Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech

I. INTRODUCTION

The Internet is a blessing and a curse.[1] Along with the manifold benefits the Internet provides—electronic research, instantaneous news, social networking, online shopping, to name a few—comes a host of dangers: online harassment and cyberbullying, hacking, voyeurism, identity theft, phishing, and perhaps still more perils that have yet to appear.[2] The Internet creates a virtual world that can result in very real consequences for people's lives. This creates a challenge for parents, schools, and policymakers attempting to keep pace with rapidly developing technologies and to provide adequate protections for children. The even greater challenge, however, is to balance these vital protections with the equally compelling freedoms of speech, expression, and thought.[3]

The heart-wrenching suicide of Missouri teenager Megan Meir in 2006 directed national attention to the devastating effects of online harassment and cyberbullying.[4] Megan was a thirteen-year-old middle-school student who engaged in an online relationship with a purported fellow teen, Josh Evans, through the popular social-

1. While the Internet presents certain dangers, it also amplifies First Amendment interests in many ways. *See* Reno v. A.C.L.U., 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, 'the content on the Internet is as diverse as human thought.' We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

2. *See* Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media, Violence and Adolescents: An Emerging Public Health Problem*, 41 J. ADOLESCENT HEALTH S1, S5 (2007) (noting that many risks come along with the "tremendous positive social and learning opportunities" created by electronic media).

3. *See* JOHN D. & CATHERINE T. MACARTHUR FOUND., LIVING AND LEARNING WITH NEW MEDIA: SUMMARY OF FINDINGS FROM THE DIGITAL YOUTH PROJECT 2 (2008), http://www.macfound.org/atf/cf/{B0386CE3-8B29-4162-8098-E466FB856794}/DML_ETHNOG_2PGR.PDF (recommending that adults "facilitate young people's engagement with digital media" to develop necessary social and technical skills).

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

networking website MySpace.[5] What began as a friendly and flirtatious exchange of messages escalated into a barrage of cruel and insulting attacks that drove Megan, who suffered from clinical depression, to take her own life.[6] Megan's mother found her hanging in her closet by her neck from a belt the day of Josh's final posting: "The world would be a better place without you."

In a tragic twist of events following Megan's death, her parents discovered that Josh Evans never existed.[7] Instead they found that Lori Drew, an adult neighbor and mother of one of Megan's female friends, created the profile in order to learn Megan's opinion of her daughter.[8] Sadly, the hoax escalated far beyond that initial intent.

Megan's story is not unusual; sadly, cyberbullying occurs in many forms and contexts throughout the country.[9] The problem primarily impacts youth, arguably the subset of our population most deserving of legislative protection.[10] According to the National Crime Prevention Counsel, 43 percent of teens have been victims of cyberbullying, but many are too ashamed or embarrassed to report the incidents to their parents or other authorities.[11]

The breadth and severity of cyberbullying demands a response from communities, parents, schools, and legislatures. However, regulation of online speech treads on delicate constitutional territory.

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5. *Id.* MySpace is an online forum for social networking through which people can communicate, either privately or publicly. Members create profile pages where they can upload images, messages, and videos to share with others on the Internet. For the MySpace terms of use, visit http://www.myspace.com/index.cfm?fuseaction=misc.terms.

6. Maag, *supra* note 4.

7. *Id.*

8. *Id.*

9. *See, e.g.*, Maria Elena Baca, *Cyberbullying: Technology Gives Teens Myriad of Ways to Torment their Peers*, BUFFALO NEWS, Mar. 26, 2007, at C1 (mentioning several cases of cyberbullying, including that of David Knight of Burlington, Ontario who resorted to homeschooling for the remainder of his high school education after an incident of cyberbullying); Molly Walsh, *Teen's Suicide Stirs Family to Action*, BURLINGTON FREE PRESS, Mar. 23, 2004, at A1 (discussing family reaction to suicide of Vermont teenager Ryan Halligan following online harassment). For an overview of the forms of cyberbullying, including flaming, harassment, denigration, impersonation, outing, trickery, exclusion, and cyberstalking, see NANCY WILLARD, EDUCATOR'S GUIDE TO CYBERBULLYING AND CYBERTHREATS (2007), http://www.cyberbully.org/cyberbully/docs/cbcteducator.pdf.

10. *See, e.g.*, Children's Online Privacy Protection Act of 1998, 91 U.S.C. §§ 6501–6506 (2006) (creating special protection for online personal information about children under the age of thirteen); Keeping Children and Families Safe Act of 2003, Pub. L. 108-36, § 121, 117 Stat. 800 (2003) (amending the Child Abuse Prevention and Treatment Act to renew and strengthen programs to reduce child abuse and neglect).

11. National Crime Prevention Council – Newsroom, *Bullying Beyond the Playground: New Research Says 43 Percent of Teens Have Been Victimized But only One in Ten Tell Their Parents*, Mar. 6, 2007, http://vocuspr.vocus.com/VocusPR30/Newsroom/Query.aspx?SiteName=NCPCNew&Entity=PRAsset&SF_PRAsset_PRAssetID_EQ=99308&XSL=PressRelease&Cache=.

In our efforts to make the Internet safer, we must be cautious not to erode the freedom of speech guaranteed by the First Amendment. While the problem of cyberbullying urgently requires a solution, policymakers should avoid the temptation to enact knee-jerk legislation that may be overly broad or create unintended consequences that restrict the freedom of expression.

This Note examines cyberbullying, focusing primarily on its impact on youth, and explores a legislative response to the problem. Part II demonstrates the need for legislation by highlighting the inadequacy of current tort and criminal laws to address cyberbullying. Part III surveys existing and proposed cyberbullying legislation and identifies trends in those laws, most of which address cyberbullying within the public-school context. Part IV identifies potential First Amendment challenges to existing and proposed cyberbullying laws in light of student speech jurisprudence. It then critiques the effectiveness of cyberbullying laws to curtail the problem without trampling First Amendment rights.

Part V offers several constitutional solutions to alleviate cyberbullying, including suggestions for how cyberbullying laws can be crafted to address the problem of online bullying while not eroding First Amendment freedoms. This Part also suggests revision of the Communications Decency Act to create qualified liability for Internet-service providers through which cyberbullies torment their victims in order to encourage these companies to take rational steps to limit the use of their services to perpetuate cyberbullying. Yet the most effective way to deal with cyberbullying is in classrooms, not courtrooms. Because this issue requires a holistic solution of which the law is only one component, Part V also addresses nonlegal measures, including educational and counseling tactics that can further alleviate the problem of cyberbullying. Finally, Part VI offers some concluding remarks on cyberbullying and the current legal landscape, and provides forward-looking recommendations about how legislators, parents, and schools should respond to cyberbullying.

II. THE NEED FOR CYBERBULLYING LEGISLATION

Cyberbullying is already too grave a problem to be ignored, and it is quickly escalating with the proliferation of Internet use and the popularity of social-networking websites.[12] Experts at the Centers for

12. *See* David-Ferdon & Hertz, *supra* note 2, at S1 (observing risks associated with the "explosion of technology and its use by adolescents"); Stacy Katz Carchman, *Cyberbullying: A Growing Threat Among Students,* SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 3, 2009, at 5

Disease Control and Prevention characterize cyberbullying as an "emerging public health problem."[13] Yet cyberbullying victims lack a specific legal remedy in many states. Although victims sometimes can resort to other related criminal laws, such as harassment or cyberstalking, these alternative legal remedies provide inadequate solutions for a unique problem. The time has come for legislative action.

A. Negative Effects of Cyberbullying

Bullying has evolved from the playground to the computer with the rise of Internet connectivity across America.[14] Nancy Willard, executive director of the Center for Safe and Responsible Internet Use, defines cyberbullying as "cruel[ty] to others by sending or posting harmful material or engaging in other forms of social aggression using the Internet or other digital technologies."[15] With teens spending increasing amounts of time on the Internet, online harassment has become more prevalent.[16] An article published in the *Journal of Adolescent Health* reported a 50 percent increase in online harassment of youth from 2000 to 2005.[17] According to a 2007 study conducted by the Pew Internet and American Life Project, one-third of teenagers reported being victims of online harassment.[18] Researchers struggle to discern the precise prevalence of cyberbullying because teenage

(reporting conclusions from a cyberbullying conference that cyberbullying is on the rise and that parents and teachers are not fully aware of the severity of the problem).

13. David-Ferdon & Hertz, *supra* note 2, at S5.

14. *See* H.R. 1072, 86th Gen. Assem., 2007 Reg. Sess. (Ark. 2007) (acknowledging that cyberbullying is a growing problem due to increased student access to the Internet); SHAHEEN SHARIFF, CYBER-BULLYING: ISSUES AND SOLUTIONS FOR THE SCHOOL, THE CLASSROOM AND THE HOME 45, tbl.3.1 (2008) (displaying transnational data on technology and stating that 91 percent of Americans age 12–15 have Internet access).

15. WILLARD, *supra* note 9 (defining cyberbullying to include many forms, such as flaming, harassment, denigration, impersonation, outing, trickery, exclusion, and cyberstalking).

16. *See* ROBIN M. KOWALSKI, SUSAN P. LIMBER & PATRICIA W. AGATSTON, CYBER BULLYING: BULLYING IN THE DIGITAL AGE 70–79 (2008) (summarizing findings of major investigations on the prevalence of cyberbullying); SHARIFF, *supra* note 14, at 70–72 (discussing the rise of Internet use and cyberbullying in America); Jaana Juvonen & Elisheva F. Gross, *Extending the School Grounds?—Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 497 (2008) (expressing concern over the sharp rise in reported incidents of cyberbullying).

17. David-Ferdon & Hertz, *supra* note 2, at S2.

18. *See* Memorandum from Amanda Lenhart on Cyberbullying and Online Teens to Pew Internet & American Life Project (June 27, 2007), *available at* http://www.pewinternet.org/~/media//Files/Reports/2007/PIP%20Cyberbullying%20Memo.pdf (announcing results of study based on a telephone survey of 935 teenagers and focus groups). The study also reported that bullying still occurs more often *offline* than online. *Id.*

victims rarely report incidents to adults.[19] One fact is clear, however: cyberbullying is a major and growing problem for American teens.

The forum and mode of bullying may have changed over the years, but the effects remain every bit as grave. In fact, the negative effects of cyberbullying are often more serious and long-lasting than those of traditional forms of bullying for several reasons.[20] First, the Internet provides a veil of anonymity that encourages users to say things they might not otherwise say in person or even on the phone.[21] Although there are ways to investigate and ultimately discover the identities of cyberbullies, they can communicate harmful messages without identifying themselves, which makes it particularly difficult for victims to respond initially.

Second, an Internet-created communication can be widely distributed at the click of a mouse and accessed by not only the bully and target but endless other users as well, particularly if an e-mail is forwarded en masse or if comments are posted on a public website.[22] Popular social-networking websites such as MySpace and Facebook provide a public forum for cyberbullies to ridicule and humiliate their victims.[23] Even worse, certain websites such as The Dirty are dedicated specifically to online criticism and exist solely for cyberbullies to post photos of individuals along with insulting captions.[24] Some of these smear sites catalogue postings by city or school so visitors can easily access information about those in their communities.[25]

Finally, the sting of cyberbullying tends to linger because hurtful comments may remain online indefinitely, forcing victims to relive the pain every time they turn on the computer or visit a

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19. *See* Juvonen & Gross, *supra* note 16, at 502 (indicating the underreporting of cyberbullying by victims).

20. *See* Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1294 (2007) (discussing why cyberbullying is often worse than offline bullying); David-Ferdon & Hertz, *supra* note 2, at S3 (calling for more research attention directed toward "how some of the unique elements of new media technology may contribute to or compound the negative impact of victimization and increase the likelihood of perpetration").

21. *See* Act 115, H.R. 1072, 86th Gen. Assem., 2007 Reg. Sess. (Ark. 2007) (recognizing that "cyberbullies feel protected by anonymity"); SHARIFF, *supra* note 14, at 32–33 (explaining how Internet anonymity facilitates cyberbullying).

22. SHARIFF, *supra* note 14, at 33 (noting the "wide audience" of cyberbullies).

23. *See* Thomas J. Billitteri, *Cyberbullying: Are New Laws Needed to Curb Online Aggression*, 18 CQ RESEARCHER 387, 388 (2008) (reporting that social-networking sites make cyberbullying easier and more dangerous).

24. The Dirty, http://thedirty.com/ (last visited Feb. 22, 2010).

25. *See, e.g.*, *id.* (enabling visitors to click on categories such as "cities" and "colleges" to easily locate "the dirt" in their area).

particular website.[26] In contrast to the relative ease and speed with bullies can engage in online harassment, the effects can be disproportionately harsh and long-lasting.

Cyberbullying can cause serious psychological harm, including depression, low self-esteem, anxiety, alienation, and suicidal intentions.[27] In severe cases, like that of Megan Meier, cyberbullying may even serve as a catalyst to suicide.[28] Through extensive media coverage of her death, Meier has become the poster child for cyberbullying, but her story is only one example of how cyberbullying can ruin lives.[29] Like Meier, thirteen-year-old Ryan Halligan took his own life after relentless bullying via online instant messaging over a period of three months by classmates accusing him of being gay.[30] For other cyberbullying victims, such as Kylie Kenney, the road to recovery can be long, painful, and expensive.[31] Kylie went through years of professional counseling and changed schools twice to deal with the psychological effects of being cyberbullied through a website entitled "Kill Kylie Incorporated" that middle-school classmates created "to show people how gay Kylie Kenney is."[32]

While cyberbullying affects people of all ages, youths are especially vulnerable to online attacks.[33] Peer acceptance is crucial to adolescents.[34] As a result, being cyberbullied by their peers may create

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26. *See* SHARIFF, *supra* note 14, at 34 ("[O]nline communications have a permanency and inseparability that are very difficult to erase.").

27. *See* Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008) (listing the psychological harms and negative impacts of cyberbullying); KOWALSKI, *supra* note 16, at 85-86 (discussing the effects of cyberbullying and comparing them to those of traditional bullying).

28. *See* Baca, *supra* note 9, at C1 (highlighting the grave consequences of cyberbullying, including suicide).

29. *See, e.g.*, CyberBully Alert, http://www.cyberbullyalert.com/blog/2008/10/stories-of-cyber-bullying/ (Oct. 13, 2008, 8:52 PST).

30. Leslie A. Pappas, *High-tech Harassment is Hitting Teens Hard*, PHILA. INQUIRER, Jan. 2, 2005, at A1.

31. Suzanne Struglinsky, *Schoolyard Bullying Has Gone High-Tech*, DESERET NEWS, Aug. 18, 2006, *available at* http://www.deseretnews.com/article/1,5143,645194065,00.html.

32. *Id.*

33. Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 331 (2008) ("Cyberbullying has generally been associated with the victimization of minors, yet the term has evolved to include adults as well."); Larry Magid, *Fine Line Between Bullying, Free Speech*, SAN JOSE MERCURY NEWS, Jan. 28, 2008 (reporting that the most cyberbullying consists of teenagers victimizing other teenagers). Some scholars differentiate peer-to-peer cyberbullying and antiauthority cyberbullying. Both are significant, although this note will focus on peer-to-peer bullying among youth. *See* SHARIFF, *supra* note 14, at 194 (classifying two types of cyberbullying: cyber-libel and cyber-insubordination).

34. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Emotional and Psychological Consequences* (2007), http://www.cyberbullying.us/cyberbullying_emotional_consequences.pdf.

stress, frustration, and anger that negatively impacts other areas of psychological and cognitive development.[35] The emotional consequences can spill over into victims' social, academic, and family lives.[36]

When online harassment goes unaddressed and unpunished, it can generate a self-perpetuating culture of cyberbullying that provokes victims to seek revenge and become cyberbullies themselves, thereby exacerbating the problem.[37] As with traditional bullying, both victims and perpetrators are more likely to engage in criminal conduct in the future.[38] Hence, cyberbullying is a problem with lasting ramifications for the individuals involved, as well as society at large.

B. Inadequacies of Existing Legal Remedies

In the absence of cyberbullying laws, victims can resort only to tort law and certain criminal laws aimed at related offenses, such as harassment or cyberstalking. However, these legal remedies are not designed to address the problem of cyberbullying. As a result, they may be insufficient to deter cyberbullies or to protect and compensate their victims. While such laws provide a creative backdoor approach to reaching cyberbullies, they fail to provide a direct means of thwarting cyberbullying.

1. Common Law

Traditional tort law provides one possible cause of action for cyberbullying victims: defamation.[39] However, it may be difficult for cyberbullying victims to prevail.[40] For example, most cyberbullying would logically fit the definition of defamatory material because it

35. *Id.* at 1–2.

36. *Id.* at 2.

37. *See* National Crime Prevention Council, Cyberbullying: A Public Advertising Campaign Aimed at Preventing Cyberbullying, http://www.ncpc.org/newsroom/current-campaigns/cyberbullying (last visited Feb. 22, 2010) (listing examples of common victim reactions to cyberbullying).

38. *See* Ottenweller, *supra* note 20, at 1293 (stating that being bullied is a predictor of later criminal behavior and that this phenomenon applies to online as well as traditional bullying); *see also* OKLA. STAT. tit. 70, § 24-100.3(A) (2008) (showing a correlation between male middle school bullies and later criminal convictions and stating that bullying may lead to several "forms of antisocial behavior, such as vandalism, shoplifting, skipping and dropping out of school, fighting, and the use of drugs and alcohol").

39. Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 277 (2008) (addressing the inadequacy of civil remedies for cyberbullying).

40. *Id.*

"harm[s] the reputation of another by making a false statement to a third person."[41] However, to succeed on a defamation claim, a plaintiff must prove that the statement (a) was false, and (b) caused material damage to her reputation—high hurdles to clear.[42] Cyberbullying content often includes opinions, taunts, or sexual innuendo that, while harmful, may be difficult to refute factually.[43] Also, in the case of many youthful victims of cyberbullying, proving reputational damage is problematic because they have not yet developed professional reputations in the community.[44]

Aside from the causation challenges accompanying tort law, individual civil remedies fail to provide a comprehensive solution to the systemic problem of cyberbullying.[45] Due to the high transaction costs associated with individualized litigation, many victims will lack the means to pursue their claims. Additionally, the possibility that the tortfeasor may be insolvent, and therefore judgment-proof, creates a risk that the victim will not be made whole even after prevailing in court.[46]

2. Communications Decency Act

The Communications Decency Act ("CDA") seeks to prevent obscenity on the Internet while promoting constitutionally protected forms of speech.[47] In order to encourage Internet-service providers ("ISPs") and website operators to enter the market and provide their valuable services to the public, Section 230 of the CDA provides immunity from civil liability for "good faith" efforts by these companies to monitor and restrict illicit content by their users.[48] In *Zeran v. America Online, Inc.*, the Supreme Court interpreted this

41. BLACK'S LAW DICTIONARY 448 (8th ed. 2004) (defining defamation).

42. Erb, *supra* note 39, at 277–79 (discussing the difficulty of prevailing on a defamation claim for cyberbullying).

43. *See id.* at 278–79 (giving examples of cyberbullying content that evades clear proof of falsity).

44. *Id.* (pointing out that students probably will not be able to prove damage to reputation).

45. Communications Decency Act of 1996, 47 U.S.C. § 230 (2006); *see* Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41, 42 (2007) (discussing why tort is an impractical remedy for cyberbullying victims).

46. *See* Areheart, *supra* note 45, at 42 (mentioning the possibility that individual tortfeasors may be judgment-proof); *see also* EXPLORING TORT LAW 123, 129 (M. Stuart Madden ed., 2005) (explaining why tort liability is an insufficient deterrent for insolvent parties and that "insolvency is likely to be the rule rather than the exception" in many tort cases, particularly those involving personal injury, death, or environmental damage).

47. 47 U.S.C. § 230 (2006).

48. *Id.*; *see* Ottenweller, *supra* note 20, at 1302–03 (explaining the immunity for ISPs created by the CDA).

provision as providing absolute immunity for ISPs and website operators in defamation cases.[49] Therefore, only individual creators of cyberbullying content may be held liable for defamatory content.[50] Pursuing an ISP—a defendant far less likely to be judgment-proof than an individual—is not an option for victims of cyberbullying.[51]

After *Zeran*, ISPs enjoy full immunity from civil liability as publishers and distributors of online speech, even when they receive notice that they are supporting tortious content. Consequently, even if a cyberbullying victim notifies an ISP about defamatory material available through its service, the ISP would be under no legal obligation to restrict access to the material, allowing it to remain on the Internet indefinitely. The same blanket immunity applies for website and listserv operators.[52] Facially, the immunity encourages industry self-regulation; operationally, it creates an environment in which ISPs and operators of social-networking websites may turn a blind eye to cyberbullying, a major problem affecting their industry.[53] Similarly, social-networking websites and listserv operators receive the same shield from liability as ISPs under the CDA, regardless of their culpability in posting or even producing defamatory material.[54]

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49. Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (1997); *see* Ottenweller, *supra* note 20, at 1304–07 (discussing the effects of the Zaran decision).

50. *See* Ottenweller, *supra* note 20, at 1317 ("[T]he *Zeran* court removed all legal responsibility for an ISP to remove content posted by cyberbullies when given notice by a parent."); Shaun B. Spencer, *Cyberslapp Suits and Jon Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493, 494 (2001) (explaining the limited availability of defendants in online speech cases due to the broad immunity for ISPs under the CDA); David Lat, *Cyber Law 101*, CONDE NAST PORTFOLIO.COM, Feb. 11, 2009, http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Tips-for-Handling-Cyber-Bullying (advising cyberbullying victims that the only possible defendant in a defamation suit is the individual commenter since website operators are immune under the Communications Decency Act).

51. *See* Areheart, *supra* note 45, at 42 (explaining why cyberbullying victims are unlikely to recover from individuals or ISPs in defamation suits).

52. *See supra* note 48 and accompanying text.

53. *Zeran*, 129 F.3d at 331–33 (explaining Congress's motive in enacting the CDA to encourage ISP self-regulation through absolute civil immunity and arguing that notice-based liability "would deter service providers from regulating the dissemination of offensive material over their own services"); Billitteri, *supra* note 23, at 402 (discussing scrutiny of social-networking sites and their role in preventing cyberbullying); *see* Ottenweller, *supra* note 20, at 1326 ("The absolute immunity afforded to ISPs effectively provides an incentive for providers to ignore removal requests . . . .").

54. *See* Areheart, *supra* note 45, at 42 (illustrating the problem of a broad interpretation of § 230 that shields from liability a moderator of a listserv who posts an allegedly defamatory email authored by a third party and an ISP that played an active role in producing defamatory content); David V. Richards, Note, *Posting Personal Information on the Internet: A Case for Changing the Legal Regime Created by § 230 of the Communications Decency Act*, 85 TEX. L. REV.

ISPs and website hosts play a crucial role in enabling cyberbullies to torment their victims, yet they have no legal obligation to protect their users from cyberbullying.[55] Even upon request from a cyberbullying victim that defamatory material be removed, ISPs and website hosts lack any legal incentive to comply because they are immune from civil suits under the CDA.[56] Although ISPs and website operators help create the online forum where cyberbullies attack their victims and are in a position to limit cyberbullying, these parties lack legal responsibility to alleviate the problem.

3. Criminal Laws Related to Cyberbullying

In states without criminal cyberbullying laws, prosecutors may attempt to pursue cyberbullies under related criminal charges, such as harassment and stalking statutes.[57] However, this approach heavily burdens prosecutors, who must find an arguably applicable law and build a case that satisfies the requirements of a law intended to fight *offline* problems.[58] Cybercrimes have unique features and raise special evidentiary issues that might not be adequately addressed by simply stretching old laws to fit new crimes.[59]

Several states have chosen to address the problem by enacting cyberstalking statutes. Cyberstalking statutes bar the use of the Internet and electronic-communication tools to repeatedly harass or threaten an individual.[60] In this sense, cyberstalking laws may be more closely related to cyberbullying than traditional stalking laws, but they still offer only limited applicability and success.[61] Most stalking and cyberstalking statutes require proof of a "credible threat" of violence, which might not be present in many instances of

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1321, 1322–23 (2007) (drawing attention to the lack of liability for interactive personal information Web sites).

55. *See supra* notes 48–51 and accompanying text.

56. *Id.*; *see also* Nicholas P. Dickerson, *What Makes the Internet so Special? And Why, Where, How, and by Whom Should Its Content be Regulated?*, 46 HOUS. L. REV. 61, 80 (2009) (describing how the CDA shields ISPs as providers of defamatory content).

57. Ruedy, *supra* note 33, at 331–35 (addressing the application of current computer crime laws to cyberbullying).

58. *See id.* (critiquing the limitations of applying other criminal laws to cyberbullying).

59. *See* Jonathan B. Wolf, Note, *War Games Meets the Internet: Chasing 21st Century Cybercriminals With Old Laws and Little Money*, 28 AM. J. CRIM. L. 95, 107–08 (2000) (discussing reasons for creating new laws to address cybercrimes).

60. U.S. DEPT. OF JUSTICE, 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (1999), http://www.justice.gov/criminal/cybercrime/cyberstalking.htm.

61. *See* Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 135–39 (2007) (analyzing problems with current cyberstalking laws, most of which require a "credible threat" of violence).

cyberbullying.[62] Cyberbullies often harass their victims without making an overt threat of this nature. Although an ad hoc approach of applying harassment or stalking laws to cyberbullying may enable prosecutors to reach perpetrators in some cases, it fails to provide a comprehensive solution to the problem of cyberbullying. Many cases may fall through the cracks of laws intended to serve other purposes.

Several federal laws are related peripherally to cyberbullying, yet none adequately addresses the problem.[63] For example, the Interstate Communications Act criminalizes the transmission of "any threat to injure the person of another" through interstate commerce.[64] However, this statute is inapplicable to a large portion of cyberbullying content that likely cannot be construed as a threat of bodily harm, even if such content is psychologically harmful.[65] Similarly, the Telephone Harassment Act, which criminalizes the use of anonymous communications "with intent to annoy, abuse, threaten, or harass," fails to capture many instances of cyberbullying.[66] Although the Act was amended in 2006 to include Internet communications, the requirement that the communications be made without disclosing the identity of the author excludes many cases of cyberbullying, as users of e-mail communications and social-networking websites are often readily identifiable.[67]

The federal Computer Fraud and Abuse Act ("CFAA"), which criminalizes unauthorized computer use and was originally intended to thwart computer hacking, might apply to a narrow segment of cyberbullying cases.[68] Yet, many cyberbullies, such as those operating from personal computers who harass their victims without violating any specific website-user agreement, would not satisfy the requirements of this statute. The failure of the CFAA as a weapon to combat cyberbullying can be seen in the case of Lori Drew, the woman who created the MySpace profile that drove Megan Meier to suicide. Because Missouri had no applicable cyberbullying law, federal prosecutors attempted to use the Act to convict Lori Drew.[69] Ironically,

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62. *Id.*

63. *Cf. id.* at 147–52 (discussing federal laws potentially applicable to cyberstalking).

64. 18 U.S.C. § 875(c) (2006).

65. Ruedy, *supra* note 33, at 332 (explaining that most cyberbullying resists classification as a threat to bodily injury).

66. 47 U.S.C. § 223(a)(1)(C) (2006).

67. *Cf.* Goodno, *supra* note 61, at 149–50 (identifying the requirement of anonymity as a barrier to applying the federal Telephone Harassment Act to cases of cyberstalking).

68. 18 U.S.C. § 1030 (2006).

69. Greg Risling, *Jury Convicts Mom of Lesser Charges in Online Hoax*, ASSOCIATED PRESS, Nov. 26, 2008 (reporting the conviction of Lori Drew).

this extreme case of cyberbullying that resulted in the death of a teenager was reduced to a mere violation of the MySpace terms of service.[70] Although Drew was originally convicted of three misdemeanor offenses of unauthorized access to computers under the CFAA, ultimately U.S. District Court Judge George Wu overturned the conviction.[71] Judge Wu aptly recognized the ill fit of the CFAA to Drew's case, noting that "there is nothing in the legislative history of the CFAA which suggests that Congress ever envisioned . . . application of the statute [to cyberbullying]."[72]

Even if Lori Drew had been convicted under the CFAA, the nature of the charges trivializes the issue of cyberbullying and fails to provide a solution to the central harm committed against Megan. The *Drew* case highlights the inadequacies of the current legal framework to punish and deter cyberbullies. Both state and federal laws directed toward harassment, communications, and stalking leave a gap to be filled by legislation specifically aimed at cyberbullying.

III. LEGISLATIVE RESPONSES TO CYBERBULLYING

In the wake of high-profile suicides like that of Megan Meier, several states and Congress have enacted or proposed cyberbullying legislation. Many of the laws were prompted by a specific, high-profile instance of cyberbullying, while others represent a proactive effort to prevent such extreme cases from occurring.[73] Most of the laws focus on prohibiting online harassment and bullying within the public-school context.

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70. *See id.* (portraying the conviction in a critical light); Ivor Tossle, *Cyberbullying Verdict Turns Rule-breakers into Criminals*, GLOBE & MAIL (Toronto, Can.), Dec. 5, 2008, at R22 (describing the legal charges brought against Drew); Emily Bazelon, *Lori Drew is a Meanie: The Problem with Prosecuting Cyber-bullying*, SLATE, Dec. 3, 2008, http://www.slate.com/id/2205952 (reporting wide criticism of Drew's conviction as "prosecutorial overreaching"). *But see* Nick Ackerman, *Criticism of Woman's Prosecution in Cyberbullying Case is Off Base*, SAN JOSE MERCURY NEWS, Dec. 22, 2008 (rebutting criticism of the use of the Computer Fraud and Abuse Act in the *Drew* case).

71. United States v. Drew, 259 F.R.D. 449, 468 (C.D. Cal. 2009), *available at* http://volokh.com/files/LoriDrew.pdf.

72. *Id.* at 2 n.2.

73. *Compare, e.g.*, Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008) (naming the bill after Megan Meier), *and* FLA. STAT. § 1006.147 (2008) (naming the state's antibullying law the "Jeffrey Johnston Stand Up for All Students Act" after a teenager who committed suicide after being harassed over the Internet), *with* IDAHO CODE § 18-917A (2004) (outlawing cyberbullying without reference to a specific incident).

A. Enacted Cyberbullying Legislation

As of 2009, twenty states had enacted laws to combat cyberbullying.[74] These laws prohibit cyberbullying in two ways. First, some specifically proscribe cyberbullying as a prohibited act within the operative provision of the law. Second, others target the broader act of bullying and include cyberbullying within the statutory definition of the terms "bullying," "intimidation," or "harassment."

States have cleared the difficult hurdle of defining cyberbullying in different ways. Only Kansas offers a direct definition of the act of cyberbullying: "bullying by use of any electronic device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites."[75] The Indiana,[76] Kansas,[77] and Oregon[78] laws explicitly mention the term "cyberbullying" without defining it, while the other state laws simply include considerations for electronic media within the definitions of bullying and harassment.[79]

With the exception of the Illinois statute, current cyberbullying laws primarily focus on the public-school setting by requiring school boards to set policies that prohibit cyberbullying. The Oregon statute is representative: "Each district school board shall adopt a policy . . .

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74. The twenty states are: Arkansas (ARK. CODE ANN. § 6-18-514 (2007)); California (CAL. EDUC. CODE §§ 32260–96 (2002)); Delaware (DEL. CODE ANN. tit. 14, § 4112D (2007)); Florida (FLA. STAT. §1006.147 (2009)); Idaho (IDAHO CODE ANN. § 18-917A (LEXIS through 2009 Reg. Sess.)); Illinois (720 ILL. COMP. STAT. ANN. 5/12-7.5 (LEXIS through 2009 Sess.)); Indiana (IND. CODE § 20-30-5.5-3 (LEXIS through 2009 1st Reg. Sess. & 2009 Spec. Sess.)); Iowa (IOWA CODE § 280.28 (LEXIS through 2008 legislation)); Kansas (KAN. STAT. ANN. § 72-8256 (LEXIS through 2008 legislation)); Maryland (MD. CODE ANN., [Educ.] § 7-424.1 (2008)); Minnesota (MINN. STAT. § 121A.0695 (2008)); Nebraska (NEB. REV. STAT. § 79-2,137 (LEXIS through 2009 1st Sess.)); New Jersey (N.J. STAT. ANN. § 18A:37-15 (LEXIS through 2009 legislation)); Oklahoma (S.B. 1941, 51st Leg., 2d Sess. (Okla. 2008) (codified as amended in various sections of OKLA. STAT.), *available at* http://sde.state.ok.us/Law/Legis/RBletters/2008/Bill/SB1941.pdf); Oregon (OR. ADMIN R. 581-022-1140 (LEXIS through Or. Bulletin 2010)); Pennsylvania (24 PA CONS. STAT. ANN. § 13-1303.1-A (LEXIS through 2009 Reg. Sess.); Rhode Island (R.I. GEN. LAWS § 16-21-26 (LEXIS through Jan. 2009 Sess.)); South Carolina (S.C. CODE ANN. §59-63-120 (LEXIS through 2009 Reg. Sess.)); and Washington (WASH. REV. CODE § 28A.300.285 (LEXIS through 2009 Reg. Sess.)). Additionally, the Governor of Michigan issued an Executive Order creating the Michigan Juvenile Accountability Block Grant Advisory Board to establish school safety programs, including bullying, cyberbullying, and gang prevention. MICH. DEPT. OF HUMAN SERV., EXEC. ORDER No. 2007-46, § 3(A)(m) (2007), *available at* http://www.legislature.mi.gov/(S(py2lnp55ctwm31bnyeuu5krj))/documents/publications/executiveorders/2007-EO-46.htm.

75. KAN. STAT. ANN. § 72-8256(a)(2).

76. IND. CODE § 20-30-5.5-3.

77. KAN. STAT. ANN. § 72-8256.

78. OR. ADMIN. R. 581-022-1140.

79. *E.g.*, S.C. CODE ANN. § 59-63-120 (" 'Harassment, intimidation, or bullying' means a gesture, an electronic communication, or a written, verbal, physical, or sexual act . . . .").

prohibiting harassment, intimidation or bullying and prohibiting cyberbullying."[80] The principle undergirding these laws is the "right to receive [a] public education in a public-school educational environment that is reasonably free from substantial intimidation, harassment, or harm or threat of harm by another student."[81]

By delegating conscription and enforcement of cyberbullying prohibition to public schools, these legislatures may have picked the most appropriate forum in which to address the problem.[82] Allowing school boards to set cyberbullying policies puts the issue in the hands of the institution most directly affected by the issue and best positioned to develop a solution.[83] For example, the Washington cyberbullying law requires school districts to set harassment and cyberbullying policies "through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives."[84] This collaborative system engages a variety of stakeholders and enables the school district to create policies that reflect the interests of all involved parties. Thus, the policies are more likely to be followed and enforced.

Public schools, equipped with trained guidance counselors, may be better suited than the juvenile-justice system to address cyberbullying among youth.[85] Due to the existing relationships and regular contact teachers and administrators have with students, they are primed to prevent and catch cases of cyberbullying, at least when

80. OR. ADMIN R. 581-022-1140.

81. ARK. CODE ANN. § 6-18-514 (2007); *see also* CAL. EDUC. CODE § 32261 (2002) (asserting that "all pupils enrolled in the state public schools have the inalienable right to attend classes on school campuses that are safe, secure, and peaceful"); IOWA CODE § 280.28(1) (LEXIS through 2008 legislation) (stating Iowa's commitment "to providing all students with a safe and civil school environment in which all members of the school community are treated with dignity and respect" and finding "that a safe and civil school environment is necessary for students to learn and achieve at high academic levels"); OR. ADMIN R. 581-022-1140(1) (basing anticyberbullying policy on the principle of "assur[ing] equity, opportunity and access for all students").

82. *See* Erb, *supra* note 39, at 280–83 (arguing for expanded jurisdiction for schools to punish cyberbullying that occurs off campus because it is a better forum for controlling cyberbullies than the criminal justice system); *see also* Juvonen & Gross, *supra* note 16, at 502–03 (suggesting that bullies are using schools "as a forum that extends school grounds," based on research data that reveals a correlation between individuals being victimized by bullies both at school and online).

83. *See* Erb, *supra* note 39, at 281 ("Due to the hybrid character of their source of authority, schools stand in an unusual interactive relationship with both the public governmental sphere and the private family sphere.").

84. WASH. REV. CODE § 28A.300.285(3) (LEXIS through 2009 Reg. Sess.).

85. *See* Erb, *supra* note 39, at 281–82 (advocating a return to viewing public schools as "mediating institutions").

they occur on school grounds or impact students in the classroom.[86] If attentive to the issue, schools may be able to intervene to solve problems more promptly and with less disruption to students' lives than a court proceeding.[87]

However, these laws have obvious limits. First, they only address cyberbullying when it is within the jurisdiction of the school boards. As discussed in Part IV, the First Amendment curbs the ability of schools to punish student speech.[88] Therefore, these laws capture only incidents of cyberbullying within the limited purview of public-school authority over student actions, leaving a large portion of cyberbullying unregulated when it occurs off-campus and during after-school hours.[89] Moreover, they leave cyberbullies who are not part of the public-school system—like Lori Drew—completely unscathed. Schools remain uncertain as to the limits of their authority regarding student Internet speech, indicating they may be ill-suited to craft policies in light of First Amendment concerns.[90] Additionally, by allowing school districts to set their own cyberbullying policies, states may lack uniformity among school districts, let alone other states.

Cognizant of First Amendment limitations on schools' ability to punish student speech, some legislatures have included provisions in cyberbullying laws that reflect these constitutional boundaries. For example, the Arkansas law prohibits cyberbullying only when it "presents a clear and present danger" of harm or a "substantial disruption" to the school environment.[91] The substantial disruption threshold is triggered by a cessation of instruction, the inability of students or staff to focus, the necessity of severe disciplinary measures, or an interference with the learning environment.[92] By placing these limits on the ability of schools to regulate student speech, the law details the appropriate circumstances under which

86. *Id.* (noting that "the school system is much more involved with parents and children in the community than is the criminal justice system").

87. *Id.* (reasoning that schools provide a " 'low-risk' medium" for controlling cyberbullying with lesser consequences to juvenile offenders).

88. *See* Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 132–39 (2007) (summarizing Supreme Court precedent addressing student speech rights).

89. *See infra* notes 177–180 and accompanying text.

90. *See* Kara D. Williams, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 723 (2008) (observing schools acknowledge their uncertainty as to their authority to punish student speech within the bounds of the First Amendment).

91. ARK. CODE ANN. § 6-18-514 (2007).

92. *Id.*

schools may punish cyberbullying and avoids overreaching the bounds of school authority over student speech.

By contrast, the Indiana cyberbullying law is exceedingly broad and gives little direction to schools as to how to exercise their authority over student speech.[93] The law requires the Indiana Board of Education to develop rules governing cyberbullying, yet it fails to impose any limitation upon the board's actions or the scope of its control over student speech.[94] Consequently, the board has wide latitude to promulgate cyberbullying policies, which presents the danger of eroding First Amendment rights if the policies adopted are overly restrictive of student speech. The Indiana legislature may have considered First Amendment limits to be implicit in the statute, but it remains unclear how the board will exercise its untethered ability to regulate cyberbullying.[95]

The Illinois cyberbullying law is the most comprehensive and far-reaching of the cyberbullying laws to date. Unlike the other cyberbullying laws, the Illinois law is not constrained to the public-school setting. It prohibits "harassment through electronic communications" at large, applying to adults as well as public-school students.[96] This statute would apply directly to a case like that of Megan Meier.[97]

The law further provides special terms for youth victims.[98] Specifically, the statute prohibits the electronic communication of messages intended to harass someone under the age of thirteen, or the knowing inducement of another to transmit such messages.[99] The Illinois law stands alone in criminalizing cyberbullying beyond the bounds of the public schools' jurisdiction.[100]

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93. IND. CODE § 20-30-5.5-3 (LEXIS through 2009 1st Reg. Sess. & 2009 Spec. Sess.).

94. *Id.*

95. *See* Joel Currier, *Cyberbullying: A Looming Issue Everyone Agrees Something Should be Done About it. But the Problem is Global, Not Local*, ST. LOUIS POST-DISPATCH, Dec. 2, 2007, at B1 (referencing the opinions of law professors that state cyberbullying laws lack specificity to protect free speech).

96. 720 ILL. COMP. STAT. 135/1-2 (LEXIS through 2009 Sess.).

97. *See* Risling, *supra* note 69 (discussing how Lori Drew, her daughter, and her business associate collaborated to harass Megan Meier online).

98. *Id.*

99. *Id.* The text reads: "[t]ransmitting an electronic communication or knowingly inducing a person to transmit an electronic communication for the purpose of harassing another person who is under 13 years of age, regardless of whether the person under 13 years of age consents to the harassment . . . ." *Id.*

100. The proposed Pennsylvania cyberbullying law would entail a similarly broad application. S.B. 1329, 192d Gen. Assem., Reg. Sess. (Pa. 2008).

Rhode Island is taking a different, more calculated legislative approach to addressing cyberbullying.[101] Its law creates a commission to study the issue and make recommendations to the legislature from an educator's perspective. It is thus directed more toward investigating the problem rather than criminalizing the behavior.[102] The commission consists of nine individuals, including a state senator, a school superintendent, a high-school principal, teachers from public and private schools, social workers, and the chief of police.[103] Unlike other cyberbullying laws aimed at prohibiting behavior, the Rhode Island law seeks to gather information on the problem to inform further legislative action.

B. Proposed Cyberbullying Legislation

1. Proposed State Legislation

In addition to cyberbullying laws already in effect, at least ten state legislatures (California,[104] Connecticut,[105] Hawaii,[106] Kentucky,[107] Maine,[108] Massachusetts,[109] Missouri,[110] New York,[111] Pennsylvania,[112] and Vermont[113]) have introduced cyberbullying bills that are currently in various stages of the political process and may

101. S.B. 99, 2007-2008 Leg., Jan. Sess. (R.I. 2007).

102. *Id.*

103. *Id.*

104. A.B. 678, Reg. Sess. (Cal. 2009).

105. H.B. 5500, Gen. Assem., Feb. Sess. (Conn. 2008).

106. S.B. 792, 25th Leg., Reg. Sess. (Haw. 2009).

107. H.B. 91, 2008 Leg., Reg. Sess. (Ky. 2008).

108. S.B. 355, 124th Leg., 1st Reg. Sess. (Me. 2009).

109. H.B. 483, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

110. S.B. 79, 95th Gen. Assem., Reg. Sess. (Mo. 2009). Missouri's existing requirement of antiharassment policies in public schools includes use of electronic communication to intimidate. S.B. 818, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008), *available at* http://www.senate.mo.gov/08info/pdf-bill/tat/SB818.pdf. However, the proposed law would more directly address cyberbullying by requiring each school district to adopt an antibullying policy and training for employees that include cyberbullying. S.B. 79, 95th Gen. Assem., Reg. Sess. (Mo. 2009).

111. A.B. 5544, 232d Leg., Reg. Sess. (N.Y. 2009); A.B. 7048, 232d Leg., Reg. Sess. (N.Y. 2009).

112. S.B. 1329, 192d Gen. Assem., Reg. Sess. (Pa. 2008). Although Pennsylvania already requires public schools to have antibullying policies that include electronic communications, this proposed law targets the act of cyberbullying more directly. It would make cyberbullying a criminal act, punishable as a misdemeanor or felony, depending on the circumstances, and would apply to offenders at large, not just public school students. *Id.*

113. H.B. 486, 2007 Leg., 69th Biennial Sess. (Vt. 2007).

pass in future sessions.[114] These laws are substantially similar to cyberbullying laws already enacted in other states in that they focus on the public-school forum.

Several of the proposed laws require school districts to implement measures for identifying, reporting, and documenting incidents of cyberbullying.[115] Kentucky's proposed law goes further by requiring local school districts to provide training for professionals with direct student contact to help identify, respond to, and prevent cyberbullying.[116] The Vermont bill also includes an educational element. It requires the state department of education to create a secondary education curriculum that teaches Internet safety, including the "recognition, avoidance, and reporting of cyberbullying."[117] Similarly, the California legislature, which already enacted a law to allow expulsion of students for cyberbullying, is considering additional legislation to require instruction on the negative impacts of cyberbullying in public schools.[118]

A few of the proposed laws are exceptionally broad. Some of the proposals, such as that of Maine, cover acts committed through a vast range of technologies, including text messaging, an increasingly prevalent mode of teenage communication.[119] The expansive Vermont bill includes cyberbullying that occurs "at any location if the acts have a direct and negative impact on students [sic] academic performance or access to school services . . . whether or not the use [of technology] occurs on or involves school property."[120] This would give schools expansive authority to punish cyberbullying generated on a private computer off-campus and outside of school hours or school-sanctioned activities. Similarly, the proposed Pennsylvania law defines acts of cyberbullying as being "committed at either the place at which the cyberbullying conduct was transmitted or at the place where the

114. The Washington legislature has also proposed a bill that would strengthen the existing bullying law, which covers bullying via electronic means. H.B. 2015, 61st Leg., Reg. Sess. (Wash. 2009). In addition to antibullying policies, the proposed law requires implementation of antibullying procedures. *Id.* Because the proposed changes to the law are minimal, it will not be included in the above discussion of proposed cyberbullying laws.

115. *E.g.*, H.B. 5500, Gen. Assem., Feb. Sess. (Conn. 2008); S.B. 792, 25th Leg., Reg. Sess. (Haw. 2009); H.B. 483, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

116. H.B. 91, 2008 Leg., Reg. Sess. (Ky. 2008).

117. H.B. 486, 2007 Leg., 69th Biennial Sess. (Vt. 2007).

118. CAL. EDUC. CODE § 48900(r) (LEXIS through 2009 Reg. Sess.); A.B. 678, Reg. Sess. (Cal. 2009).

119. S.B. 355, 124th Leg., 1st Reg. Sess. (Me. 2009); *see* Katie Hafner, *Texting May be Taking a Toll*, N.Y. TIMES, May 25, 2009, http://www.nytimes.com/2009/05/26/health/26teen.html (reporting on the prevalence of text messaging among teenagers).

120. H.B. 486, 2007 Leg., 69th Biennial Sess. (Vt. 2007).

cyberbullying conduct was received."[121] Accordingly, cyberbullying content created off-campus on a personal computer that is later accessed from a school computer would be considered to be an on-campus offense.

Some of the proposed laws also entail severe penalties for cyberbullying—much more severe than the school sanctions imposed by current cyberbullying laws. The Pennsylvania bill provides that a first offense of cyberbullying constitutes a first-degree misdemeanor, whereas a second offense—or a first offense by someone previously charged with a violent crime involving the same victim or school—qualifies as a third-degree felony.[122] As a result, students could face hefty consequences for computer content created in the privacy of their own homes outside of school hours.

2. Proposed Federal Legislation

On the federal legislative front, Representative Linda Sánchez of California introduced the Megan Meier Cyberbullying Prevention Act in April 2009.[123] The proposed law imposes a fine and up to two years imprisonment for anyone who "transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior." This bill provides a direct means to prosecute cyberbullying cases like hers and those of other online harassment victims. The Act applies beyond the realm of public schools and is broad enough to capture cyberbullying committed by or targeting adults and students. It appears to cover many cases of cyberbullying that are beyond the reach of most current and proposed state legislation. Yet the bill, cosponsored by fourteen Democrats and one Republican, is unlikely to pass.[124] Representatives from both political parties criticized the bill as an unconstitutional restriction on free speech at an October 2009 hearing of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.[125]

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121. S.B. 1329, 192d Gen. Assem., Reg. Sess. (Pa. 2007).

122. *Id.*

123. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

124. State Net, Congressional Bills Legislative Forecasts – Current Congress, H.R. 1966, 111th Cong. (2009) (on file with VANDERBILT LAW REVIEW) (predicting a 19 percent chance the bill will pass in the House of Representatives and a 5 percent chance it will pass in the Senate).

125. *Judiciary Subcommittee Considers Conflicting Solutions to Cyberbullying*, WASH. INTERNET DAILY, Oct. 1, 2009 (reporting resistance to the Megan Meier Cyberbullying Prevention Act at the hearing of the House Judiciary Subcommittee on Crime, Terrorism and

The proposed Student Internet Safety Act, on the other hand, takes a milder approach to cyberbullying prevention through education.[126] It would require recipients of federal funding under the Elementary and Secondary Education Act of 1965 to promote safe Internet use among students.[127] Such programming would include cyberbullying prevention and increased involvement from parents to reinforce safe Internet use by their children.[128] The bill, which passed through the House of Representatives with strong bipartisan support, currently sits with the Senate Committee on Health, Education, Labor, and Pensions.[129]

IV. POTENTIAL FIRST AMENDMENT CHALLENGES TO CYBERBULLYING LAWS

The emergence of cybercrimes calls for assessment of existing laws to determine whether to update them or enact new ones to address online problems. Legislators, however, should be wary of hastily and improvidently creating overly broad statutes that impinge upon the First Amendment.[130] Freedom of speech is not absolute; rather, there are limits to the protections afforded by the First Amendment.[131] But the state retains wide latitude in regulating classes of speech that offer such negligible social value that "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[132] Although cyberbullying offers little, if any, social value, legislators must avoid regulating

Homeland Security); SHG, *A Law Too Ugly*, SIMPLE JUSTICE, Oct. 2, 2009, http://blog.simplejustice.us/2009/10/02/a-law-too-ugly.aspx (same).

126. Student Internet Safety Act of 2009, H.R. 780, 111th Cong. (2009).

127. *Id.*

128. *Id.*

129. *H.R. 780 Student Internet Safety Act Passes House Vote*, INTERNET SAFETY CENT., June 17, 2009, http://www.internetsafetycentral.com/2009/06/hr-780-student-Internetsafety-act-passes-house-vote.html.

130. *See* Goodno, *supra* note 61, at 157 (noting the importance of updating laws to keep pace with technology); Christopher E. Roberts, *Is My Space Their Space?: Protecting Student Cyberspeech in a Post-*Morse v. Frederick *World*, 76 U.M.K.C. L. REV. 1177, 1181 (2008) (observing that "[s]tudent cyberspeech is an area where the law has not effectively caught up with technology"); *see also* Ruedy, *supra* note 33, at 345 ("Legislators should be cautious in deciding to create anticyberbullying laws, and should take care not to overstep the bounds of the First Amendment."); Currier, *supra* note 95, at B1 (reporting that "[l]egal experts warn against an emotionally driven response to Megan [Meier's] death" due to First Amendment concerns).

131. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (recognizing narrow classes of speech the state can regulate without First Amendment conflict).

132. *Id.* at 572.

cyberbullying in a way that would prohibit other forms of protected speech.

A. Supreme Court Precedent on the First Amendment and Student Speech

Because most existing and proposed cyberbullying laws apply to the public-school forum, cases where the First Amendment has been held to protect student speech provide a useful starting point for an analysis. Although the Supreme Court has yet to rule on a case of student Internet speech,[133] lower courts, legislatures, and educators have applied Supreme Court precedent governing offline speech to the online context. Four cornerstone Court cases comprise the relevant legal foundation.

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

The Court established the high-water mark for student speech rights in its 1969 decision in *Tinker v. Des Moines Independent School District*. In *Tinker*, students wore black armbands to school as a symbol of protest against the Vietnam War.[134] The school responded by invoking a policy against wearing armbands and suspended the students when they continued to wear the armbands.[135] The Supreme Court upheld the students' First Amendment challenge to their suspension. While recognizing the necessity for "comprehensive authority" of school officials over school conduct, the Court balanced this need against the First Amendment, holding that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[136] Thus, student speech rights could be restricted only if they "substantially interfere[d] with the work of the school or impinge[d] upon the rights of other students."[137] The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was

133. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 603–04 (2007) (recognizing the Supreme Court has not articulated a standard to judge off-campus speech); Kelsey Beltramea, *Tangled Web: Courts Conflict in Efforts to Define Schools' Power Over Online Speech*, STUDENT PRESS L. CTR., Fall 2008, at 10, *available at* https://www.splc.org/report_detail.asp?id=1439&edition=46 (observing that the Supreme Court has never decided a case of student Internet speech and quoting David L. Hudson, Jr., of the First Amendment Center, predicting the high court will grant certiorari in a future case to resolve the issue).

134. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

135. *Id.*

136. *Id.* at 506–07.

137. *Id.* at 509.

insufficient to justify the school's actions restricting student expression that did not cause a material and substantial disruption.[138] Courts now apply the "substantial disruption" test, referred to as the *Tinker* standard, as the legal gauge to balance the right to regulate expression against First Amendment concerns in student speech cases.[139]

2. *Bethel School District v. Fraser*

The Court recognized limits to student speech rights in *Bethel School District v. Fraser*, a 1986 case which involved a sexually explicit speech delivered at a school assembly of approximately 600 high school students.[140] The Court held that the speech was beyond the reach of First Amendment because lewd and vulgar material offers negligible value to public discourse and offends social interests, thereby entitling the school to punish the speech.[141] Furthermore, the Court found that the state has "recognized an interest in protecting minors from exposure to vulgar and offensive spoken language," and permitting such lewd speech would "undermine the school's basic educational mission."[142] In addition to lewd and vulgar speech, other forms of unprotected speech include defamation, libel, fighting words,[143] incitement to violence, and true threats.[144] In order to constitute a true threat—arguably the most applicable of these

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138. *Id.*

139. As student speech jurisprudence has developed, courts have traditionally focused on the "substantial disruption" prong of *Tinker*, rather than whether the speech invades the rights of others. However, in a 2006 case, the Ninth Circuit upheld a San Diego school's ability to ban a student from wearing a t-shirt with an antigay message, primarily based on the fact that it conflicted with the individual rights of other students. The opinion focused on whether the speech "impinged upon the rights of other students," rather than the more often relied upon "substantial disruption" aspect of the *Tinker* standard. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006) (finding that Harper's t-shirt impinged the rights of other students and that "public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development"). The *Harper* case is an anomaly in the application of the *Tinker* standard, under which courts usually rule in favor of speech regulation only if the speech causes a substantial disruption to the classroom environment. *See* David L. Hudson, Jr., *Tinkering with* Tinker *standards?,* FIRST AMEND. CTR., Aug. 9, 2006, http://www.firstamendmentcenter.org/analysis.aspx?id=17253 (analyzing the "unusual application" of the *Tinker* standard in *Harper*).

140. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 677–78 (1986).

141. *Id.* at 684–85.

142. *Id.*

143. Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

144. *Id.* at 571–73.

categories of speech to the issue of cyberbullying—a reasonable person must objectively perceive the speech as a "serious expression of an intent to commit an act of unlawful violence."[145]

3. *Hazelwood School District v. Kuhlmeier*

The *Hazelwood* Court established the right of schools to censor school-sponsored publications.[146] This 1988 decision allowed a school principal to strike two articles from publication in a school paper because of their provocative subject matter: teen pregnancy and divorce.[147] The Court found that the school's action was justified by its right to "disassociate itself" from the speech in order to avoid the attribution of the individual student views expressed in the articles to the school itself.[148] Thus, a school may limit the "style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[149] The Court gave wide discretion to educators to determine reasonable pedagogical concerns, ranging from speech that is "inadequately researched" to that which is "unsuitable for immature audiences.[150] The editorial control created by *Hazelwood* is generally limited to on-campus or school-sponsored speech.[151] However, some lower federal courts have extended school authority to so-called "underground" newspapers distributed on-campus.[152]

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145. Virginia v. Black, 538 U.S. 343, 359 (2003). *But see* Ruedy, *supra* note 33, at 341–42 (discussing the lack of a "uniform test" for true threats and discussing the Ninth Circuit's approach to the true threat analysis that considers true threats by an "objective standard" and "in light of their entire factual context, including the surrounding events and reaction of the listeners" (quoting Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc))). For an explanation of why defamation and libel may be inapplicable or useless in cyberbullying cases, see *supra* Part II.B.1.

146. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

147. *Id.* at 263–64.

148. *Id.* at 271 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986)).

149. *Id.* at 273.

150. *Id.* at 271.

151. *See* Erb, *supra* note 39, at 262 (stating that the case "generally is not instructive in off-campus cyberbullying cases").

152. *See, e.g.*, Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821, 822–23 (7th Cir. 1998) (allowing a school to punish a student for an article printed in an underground newspaper distributed on campus). More often, however, courts apply the *Tinker* standard to underground newspapers. *See* David L. Hudson, Jr., *Underground Papers and Off-Campus Speech*, FIRST AMEND. CTR., http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=underground_newspapers&SearchString=underground_newspapers (last visited Feb. 22, 2010) (explaining the application of *Tinker* to underground newspapers).

4. *Morse v. Frederick*

The Court recently strengthened the ability of schools to punish speech made at school-sanctioned activities in *Morse v. Frederick*.[153] This 2007 case centered on Joseph Frederick, a high-school student who displayed a banner proclaiming "Bong HiTS 4 Jesus" as the Olympic torch passed through his hometown of Juneau, Alaska in 2002.[154] When he refused to take down the sign, the school principal suspended him for violating the school's policy against advocating illegal drugs.[155] Although Frederick's expression occurred on a public street outside the physical school grounds, the Court found that the school could punish it as if it had occurred on-campus because it determined that the Olympic torch relay was a school-sponsored activity.[156]

Although Chief Justice Roberts, writing for the majority, acknowledged "uncertainty at the outer boundaries as to when courts should apply school speech precedents," the opinion treated the off-campus speech as if it had occurred on school grounds.[157] The Court considered the event to be an extension of school territory based on several factors: (a) the principal gave students permission to attend; (b) the event occurred during normal school hours, and (c) members of the school community were in attendance.[158] The Court effectively expanded school authority beyond the campus to outside events sanctioned by the school, thereby continuing the post-*Tinker* trend of limiting student speech rights.[159]

B. Implications of Student Speech Jurisprudence on Cyberbullying Laws

In light of Supreme Court jurisprudence on student speech, how does cyberbullying fit into the picture? Combining the lessons of *Tinker*, *Bethel*, *Hazelwood*, and *Morse*, schools may restrict student speech in a school-sponsored forum for pedagogical reasons if it

153. Morse v. Frederick, 551 U.S. 393 (2007); *see also* Roberts, *supra* note 130, at 1178 (analyzing Morse as an extension of schools' ability to restrict speech "beyond the school's physical boundaries").

154. *Morse*, 551 U.S. at 397.

155. *Id.* at 398.

156. *Id.* at 400–01.

157. *Id.*

158. *Id.*

159. *See* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008) (observing that in *Morse*, the Court "continue[d] the trend of the Court to move away from the robust vision of student speech rights it embraced in *Tinker*").

amounts to a "substantial and material disruption," or if it falls into a category of speech unprotected by the First Amendment, such as obscenity or true threats.[160] However, these principles are not as easily applied in an online context.[161] The Internet obscures the boundary between on-campus and off-campus speech, leaving schools and courts to grapple with how to treat the "grey area" created by the vast amount of online speech created off-campus that is accessed on-campus and affects students at school.[162]

Because *Tinker* dealt specifically with on-campus speech, the case leaves unresolved the question of whether and how the standard applies to online speech, particularly online expression created off-campus.[163] Though *Morse* hints at the current Court's vision of the scope of student speech rights, it fails to settle this legal quandary.[164] The decision effectively stretches school authority beyond the physical campus to encompass a public event with ties to the school; however, it remains unclear whether this concept extends to the online world.[165] Under an expansive reading of *Morse*, the slightest connection with the school, such as a website created off-campus that is directed at the school community, might trigger categorization as on-campus speech.[166] Nonetheless, without more direction from the Supreme Court, school administrators cannot be certain how this type of online expression should be treated.[167]

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160. *See supra* notes 134, 140, 146, 153 and accompanying text.

161. Beltramea, *supra* note 133, at 10.

162. *See* Brannon P. Denning & Molly C. Taylor, Morse v. Frederick *and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 837 (2008) (arguing that "technology has blurred the line between on-campus and off-campus speech"); Erb, *supra* note 39, at 272 (opining that "the lack of a bright-line rule with which to evaluate cyberbullying incidents has left school administrators to play a guessing game when deciding what sort of conduct should be punished").

163. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 603–04 (W.D. Pa. 2007) (acknowledging the lack of directly applicable precedent); Markey, *supra* note 88, at 135 ("[T]he *Tinker* case did not expressly extend its reasoning to off-campus student speech.").

164. *See* Denning & Taylor, *supra* note 162, at 859 (explaining how *Morse* failed to clarify the questions left unanswered by *Tinker*); Papandrea, *supra* note 159, at 1028–30 (declaring that in *Morse* "the Supreme Court missed an opportunity to determine whether public schools have authority to restrict student speech that occurs off school grounds").

165. *See* Roberts, *supra* note 130, at 1180 (noting the possibility that the extension of school authority in *Morse* to "speech that was physically off-campus" could "lay a framework for school officials to restrict more student speech than ever before").

166. *See* Papandrea, *supra* note 159, at 1030 ("Permitting schools to restrict student speech in the digital media would necessarily interfere with the free speech rights juveniles enjoy when they are outside the schoolhouse gates.").

167. *See* Williams, *supra* note 90, at 709 (declaring the need for courts to provide guidance to schools in this area of the law).

Lacking clear guidance from the Supreme Court, lower federal courts and state courts have disagreed whether online speech created off-campus is protected.[168] For example, in *Layshock v. Hermitage School District*, a district court ruled against a school that disciplined a student for creating a fake MySpace profile of his principal, which mocked the principal and asserted that he used drugs, among other insults.[169] The court held that students' access of the website at school "d[id] not authorize school officials to become censors of the world-wide web."[170]

By contrast, other courts have upheld the authority of schools to regulate online expression even when it is created off-campus. For instance, in *J.S. v. Bethlehem Area School District*, the school was allowed to punish a student for creating a website off-campus entitled "Teacher Sux" that called for the death of a teacher and solicited money for the services of an assassin.[171] Although the website was created off-campus without the use of school resources, its aim at the school allowed the court to apply the *Tinker* standard and uphold school authority to regulate the speech as if it had been created on-campus.[172]

If courts determine online expression created off-campus is beyond the reach of public schools, some current and proposed cyberbullying laws may be rendered unconstitutional insofar as they seek to regulate student speech that originates off-campus. For example, the proposed Vermont law specifically regulates online speech created off-campus.[173] Similarly, the Delaware law provides that "the physical location or time of access of a technology-related incident is not a valid defense in any disciplinary action by the school district."[174] Equally problematic are those cyberbullying laws, such as Indiana's, written broadly enough to cover off-campus speech, without explicitly indicating whether they apply to on-campus or off-campus dialogue.[175] By contrast, cyberbullying laws with internal limitations parallel to the *Tinker* standard that are restricted to speech that

168. *See* Papandrea, *supra* note 159, at 1054 (observing the lack of direction lower courts have regarding how to handle "student speech involving the digital media").

169. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).

170. *Id.* at 597.

171. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).

172. *Id.* at 869.

173. H.B. 486, 2007 Leg., 69th Biennial Sess. (Vt. 2007).

174. DEL. CODE ANN. tit. 14, § 4112D(f)(1) (2007).

175. *E.g.*, IND. CODE § 20-30-5.5-3 (LEXIS through 2009 1st Reg. Sess. & 2009 Spec. Sess.) (requiring the state department of education and state board to adopt guidelines for cyberbullying without defining the scope of those guidelines).

causes a "substantial and material disruption" or on-campus incidents are more likely to pass constitutional muster.[176]

Because most cyberbullying occurs off-campus, limiting cyberbullying laws to speech created on public-school campuses would seriously undermine their effectiveness in addressing the problem.[177] Restricting school authority to content created on-campus or content causing a substantial and material disruption under the *Tinker* standard allows a huge portion of cyberbullying to go unregulated.[178] If schools cannot regulate online expression created off-campus, these laws allow many cyberbullies to evade punishment and provide little comfort to their victims. Under such circumstances, cyberbullying laws would not protect victims like Megan Meier, who was harassed through a MySpace webpage created off-campus.[179]

Nor would the true threat doctrine help schools regulate cyberbullying, since most cases are unlikely to qualify as a "true threat."[180] Cyberbullying often involves harassment, taunting, and ridicule without direct assertions of intended physical violence.[181] Even when cyberbullying does take on violent characteristics or indirect threats—such as the *Bethlehem* website that advocated the death of a teacher or the MySpace page of Josh Evans that told Megan Meier "the world would be better off without you"—it still may not constitute a true threat, despite the negative, even deadly, ramifications on the target.[182] Furthermore, lower courts have developed various tests to assess true threats, and one of the most commonly cited factors is "whether the threat was communicated

176. *E.g.*, H.B. 1072, 86th Gen. Assem., Reg. Sess. (Ark. 2007).

177. Dep't of Educ., Other Regulatory Agency Actions, 194 Vt. Gov't. Reg. 13, 18 (2007) (recognizing the difficulty of regulating cyberbullying because "cyberbullying is more likely to occur off school grounds"); Erb, *supra* note 39, at 258 ("[M]ost of the content produced by cyberbullying originates away from the school campus on personal computers; however, the effects of such content can be felt every day within the schoolhouse gates.").

178. *See* David-Ferdon & Hertz, *supra* note 2, at S3 (noting that much "electronic aggression is likely perpetrated outside of school hours with personal communication devices rather than with school technology resources" even though it impacts students at school); Erb, *supra* note 39, at 271–72 (discussing the "loopholes available to students").

179. *See supra* notes 4–8 and accompanying text.

180. *See* Erb, *supra* note 39, at 271 (explaining that "many school officials are frustrated and left wondering what can be done to address speech that does not rise to the level of a 'true threat' ").

181. *See id.* at 257–58 (explaining that "most of the content produced by cyberbullying originates away from the school campus on personal computers," so often there is no immediate fear of personal injury).

182. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 860 (Pa. 2002); *see also supra* notes 4–7 and accompanying text.

directly to its victim."[183] This factor would eliminate the majority of cyberbullying that takes place on social-networking sites because posting material on a public forum would not qualify as direct transmission.

Alternatively, even if courts consider online expression to be on-campus speech, cyberbullying may fall short of constituting a "material and substantial disruption" of school activities.[184] *Tinker* fails to explicitly delineate what constitutes a "material and substantial disruption," which has predictably resulted in inconsistent application of its standard.[185] Courts disagree on which factors should be considered in the "material and substantial disruption" inquiry and whether the "disruption" should be judged by the response of students, the administration, or both.[186]

Vague as it is, several legal commentators contend that the *Tinker* benchmark is unreasonably high—too high to capture many cases of cyberbullying.[187] The nature of cyberbullying, which often involves a single target rather than the school community at large, greatly limits the potential to cause a "substantial disruption" significant enough to satisfy the *Tinker* standard.[188] Thus, under the *Tinker* standard, schools may have limited authority to punish cyberbullies regardless of where the content originates, which severely undermines the utility of cyberbullying laws in public schools.

Aside from the debate over student speech rights, even cyberbullying laws that address the issue outside of the public-school context are not free from constitutional concerns. For example, the proposed federal Megan Meier Cyberbullying Prevention Act casts such a wide net over speech that it could criminalize some highly

183. United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

184. *See* Denning & Taylor, *supra* note 162, at 844 (criticizing the material and substantial disruption standard as a vague guidepost that fails to clarify how cyberbullying should be regulated).

185. *See* Papandrea, *supra* note 159, at 1065 (observing that "lower courts are all over the map" in their application of *Tinker*); Williams, *supra* note 90, at 721 (noting the ambiguity of the *Tinker* standard and lack of uniform application among lower courts).

186. *See* Williams, *supra* note 90, at 721–22 (describing how lower courts vary in applying the *Tinker* standard).

187. *See, e.g.*, Erb, *supra* note 39, at 267–71 (judging the application of the *Tinker* standard by lower courts to be overly protective of schools' ability to punish speech); Papandrea, *supra* note 159, at 1067 ("[M]ost courts that apply the Tinker standard are far too deferential to the schools' claims . . . ."); Beltramea, *supra* note 133, at 11 (quoting First Amendment scholar David Hudson as saying schools "are fairly creative with coming up with different disruption rationales").

188. *See* Erb, *supra* note 39, at 274 (reasoning that the "individualized" nature of cyberbullying makes it less likely that such acts will "cause a 'substantial or material disruption' to the school environment[,]" even if it causes a disruption for the particular student).

protected political speech.[189] At the same time, even for cyberbullying cases that fall squarely within the intended scope of the Act, it would be difficult to prove use of electronic means to "support severe, repeated and hostile behavior" because the statute does not define this standard.[190] Such a nebulous standard could also lead to selective enforcement of the law, which carries the threat of up to two years imprisonment. Only laws, such as the proposed Student Internet Safety Act, that take a purely educational approach to address cyberbullying escape the constitutional quagmire created by legislation that directly regulates expression.

V. CONSTITUTIONAL SOLUTIONS TO ADDRESS CYBERBULLYING

Cyberbullying is a complex problem that presents a new type of challenge for lawmakers, educators, and parents. It implicates freedom of speech in a way unanticipated by many existing laws, and there may not be a single solution to this social problem. Instead, the issue requires an innovative, multidisciplinary approach that tackles the problem from a variety of angles, both legal and nonlegal. In light of the limitations on cyberbullying laws discussed in Part IV.B, the most effective and constitutional ways of dealing with this issue may reside in the classroom rather than the courtroom. Recognizing the need for a holistic solution to cyberbullying, policymakers should pursue various avenues to alleviate cyberbullying, all of which comport with the First Amendment.

A. Bringing Tinker *into the Internet Age*

The lack of judicial clarity on the scope of public-school authority to regulate online speech marks a high hurdle in the fight against cyberbullying.[191] Because youths are particularly vulnerable to cyberbullying and most laws prohibiting it target the school context, schools represent a critical battleground for cyberbullying prevention.[192] However, without direction on when and how they may

189. *See* Steven Kotler, *Cyberbullying Law Could Ensnare Free Speech Rights*, FOXNEWS.COM, May 14, 2009, http://www.foxnews.com/politics/2009/05/14/cyberbullying-ensnare-free-speech-rights/ (noting that the law could be used to target online political commentators).

190. *See id.* (quoting UCLA law professor Eugene Volokh on his skepticism regarding the law).

191. *See* Sarah O. Cronan, Note, *Grounding Cyberspeech: Public Schools' Authority to Discipline Students for Internet Activity*, 97 KY. L.J. 149, 165 (2009) (describing the problem of "inconsistent results and lack of predictability" in student speech jurisprudence).

192. *See supra* notes 34–37 and accompanying text.

legally punish student Internet expression, schools are left paralyzed in the face of uncertainty.[193]

Many First Amendment rights advocates hoped the Supreme Court would clarify the ambiguity in this area of the law in *Morse*, in which legal counsel for the school urged the Court to use the case to clear the "doctrinal fog infecting student speech jurisprudence."[194] The Court failed to heed the request. The lingering vagueness on student speech rights creates disincentives for schools to tackle the issue aggressively, often making it safer and easier for the school to ignore cyberbullying.

On the other hand, schools could find themselves in a predicament if they fail to act. Not only may the problem of cyberbullying continue to escalate, but schools also may face Title IX liability for not preventing harassment when cyberbullying involves sexual or racially discriminatory content.[195] The current legal environment creates a no-win situation for schools unsure of how to address abusive online speech without facing liability.

Therefore, the Supreme Court should address online student speech and give legislators and schools the clear direction they need to respond appropriately to cyberbullying.[196] It is time for student speech jurisprudence to progress to account for advances in technology and issues currently facing schools. Several scholars have proposed ways in which the Court should revise the *Tinker* standard to better deal with modern issues of Internet speech.[197] Some advocate extending school authority over online speech created off-campus, while others

193. *See supra* note 91 and accompanying text.

194. Bill Mears, *High Court Hears 'Bong Hits for Jesus' Case*, CNN.COM, Mar. 19, 2007, http://www.cnn.com/2007/LAW/03/19/free.speech/index.html?iref=newssearch.

195. *See* 20 U.S.C. § 1681 (2006) (obligating schools to prevent sexual harassment); *see also* NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 111 (2007) (mentioning potential liability for schools under Title VI of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972); Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 905–19 (2001) (describing the "catch-22" schools face when deciding whether to regulate student web pages since they could face Title IX liability for failing to prevent sexual harassment).

196. *See* Williams, *supra* note 90, at 719 (calling for a "workable standard" for courts to judge Internet speech).

197. *See, e.g.*, Markey, *supra* note 88, at 132 (suggesting that the *Tinker* standard should only apply to off-campus speech if the "student knowingly or recklessly distributes the speech on-campus"); Renee L. Servance, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1239 (proposing an "impact analysis" under which schools may regulate online speech if (1) "both the target and the speaker are members of the same school community," (2) the speech causes an actual or foreseeable harm, and (3) disruption to the school's ability to educate or maintain classroom control).

insist that speech expressed outside the schoolhouse gates should remain beyond the control of school officials.[198]

Because the nature of the "material and substantial disruption" inquiry is fact-specific, a bright-line rule may prove difficult to produce. A multifactor analysis may be more appropriate in this context. Among factors courts should weigh would be (a) whether the online content was created at school or using school resources; (b) whether the content was viewed on campus; (c) the extent to which students discussed the content on campus; (d) the measures taken by the school in response to the incident; and (e) the appropriateness of the school's reaction. The first factor should be dispositive: when cyberbullying content is created on campus or using school resources, the speech should satisfy the *Tinker* standard. For content created off-campus without the use of school resources, the court should proceed to evaluate the remaining factors with a presumption that the speech falls outside the scope of *Tinker* and is therefore protected by the First Amendment. While multifactor tests allow courts leeway in their application, this approach would be a vast improvement on the current *Tinker* standard, which is ill-suited for the online context.

Regardless of the manner in which the Court chooses to redefine *Tinker*, the greatest need is for an unambiguous guideline schools and courts can apply to Internet speech.[199] Courts must strike a delicate balance between maintaining a productive and safe educational environment and allowing free speech and Internet dialogue to flourish.[200] In order for schools to address cyberbullying effectively, they need the latitude to regulate online student speech in some instances, while also avoiding unreasonable restrictions on Internet expression.

198. *Compare* Erb, *supra* note 39, at 285–86 (calling for expanded school jurisdiction over off-campus cyberbullying), *and* Servance, *supra* note 197, at 1238–39 (advocating greater deference for schools in online speech cases), *with* Papandrea, *supra* note 159, at 1101–02 (concluding that none of the justifications for allowing schools to regulate off-campus speech are valid and schools should be restricted from regulating such speech), *and* Markey, *supra* note 88, at 155–56 (arguing for more protection of student speech rights).

199. There are several current online student speech cases that could provide a vehicle for the Supreme Court to clarify this area of jurisprudence if the parties appeal the appellate court decisions and the Court grants certiorari. *See generally*, *e.g.*, Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

200. *See* Papandrea, *supra* note 159, at 1032–37 (praising the benefits of technology on the "social and cultural development" of teenagers).

B. Trimming the Unconstitutional Edges of Cyberbullying Laws

Until the Supreme Court provides clarity on the ability of schools to regulate online speech, legislators should tailor cyberbullying laws carefully to avoid running afoul of the First Amendment.[201] Because most existing and proposed cyberbullying laws focus on public schools, it is important that these laws do not exceed school authority to proscribe student speech, particularly Internet content created off-campus. When legislatures delegate the creation and implementation of cyberbullying policies to school boards, these bodies should involve legal counsel, in addition to parents and educators, in the policy-setting process. Cyberbullying laws should also specifically define the act of cyberbullying, as does the Kansas law, to avoid unconstitutional vagueness.[202]

To keep cyberbullying laws within constitutional bounds, lawmakers should also better define the scope of public-school authority to proscribe speech, including limitations on this power that reflect the *Tinker* "material and substantial disruption" standard. Some cyberbullying laws, such as that of Arkansas, already contain provisions that restrict the ability of schools to punish online speech that fails to satisfy the *Tinker* standard.[203] Others, such as the Indiana cyberbullying law, may be deemed overly broad because they extend school authority to online expression made off-campus.[204] When school antibullying and antiharassment policies exceed the *Tinker* standard, they run the risk of being struck down by the courts.[205] Policymakers should diligently track developments in case law and should craft cyberbullying laws that are consistent with the limits of school jurisdiction over online speech.

Of course, the value of even well-tailored cyberbullying laws depends on how courts apply the *Tinker* standard to online-speech cases in the future. As discussed in Part IV, the force of public-school cyberbullying laws would be seriously diluted if courts deny schools the ability to regulate off-campus speech. The efficacy of most existing and proposed cyberbullying laws hinges on whether courts will allow

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201. *See supra* notes 163–167 and accompanying text.

202. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (discussing the dangers of vague laws that violate First Amendment interests by (1) failing to give fair notice of a legal violation, (2) creating risk of arbitrary and discriminatory enforcement, and (3) creating a chilling effect on expression).

203. *See supra* notes 184–186 and accompanying text.

204. *See supra* notes 173–176 and accompanying text.

205. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216–17 (2001) (invalidating an overly broad school antiharassment policy that covered more speech than the *Tinker* test).

schools to proscribe online speech that is created off-campus and creates a "material and substantial disruption" on-campus. If school authority to punish student speech does not extend to expression made via students' home computers, most cyberbullying content—the vast majority of which is generated off-campus and targets an individual victim—would go unpunished.[206] Due to this crippling limitation, cyberbullying laws are certainly not the only—nor best—solution not to address this issue.

C. No More Free Ride for ISPs and Website Operators under the Communications Decency Act

Modifying the Communications Decency Act ("CDA") presents another opportunity to strengthen the legal defense against cyberbullying.[207] Congress should revise the CDA to create notice-based liability for ISPs and website operators, thereby requiring them to remove defamatory content upon notification.[208] Providers should be required to implement and to record a notice and take-down process in order to gain protection from liability.

The proposed system would work much like the safe harbor under section 512 of the Digital Millennium Copyright Act ("DMCA"), which protects online-service providers ("OSPs") who inadvertently host materials that infringe intellectual property rights.[209] OSPs are exempt from liability under the DMCA if they have a designated agent who removes infringing content upon notification.[210] As many of the same parties who are subject to the DMCA also fall within the scope of the CDA, perhaps the very same agent and process could be utilized to facilitate the removal of obscene content. To aid parties in making take-down decisions, Congress could assign the Federal Communications Commission ("FCC") the task of publishing guidelines to indicate which types of communications should be removed from the Internet. These guidelines would only be advisory in nature, as each request requires a fact-specific approach and a bright-line rule would be inappropriate in this context.

Under a notice-based liability scheme, ISPs and website hosts would have a legal incentive to combat cyberbullying that occurs by

206. *See supra* notes 177–179 and accompanying text.

207. *See* Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 811–14 (2008) (advocating revision of the CDA).

208. *See* Areheart, *supra* note 45, at 43 (calling for a "notice and take-down regulatory scheme, similar to that under DMCA").

209. 17 U.S.C. § 512(c) (2006).

210. *Id.*

means of their services. The danger, of course, is that we do not want to create an Internet police force or create a chilling effect on online speech. However, the application of reasonable guidelines from the FCC would control for this risk by providing a standard by which parties may judge potential online harassment before removal. As long as ISPs and website hosts abide by the notice and take-down procedures, they would receive safe harbor under the CDA. Social-networking sites like Facebook and MySpace, which are widely used for purposes other than cyberbullying, would probably continue to thrive under this suggested regime. Websites like The Dirty, on the other hand, that exist solely for the purpose of personal ridicule would likely dissipate under this proposed change to the CDA. Such websites either would become inundated with an unmanageable volume of takedown requests or would have negligible content left after complying with the requests.

For OSPs that choose to ignore legitimate removal requests, this revision of the CDA would provide cyberbullying victims another avenue for legal recourse. It would also significantly strengthen defamation as a tool to fight cyberbullying because deep-pocketed corporations are more lucrative targets for lawsuits than individuals.[211] As acknowledged in Part II, defamation suits may not provide a complete, proactive solution to prevent cyberbullying. However, requiring ISPs and website hosts to remove defamatory content upon notice may curtail the effects of cyberbullying and prevent prolonged harm resulting from online harassment that remains on the Internet for extended periods of time.[212] Also, creating liability for ISPs and social-networking-site hosts under limited circumstances would compel companies in those industries to become more involved in addressing this serious problem.[213]

Liability for ISPs and website operators under the CDA should be appropriately tempered to prevent a chilling effect on the important

211. *Cf. supra* note 50 and accompanying text.

212. *See supra* notes 53–56 and accompanying text.

213. Social-networking sites, including MySpace and Facebook, are already working with governments in the United States, United Kingdom, and Europe to help protect children online. However, most of these efforts focus on protecting user privacy, which may help alleviate cyberbullying but does not fully address the problem or entail any obligation for website hosts to remove defamatory material. *See Social Networking Sites Ink Safety Pact; European Online Communities Will Work Together to Protect the Interests of Minors*, INFO. WEEK, Feb. 10, 2009, http://www.informationweek.com/news/internet/social_network/showArticle.jhtml?articleID=213402607 (reporting the strides social-networking sites are making to protect the privacy of minors).

services these companies provide.[214] Notice-based liability should only apply to reasonable removal requests. Moreover, ISPs and website hosts should not have an affirmative duty to monitor their users unless a legitimate complaint is received.[215] While reviewing and enforcing take-down requests would require some administrative resources, it is only appropriate for these companies to share in the burden of preventing illegal use of their services by cyberbullies. Creating notice-based liability for ISPs and website hosts under the CDA would help rid the enduring effects of cyberbullying without burdening free speech on the Internet, thereby reinforcing the original purpose of the Act.

D. Nonlegal Measures: Thinking Outside of the Courtroom

A comprehensive solution to eradicating cyberbullying requires looking beyond the strictures of the law to other disciplines. Although this Note primarily focuses on legal measures to address cyberbullying, nonlegal tactics, such as educational programming, counseling, and legislative action, contribute to a more complete solution to this complex social problem. Cyberbullying laws alone are an insufficient cure, especially considering that in order to withstand constitutional scrutiny, they may be weakened to the point that they fail to cover the majority of off-campus cyberbullying instances. In fact, until the Supreme Court offers more constitutional guidance on how schools may regulate online speech, nondisciplinary action may be the most prudent and effective way for schools to respond to cyberbullying.

Education, training, and counseling in homes and schools may help prevent cyberbullying in a more proactive manner than cyberbullying laws.[216] Especially at the elementary- and middle-school levels, it is important for children to build safe online habits.[217]

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214. The Illinois cyberbullying law, for example, creates qualified immunity for ISPs "except for willful or wanton conduct." 720 ILL. COMP. STAT. ANN. 135/1-2(c) (LEXIS through 2009 Sess.). Some limitation on liability is needed to prevent the chilling effect that could result under a scheme where ISPs and website hosts are fully liable for their users' actions.

215. *But see* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (warning that notice-based liability for ISPs under the CDA would create crushing liability for service providers).

216. *See* Chaffin, *supra* note 207, at 814–16 (emphasizing the importance of educational campaigns for parents and students); Cronan, *supra* note 191, at 172 (advocating implementation of preventative educational programs in schools).

217. *See* Carchman, *supra* note 12, at 5 (highlighting the importance of cyberbullying education at around the fifth grade level "because there is a jump in the incidence's [sic] from 6th

Schools need not invest extensive resources in developing a cyberbullying curriculum. Organizations such as the Center for Safe and Responsible Internet Use offer educational materials, handouts, and training materials, some available free online.[218]

The federal Broadband Data Improvement Act of 2008 represents a step in the right direction.[219] The law requires schools receiving federally subsidized telecommunications services to educate students about online safety, including "cyberbullying awareness and response."[220] However, the Act's educational mandate only applies to the approximately thirty thousand schools and libraries approved for Universal Service Fund assistance, leaving the rest of the over one hundred thousand public schools unaffected.[221]

Yet even without a nationwide federal program, several school districts across the country have already implemented anticyberbullying and Internet safety programs for parents as well as students.[222] These programs have shown some success. An empirical study in Virginia, the first state to mandate Internet-safety education in schools, revealed significant improvement in students' responses to

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to 7th grade," according to Justin Patchin, Assistant Professor of Criminal Justice at the University of Wisconsin).

218. Center for Safe and Responsible Internet Use, Professional Resources, http://www.cyberbully.org/professionals/ (last visited Feb. 22, 2010); *see also* Virginia Department of Education, Internet Safety in Schools, http://www.doe.virginia.gov/support/safety_crisis_management/internet_safety/index.shtml (last visited Feb. 22, 2010) (providing an extensive list of Internet safety resources).

219. Broadband Data Improvement Act, Pub. L. No. 110-385, § 215 (2008).

220. *Id.* The Act also creates an Online Safety and Technology working group and a national public awareness program on Internet safety for children by the Federal Trade Commission. These provisions appear to be more focused on preventing child pornography than cyberbullying. *Id.* §§ 212, 214.

221. DATA 360, NUMBER OF SCHOOLS IN THE UNITED STATES, http://www.data360.org/dsg.aspx?Data_Set_Group_Id=1389 (last visited Feb. 22, 2010); NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATIONAL STATISTICS, http://nces.ed.gov/programs/digest/d07/tables/dt07_005.asp (last visited Feb. 22, 2010); UNIVERSAL SERV. ADMIN. CO., 2007 PROGRAM STATISTICS, http://www.universalservice.org/about/universal-service/fund-facts-charts/sl-FY2007-statistics.pdf.

222. *See, e.g.*, Dep't. of Educ., Other Regulatory Agency Actions, 194 Vt. Gov't. Reg. 13, 18 (Weil Mar. 2007) (acknowledging the need to provide information about cyberbullying to parents); *Cyberbullying Workshop Provides Tips for Parents; New Law Requires Districts to Expand Bullying Policies*, OLYMPIAN (Olympia, Wash.), May 22, 2007, at 2B (giving the details of a cyberbullying workshop co-sponsored by Reeves Middle School and Committee for Children in Olympia, Washington); Monique DeVoe, *Students Hear Goddard Talk on Web Safety*, ARIZ. REPUBLIC, Nov. 18, 2008, at 3 (reporting that Arizona Attorney General Terry Goddard tries to speak to schools at least once a week as part of his Internet Safety School Tour). International educators have also responded to cyberbullying with similar tactics. *E.g.*, Marie Murray, *Torturing the Psyche in Cyberspace*, IRISH TIMES, Dec. 9 2008, at 11 (announcing a pamphlet, *Get With It - A Guide to Cyberbullying*, published by the Irish Minister for Justice, Equality and Law Reform).

questions about cyberbullying after completing the Internet-safety-education program.[223] The director of the Virginia Office of Educational Technology for the Virginia Department of Education, Tammy McGraw, teamed up with Pokémon Learning League, the educational branch of the popular children's video-game producer, to develop animated online lessons on cyberbullying for use in classrooms.[224] In addition to traditional classroom-teaching methods, Virginia's innovative educational approach appropriately uses online educational tools to address an online problem.

While schools must respect the parental domain, educators do have a role to play in teaching students about Internet dangers.[225] Education and training on how to respond to and prevent cyberbullying should extend not only to parents and students but to teachers and administrators as well.[226] Once educators learn of potential cyberbullying, they should notify parents and provide any available resources and recommendations to help alleviate the problem before it develops further. Fortunately, as the problem of cyberbullying has proliferated, so have anticyberbullying resources designed to help parents and teachers deal with the problem.[227]

Parents and teachers must also monitor student Internet access and limit it to healthy levels.[228] Internet-filtering software enables parents to block their children's access to inappropriate websites at home to prevent them from wandering onto forbidden

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223. SAFE Internet Act, S. 1047, 111th Cong. § 2(a)(4) (2009).

224. Chris Riedel, *The Fight Against Cyberbullying,* JOURNAL, May 1, 2008, http://thejournal.com/Articles/2008/05/01/The-Fight-Against-Cyberbullying.aspx?Page=2&p=1.

225. *See* David-Ferdon & Hertz, *supra* note 2, at S4 (illustrating the key role of educators in preventing online harassment by students); *see also* Denning & Taylor, *supra* note 162, at 868 (mentioning that a principal's request that parents and students sign a contract to monitor home computer use probably exceeded his role). *But see* Chaffin, *supra* note 207, at 814–15 (calling for a "nation-wide push for the inclusion of anticyberbullying contracts within student Internet usage contracts").

226. *See, e.g.*, IOWA CODE § 280.28 (LEXIS through 2008 legislation) (encouraging antiharassment and antibullying training for employees who interact with students); WILLARD, *supra* note 195, at 163–64 (discussing the need for professional development at various levels of the educational bureaucracy); *see also* DEL. CODE ANN. tit. 14, § 4123A (2007) (requiring that each school district and charter school provide at least one year of annual training to teachers on the prevention of youth gang activity and bullying).

227. Several websites (for instance, www.stopcyberbullying.org; www.isafe.org; and www.cyberbully.org) are devoted to helping adults and children deal with cyberbullying.

228. David-Ferdon & Hertz, *supra* note 2, at S4–S5 (highlighting the need for increased parental monitoring based on data that "40% of adolescents report their parents do not impose rules around their Internet use and are unaware of what they do on the Internet"); Ruedy, *supra* note 33, at 346 (recommending that parents "set limits online and monitor the activity of their children in order to protect them from cyberbullying").

pages, whether intentionally or inadvertently.[229] At school, the Children's Internet Protection Act requires schools receiving federal technology funds from the Elementary and Secondary Education Act to comply with technology-protection measures, including restricting access to inappropriate Internet content.[230] The Deleting Online Predators Act, proposed in 2006, would prevent students on public-school campuses from accessing social-networking websites, where a large portion of cyberbullying occurs, but unfortunately Congress did not pass this legislation.[231]

Of course, adding cyberbullying education, training, and Internet-monitoring software in schools requires resources. For public-school systems in many parts of America, which already strain to finance essentials like textbooks and teacher salaries, funding additional programming may prove challenging.[232] On the other hand, investing in cyberbullying prevention may decrease the long-term costs cyberbullies create for schools and society at large in terms of harm to victims and resources spent punishing or prosecuting offenders. Also, educational tactics might be implemented with varying degrees of effectiveness around the country. The success of these measures depends in large part on the commitment of individual teachers, administrators, and parents to help children and teens develop safe online habits.

Finally, while educational measures may dissuade would-be cyberbullies from becoming online predators, this approach lacks the stronger deterrent effect of cyberbullying laws that prohibit and punish conduct. When education fails to prevent cyberbullying from occurring, offenders deserve to face penalties, both for retributive purposes and to dissuade others from engaging in like conduct. Therefore, educational tools will be most effective in combination with disciplinary measures.

None of the educational or monitoring tactics discussed in this Section restricts student speech or raises First Amendment concerns.

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229. *But see* WILLARD, *supra* note 195, at 176 (noting the limitations of filtering software); Anthony E. Wolf, *Watch Their Web Ways - but Don't Suffocate Them*, GLOBE & MAIL (Toronto, Can.), Feb. 17, 2009, at L3 (advocating the use of filtering software while pointing out its flaws, including the fact that tech-savvy teens can often find a way to access restricted online content).

230. Children's Internet Protection Act, Pub. L. No. 106-554, § 1711 (2000).

231. Deleting Online Predators Act, H.R. 5319, 109th Cong., § 3 (2006); *see* Roberts, *supra* note 130, at 1189–90 (pointing out the advantages and disadvantages of CIPA and DOPA).

232. *See, e.g.*, Sherry Labyer, *Schools Facing Turbulent Times*, DUNCAN BANNER (Duncan, Okla.), Feb. 22, 2009, *available at* http://www.tmcnet.com/usubmit/2009/02/22/4005003.htm (discussing the financial hardships of Oklahoma public schools, which faced increased costs in 2009 but received no increase in appropriations from the Oklahoma legislature).

These nonlegal measures should be the first step in creating a line of defense against cyberbullying. This multidisciplinary approach addresses cyberbullying more proactively and with less constitutional tension than cyberbullying laws. However, when educational and other nonlegal measures fail to prevent cyberbullying, legal remedies should serve as a backstop to ensure appropriate retribution for offenders and justice for their victims.

VI. CONCLUSION

As illustrated by the tragic story of Megan Meier, cyberbullying is a burgeoning problem in America, especially among youth. Cyberbullying plagues at least one-third of American teenagers[233] and inflicts negative consequences on society at large.[234] Hence, this problem deserves the attention of legislatures, schools, and parents. Although legislators need to work quickly to address this problem, they must also be wary of hastily enacting improvident laws that erode First Amendment rights. In particular, policymakers should craft cyberbullying laws cautiously in light of the current uncertainty as to the ability of public schools to regulate online student speech. Until the Supreme Court clarifies the authority of schools over online speech, legislators and educators must respond to cyberbullying in a way that avoids restricting students' free speech rights.

As American laws and policies modernize to address cybercrimes, courts must fervently protect First Amendment rights online while encouraging an Internet environment where children can learn and communicate safe from the attacks of cyberbullies. Only when courts, legislators, schools, and parents work collectively on a multidisciplinary approach to cyberbullying can we adequately protect our nation's youth from online harassment without inhibiting free expression, education, and social interaction on the Internet.

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233. *See supra* note 18 and accompanying text.

234. *See supra* Part II.A.

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