271]

Additionally, as the *Welch* court indicated, the law should include a statement that the statute does not include constitutionally protected speech or activities.[272] Unlike the political speech the Court protected in *Tinker*, most incidents of cyberbullying involve comments that are offensive and serve no other purpose than to injure.[273]

Based on the above criteria, a sample cyberbullying complaint would read:

> On or about January 9, 2011, the defendant knowingly caused emotional distress to the victim by sending electronic mail to 300 electronic mail addresses, most of which belonged to classmates of the victim, and the content of such e-mail, true or untrue, included sexually explicit and embarrassing photographs.

Intent can be proven with a forensic examination of the sender's computer or information from the Internet Service Provider, evidence that the sender uses that email address, and that he, for example, bragged to someone that he sent the e-mail. Causation can be shown by the victim recounting what she felt when she learned of the content of the e-mail and that it was sent to her peers. As discussed above, the standard for causation should be an objective one. Applying the above criteria to New Hampshire's bullying statute should result in an effective legislation. Bullying should be defined as:

> (a) A single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, that serves no legitimate purpose and is directed at another person that

270. Schwartz, *supra* note 224, at 431–32 (quoting Hammack, *supra* note 269, at 101).

271. *See supra* note 229 and accompanying text.

272. *See* Commonwealth v. Welch, 825 N.E.2d 1005, 1018–19 (Mass. 2005).

273. *See supra* Part II.

the defendant knows will result and does result in:

> (1) Physical harm to a pupil or damages the pupil's property;
> (2) Causes emotional distress to a pupil;
> (3) Interferes with a pupil's educational opportunities; or
> (4) Creates a hostile educational environment.

Eliminating the substantial disruption language, and instead making the statute a specific intent crime in addition to including a provision indicating that the statute does not proscribe speech that serves a legitimate purpose could successfully circumvent the First Amendment.

VII. CONCLUSION

As the number of teenagers going online continues to expand, the problem of cyberbullying will continue to get worse. The Internet is a wonderful tool that allows people to connect with one another quickly and effectively. However, it also provides a dangerous venue on which to expose, ridicule or harass others, and on which there is no effective recourse for victims. State statutes that attempt to regulate cyberbullying are an encouraging sign, but the current trend of only allowing schools to punish cyberbullies when their actions create a substantial disruption on campus seriously hinders the ability of concerned parties to effectively address the issue. The substantial disruption doctrine upon which cyberbullying statutes are currently based is vague, and will only lead to First Amendment challenges—perpetuating the problem instead of solving it. The difficulty in balancing First Amendment rights on one hand and protecting victims of cyberbullying on the other can be effectively addressed by statutes that place the responsibility of punishing bullying in the hands of government officials and focus on the intent of the bully, instead of the resulting harm. Cyberbullying, like any other crime, cannot be eradicated, but through focused legislation, it can be drawn back in the hopes that serious incidents, leading perhaps to suicide, will be deterred.