NOTES

BULLIED TO DEATH: CYBERBULLYING AND STUDENT ONLINE SPEECH RIGHTS

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Abstract

In the age of online social networking, photo and video sharing, blogs, text messaging, and other forms of communication technology, bullying among teenagers has reached a whole new level. It has transcended the traditional schoolyard context and crossed into cyberspace, leaving victims of bullying more vulnerable than ever. Recent headline-grabbing suicides, such as the cyberbullying-related suicides of Megan Meier, Phoebe Prince, Tyler Clementi, and Jamey Rodemeyer, have launched the issue of cyberbullying into the national spotlight.

With so many recent cases of suicide, school officials, legislators, teachers, and parents are struggling to curb cyberbullying among students without infringing their First Amendment rights. This Note addresses the uncertain legal boundaries that public school officials face in regulating online student speech and recommends anticyberbullying rules that schools constitutionally may apply to prevent and reduce both on- and off-campus cyberbullying.

This Note suggests that in establishing these rules, schools should maintain the distinction between on- and off-campus cyberbullying, by regulating on-campus cyberbullying in most circumstances and giving full First Amendment protection to exclusively off-campus cyberbullying in all circumstances. This approach leaves open ample avenues for schools to regulate the most common form of cyberbullying—that is, off-campus cyberbullying connected with on-campus in-person bullying. In dealing with this increasingly prevalent form of bullying, schools should be able to reach the off-campus element by regulating bullying as a whole. In doing so, schools will be able to create a safer school environment for cyberbullying victims without infringing on protected student speech rights.

* J.D. expected May 2012, University of Florida Levin College of Law. I would like to thank the members of the editorial board and staff of the Florida Law Review for their advice and hard work on this Note. I would also like to thank Professor Diane H. Mazur for her insight and invaluable guidance. Most importantly, I would like to thank my parents Ray and Karen Ho for their love and support.
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INTRODUCTION

Jeffrey Johnston had a bright future ahead of him. He was an honors student at Trafalgar Middle School in Cape Coral, Florida. He had a loving family and a close group of friends. But after relentless bullying, both at school and online, Jeff ended his own life at the age of fifteen.1

It all began in the seventh grade, when a bully began taunting Jeff at school. The bully “started trashing [Jeff] at school, cursing [Jeff] out

under his breath, and telling everyone [Jeff] was gay.” 2 Notes were passed. Rumors were spread. Soon, the taunting reached the Internet. 3 When Jeff began the eighth grade, the bully hacked into an online video game that Jeff and his friends had created and bombarded the site with nasty comments about Jeff. 4 The bully also began an online journal, which allowed him to attack Jeff even further. 5 The bully’s posts included comments such as, “Jeff is a fagget [sic]. He needs to die.” 6

Gradually, the effect the bullying had on Jeff became obvious to those around him. He became withdrawn and quiet—a shadow of his former self. According to his mother Debbie, “Jeff was never the same. That . . . inner core of happiness that just shone like a light from him was . . . gone.” 7 By the summer after his freshman year of high school, Jeff could no longer handle the bullying. On the morning of June 29, 2005, Debbie went to wake up her son, but instead found his body hanging inside his bedroom closet. 8

The story of Jeff Johnston tragically has become all too common. Over the course of the 2009–2010 school year, at least one student, on average, committed suicide every month as a direct result of bullying. 9 These suicides have forced school administrators, teachers, and parents to acknowledge not only that bullying has become a national epidemic, but also that bullying has reached a whole new level due to “technology lubricating the social lives of teenagers.” 10 Bullying has transcended the traditional schoolyard context and has crossed into cyberspace, “amplifying standard adolescent cruelty” and leaving bullied students like Jeff Johnston more vulnerable than ever. 11

Therefore, legislators, school officials, parents, and students must find a way to limit cyberbullying and its often-tragic consequences. This Note addresses the uncertain legal boundaries that public school officials face in regulating online student speech and recommends

2. Id. at 123 (quoting Jeff Johnston) (internal quotation marks omitted).
3. Id.
4. Anna Scott, Mom Fights for Dead Son, SARASOTA HERALD-TRIB., Apr. 10, 2007, at A1, 9A (explaining that all of Jeff’s classmates “could see the corrupted version [of the game] online”).
5. Id.
6. Id. (quoting the online journal) (internal quotation marks omitted).
7. This Emotional Life: Family, Friends & Lovers (PBS television broadcast Jan. 4, 2010).
8. Rosen, supra note 1, at 124.
anticyberbullying rules that schools constitutionally may apply to reduce both on- and off-campus cyberbullying. Part I of this Note defines cyberbullying. Part II discusses the current law in traditional student speech cases. Part III explains the limits of the Supreme Court’s traditional student speech standards in the context of cyberbullying cases and discusses the inconsistent ways in which lower courts have applied the standards in recent online student speech cases. Finally, Part IV proposes effective, flexible approaches to protecting cyberbullying victims both on- and off-campus without violating student speech rights.

I. WHAT IS CYBERBULLYING?

There is no clearcut definition of the term “cyberbullying,” which can describe a variety of digital speech, ranging from “rude comments left on MySpace pages, to harassment via e-mail, or the wide dissemination of private (sometimes embarrassing) information.” The Centers for Disease Control and Prevention (CDC) defines “electronic aggression,” such as cyberbullying, as “[a]ny type of harassment or bullying (teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through email, a chat room, instant messaging, a website (including blogs), or text messaging.” This definition includes actions taken by students to harass teachers and school administrators online.

The scope of this Note, however, is limited to cyberbullying among students, bringing it in line with the following definition: “[A] child, preteen, or teen [being] tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen, or teen using the Internet, interactive and digital technologies[,] or mobile phones.” This Note focuses on this relatively narrow definition because it seeks to propose prevention techniques and solutions for


protecting victims like Jeff Johnston, rather than teachers and school administrators, and for limiting cyberbullying among children, preteens, and teens.

The prevalence of this new form of bullying among children, preteens, and teens is shocking. A study led by the National Institute of Child Health and Human Development found that 13.6% of the students from a “nationally representative sample” of students from sixth to tenth grade were involved in cyberbullying over just a two-month period. Researchers have attributed this pervasiveness “to the proliferation of information and communications technology.” With easy access to “computer-mediated communications,” such as social networking sites, video sharing sites, instant messaging platforms, blogs, e-mails, and chat rooms, as well as “mobile telephony,” such as text messaging and video sharing, bullies can attack their victims with just one click.

Experts have observed that these developments in bullying have led “to an unprecedented—and often unintentional—degree of brutality.” Because cyberbullies do not have to confront their victims face-to-face, they may feel less inhibited in their attacks. Because of “the distance between bully and victim on the Internet,” cyberbullies may engage in bullying “without being forced to see its effect.” Furthermore, because cyberbullies are “[n]o longer confined to school grounds or daytime hours,” the home is no longer a safe haven for victims. All of these factors have enabled bullies to act “more sadistic, more brutal’ than in

15. Jing Wang, Ronald J. Iannotti & Tonja R. Nansel, School Bullying Among Adolescents in the United States: Physical, Verbal, Relational, and Cyber, 45 J. ADOLESCENT HEALTH 368, 369–70 (2009) (explaining that this statistic includes students who were “bullying others, being bullied, or both”).


18. See Mary-Rose Papandrea, Student Speech Rights in the Digital Age, 60 FLA. L. REV. 1027, 1034 (2008) (“Teenagers . . . frequent video- and photo-sharing websites, such as YouTube.com and Flickr.com.”).

19. Id.

20. Id. at 1032; see also John Cloud, Bullied to Death?, TIME, Oct. 18, 2010, at 60, 62 (noting that “insults can [now] be delivered in nanoseconds via handhelds”).


22. Id.

23. Id.
the past."24

The consequences of these often-brutal attacks include suicide, which some scholars have termed “cyberbullicide.”25 Tragic incidents of cyberbullicide confirm that cyberbullying “can pose a very real danger to . . . students’ safety” by contributing significantly to youth suicide.26 The number of students who have committed suicide after being bullied online is drawing an increasing amount of national attention.27 In September 2010 alone, three teenage boys—one in Houston, one in Greensburg, Ind[iana], and one in a small central California city called Tehachapi—and one college student at Rutgers University committed suicide due to bullying in school and online.28

II. THE CURRENT LAW ON REGULATING STUDENT SPEECH

With so many recent cases of cyberbullicide, school officials, legislators, teachers, and parents are struggling to curb cyberbullying among students without infringing on students’ First Amendment rights.29 The recent trend in school regulation has shown that legislators and school officials have been responding to social pressure to “pass tougher laws and implement stricter discipline policies to punish

24. Scott, supra note 4 (quoting author Elizabeth Bennett); see also Cloud, supra note 20, at 62 (“At least the bullies of previous decades had to hold you down before they could spit in your face.”); Larry Magid, Tyler Clementi’s Death Is a Call to Action, CNET.COM (Oct. 4, 2010, 3:55 PM), http://news.cnet.com/8301-19518_3-20018492-238.html (“At least in a school yard brawl, a bully can see his or her victim suffer. Online bullies may never know how much suffering they’re inflicting.”).

25. Hinduja & Patchin, supra note 16, at 207 (defining “cyberbullicide” as “suicide indirectly or directly influenced by experiences with online aggression”) (citing SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 66 (2009)).


28. See Cloud, supra note 20, at 60 (noting that “[t]he four cases [of William Lucas, 15, Tyler Clementi, 18, Asher Brown, 13, and Seth Walsh, 13] tumbled onto one another so quickly that they caught school officials across the country off guard”).

cyberbullying.” Approximately thirty states have passed anticyberbullying laws to address this problem. But without clearer standards for the authority to regulate the expansive area of online speech, legislators and school officials risk regulating protected student speech.

The Supreme Court has not yet addressed the issue of student speech rights in the context of online speech. However, past student speech cases nevertheless may provide helpful guidelines for determining when schools may restrict student speech without violating students’ First Amendment rights.

A. Student Speech Rights Cases

In determining when school officials may punish students for online speech, lower courts generally look to Supreme Court student speech jurisprudence for guidance. Consequently, most analyses of First Amendment issues integral to cyberbullying cases are made against the backdrop of four prominent Supreme Court decisions: Tinker v. Des Moines Independent Community School District, Bethel School District No. 403 v. Fraser, Hazelwood School District v. Kuhlmeier, and Morse v. Frederick.

The Supreme Court first addressed public school students’ rights to free speech in Tinker. In that case, school officials suspended three students for wearing black armbands to school in protest of the Vietnam War. The Court famously held that school officials did not have unlimited authority to regulate student speech because students do not “shed their constitutional rights to freedom of speech or expression at

30. Id. at 1566.
31. See infra Part IV.B.1 (discussing cyberbullying laws).
32. Hoder, supra note 29, at 1566–70.
33. Id. at 1567, 1570.
36. Id. at 504.
the schoolhouse gate.” Rather, student speech may only be punished if it meets the “material[] and substantial[] interfere[nce]” standard—that is, the speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” Furthermore, the Court added that “undifferentiated fear . . . of [a] disturbance is not enough” to satisfy this standard. The Court thereby “imposed a significant burden on schools to justify silencing student speech.”

The Court did not revisit the Tinker decision until Fraser, seventeen years later. In Fraser, school officials suspended a student for making a sexually explicit speech at a school assembly in an effort to nominate a fellow student for elective office. In upholding the school officials’ decision to suspend the student, the Court “took a much more restrictive view of student speech rights than it had in Tinker and gave great deference to school officials to censor student speech in the name of promoting ‘socially appropriate behavior.’” Unlike in Tinker, the Fraser Court “was less concerned with students’ free speech rights than with deferring to the school’s ‘basic educational mission’ to teach the ‘fundamental values of ‘habits and manners of civility’ essential to a democratic society.” Additionally, the Court distinguished students’ free speech rights from those of adults, stating that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”

Two years later, the Court further narrowed Tinker in Kuhlmeier. In that case, the Court upheld school officials’ decision to prohibit the publication of articles relating to pregnancy and divorce in a newspaper written and edited by one of the school’s journalism classes. As in Fraser, the Kuhlmeier Court did not rest its holding on the “substantial disruption” standard of Tinker. Rather, the Court held that a school may “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions

37. Id. at 506.
38. Id. at 505, 513 (internal quotation marks omitted) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
39. Id. at 508.
40. Starrett, supra note 34, at 217.
42. Id. at 677–78.
43. Papandrea, supra note 18, at 1045 (quoting Fraser, 478 U.S. at 681).
44. Id. (quoting Fraser, 478 U.S. at 685).
45. Fraser, 478 U.S. at 681 (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).
46. Id. at 682.
48. Id. at 262–66.
are reasonably related to legitimate pedagogical concerns.”50 In reaching this holding, the Court “distinguished between tolerating speech, as in Tinker, and promoting or publishing student speech, which puts the school’s imprimatur on that speech.”51

Nearly twenty years after Kuhlmeier, the Supreme Court “created a third content-based exception to the stringent Tinker standard in Morse v. Frederick.”52 In Morse, the Court upheld school officials’ decision to suspend a student for prominently displaying a banner declaring, “BONG HITS 4 JESUS,” during the 2002 Olympic Torch Relay.53 Although this incident occurred off campus, the Court emphasized that it occurred “[a]t a school-sanctioned and school-supervised event.”54 The event occurred during school hours and was sanctioned by the principal “as an approved social event or class trip.”55 Teachers and administrators supervised the students, and “[t]he high school band and cheerleaders performed.”56 A plurality of the Court thus found that “there was a sufficient relationship between the school and the activity to justify the school’s punishment.”57 The Court also emphasized that “the government [has an] interest in stopping student drug abuse.”58 Consequently, the school did not violate the student’s First Amendment rights.59

Therefore, the general rule is that if student speech occurs “under school supervision,” courts will apply the standards from Tinker, Fraser, Kuhlmeier, or Morse.60 The standards for off-campus student speech, however, are less clear because the Supreme Court has addressed only cases involving on-campus speech or speech occurring during school-sponsored activities. There is no clear standard for courts to apply in determining whether a school may restrict off-campus cyberbullying, which is the most common form of cyberbullying.61

50. Kuhlmeier, 484 U.S. at 273.
51. Hoder, supra note 29, at 1574.
52. Id.
54. Id. at 396.
55. Id. at 400 (quoting the school district’s rules) (internal quotation marks omitted).
56. Id. at 401.
57. Hoder, supra note 29, at 1575.
58. Morse, 551 U.S. at 408.
59. Id.
60. See Lee Goldman, Student Speech and the First Amendment: A Comprehensive Approach, 63 FLA. L. REV. 395, 397 n.8 (2011) (“To be under school supervision, the student does not have to be literally on-campus. For example, speech during school trips or school-sponsored activities is considered on-campus.”).
lack of clarity has contributed significantly to inconsistent holdings in lower court cyberbullying cases.  

B. On-Campus Versus Off-Campus Speech Cases  

Before analyzing the divergent holdings in lower court cyberbullying cases, it is useful to discuss the primary differences between on- and off-campus speech in lower court student speech cases. The distinction is especially important because it is frequently the deciding factor in determining whether a school may constitutionally restrict speech. The following cases exemplify this on-campus, off-campus distinction and show how courts rely on the distinction to determine the outcome of student free speech cases.

1. Thomas v. Board of Education  

In Thomas v. Board of Education, school officials suspended students for producing “a satirical publication addressed to the school community . . . pasquining school lunches, cheerleaders, classmates, and teachers” and including “[a]rticles on masturbation and prostitution.” 63 The students typed some of the articles on-campus and stored copies of the publication in a teacher’s closet. 64 Although the students distributed the publications off-campus, copies inevitably surfaced on campus. 65

Nevertheless, the U.S. Court of Appeals for the Second Circuit classified the speech as off-campus because “any activity within the school itself was de minimis.” 66 For this reason, the Tinker “substantial disruption” standard, requiring the speech to “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others,” did not apply. 67 The court consequently found that the school’s disciplinary actions “ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith.” 68 Therefore, the court ruled in favor of students’ rights, suggesting that “off-campus student speech should enjoy full First Amendment protection, unless the student somehow caused the speech to occur on-campus.” 69  

62. See infra Part III.
64. Id. at 1045.
65. Id.
66. Id. at 1050.
68. Thomas, 607 F.2d at 1050.
69. Markey, supra note 34, at 142.
2. Boucher v. School Board of Greenfield

Unlike the Second Circuit in Thomas, the U.S. Court of Appeals for the Seventh Circuit in Boucher v. School Board of Greenfield tipped the balance between school authority and students’ rights in favor of the school. In Boucher, school officials expelled a student for authoring an underground newspaper article explaining how to hack into the school’s computers. The court upheld the school officials’ decision, even though it acknowledged that the student author of the article neither used school facilities to publish the article nor participated in the on-campus distribution of the article.

“Because the article was . . . distributed on campus and advocated an on-campus activity,” the court concluded that “the potential for on-campus disturbance was great enough to overcome the geographic origin of the speech.” This reasoning is inconsistent with the Second Circuit’s holding in Thomas. The court in Thomas found that because the student speech was off-campus, the Tinker “substantial disruption” standard did not apply. Despite having a fact pattern similar to Thomas, the Seventh Circuit in Boucher applied the Tinker standard and consequently found that the school made a “reasonable forecast of disruption.”

3. Doe v. Pulaski County Special School District

In what seems like another inconsistent ruling, the U.S. Court of Appeals for the Eighth Circuit in Doe v. Pulaski County Special School District upheld the expulsion of a student who had written a “letter [off campus about] how he would rape, sodomize, and murder a female classmate who had previously broken up with him.” The court held that because the student’s speech was a “true threat,” the school’s disciplinary actions did not violate his constitutional rights. By holding that schools may regulate off-campus speech that falls into a category of unprotected speech, such as true threats, the Eighth Circuit in Pulaski extended school officials’ authority in a way that seemed to contradict the [Second Circuit]’s assertion in Thomas that a school...
official does not have any authority over off-campus speech."79

4. Porter v. Ascension Parish School Board

The U.S. Court of Appeals for the Fifth Circuit’s reasoning in Porter v. Ascension Parish School Board,80 on the other hand, was more akin to that of Thomas. In Porter, school officials suspended a student and ultimately required the student to move to a different school when “a sketch depicting a violent siege on [his school] . . . was accidentally taken to school by his younger brother.”81 The court found that the student’s sketch was not “speech on campus or even speech directed at the campus,” and it was not a true threat.82 Therefore, the Fifth Circuit held that the student’s drawing was protected by the First Amendment.83

Overall, in trying to draw the line between on- and off-campus speech, the Second and Fifth Circuits have tended to favor students’ rights, while the Seventh and Eighth Circuits have favored greater school regulation. As these lower court student speech cases illustrate, the distinction between on- and off-campus speech is sometimes unclear. The boundaries separating these two types of student speech become hazier in cyberbullying cases, which present even more difficult issues for courts.

III. STUDENT SPEECH CASE LAW APPLIED TO CYBERBULLYING

With some forty years of Supreme Court precedent regarding student speech, it is well established that student speech rights under the First Amendment receive “separate analysis from the more general First Amendment speech jurisprudence that applies to speech in a public forum.”84 This precedent, however, does not provide lower courts “with clear guidance on when the Constitution permits school regulation of online speech.”85

A. Standards Used by Lower Courts

In the absence of Supreme Court precedent, lower courts struggle with online student speech cases, particularly because “[u]nlke traditional forms of speech, Internet content is not limited by geography.”86 Nevertheless, lower courts continue to apply the

79. Hoder, supra note 29, at 1578.
80. 393 F.3d 608 (5th Cir. 2004).
81. Id. at 611.
82. Id. at 615, 617–18.
83. Id. at 620.
84. Hoder, supra note 29, at 1567.
85. Id. at 1576.
traditional “off-campus and on-campus speech distinction” to these cases. 87 By trying to fit what seems to be a new square peg in an old round hole, courts frequently contradict each other “on when school speech standards rather than general First Amendment principles govern in online student speech cases.” 88 In the midst of this uncertainty, three definite standards emerge from lower court opinions: (1) the Tinker approach, (2) the foreseeability approach, and (3) the off-campus speech approach. These approaches are inconsistent with each other and arguably are even inconsistent with Supreme Court precedent. Consequently, these approaches do not provide lower courts with a workable standard with which to address the issue of cyberbullying.

1. The Tinker Approach

One of the approaches lower courts take when addressing cyberbullying student speech cases is to treat online speech viewed at school as on-campus speech, thereby bringing it within the reach of the Tinker “substantial disruption” test. 89 Under the Tinker approach, courts allow speech to be punished if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” 90 without regard to “where the online speech in controversy originated or how it reached campus.” 91

For example, in Beussink v. Woodland R-IV School District, school officials suspended a student for posting an online homepage criticizing his school and using crude and vulgar language. 92 Although the student created the homepage at home and did not intend for it to be accessed or viewed at school, another student accessed the homepage at school and showed it to a teacher who then reported it to the principal. 93 In evaluating the validity of the student’s suspension, the U.S. District Court for the Eastern District of Missouri, “[w]ithout analyzing the issue of whether the speech occurred on- or off-campus, . . . applied the Tinker test.” 94 Because the court found that the student’s homepage “did not materially and substantially interfere with school discipline,” it

88. Hoder, supra note 29, at 1567; see also Starrett, supra note 34, at 214 (noting the lower courts’ inconsistencies in extending “Supreme Court student speech jurisprudence to online speech” cases).
91. Hoder, supra note 29, at 1580.
92. 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).
93. Id. at 1177–78.
94. Tuneski, supra note 89, at 154.
enjoined the school from implementing the suspension. The court thereby “expand[ed] the ‘substantial disruption’ analysis to cover all student speech.”

2. The Foreseeability Approach

Under the foreseeability approach, courts apply the Tinker “substantial disruption” test “when it [is] foreseeable that the speech [will] make its way onto campus.” Courts have applied this approach in several cases, including two Second Circuit cases: Wisniewski v. Board of Education of the Weedsport Central School District and Doninger v. Niehoff.

In Wisniewski, school officials suspended a student for creating and using an AOL Instant Messenger (IM) “buddy icon” depicting his English teacher being shot and killed. Although the student did not bring the icon on campus, another student provided a copy of it to the teacher depicted. The Second Circuit upheld the student’s suspension on the basis of the Tinker “substantial disruption” test. The court found that because the student created the image knowing that there was a “reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school,’” the school’s disciplinary action did not violate his First Amendment rights.

Similarly, in Doninger, “the Second Circuit extended school authority to [include] off-campus online speech that had not yet caused any disruption.” In that case, a student posted a message calling the school’s administration “douchebags” on the student’s publicly accessible blog. The court found that because the student’s blog post dealt with school-related events and was directed towards fellow students, it was reasonably foreseeable that the student’s speech would

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95. Beussink, 30 F. Supp. 2d at 1181–82.
96. Pike, supra note 26, at 992.
97. Hoder, supra note 29, at 1581.
98. 494 F.3d 34 (2d Cir. 2007).
99. 527 F.3d 41 (2d Cir. 2008).
100. Wisniewski, 494 F.3d at 35–37 (“[With the] AOL IM program . . . a sender of IM messages [may] display on the computer screen an icon, created by the sender, which serves as an identifier of the sender, in addition to the sender’s name. The IM icon of the sender and that of the person replying remain on the screen during the exchange of text messages between the two ‘buddies.’”).
101. Id. at 36.
102. Id. at 38, 40.
103. Id. at 38–39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).
104. Hoder, supra note 29, at 1582.
105. Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008).
reach the campus and create a substantial disruption on-campus.\textsuperscript{106} The court therefore upheld the school’s disciplinary action toward the student.\textsuperscript{107}

As Wisniewski and Doninger illustrate, the foreseeability approach—like the Tinker approach—may be applied to off-campus online speech, so long as it is reasonably foreseeable that the speech will make its way to campus. In analyzing the application of these two standards, however, it is important to acknowledge that when school officials punish students for off-campus speech, a host of First Amendment issues arise. Notably, if a school, which is a state actor, punishes a student for off-campus online speech that constitutes expressive conduct, the school’s disciplinary actions must somehow be justified under the First Amendment.\textsuperscript{108} If the cyberbullying does not “rise[] to the level of fighting words” or other traditionally unprotected categories of speech, the school will likely find it difficult to justify its actions.\textsuperscript{109} This difficulty arises because—outside the unique environment of the school where school officials may control student speech to some extent—regulations imposed on speech that do not fall within one of the traditionally unprotected categories of speech are presumed to be unconstitutional.\textsuperscript{110} For these reasons, some scholars argue that the Tinker approach and the foreseeability approach erroneously extend school authority too far.\textsuperscript{111}

3. The Off-Campus Speech Approach

These same scholars argue that a better standard is the off-campus speech approach, as it treats online speech as protected speech when it occurs off-campus and is therefore more consistent with the Supreme Court’s reasoning in Tinker.\textsuperscript{112} The U.S. District Court for the Western District of Washington applied this standard in Emmett v. Kent School District No. 415.\textsuperscript{113} In Emmett, school officials initially expelled (but later only suspended) a student for creating a website that included mock obituaries and allowed visitors to vote on who would “die”

\begin{itemize}
\item \textsuperscript{106} Id. at 50.
\item \textsuperscript{107} Id. at 53–54.
\item \textsuperscript{108} Kara Carnley-Murrhee, Cyberbullying: Hot Air or Harmful Speech?, UF LAW, Winter 2010, at 16, 19.
\item \textsuperscript{109} Id.; see also Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (describing “fighting words” and noting that such speech carries no constitutional protection).
\item \textsuperscript{110} The main unprotected categories of speech include: obscenity, fraudulent misrepresentation, defamation, advocacy of imminent lawless behavior, and fighting words. See United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).
\item \textsuperscript{111} Goldman, supra note 60, at 407, 417; Hoder, supra note 29, at 1582.
\item \textsuperscript{112} See, e.g., Goldman, supra note 60, at 407, 411; Tuneski, supra note 89, at 158–59; see also infra Part IV.C.1.
\item \textsuperscript{113} 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).
\end{itemize}
next.\footnote{114} Unlike the \textit{Beussink} court, the court in \textit{Emmett} did not make the immediate jump to applying the \textit{Tinker} “substantial disruption” test because it found that the student’s website was created and hosted off-campus.\footnote{115}

The \textit{Emmett} court reasoned that it was unnecessary to apply the “substantial disruption” test because it “was confident that the school could not reach outside of its gates to penalize a student for otherwise protected speech.”\footnote{116} The court thus limited the application of the \textit{Tinker} standard to on-campus speech. Two years later, the U.S. District Court for the Eastern District of Michigan followed the same approach in \textit{Mahaffey v. Aldrich}.\footnote{117} The Mahaffey court interpreted “\textit{Tinker} to subject student speech to punishment only when such speech ‘occurred on school property,’” thereby supporting the viability of the off-campus speech approach.\footnote{118}

\textbf{B. The Third Circuit Split on MySpace Cases}

The inconsistent standards applied by the lower courts make evident the need for “the Supreme Court to define the contours of First Amendment protection for student speech on the Internet—specifically where that speech, though occurring off-campus and during non-school hours, reaches the school environment.”\footnote{119} Although now resolved, the previous U.S. Court of Appeals for the Third Circuit split in \textit{Layshock v. Hermitage School District}\footnote{120} and \textit{J.S. ex rel. Snyder v. Blue Mountain School District}\footnote{121} further highlights this need for a clear standard, as it exemplifies the current uncertainties in the realm of online student speech.

In \textit{Layshock}, a student created a “parody profile” under his school principal’s name on MySpace.\footnote{122} The student created this profile off-campus at his grandmother’s house, but allowed classmates viewing privileges by adding them as friends through the fake account. The student also accessed the profile at school to show it to other classmates.\footnote{123} The Third Circuit found that the disciplinary actions the
school ultimately took against the student were unconstitutional, even though “the speech was vulgar and did create some disruption” at school.124 The court held that “[i]t would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child’s home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities.”125

Despite this holding, another “panel of Judges of the Third Circuit reached the opposite conclusion on the very same day in a similar case,” J.S. ex rel. Snyder v. Blue Mountain School District.126 In J.S., two students, J.S. and K.L., created a MySpace profile for their school principal under the fictitious name “m-hoe=].”127 The students created this profile off-campus from a home computer, but initially set the profile setting to “public,” thereby allowing general public viewing.128 Eventually, J.S. and K.L. set the profile to “private,” but allowed classmates viewing privileges by adding them as friends.129 School officials suspended J.S. and K.L. for a ten-day period.130 Drawing from Tinker, this Third Circuit panel found the students’ suspension constitutional because “school authorities need not wait until a substantial disruption actually occurs in order to curb the offending speech if they are able to ‘demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities.’”131 The court found the school’s actions appropriate, particularly in light of the serious accusations made against the principal, the lewd and vulgar language on the profile, and the “inherent potential of the Internet” to enable quick dissemination of information on the profile—all factors increasing the potential for substantial disruption.

Because this holding was directly at odds with the holding in Layshock, the Third Circuit agreed to rehear the cases en banc to clarify

124. Id. at 254, 263; Goldman, supra note 60, at 427.
125. Layshock, 593 F.3d at 260.
127. 593 F.3d 286, 290–91 (3d Cir. 2010), reh’g en banc granted, opinion vacated (Apr. 9, 2010) (finding that the profile included a photo of the principal copied and pasted from the school district’s website; described the principal in vulgar and offensive terms, including “pervert,” “sex addict,” “fagass,” and “tight ass,” and insinuated the principal was a pedophile).
128. Id. at 291–92.
129. Id. at 292.
130. Id. at 293.
132. Id. at 301 & n.7.
the rulings. The Third Circuit’s en banc decisions, filed on June 13, 2011, resolved the circuit split in favor of student speech. The court “decided in both cases that schools may not punish online, off-campus speech to the same extent that they may when dealing with in-school speech.” Specifically, the court held that the Supreme Court’s decision in Fraser to defer to the school’s “basic educational mission” to teach the “fundamental values of ‘habits and manners of civility’ essential to a democratic society” does not apply to off-campus, online speech. Moreover, the court maintained “that off-campus speech is not transformed into school speech, subject to the Fraser standard, simply because some students access it on school computers, or because the principal requested that a hard copy of the website be brought into the school.”

Significantly, the court held in both cases that the facts of each case “d[id] not support the conclusion that a forecast of substantial disruption was reasonable.” However, the court left unanswered the issue of “whether off-campus, online speech that is reasonably considered substantially disruptive could be censored.” This important question remains to be resolved in future cases, and until the Supreme Court establishes a standard for online student speech cases, it is likely that the trend of inconsistency among the lower courts will continue.

IV. REDEFINING STUDENT PROTECTIONS

Regardless of whether there is a clear Supreme Court standard for dealing with cyberbullying cases, school authorities may still find ways to protect both student speech rights and the rights of cyberbullying victims. An analysis of effective ways to prevent and regulate cyberbullying while still preserving students’ rights to free speech may clarify this gray area of student speech and help reduce the instances of cyberbullying among students.


134. Id.

135. Id.


137. Goldberg, supra note 133.


139. Goldberg, supra note 133.
A. Protecting Student Speech Rights

Before discussing the various ways to combat the problem of cyberbullying, it is important to note that the regulation of cyberbullying should be done with a certain degree of restraint. There is no doubt that cyberbullying is a significant and dangerous problem facing students today.\textsuperscript{140} School officials may consequently be tempted to be aggressive in their regulation of student online speech. Nevertheless, “there are reasons to be reluctant to regulate such student communications outside school supervision.”\textsuperscript{141} The Supreme Court has observed that education “is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values.”\textsuperscript{142} If schools completely undermine students’ rights to free speech, one of the most basic rights cherished by American citizens, students may develop a shaky “foundation of good citizenship,” to say the least.\textsuperscript{143} As noted constitutional law expert Dean Erwin Chemerinsky argues, “[T]here is dissonance, if not hypocrisy, in teaching students that free speech matters when school officials themselves provide virtually no protection for student speech.”\textsuperscript{144}

Perhaps the most effective way to ensure that student speech rights are protected is for schools to establish clear rules regarding cyberbullying among students. This rationale is twofold. First, without clear rules, undue discretion is given to school authorities—after all, depending on how they feel about a particular student’s online speech, these authorities could decide to look the other way rather than discipline the student. Such selective enforcement could lead to discrimination against certain students or certain points of view. Furthermore, “[u]nclear rules risk chilling speech.”\textsuperscript{145} If a student does not know whether her online speech will be held to be protected speech, she may decline to exercise her right to speak.

Second, as Professor Lee Goldman notes, “unless rules are clear, school officials will have little incentive to protect students’ First Amendment rights.”\textsuperscript{146} School authorities have qualified immunity, meaning that they are shielded “from lawsuits for damages, unless their actions violate clearly established rights of which an objectively reasonable official would have known.”\textsuperscript{147} Without the prospect of a

\begin{itemize}
\item \textsuperscript{140} See supra text accompanying notes 9–11.
\item \textsuperscript{141} Goldman, supra note 60, at 413.
\item \textsuperscript{142} Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Erwin Chemerinsky, Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools, 42 U.C. DAVIS L. REV. 825, 826 (2009).
\item \textsuperscript{145} Goldman, supra note 60, at 407.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Doninger v. Niehoff, 594 F. Supp. 2d 211, 220 (D. Conn. 2009); see also John C.
damage award, the only option for students whose rights have been violated is injunctive relief—an unsatisfactory result in light of the costs of litigation and the fact that the suspension or other disciplinary action has likely been carried out. Therefore, unless rules are clear, “school officials will have little fear that their disciplinary decisions will be reversed,” and student speech rights may easily be violated without any legal consequences.

B. Protecting Victims of On-Campus Cyberbullying

1. Bolstering Supreme Court Precedent with State Anti-bullying Laws

Because the Supreme Court has already addressed the issue of on-campus student speech in cases such as Tinker, Fraser, Kuhlmeier, and Morse, the rules pertaining to on-campus cyberbullying should be relatively clear, in comparison to the rules pertaining to off-campus cyberbullying. School officials should be able to discipline students engaging in on-campus cyberbullying without violating their First Amendment rights if the students’ conduct meets the standards discussed in Tinker, Fraser, Kuhlmeier, or Morse.

Applying Supreme Court precedent to justify school regulation of on-campus cyberbullying, however, still leaves cyberbullying victims vulnerable because school officials may not necessarily choose to regulate the speech, even when constitutionally justified. School officials sometimes fail to stop even traditional bullying occurring under school supervision—in spite of victims’ appeals for help. This failure to act often carries over into school regulation of on-campus cyberbullying, thereby providing little guarantee that victims of on-

149. Id. at 408.
150. Note that “on-campus cyberbullying” is not limited to cyberbullying that occurs “on campus” in a literal sense. It includes cyberbullying under school supervision, which could include cyberbullying during school-sponsored activities, for instance. See id. at 397 n.8.
151. See supra Part IIA.
152. Tyler Long, a student in the Murray County, Georgia, school system, for example, was bullied for years at school because he suffered from a social disorder called Asperger syndrome. Tyler’s parents brought the bullying to the school’s attention very early on, but the school took no action to stop it. As a result of the unchecked on-campus bullying, Tyler took his own life at the age of seventeen. Even after Tyler’s death, the school continued to deny responsibility, claiming sovereign immunity as one of its defenses when Tyler’s parents sued the school district and the school principal. The school did not even reprimand Tyler’s bullies for mocking his death by wearing nooses around their necks to school. See Jim Dubreuil & Eamon McNiff, Bullied to Death in America’s Schools, ABC NEWS: 20/20, Oct. 15, 2010, http://abc.news.go.com/2020/TheLaw/school-bullying-epidemic-turning-deadly/story?id=11880841; see also Answer at 28, Long v. Murray Cnty. Sch. Dist., No. 4:10-CV-00015-HLM (N.D. Ga. Apr. 16, 2010), available at http://media.timesfreepress.com/docs/2010/04/Answer_to_amended_complaint_file-stamped_copy.pdf.
campus cyberbullying will be protected.\footnote{153}

In states with antibullying laws, however, schools are much more likely to come to the aid of on-campus cyberbullying victims. First, schools with antibullying laws are encouraged, and sometimes even required, to act in accordance with pre-established antibullying policies that require an administrative response to on-campus cyberbullying.\footnote{154} Furthermore, because antibullying policies often track the language of Supreme Court precedent, they eliminate some of the guesswork that schools face in trying to act in compliance with past Supreme Court student speech cases.\footnote{155} The application of state anticyberbullying laws may consequently be one of the most effective ways to protect on-

\footnotetext{153}{For instance, Jeff Johnston’s mother reported the on- and off-campus bullying of her son to school officials. In fact, she was a teacher at Jeff’s school herself, but because the school responded by simply talking to Jeff’s class about the bullying, rather than taking a more proactive antibullying stance, the school failed to deter Jeff’s bullies. Rather, the school’s response motivated Jeff’s bullies to become even crueler. See \textit{This Emotional Life Experts Biography: Debbie}, PBS.ORG, http://www.pbs.org/thisemotionallife/people/personal-story/debbie (last visited Feb. 5, 2012) (related television broadcast available at http://www.youtube.com/watch?v=tmxSzis_RMg); see also Margery D. Rosen, \textit{supra} note 1, at 123–24.}


\footnotetext{155}{Most of these policies track the language of \textit{Tinker}’s “material[] and substantial[] interference” standard. \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted); \textit{see, e.g., Student Harassment Prevention Act, ALA. CODE § 16-28B-3} (2009) (defining “harassment” as a “pattern of behavior that may ... [h]ave the effect of substantially disrupting or interfering with the orderly operation of the school”); \textit{CONN. GEN. STAT. § 10-222d} (2011) (defining “bullying” as behavior that may “substantially disrupt[] the education process or the orderly operation of a school”); \textit{105 ILCS § 5/27-23.7} (2010) (defining “bullying” as conduct having certain harmful effects, including: “substantially interfering with the student’s or students’ academic performance,” or “substantially interfering with the student’s or students’ ability to participate in or benefit from the services, activities, or privileges provided by a school”); \textit{KY. REV. STAT. § 525.070} (2008) (including in its definition of “bullying” conduct that “[s]ubstantially disrupts the operation of the school”); \textit{MD. CODE § 7-424} (2008) (defining “bullying” as conduct that “[c]auses a hostile educational environment by substantially interfering with a student’s educational benefits, opportunities, or performance, or with a student’s physical or psychological well-being”); \textit{MASS. GEN. LAWS ch. 71, § 370} (2010) (including in its definition of “bullying” conduct that “materially and substantially disrupts the education process or the orderly operation of a school”); \textit{Matt’s Safe School Law, MCL 380.1310b} (2011) (including in its definition of “bullying” conduct that “[c]auses substantial disruption in, or substantial interference with, the orderly operation of the school”); \textit{MISS. CODE § 37-11-67} (2010) (including in its definition of “bullying” actions that “substantially interfer[e] with or impair[] a student’s educational performance, opportunities or benefits”); \textit{N.H. REV. STAT. § 193-F:3} (2010) (including in its definition of “bullying” conduct that “[s]ubstantially disrupts the orderly operation of the school”); \textit{Anti-Bullying Bill of Rights Act, NJS 18A:37-13.2} (2011) (defining “bullying” as conduct that “substantially disrupt[s] or interfere[s] with the orderly operation of the school or the rights of other students”).}
campus cyberbullying victims.

The number of states that have enacted these laws underscores their effectiveness. As of early 2012, forty-eight states have passed antibullying legislation.\(^{156}\) Of the forty-eight state laws, the antibullying law in Florida, aptly titled the “Jeffrey Johnston Stand up for All Students Act,” is considered one of the most effective.\(^{157}\) The Act requires school districts in Florida to adopt policies prohibiting bullying, including cyberbullying.\(^{158}\) It extends the reach of school authorities beyond the school campus to include off-campus activities under school supervision.\(^{159}\) It mandates that school officials establish procedures for reporting, investigating, and responding to bullying or harassment.\(^{160}\) Furthermore, the Act disciplines noncomplying districts by withholding federal funds.\(^{161}\)

In application, state anticyberbullying laws like the “Jeffrey Johnston Stand up for All Students Act” may be a significant deterrent to on-campus cyberbullying. The recent arrest of two cyberbullies from Estero High School—a school that incidentally belongs to the same school district as Jeff Johnston’s high school—under the “Jeffrey Johnston Stand up for All Students Act,” demonstrates the effectiveness of such laws.\(^{162}\) According to Lieutenant Ryan Bell from the Lee County Sheriff’s Office, “To my knowledge and to the knowledge of the people assigned, we believe this is the first of its kind (under the Jeffrey Law) anywhere in the area.”\(^{163}\) Such a tough response to cyberbullying in high schools signals that state laws such as the “Jeffrey Johnston Stand up for All Students Act” may finally give school

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158. Fl. Stat. § 1006.147(4).
159. Id. § 1006.147(2)(b).
160. Id. § 1006.147(4).
161. Id. § 1006.147(8).
162. The students created a fake Facebook profile under their classmate’s name with sexually explicit photos and comments about sex acts. As a result, the victim “was ‘subjected to numerous incidents of teasing and ridicule for an ongoing period.’” See Valli Finney, Facebook Prank Ends with Two Estero Teens Arrested, NAPLESNEWS.COM, Jan. 13, 2011, http://www.naplesnews.com/news/2011/jan/13/facebook-prank-naked-teens-girls-estero (quoting Deputy Allen Thierer). Although prosecutors ultimately did not charge the two cyberbullies (at the request of the victim’s father), it is notable that they were “referred to a pretrial diversion program” that required them “to go before an accountability board that help[s] youths accused of crimes understand the harm that was done and assigns punishment.” See FL Teens Won’t Be Prosecuted in Cyberbullying Case, ABC NEWS (Feb. 23, 2011), http://abcnews.go.com/US/wireStory?id=12978047.
districts the tools they need to counter on-campus cyberbullying.

2. School Internet Safety Policies

A more indirect way for schools to control on-campus cyberbullying is to institute and apply school Internet safety policies to monitor and block certain on-campus Internet use. School officials may be justified in applying such policies, as they play “an essential role in regulating school affairs and establishing appropriate standards of conduct.” Therefore, as Goldman urges, “[s]chools should have the right to control the use of their property . . . and they could adopt any rule for its use, including a rule precluding use of school computers to create anything that is likely to cause a substantial disruption at school.” By creating such a rule, schools may prevent and prohibit on-campus cyberbullying without targeting the content of the speech and consequently avoid raising First Amendment concerns.

In fact, some schools are required by federal law to adopt such rules. Schools that receive federal funding through the E-Rate Program, “a program that makes certain communications technology more affordable for eligible schools and libraries,” are required under the Children’s Internet Protection Act (CIPA) to enact Internet safety policies that “block[] or filter[] Internet access” on school computers to pictures “that are (I) obscene; (II) child pornography; or (III) harmful to minors.” Schools subject to CIPA are also required to address certain issues such as “access by minors to inappropriate matter on the Internet.” Although the reach of CIPA is beyond the scope of this Note, it is worth noting that its requirements could be extended to apply to on-campus cyberbullying, as long as the cyberbullying is construed as some kind of unauthorized use of school computers.

C. Protecting Victims of Off-Campus Cyberbullying

1. First Amendment Protection for Off-Campus Speech

The regulation of off-campus cyberbullying presents special First Amendment issues. Many lower courts have ignored these issues by failing to maintain the distinction between off- and on-campus cyberbullying and by applying the Tinker standard to off-campus speech

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166. Goldman, supra note 60, at 424–25.
169. Id. at 350–51.
under either the *Tinker* approach or the foreseeability approach.\(^{170}\) Lower courts, including the Second Circuit, have justified applying the *Tinker* standard to off-campus speech by reasoning that the speech “*might* come onto campus and cause a disruption.”\(^{171}\)

The application of this test to off-campus speech, however, is misguided because the facts in *Tinker* did not involve off-campus speech. As attorney Lisa L. Swem notes, “[T]he *Tinker* Court’s reference to the ‘special characteristics of the school environment’ suggest that the Court was only addressing on-campus expression when it held that students and teachers do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”\(^{172}\)

Furthermore, this approach extends school authority too far, as it enables schools to punish speech that should otherwise be protected.\(^{173}\) Taken to extremes, this approach could enable schools “to punish students for watching popular television shows or reading particular magazines, newspaper articles, or books for fear that discussion at school of such normally protected speech will disrupt classes or interfere with the fundamental values that the school seeks to teach.”\(^{174}\)

Therefore, as Goldman suggests, courts should limit the application of the *Tinker* “substantial disruption” standard to on-campus speech cases and give full First Amendment protection to off-campus speech.\(^{175}\)

Giving First Amendment protection to off-campus speech, however, does not imply that all off-campus speech is protected.\(^{176}\) If off-campus cyberbullying falls into one of the traditionally unprotected categories of speech, such as obscenity, defamation, fighting words, or true threats, the off-campus speech should be “viewed by the courts as having such slight social value that First Amendment protection is not warranted.”\(^{177}\) But the likelihood of off-campus speech falling into one of the unprotected categories of speech is low, as the Supreme Court has, in most cases, construed the unprotected categories of speech quite

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170. See supra Parts III.A.1, III.A.2.
171. Hoder, supra note 29, at 1581–82 (emphasis added).
173. Goldman, supra note 60, at 408; Swem, supra note 172, at 184.
174. Goldman, supra note 60, at 408.
175. See id. for a more detailed analysis of why off-campus student speech deserves full First Amendment protection.
176. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (noting that certain areas of speech may “be regulated *because of their constitutionally proscribable content*”); see also Swem, supra note 172, at 185 (citing *R.A.V.*., 505 U.S. at 382–90) (observing that “[t]he First Amendment . . . does not protect all off-campus speech”).
narrowly. Therefore, in most circumstances, regulation of off-campus cyberbullying by school officials should be off-limits.

2. Regulation of the Vicious Bullying Cycle

At first glance, giving First Amendment protection to almost all off-campus speech appears to be a harsh standard. This view seems to strip cyberbullying victims of any protection from off-campus cyberbullying, which is the most common form of cyberbullying. However, this standard should rarely apply, as cyberbullying is rarely confined exclusively to off-campus speech on the Internet. Many cases of cyberbullicide reveal that off-campus cyberbullying is often closely connected to on-campus bullying. Furthermore, studies have shown that “bully victims in the physical world [are] also likely to be bully victims in cyberspace,” and that “most cyberbullies [are] also traditional bullies.” Therefore, although cyberbullying may occur off campus, the bullying does not necessarily stop at school during school hours—it simply becomes part of “a vicious bullying cycle.”

If the on-campus element of the bullying is so closely connected to the off-campus element, schools should be able to reach the off-campus cyberbullying by addressing it in the context of the particular situation. In other words, courts should extend school officials’ authority to reach the off-campus element of bullying so long as the “school officials can demonstrate that the [bullying] has a direct and immediate effect on school discipline or the school’s general safety and welfare.” School officials can meet this burden by arguing that because the off-campus cyberbullying is simply an element of “a vicious bullying cycle” that includes on-campus bullying, it is connected to “the orderly operation of [the] school.” In schools with pre-established antibullying policies, like those mandated by the “Jeffrey Johnston Stand up for All Students

178. R.A.V., 505 U.S. at 383 (“[A] limited categorical approach has remained an important part of our First Amendment jurisprudence.”).
179. DeHue, Bolman & Vollink, supra note 61, at 219; Smith et al., supra note 61, at 379, 381.
180. See supra notes 27–28 and accompanying text. The following headline-drawing cyberbullicides resulted from off-campus cyberbullying that was at least partially connected to on-campus bullying: Asher Brown, 13, Ryan Halligan, 13, Seth Walsh, 13, Alexa Berman, 14, Jamey Rodemeyer, 14, Jeff Johnston, 15, William Lucas, 15, Phoebe Prince, 15, and Ashley Rogers, 15. See supra notes 27–28.
181. Qing Li, New Bottle but Old Wine: A Research of Cyberbullying in Schools, 23 COMPUTERS IN HUM. BEHAV. 1777, 1786 (2007); Smith et al., supra note 61, at 377 (citing Juliana Raskauskas & Ann D. Stoltz, Involvement in Traditional and Electronic Bullying Among Adolescents, 43 DEVELOPMENTAL PSYCHOL. 564, 568 (2007)).
182. Cloud, supra note 20, at 63.
183. Swem, supra note 172, at 181.
Act,” this burden may be more easily met, as acts of bullying such as “teasing,” “social exclusion,” and “public humiliation,” which sometimes go unpunished in schools without antibullying policies, are considered to affect “the orderly operation of [the] school” and are therefore punishable.\(^{185}\)

By following this approach, schools can avoid mystifying cyberbullying as a completely new and independent phenomenon and correctly recognize that in many instances, cyberbullying simply helps to “amplify and accelerate the hurt and the pain that [the victim is] trying to deal with that started at school and in person in the real world.”\(^{186}\) This approach properly acknowledges that cyberbullying is bullying and that schools should be able to regulate it if the burdens mentioned above are met. As Kevin Jennings, the director of President Barack Obama’s Office of Safe and Drug-Free Schools, notes, “[T]he machines are not the issue. The behavior is the issue. . . . Hateful behavior is never appropriate, no matter whether it happens online or in person. The idea that one is different from the other is the major problem.”\(^{187}\)

3. Successful Alternate Approaches

Not every anticyberbullying method is foolproof, however, as there will always be unusual cases that fall between the cracks. To ensure that all victims are protected, schools and parents should pursue all possible avenues to stop cyberbullying as soon as it is reported.

An often-overlooked but effective way to punish cyberbullies is through notifying the victims’ and bullies’ parents.\(^{188}\) Notifying the bullies’ parents is one of the methods advocated by the “Jeffrey Johnston Stand up for All Students Act.”\(^{189}\) By immediately notifying “parents of the perpetrator of an act of bullying or harassment,” schools may regulate, though indirectly, incidents of cyberbullying, while also protecting cyberbullies’ First Amendment rights.\(^ {190}\) If parents fail to punish the cyberbully or prevent further cyberbullying from occurring, victims and their parents may always take matters into their own hands and seek recourse through tort and criminal laws.\(^ {191}\)

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187. Cloud, supra note 20, at 62–63 (quoting Kevin Jennings) (internal quotation marks omitted).
188. Goldman, supra note 60, at 415–16.
190. Id. at § 1006.147(4)(i).
criminal systems may be effective mechanisms for preventing cyberbullying, especially in terms of deterrence in the face of potentially high penalties.\footnote{192}

Perhaps the most successful way to prevent cyberbullying, however, is for schools to take preemptive action by educating students and parents about the dangers of the Internet.\footnote{193} Rather than trying to combat cyberbullying after the fact, schools should “instill a culture of online safety in children” early on.\footnote{194} With regard to on-campus bullying, studies have shown that “programs that build from within schools and work with both victims and bullies” are successful in reducing student-on-student aggression.\footnote{195} The same approach may be extended to anticyberbullying programs in order to educate potential bullies about the consequences of cyberbullying and to make victims aware of the fact that their bullies can, in fact, be punished.\footnote{196} Such an approach towards cyberbullying not only avoids the First Amendment issues associated with some of these methods, but also works in establishing a safer online environment for students.

\section*{Conclusion}

By establishing clear anticyberbullying rules, schools can successfully address the growing problem of cyberbullying among students while promoting free speech values. In establishing these rules, schools should maintain the distinction between on- and off-campus cyberbullying by regulating on-campus cyberbullying in most circumstances and by giving full First Amendment protection to exclusively off-campus cyberbullying in all circumstances.

This approach leaves open ample avenues for schools to regulate the most common form of cyberbullying—that is, off-campus cyberbullying connected with on-campus bullying. In dealing with this increasingly prevalent form of bullying, schools should be able to reach the off-campus element by regulating the bullying as a whole in most circumstances. In doing so, schools will be able to create a safer school environment for cyberbullying victims without infringing on protected

cyberbullying may be punishable as stalking, harassment, defamation, invasion of privacy, threats, and identity theft); Goldman, supra note 60, at 409.
\footnote{192.} Goldman, supra note 60, at 416.
\footnote{193.} See id. at 417; see also Programs that Work, BULLY POLICE USA, http://www.bullypolice.org/program.html (last visited Feb. 5, 2012) (listing some effective antibullying educational programs).
\footnote{195.} Cloud, supra note 20, at 63.
\footnote{196.} Li, supra note 181, at 1787 (“[M]any effective techniques to combat cyberbullying and bullying are the same. These techniques include teaching students to report incidents and building awareness of the problem.”).
student speech rights.