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COMBATING CYBERBULLYING WITHIN THE METES AND BOUNDS OF EXISTING SUPREME COURT PRECEDENT

INTRODUCTION

Phoebe Nora Mary Prince, a pretty blue-eyed Irish teenager, moved to South Hadley, Massachusetts, in the summer of 2009.¹ A troubled girl, Phoebe had a history of bipolar disorder, depression, and self-mutilation.² The move to America seemed like the perfect opportunity to make a fresh start. She started her freshman year at South Hadley High School that fall.³ Unfortunately, the new girl quickly became the target of ruthless and insufferable harassment at the hands of her peers.⁴

Much of the bullying stemmed from Phoebe's relationships with certain boys.⁵ One female classmate, jealous that a boy she liked was taking Phoebe to a school dance, told Phoebe she should kill herself.⁶ Other students called Phoebe an "Irish slut," physically threatened her, and knocked books from her hands on a daily basis.⁷ Someone also scribbled her out of a class picture hanging up at school.⁸ Even at

¹ Ramin Setoodeh, *Phoebe Prince's Legacy: A Town Tries To Heal*, PEOPLE, Oct. 18, 2010, at 63; Anne-Marie Dorning, *New Developments Raise New Questions in Suicide of Phoebe Prince*, ABC NEWS (Dec. 15, 2010), <http://abcnews.go.com/US/settlement-federal-investigation-raise-questions-wrongdoing-case-15/story?id=12394493&page=1>.

² Jessica Bennett, *From Lockers to Lockup: School Bullying in the Digital Age Can Have Tragic Consequences. But Should It Be a Crime?*, NEWSWEEK, Oct. 11, 2010, at 38, 40.

³ Jessica Van Sack et al., *Pal: Suicide Victim Target of Bullies: Girls 'Jealous' of Popular Teen, Friend Says*, BOS. HERALD, Jan. 26, 2010, at 6.

⁴ Erick Eckholm & Katie Zezima, *9 Teenagers are Charged After Suicide of Classmate*, N.Y. TIMES, March 30, 2010, at A14. One student believes Phoebe was chosen because she was new, different, and unfamiliar with the school. *Id.*

⁵ Setoodeh, *supra* note 1, at 63. Two boys, including the football team captain, were charged with statutory rape shortly after Phoebe committed suicide. *Id.* at 60–63; Eckholm & Zezima, *supra* note 4, at A14.

⁶ Van Sack, *supra* note 3.

⁷ Eckholm & Zezima, *supra* note 4, at A14.

⁸ Bennett, *supra* note 2, at 39.

home, Phoebe found no safe haven. Her bullies mocked her on Facebook⁹ and harassed her via text messages.¹⁰

It all became too much for Phoebe. In January 2010, while Phoebe was walking home from school, some students hurled a crumpled soda can and shouted obscenities at her from a passing car.¹¹ Although she had endured similar treatment over the past several months,¹² at that moment Phoebe's suffering crescendoed, and she text-messaged a friend that she "[couldn't] do it anymore."¹³ Her little sister found her hanging from a stairwell later that afternoon.¹⁴

Phoebe is just one of the many teens who have taken their lives in response to relentless bullying. In Ohio, four students from the same high school killed themselves within a three-year span as the result of teen bullying.¹⁵ One of the students, Jennifer Eyring, was bullied because of her learning disability.¹⁶ She pleaded with her mother every morning to let her stay home and, when forced into school, needed Pepto-Bismol to calm her stomach.¹⁷ Jennifer overdosed on antidepressant pills in 2006.¹⁸ Eric Mohat and Meredith Rezak, close friends, faced ruthless harassment because their peers believed they were gay.¹⁹ In 2007, the friends shot themselves to escape their pain.²⁰ A year later, Sladjana Vidovic also committed suicide after months of ridicule from fellow students.²¹ Classmates called Sladjana a "slut" and made fun of her thick Croatian accent.²² She ultimately jumped out of her bedroom window with a rope tied around her neck.²³

While these Ohio students were all victims of traditional bullying, modern technology now plays a significant role in many teen suicides. For example, Jessica Logan, a student in the Cincinnati

⁹ *Id.*

¹⁰ Eckholm & Zezima, *supra* note 4, at A14.

¹¹ Bennett, *supra* note 2, at 39.

¹² Peter Schworm & Brian Ballou, *9 Teens Charged in Girl's Bullying*, BOS. GLOBE, Mar. 30, 2010, at Metro 1 (reporting comments of the District Attorney that "[t]he events were not isolated, but the culmination of a nearly-three month campaign of verbally assaultive behavior and threats of physical harm").

¹³ Bennett, *supra* note 2, at 40.

¹⁴ *Id.* at 39.

¹⁵ Meghan Barr, *1 Ohio School, 4 Bullied Teens Dead at Own Hand*, MSNBC.COM (Oct. 8, 2010, 2:56 PM), http://www.msnbc.msn.com/id/39578548/ns/health-kids_and_parenting.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* Eric's parents requested that the coroner label his death "bulicide." *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

suburb of Montgomery, Ohio,²⁴ hanged herself in 2008 after an ex-boyfriend disseminated nude photographs of her to hundreds of students.²⁵ Female classmates called her a “slut” and “whore.”²⁶ According to her mother, Jessica committed suicide because the harassment became unbearable.²⁷ Tyler Clementi committed suicide after his roommate, Dharun Ravi, allegedly broadcast a live sexual encounter between Tyler and another male over the Internet.²⁸ When Tyler learned of the broadcast, he jumped off the George Washington Bridge into the Hudson River.²⁹

Stories such as these have led the media to suggest that bullying has reached pandemic levels.³⁰ Indeed, bullying is a growing problem in American schools. One hundred sixty thousand children will miss school today for fear of being bullied.³¹ With the advent and popularization of the Internet, an age-old practice has taken on an entirely new form. Victimization that was once limited to buses and playgrounds now extends to the home computer and cell phone.³² Victims can no longer find a safe haven in their bedrooms.³³

This Note explores the cyberbullying controversy, focusing on the conflict between the desire of schools to provide a safe learning environment and the First Amendment rights of their students.³⁴ Part I discusses the seriousness of bullying and why it is particularly harmful in the cyber age. Part II then details the Supreme Court’s treatment of student speech and a school’s ability to regulate that

²⁴ *Mom’s Fight to End Cyber Abuse*, CBS NEWS (May 14, 2009, 11:35 AM), <http://www.cbsnews.com/stories/2009/05/14/earlyshow/main5013235.shtml?tag=contentMain;contentAux>.

²⁵ *Id.*; see also Timothy Wilson, *Teens Online and on Cells But Not on Their Guard: Group Calls Attention to Safety Concerns*, WASH. POST, July 9, 2009, at District Extra 3 (reporting that one-fifth of teens have sent, received, or forwarded sexually explicit photos through text message or email).

²⁶ CBS NEWS, *supra* note 24.

²⁷ *Id.*

²⁸ Alex Tresniowski et al., *Tormented to Death?*, PEOPLE, Oct. 18, 2010, at 56, 56.

²⁹ *Id.*

³⁰ See Bennett, *supra* note 2, at 39. (acknowledging the ‘dozens of articles that have called bullying a “pandemic”).

³¹ *20/20* (ABC television broadcast Oct. 15, 2010), available at <http://abc.go.com/watch/2020/SH559026/VD5592259/bullied-to-death-victims-stories>.

³² See Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 652 (2009) (“Playground bullies have exchanged their brute-force tactics for electronic weapons.”).

³³ See *What is Cyberbullying?*, NAT’L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (last visited Oct. 2, 2011) (noting that cyberbullying is viewed as more extreme by the victim because it occurs in his or her home).

³⁴ This First Amendment discussion applies only to public schools. The First Amendment only protects against government speech restrictions. Because private schools are not state actors, the protections in the Bill of Rights do not apply. ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 35 (2009).

speech when it materially or substantially disrupts the work and discipline of the school or invades the rights of others under *Tinker v. Des Moines Independent Community School District*.³⁵ Part III explains that the majority of lower courts have extended the *Tinker* standard to off-campus speech. These holdings suggest that, because it ostensibly occurs within the school environment, cyberbullying can be regulated by school officials as student speech. But, Part IV argues that this approach is misguided, resulting from the application of the *Tinker* standard to circumstances that the Supreme Court never intended, and that schools, in fact, lack the constitutional authority to regulate off-campus student Internet speech. Finally, Part V explores alternative methods to combat cyberbullying and proposes a legislative approach that would compel schools to promote awareness within their communities and implement stringent on-campus bullying policies. The inclusion of such a model policy could also clarify the line between constitutionally protected speech and unprotected bullying that is subject to school discipline.

I. THE CYBERBULLYING PROBLEM

The Center for Safe and Responsible Use of the Internet defines cyberbullying as “being cruel to others by sending or posting harmful material or engaging in other forms of social cruelty using the Internet or other digital technologies.”³⁶ Cyberbullying takes many forms: a bully may create a website that makes fun of the victim, circulate cruel or harmful material about the victim, or exclude the victim from buddy lists and chat rooms.³⁷ Bullying of any kind may result in depression, anxiety, chronic illness, poor self-esteem, substance abuse, family problems, and suicidal ideation.³⁸ Moreover, victims of cyberbullying are nearly twice as likely to commit suicide as compared to the general population.³⁹

Cyberbullying is more harmful than traditional bullying for several reasons. For instance, online content is “harder to wash away than

³⁵ 393 U.S. 503, 513 (1969).

³⁶ Nancy Willard, *Cyberbullying Legislation and School Policies: Where Are the Boundaries of the ‘Schoolhouse Gate’ in the New Virtual World?*, CTR. FOR SAFE & RESPONSIBLE INTERNET USE 1 (Mar. 2007), <http://csriu.org/cyberbully/docs/cblegislation.pdf>.

³⁷ See NAT’L CRIME PREVENTION COUNCIL, *supra* note 33.

³⁸ See *Id.* (describing the effects cyberbullying may have on victims); Turbert, *supra* note 32, at 655 (relating research findings which show that bullying may cause depression, anxiety, and other ailments).

³⁹ Jennifer Sinco Kelleher, *Battling the Bullies; West Islip Girl Scout Makes her Points at House Hearing; Tells of a Classmate Who Suffered From Online Attack*, NEWSDAY, June 25, 2010, at A08.

comments scrawled on a bathroom wall,”⁴⁰ and its cruelty thus constantly plagues its victim.⁴¹ Cyberbullying’s victims are also unable to escape torment, even in their own home⁴² and may be in perpetual fear of another attack.⁴³ This anxiety often results in poor academic performance and increased absences from school.⁴⁴ Moreover, because cyberbullies can cloak their identities through screen names and e-mail addresses, victims may not even know who is tormenting them,⁴⁵ which can add to the anonymity that often motivates the bullying in the first place, and transforms school into an unwelcome and unsafe environment.⁴⁶

Cyberbullying’s electronic medium can also lead bullies to be crueler to their victims. Because cyberbullying occurs “from a physically distant location . . . the bully does [not] . . . see the immediate response of the target.”⁴⁷ As a result, cyber-attacks can be particularly brutal. Psychologists have concluded that “the [physical] distance between bully and victim . . . is leading to an unprecedented—and often unintentional—degree of brutality, especially when combined with a typical adolescent’s lack of impulse control and underdeveloped empathy skills.”⁴⁸

Finally, unlike in the lunchroom or on the playground, there is little supervision in cyberspace.⁴⁹ Parents who lack technological savvy may not realize that their children are bullies.⁵⁰ Even if parents discover that their son or daughter is harassing another student

⁴⁰ Bennett, *supra* note 2, at 39–40.

⁴¹ See SHAHEEN SHARIFF, CONFRONTING CYBER-BULLYING: WHAT SCHOOLS NEED TO KNOW TO CONTROL MISCONDUCT AND AVOID LEGAL CONSEQUENCES 45 (2009) (“[O]nline communications have a permanence and inseparability that is difficult to erase.”).

⁴² NAT’L CRIME PREVENTION COUNCIL, *supra* note 33 (“Being bullied at home can take away the place children feel most safe.”).

⁴³ See Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 112 (2009) (“[Cyberbullying] [v]ictims may be in constant fear for their safety . . .”).

⁴⁴ SHARIFF, *supra* note 41, at 37.

⁴⁵ See *id.* at 44 (“Fear of unknown cyber perpetrators among classmates and bullying that continues at school distracts all students . . . from schoolwork.”).

⁴⁶ SHARIFF, *supra* note 41, at 44.

⁴⁷ Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CTR. 2 (2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf; see also Kelleher, *supra* note 39 (“[Bullies] don’t have to look their target in the eye.”).

⁴⁸ Turbert, *supra* note 32, at 654 (quoting Amy Harmon, *Internet Gives Teenage Bullies Weapons to Wound From Afar*, N.Y. TIMES, Aug. 26, 2004, at A1).

⁴⁹ Zande, *supra* note 43, at 110.

⁵⁰ See Hinduja & Patchin, *supra* note 47, at 2 (noting that many adults lack the technological know-how to monitor their children’s Internet use); *Dr. Phil Takes Up Cyber-Bullying Fight*, CBS NEWS (July 1, 2010, 3:06 PM), <http://www.cbsnews.com/stories/2010/06/24/earlyshow/main6613649.shtml> (noting that modern children are more computer literate than their parents).

through the Internet or a cell phone, they may believe that bullying is a common form of schoolyard behavior.⁵¹ Moreover, victims of cyberbullying may find it difficult to disclose their victimization.⁵² Dominique Napolitano, a fifteen-year-old who testified before a House committee on the issue in June 2010, explained that victims are afraid that the bullying will become worse if they seek help from an adult.⁵³ Unfortunately, when parents, schools, and communities fail to intervene—because of unfamiliarity with modern technology, indifference toward the situation, or any other reason—children learn that such behavior is tolerable.⁵⁴

The number of students who fall victim to cyberbullying is unclear because of definitional uncertainty and significant variation among research findings.⁵⁵ One fact, however, is clear—cyberbullying is a major societal problem without a simple solution. If school officials attempt to restrict cyberbullying to protect some of their students, they risk infringing upon the First Amendment rights of others.

II. FIRST AMENDMENT CONSIDERATIONS

Even though cyberbullying has harmful, and sometimes deadly, consequences, even bullies have constitutional rights. Internet speech may be entitled to First Amendment protection. Schools must, therefore, have the constitutional authority to regulate this expression if they wish to address the cyberbullying problem.⁵⁶

Students are “persons” under the Constitution and are thus unquestionably entitled to free speech rights. In *Tinker v. Des Moines Independent Community School District*,⁵⁷ the Supreme Court famously held that “[i]t can hardly be argued that . . . students . . .

⁵¹ See Cindy Gallagher, *Sticks and Stones Have Remedies at Law—It is Name-Calling That Hurts Kids: Can State Anti-Bullying Statutes Really Help Kids Who Are Victims of In-School Bullying?*, 4 J. L. & SOC. CHALLENGES 21, 24 (2002) (noting that cultural and social norms discourage school personnel from reprimanding students for inappropriate bullying because they are “just being kids”).

⁵² Kelleher, *supra* note 39.

⁵³ *Id.* (“[T]hey’re afraid things will get worse. . . . Am I going to be cyberbullied even more because of it?”) (quotation omitted).

⁵⁴ See *id.* (failure of school district to intervene suggests approval).

⁵⁵ See *Stop Cyberbullying Before it Starts*, NAT’L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/resources/files/pdf/bullying/cyberbullying.pdf> (last visited Oct. 2, 2011) [hereinafter *Stop Cyberbullying*] (finding that 43 percent of teens have been cyberbullied in the past year); Bennett, *supra* note 2 (reporting that twenty percent of American students are bullied each year); Hinduja & Patchin, *supra* note 47, at 1 (noting the wide variation in survey estimates, from ten to forty percent or more, of the number of youths experiencing cyberbullying).

⁵⁶ See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

⁵⁷ 393 U.S. 503 (1969).

shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁸ In fact, the First Amendment plays an important role in public education. As the Supreme Court noted in *Keyishian v. Board of Regents*⁵⁹:

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.⁶⁰

On the other hand, the right to free speech is not boundless.⁶¹ While the First Amendment may protect speech that promotes different perspectives in the classroom, it may not insulate a bully’s japes from punishment. It would seem absurd to argue that the future of our nation depends upon allowing bullies to harass their classmates and disrupt the learning environment.⁶² Thus, the law must draw a delicate line between student speech that promotes First Amendment interests and that which does not.⁶³

The Supreme Court made this distinction in *Tinker*. In that case, a group of students planned to express their opposition to the Vietnam War by wearing black armbands to school.⁶⁴ When school officials became aware of the plan, they adopted a policy stating that any student wearing a black armband to school would first be asked to remove it and then suspended if he or she refused to do so.⁶⁵ In considering the constitutionality of this school policy, the Court created the *Tinker* standard: schools can regulate student speech only

⁵⁸ *Id.* at 506; *see also id.* at 511 (“Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.”).

⁵⁹ 385 U.S. 589 (1967).

⁶⁰ *Id.* at 603 (internal quotations and citations omitted); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

⁶¹ *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[T]he right of free speech is not absolute at all times and under all circumstances.”).

⁶² *See Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) (“There is no constitutional right to be a bully.”).

⁶³ *See DUPRE, supra* note 34, at 2 (identifying the conflict between “the rights of individual students to speak . . . [and] the rights of other students to learn”).

⁶⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). Five children were involved in the protest. The younger children, aged eight and eleven, were left out of the case for fear the court would question whether they had their own political views or were acting at the direction of their parents. DUPRE, *supra* note 34, at 26.

⁶⁵ *Tinker*, 393 U.S. at 504.

when it “materially or substantially disrupt[s] the work and discipline of the school.”⁶⁶ To satisfy this burden, schools must show “more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁶⁷ On the facts before it, the Court found that the school could not make this showing and, therefore, its armband prohibition violated the students’ First Amendment right to free speech.⁶⁸

Courts commonly view *Tinker* as the default standard to apply in student speech cases, unless the facts fall within one of three categories authorizing schools to constitutionally restrict their students’ speech even absent a material disruption. The first category, articulated in *Bethel School District No. 403 v. Fraser*,⁶⁹ allows a school to prohibit speech if the speech is vulgar or lewd and “would undermine the school’s basic educational mission.”⁷⁰ The speech at issue in *Bethel* involved sexually explicit metaphors in an address at a school assembly.⁷¹ While the Court recognized an “undoubted freedom to advocate unpopular and controversial views in schools and classrooms,” it ultimately found that the student’s innuendo crossed the line of socially acceptable behavior.⁷² Hence, “it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”⁷³

The second category, found in *Hazelwood School District v. Kuhlmeier*,⁷⁴ permits schools to exercise control over school-sponsored speech if their actions are “reasonably related to legitimate pedagogical concerns.”⁷⁵ In *Hazelwood*, a high school principal redacted student articles on teen pregnancy and divorce from a school-sponsored newspaper.⁷⁶ The Court considered it a decisive factor that readers could perceive the speech as school-sponsored,

⁶⁶ *Id.* at 513. A consensus has emerged among lower courts that *Tinker* also includes threats of material or substantial disruption; see, e.g., *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 973 (S.D. Ohio 2005) (holding that student speech at issue “falls well short of the *Tinker* standard for reasonably anticipating a disruption of school activities”); see also Kristi L. Bowman, *The Civil Rights Roots of Tinker’s Disruption Tests*, 58 AM. U. L. REV. 1129, 1152 n.140 (2009) (noting that *Tinker* created a reasonable anticipation test).

⁶⁷ *Tinker*, 393 U.S. at 509.

⁶⁸ *Id.* at 514.

⁶⁹ 478 U.S. 675 (1986).

⁷⁰ *Id.* at 685.

⁷¹ *Id.* at 677–78.

⁷² *Id.* at 681.

⁷³ *Id.* at 685–86.

⁷⁴ 484 U.S. 260 (1988).

⁷⁵ *Id.* at 273.

⁷⁶ *Id.* at 264.

noting that “[a] school must be able to set high standards for the student speech that is disseminated under its auspices”⁷⁷

The Court’s third category, found in *Morse v. Frederick*,⁷⁸ permits schools to “take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”⁷⁹ In *Morse*, a principal forced a student to take down a fourteen-foot banner unfurled at a school-sponsored event that read “BONG HiTS 4 JESUS.”⁸⁰ The Court permitted the principal’s action and held that the principal did not violate the First Amendment by confiscating the banner and suspending the student.⁸¹

These cases leave many questions unanswered for school officials attempting to solve the cyberbullying dilemma. Most significantly: does the *Tinker* standard apply to off-campus Internet speech? In each of the cases discussed above, the student conduct took place on campus⁸² or at a school-sponsored event.⁸³ While the Court could have addressed off-campus speech in *Morse*, as the banner was displayed at an off-campus field trip, it explicitly chose not to do so.⁸⁴ Many lower courts have attempted to resolve this unanswered question. Unfortunately, as Part III of this Note demonstrates, they have not reached a clear consensus.

III. LOWER COURTS APPLYING *TINKER* TO OFF-CAMPUS STUDENT SPEECH

Although most courts view *Tinker* as the default standard in student-speech cases,⁸⁵ federal courts generally disagree as to whether the standard applies to off-campus, Internet speech. For example, on February 4, 2010, two different panels of the United States Court of

⁷⁷ *Id.* at 271–72.

⁷⁸ 551 U.S. 393 (2007).

⁷⁹ *Id.*

⁸⁰ *Id.* at 397.

⁸¹ *Id.*

⁸² See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988) (students wrote articles for a school-sponsored newspaper disseminated at school); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986) (student gave inappropriate speech during a school assembly); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (students wore black armbands to school).

⁸³ See *Morse*, 551 U.S. at 397 (student unfurled a banner at a school-sponsored event that was held during normal school hours).

⁸⁴ See *id.* at 401 (“There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.”) (citations omitted).

⁸⁵ Frank D. LoMonte, *Shrinking Tinker: Students are “Persons” Under Our Constitution—Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1328 (2009) (“Most courts continue to recognize *Tinker* as supplying the default standard under which regulation of student expression is to be judged unless the facts fit one of the relatively narrow exceptions carved out by the Supreme Court.”).

Appeals for the Third Circuit handed down contradictory decisions regarding the First Amendment's protection of student-created, parody Myspace profiles of their school principals.⁸⁶ Most courts have held that schools can restrict students' off-campus speech, though none have addressed cyberbullying in particular.⁸⁷ These Third Circuit decisions, however, exemplify the confusion that continues to surround the issue of students' off-campus, Internet speech.

Those in support of extending *Tinker* to regulate off-campus student Internet speech employ the conventional "substantial disruption" test to justify such a result. One justification views *Tinker* through a modern perspective.⁸⁸ *Tinker* considered the school environment as it was in 1969—when the country was in the midst of an antiwar, free-speech movement,⁸⁹ but the school landscape has changed dramatically since that time. One commentator noted that "the Internet marks [a] landscape change as dramatically as the Front Range marks the end of the Great Plain."⁹⁰ In light of modern technology, the idea that the school environment described in *Tinker* now extends to cyberspace has become quite popular.⁹¹

Proponents of this position also focus on the consequences of the expression rather than the physical location where it occurred. They

⁸⁶ *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *vacated en banc*, 650 F.3d 915 (3d Cir. 2011), was handed down the same day as *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010), *aff'd* 650 F.3d 205 (3d Cir. 2011); see *infra* notes 150–53 and accompanying text for a more detailed discussion of *Layshock*. The Third Circuit, sitting en banc, has since reheard both cases in an effort to resolve the confusion surrounding the conflicting decisions. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).

⁸⁷ *Tinker*, 393 U.S. at 513 (holding that schools may regulate student speech if the speech materially disrupts school work and discipline). In addition to the material disruption test, *Tinker* also appears to allow the restriction of student speech where it "coll[ides] with the rights of other students to be secure and to be let alone." *Id.* at 508. In *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007), the United States Court of Appeals for the Ninth Circuit used this standard to uphold a ban on T-shirts denouncing homosexuality from a school campus. The court concluded that the T-shirt "collide[d] with the rights of other students in the most fundamental way." 445 F.3d at 1178 (internal quotation and citation omitted). *Harper* is the only reported case that relies on the second factor of *Tinker* to regulate student speech; it also lacks precedential value. See *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (noting that "vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect") (internal quotation and citation omitted).

⁸⁸ That same environment now extends to cyberspace, far beyond the actual campus. See SHARIFF, *supra* note 41, at 117 (explaining that the school environment is "no longer restricted to the campus").

⁸⁹ Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1185 (2009).

⁹⁰ DUPRE, *supra* note 34, at 231 (citation omitted).

⁹¹ See, e.g., Zande, *supra* note 43, at 133 (arguing that the *Tinker* standard should be applied to cyberspeech and off-campus student speech).

assert that no distinction should be made between on-campus and off-campus speech. As Judge Newman of the United States Court of Appeals for the Second Circuit argued in a concurring opinion, “territoriality is not necessarily a useful concept in determining the limit of [a school’s] authority.”⁹²

The United States Court of Appeals for the Second Circuit advanced an argument similar to Newman’s in *Wisniewski v. Board of Education*.⁹³ In that case, a school punished a student who created an online chat icon suggesting the execution-style murder of his English teacher.⁹⁴ The student created the icon off-campus, and it came to the attention of school officials only after another student supplied the teacher with a copy.⁹⁵ The court, applying *Tinker*, found that the school could punish the student for creating the icon because it represented a reasonably foreseeable risk of substantial disruption within the school environment, despite the fact that the expression occurred off campus.⁹⁶

The Second Circuit also applied the “foreseeable risk of substantial disruption” test in *Doninger v. Niehoff*.⁹⁷ In *Doninger*, school officials’ decision to postpone an annual battle-of-the-bands concert that Student Council members had planned led a student to criticize the “douchebags in [the] central office” on her publicly-accessible blog.⁹⁸ School administrators received numerous phone calls in response to the post,⁹⁹ which contributed to the court’s conclusion that the post “created a foreseeable risk of substantial disruption to the work and discipline of the school” and, therefore, that the school could discipline the student.¹⁰⁰

Similarly, in *J.S. v. Blue Mountain School District*,¹⁰¹ the United States Court of Appeals for the Third Circuit determined that a school

⁹² *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring in judgment); see also Zande, *supra* note 43, at 133 (“[S]chool[s] should be able to punish . . . cyberbully[ing] regardless of the physical location where it occurred.”).

⁹³ 494 F.3d 34 (2d Cir. 2007).

⁹⁴ *Id.* at 36. The icon depicted a pistol firing a bullet at someone’s head and splattered blood. The words “Kill Mr. VanderMolen” appeared below. *Id.*

⁹⁵ *Id.* at 35–36.

⁹⁶ *Id.* at 40.

⁹⁷ 527 F.3d 41 (2d Cir. 2008).

⁹⁸ *Id.* at 45.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 53. This case also yielded significant precedent with respect to qualified immunity. The Second Circuit held that, because the student’s First Amendment free speech rights were not clearly established at the time of the incident, the principal and superintendent were entitled to qualified immunity. *Doninger v. Niehoff*, 642 F.3d 334, 356 (2d Cir. 2011). Under the relevant test, the court found that it was objectively reasonable for these school officials to conclude that the student’s post was potentially disruptive to the degree required by *Tinker*. *Id.* at 348–49.

¹⁰¹ 593 F.3d 286 (3d Cir. 2010) *vacated en banc*, 650 F.3d 915 (3d Cir. 2011). The Third

“need not wait until a substantial disruption actually occurs,” but may meet its burden by “demonstrate[ing] any facts which might reasonably have led [it] to forecast substantial disruption of or material interference with school activities.”¹⁰² In that case, the court allowed the suspension of a middle-school student who created a Myspace profile of her principal. Even though the profile was created entirely off-campus,¹⁰³ it could be accessed only from an off-campus location,¹⁰⁴ and had caused no actual disruption,¹⁰⁵ the court found no First Amendment violation because, based on the threat of substantial disruption, the school was entitled to punish the student for creating the profile.¹⁰⁶

Finally, in *Kowalski v. Berkeley County Schools*,¹⁰⁷ the United States Court of Appeals for the Fourth Circuit upheld the suspension of a student who bullied her classmate with a Myspace page called “Students Against Sluts Herpes” because her speech interfered with the work and discipline of the school.¹⁰⁸ The court reasoned that, although the student created the page at home, she knew that her message would be heard by other students and that the fallout “would be felt in the school itself.”¹⁰⁹ In rendering its decision, the Fourth Circuit seemed particularly concerned with the “mean spirited and hateful” nature of the page and noted that bullying “must be taken seriously by school administrators”¹¹⁰

Federal courts have also expressed their willingness to sanction schools’ regulation of off-campus expression under *Tinker* had the school established an actual disruption. In *Killion v. Franklin Regional School District*,¹¹¹ for example, a student published a top-ten list about his school’s athletic director in an e-mail commenting

Circuit, sitting en banc, subsequently held that the school district violated the student’s First Amendment free speech rights when it suspended her for creating the Myspace profile. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 (3d Cir. 2011). The Court explained that “[t]he facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of [the] profile.” *Id.* at *11.

¹⁰² *J.S.*, 593 F.3d at 298 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

¹⁰³ *Id.* at 291. The student created the profile entirely from her home. *Id.*

¹⁰⁴ *Id.* at 292. The Middle School computers blocked access to MySpace. *Id.*

¹⁰⁵ *See id.* at 299 (finding that the profile created minor inconveniences rather than a substantial disruption).

¹⁰⁶ *Id.* at 303.

¹⁰⁷ 652 F.3d 565 (4th Cir. 2011).

¹⁰⁸ *Id.* at 572–73.

¹⁰⁹ *Id.* at 573.

¹¹⁰ *Id.* at 577.

¹¹¹ 136 F. Supp. 2d 446 (W.D. Pa. 2001).

on the relationship between the administrator's weight and his genitalia.¹¹² The United States District Court for the Western District of Pennsylvania compared the situation to *J.S. v. Bethlehem Area School District*,¹¹³ in which the teacher was so traumatized by a website created about her that she was forced to take medical sabbatical for the next year.¹¹⁴ Applying the *Tinker* standard, the *Killion* court determined that the school was not entitled to suspend the student because it had shown no actual disruption.¹¹⁵ As compared to *Bethlehem*, the speech was not threatening and did not cause the teacher to take a leave of absence.¹¹⁶

IV. THESE COURTS ARE MISGUIDED

Many courts utilize the "substantial disruption" test to justify the constitutionality of schools' punishment of off-campus student speech. The Court in *Tinker*, however, did not so much as hint that the standard should be applied to off-campus speech.¹¹⁷ Conversely, the Court relied exclusively on on-campus scenarios and locations in reaching its decision:

A student's rights, therefore, do not embrace merely the *classroom* hours. When he is in the *cafeteria*, or on the *playing field*, or *on the campus* during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.¹¹⁸

Moreover, while the expression in *Morse* took place off school property, no Justice seriously contended that the students were anywhere but at a school-sponsored event.¹¹⁹ Student Internet speech,

¹¹² *Id.* at 448. The list contained statements such as "[b]ecause of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade." *Id.*

¹¹³ 807 A.2d 847 (Pa. 2002).

¹¹⁴ *Id.* at 852.

¹¹⁵ *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

¹¹⁶ *Id.*

¹¹⁷ See Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 270 (2001) (noting that the *Tinker* court "never suggested that [its] limitation on students' speech rights applied *outside* of the school setting . . .").

¹¹⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (emphasis added) (internal citation and quotation omitted); see also Calvert, *supra* note 89, at 1177 (noting that the Court reasoned with on-campus scenarios and on-campus locations during school hours when adopting its "substantial disruption" test).

¹¹⁹ DUPRE, *supra* note 34, at 241.

on the other hand, occurs almost exclusively off campus and during non-school hours. The Supreme Court has never held that schools may regulate such speech.

Schools should not be permitted to punish a child for the words that he utters in his home solely because he or she is a student. The Supreme Court has allowed schools remarkable deference in the management of on-campus speech.¹²⁰ Judges are far removed from, and thus less inclined to interfere with, the day-to-day operations of schools.¹²¹ However, school officials could abuse this discretion if they were able to regulate off-campus speech. Former law clerk and current Harvard professor Martha Field¹²² expressed concern to the *Tinker* Court that “school officials [could] hypothesize the requisite likelihood of disorder for anything that they [did not] like, for whatever reason, including reasons that violate the First Amendment, and administer a highly discriminatory system.”¹²³

This fear is easily realized by allowing the limited First Amendment analysis afforded to student speech made on campus to follow a student home merely because of his or her status as a student.¹²⁴ Schools could prohibit students from discussing entire topics, such as opinions about teachers or administrators, when in the privacy of their own homes.¹²⁵ Additionally, “there would be little to prevent school officials from regulating adult speech uttered in the community.”¹²⁶ After all, “[a]dults often say things that give rise to substantial disruptions in public schools.”¹²⁷ Certainly the *Tinker* Court would not have endorsed these results.¹²⁸

¹²⁰ See LoMonte, *supra* note 85, at 1354; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (Those officials involved in the educational process perform “important, delicate, and highly discretionary functions . . .”).

¹²¹ See DUPRE, *supra* note 34, at 17 (noting that, while most judges and justices are “better educated than most teachers and principals,” they are “not trained to run schools, and they are far removed from the day-to-day problems in the classroom”).

¹²² Faculty Directory, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/index.html?id=19> (last visited Sept. 15, 2011).

¹²³ Bowman, *supra* note 66, at 1160 (citation omitted).

¹²⁴ See LoMonte, *supra* note 85, at 1326 (criticizing those courts that have “accept[ed] uncritically the proposition that the special First Amendment infirmities under which students labor on school premises during school time follow these young people everywhere they go by dint of their student status”); *id.* at 1355 (observing that the unique student/school relationship seems to be recognized only where uniqueness works to disadvantage the speaker).

¹²⁵ *Id.* at 1355; see also *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J., concurring in judgment) (“Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students’ expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.”).

¹²⁶ *Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (Smith, J., concurring in judgment).

¹²⁷ *Id.*

¹²⁸ See Calvert, *supra* note 89, at 1175 (“[S]ome lower courts are now using—misusing, really—*Tinker* in a situation and scenario that the Court in 1969 could hardly have imagined.”).

Parents, not schools, should punish children for their off-campus expression,¹²⁹ unless the children intend for their speech to reach school grounds. As one commentator has argued, “[s]chools must not be allowed to usurp control from parents over the off-campus speech and off-campus behavior of their children simply because such speech or behavior relates to or is somehow about other students or administrators.”¹³⁰ When children are away from school property and not engaged in school-sponsored activities, they are not students. They are, rather, “minors under parental control and supervision.”¹³¹ Provided that children do not deliberately and physically disseminate their off-campus speech on campus, students should be afforded the same constitutional protections as non-students.¹³²

A handful of courts have adopted this stance. The Second Circuit’s decision in *Thomas v. Board of Education*,¹³³ the Fifth Circuit’s *Porter v. Ascension Parish School Board*,¹³⁴ and *Layshock v. Hermitage School District*¹³⁵ all analyzed issues of off-campus student expression and ultimately did not permit the regulation of such expression.¹³⁶ Moreover, in *J.S. v. Blue Mountain School District*,¹³⁷ the United States Court of Appeals for the Third Circuit, sitting en banc, reversed and remanded the Middle District of Pennsylvania’s ruling that suspension was an appropriate punishment for a student who created a fake Myspace profile that made fun of her middle school principal.¹³⁸ As discussed above, a Third Circuit panel had previously upheld the suspension.¹³⁹

¹²⁹ See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (“[S]chool officials . . . are not empowered to assume the character of *parens patriae*”); see also Turbert, *supra* note 32, at 678 (“[W]hen a school punishes a student’s at-home online activity, is its intervention blurring the separation of power between school authority and parental authority?”).

¹³⁰ Calvert, *supra* note 89, at 1178.

¹³¹ *Id.* at 1179.

¹³² See LoMonte, *supra* note 85, at 1354 (“[O]ff-campus speech by students . . . stands on the same footing as speech by any other citizen, so long as the student does not physically disseminate the speech on campus.”); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that absent a constitutionally valid reason for regulation, students are entitled to express their views).

¹³³ 607 F.2d 1043 (2d Cir. 1979).

¹³⁴ 393 F.3d 608 (5th Cir. 2004).

¹³⁵ 593 F.3d 249 (3d Cir. 2010). The United States Court of Appeals for the Third Circuit, sitting en banc, vacated its original decision and reached a result similar to that of the initial panel. The court held that the school district violated the student’s First Amendment free speech rights when it disciplined him for creating the profile. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc).

¹³⁶ See *infra* notes 137–53 and accompanying text.

¹³⁷ 650 F.3d 915 (3d Cir. 2011) (en banc).

¹³⁸ *Id.* at 920.

¹³⁹ *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010) *vacated en banc*, 650 F.3d 915 (3d Cir. 2011).

Thomas involved a handful of students who were suspended for publishing an underground newspaper addressed to the school community.¹⁴⁰ The students stored the publication in a closet at school and occasionally typed the articles within the school.¹⁴¹ However, the Second Circuit was satisfied that most of the work was done in the students' homes, off-campus, and after school hours. The court reasoned "[t]hat a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet [did] not alter the fact that [the magazine] was conceived, executed, and distributed outside the school."¹⁴² In making a distinction between parental and school discipline, the court noted that activities such as this fall outside the jurisdiction of school officials¹⁴³ and that school discipline must be confined to the "metes and bounds of the school itself."¹⁴⁴

The student expression in *Porter* similarly fell within the protection of the First Amendment. The student in that case drew a violent illustration at home that depicted his school campus under siege.¹⁴⁵ The sketch was concealed in his closet for two years and only inadvertently taken to school by his brother.¹⁴⁶ School administrators responded by allowing the student to enroll in an alternative school conditioned on his waiving his right to an expulsion hearing.¹⁴⁷ The United States Court of Appeals for the Fifth Circuit found that the case fell outside the scope of *Tinker* and, even if a substantial disruption had ensued, the school overstepped its bounds.¹⁴⁸ The student "never intended [his sketch] to be brought to campus" and "took no action to . . . publicize[] in a way certain to result in its appearance [on-campus]."¹⁴⁹

Moreover, in *Layshock*, the United States Court of Appeals for the Third Circuit found that the First Amendment protected a high school student who was suspended for creating a Myspace profile of his

¹⁴⁰ *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1045(2d Cir. 1979).

¹⁴¹ *Id.*

¹⁴² *Id.* at 1050.

¹⁴³ *See id.* at 1051 ("[T]he *First Amendment* forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. . . . The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression.") (emphasis added).

¹⁴⁴ *Id.* at 1052. The court noted that it could envision a case in which students incite substantial disruption within the school from some other location. However, under the facts of the case at bar, there was no threat of such disruption. *Id.* at 1052 n.17.

¹⁴⁵ *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611 (5th Cir. 2004).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 612.

¹⁴⁸ *See id.* at 615 ("This is not exactly speech on campus or even speech directed at campus.").

¹⁴⁹ *Id.* at 615, 620.

principal.¹⁵⁰ The student created the profile at home, but used school computers to show his classmates.¹⁵¹ The Third Circuit determined 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.”¹⁵² The court expressed reluctance to expand the arm of school authority beyond the school, although the circumstances of the case did not require that the parameters of this authority be defined.¹⁵³

Finally, in *Blue Mountain*, the Third Circuit held that the school district violated a middle-school student’s First Amendment speech rights when it suspended her for speech that “caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school.”¹⁵⁴ The court found it significant that the student did not even intend for the speech to reach the school and, in fact, “took specific steps to make the profile ‘private’ so that only her friends could access it.”¹⁵⁵ The court noted that “[t]he fact that her friends happen to be [classmates] is not surprising, and does not mean that [her] speech targeted the school.”¹⁵⁶

Admittedly, the sting of words transmitted from a home computer or cell phone is often felt within the school and may even result in a substantial disruption.¹⁵⁷ However, using the “substantial disruption” test to regulate off-campus student expression severely undermines the First Amendment.¹⁵⁸ As one commentator has noted, “an overuse of the *Tinker* justification against off-campus cyberbullying could lead to an abuse of school power and chill student conduct that is normally protected under the Constitution.”¹⁵⁹ Another argued that subjecting off-campus student speakers to punishment merely because their expression rouses the school community “poses an intolerable threat to the First Amendment rights of students.”¹⁶⁰ The misuse of

¹⁵⁰ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. 2010).

¹⁵¹ *Id.* at 252–53.

¹⁵² *Id.* at 260.

¹⁵³ *Id.* at 263. The Third Circuit found no evidence that the profile resulted in a substantial disruption and the school district did not object thereto. Therefore, the school could not justify its punishment of the student under *Tinker*. *Id.*

¹⁵⁴ *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (en banc).

¹⁵⁵ *Id.* at 930.

¹⁵⁶ *Id.* at 930–31.

¹⁵⁷ See SHARIFF, *supra* note 41, at 37 (noting that victims of cyberbullying often display poor academic performance and school avoidance in response to the online attacks).

¹⁵⁸ See Calvert, *supra* note 117, at 287 (“[T]he school’s own internal discipline system . . . must be reined in before First Amendment rights are needlessly sacrificed.”)

¹⁵⁹ Turbert, *supra* note 32, at 678.

¹⁶⁰ Alexander G. Tuneski, Note, *Online, Not Grounds: Protecting Student Internet Speech*,

Tinker to regulate off-campus student Internet speech is inconsistent with the principles enunciated by the Supreme Court. Such expression should instead be afforded the full protection of the First Amendment.¹⁶¹

V. CONSTITUTIONAL ALTERNATIVES

Although schools should lack the constitutional authority to regulate off-campus student speech under most circumstances, society may address the cyberbullying problem through the criminal justice system, the civil justice system, and, preferably, through education. Below, this Note analyzes the prospect that the criminal and civil justice systems will provide adequate remedies, and finds that they do not.

A. *The Criminal Justice System*

The ever-increasing media hype around cyberbullying has led to demands for more drastic punishment, and the government has responded accordingly.¹⁶² After Phoebe Prince's suicide, the district attorney charged the teens who bullied her with felony charges ranging from stalking to criminal harassment.¹⁶³ The individuals responsible for the Internet broadcast that drove Tyler Clementi to jump from the George Washington Bridge faced an invasion-of-privacy charge, but may also find themselves defending against a hate crime indictment.¹⁶⁴ These two cases demonstrate that the criminal justice system is one method by which society may deter cyberbullying.

"The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people

89 VA. L. REV. 139, 187 (2003).

¹⁶¹ *Id.* at 159 ("Both policy and logic demand that internet speech be clearly classified as off-campus speech and afforded the full protection of the First Amendment.").

¹⁶² Jessica Bennett, *Is the 'Bullying Epidemic' a Media Myth?*, DAILY BEAST (Oct. 1, 2010, 9:43 AM), <http://www.thedailybeast.com/newsweek/2010/10/01/is-the-bullying-epidemic-a-media-myth.html> [hereinafter *Media Myth*] (describing arguments for and against creating new punishments for cyberbullying); see also Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1 (reporting that chairman Steven Goldstein of Garden State Equality viewed the recent cyber-bullying related death of gay college student, Tyler Clementi, as a hate crime).

¹⁶³ Setoodeh, *supra* note 1, at 60–63. In May 2011, the teens were placed on probation. Despite the lenient sentences, David Sullivan, the regional district attorney, said that the prosecution nonetheless sent the message that "bullying and harassment will not be tolerated in our schools." Erick Eckholm, *3 Ex-Students Get Probation in Bullying Linked to a Suicide*, N.Y. TIMES, May 6, 2011, at A19.

¹⁶⁴ Tresniowski, *supra* note 28, at 56.

might find distasteful or discomfoting.”¹⁶⁵ The Supreme Court has consistently held, however, that the right to free speech is not limitless.¹⁶⁶ In *Chaplinsky v. New Hampshire*,¹⁶⁷ for instance, the Court held that a state may punish those words “which by their very utterance inflict injury or tend to incite an immediate breach of peace.”¹⁶⁸ That case involved a public speech denouncing all religion as a racket.¹⁶⁹ When confronted by a city marshal, Chaplinsky called the man a “God-damned racketeer” and “a damned fascist.”¹⁷⁰ He was subsequently convicted under a New Hampshire incitement statute.¹⁷¹ In upholding the conviction, the Court reasoned that some words are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁷² Under *Chaplinsky*, therefore, students could face criminal sanctions if they communicate words that would cause an average addressee to fight.¹⁷³ But because the Supreme Court has limited the fighting words doctrine to face-to-face confrontation,¹⁷⁴ however, the criminal sanctions implicated thereby would be limited to traditional instances of bullying, making it inapposite to Internet cyberbullying.

¹⁶⁵ *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

¹⁶⁶ *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”)

¹⁶⁷ 315 U.S. 568.

¹⁶⁸ *Id.* at 572.

¹⁶⁹ *Id.* at 569–70.

¹⁷⁰ *Id.* at 569.

¹⁷¹ *Id.*

¹⁷² *Id.* at 572.

¹⁷³ *See Id.* at 573–74 (applying a standard of whether epithets would be likely to cause an average person to retaliate in upholding the challenged statute). The likelihood that a fighting words charge would succeed is unclear. Free-speech expert Robert O’Neil criticized the *Chaplinsky* decision in that it “has caused no end of confusion during the ensuing six decades.” Robert M. O’Neil, *Rights in Conflict: The First Amendment’s Third Century*, 65 LAW & CONTEMP. PROBS., Spring 2002, at 7, 18. However, because courts often consider the circumstances surrounding the verbal assault, a fighting words charge is more likely to stick if the words are accompanied by threatening conduct. David L. Hudson Jr., *Fighting Words*, FIRST AMENDMENT CTR., http://archive.firstamendmentcenter.org/speech/personal/topic.aspx?topic=fighting_words (July 2009).

¹⁷⁴ *See Cohen v. California*, 403 U.S. 15 (1971). The defendant in *Cohen* was observed outside a courthouse wearing a jacket that said “Fuck the Draft.” *Id.* at 16. The Supreme Court rejected application of the fighting words doctrine in that the jacket was not a face-to-face personal insult. *Id.* at 20. “While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not directed to the person of the hearer. No individual actually or likely to be present could reasonably have regarded the words on [his] jacket as a direct personal insult.” *Id.* (internal quotation marks and citation omitted).

Cyberbullies could also face criminal liability under the true threat doctrine. “True threats” include those statements which “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁷⁵ The Supreme Court has determined that such speech is beyond the protection of the First Amendment. The Court first discussed true threats in *Watts v. United States*.¹⁷⁶ In that case, Respondent told a crowd of demonstrators that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”¹⁷⁷ The Court concluded that this statement constituted a constitutionally protected political hyperbole rather than a true threat against the President.¹⁷⁸ More recently, in *Virginia v. Black*,¹⁷⁹ the Court found that a Virginia criminal statute did not violate the First Amendment insofar as it banned cross burning with intent to intimidate. Cross burning is almost certain to inspire fear of bodily harm and, accordingly, the court held that a ban on such conduct is permissible under the First Amendment.¹⁸⁰ Unfortunately, outside of *Watts* and *Black*, the Court has offered little guidance as to what constitutes a true threat.

Many courts have employed the reasonable person standard when determining whether a statement amounts to a true threat.¹⁸¹ Under the reasonable person standard, courts look to whether a reasonable person would interpret the threat as a serious expression of intent to cause harm.¹⁸² Factors relevant to this determination may include the reaction of the recipient, whether the threat was conditional, and how the threat was communicated.¹⁸³ In *Doe v. Pulaski County Special School District*,¹⁸⁴ a student prepared two violent and obscenity-laced letters to an ex-girlfriend expressing a desire to molest, rape, and murder her.¹⁸⁵ The student prepared both letters in his home, where they remained until they were discovered by another student.¹⁸⁶ That

¹⁷⁵ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

¹⁷⁶ 394 U.S. 705 (1969).

¹⁷⁷ *Id.* at 706.

¹⁷⁸ *Id.* at 708.

¹⁷⁹ 538 U.S. 343, 363 (2003).

¹⁸⁰ *Id.* at 363. However, the statute also allowed any such burning as prima facie evidence of intent to intimidate. The Court struck down the provision in that “[t]he First Amendment does not permit such a shortcut.” *Id.* at 367.

¹⁸¹ See, e.g., *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (finding that courts have consistently adopted the reasonable person test in making this determination).

¹⁸² *Id.*

¹⁸³ *Id.* at 623.

¹⁸⁴ 306 F.3d 618 (8th Cir. 2002).

¹⁸⁵ *Id.* at 619.

¹⁸⁶ *Id.*

student took one of the letters and delivered it to the female student.¹⁸⁷ The court concluded that, because “a reasonable recipient would have perceived [the] letter as a serious expression of intent to harm” the female student, they amounted to a true threat.¹⁸⁸

In addition to the incitement and true-threat doctrines, cyberbullies could face criminal liability for harassment and stalking. In Phoebe Prince’s case, the District Attorney decided to bring criminal charges for harassment and stalking against those who had bullied Phoebe after an investigation revealed conduct that “far exceeded the limits of normal teenage relationship-related quarrels.”¹⁸⁹ This unprecedented move caused quite a stir in the small Massachusetts town. The superintendent of South Hadley schools was surprised that the District Attorney drew such a strong connection between the bullying and suicide.¹⁹⁰ Others, including parents whose children were also bullied, were pleased that the District Attorney brought the charges.¹⁹¹

There are clearly methods under existing criminal law by which cyberbullies can be punished. However, most attacks by cyberbullies, despite their injurious consequences, do not rise to the level of criminal conduct.¹⁹² One proposed solution is to cast a wider net. The Megan Meier Cyberbullying Prevention Act,¹⁹³ for instance, sought to make cyberbullying a federal crime. Representative Linda Sánchez, primary author of the bill, argued before the Subcommittee on Crime, Terrorism, and Homeland Security that law enforcement needs the tools to punish “serious, repeated, and hostile communications”¹⁹⁴ Under her bill, it would be a federal offense to “transmit[] in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a

¹⁸⁷ *Id.* at 619–620.

¹⁸⁸ *Id.* at 626.

¹⁸⁹ Eckholm & Zezima, *supra* note 4, at A14 (these felony charges included “statutory rape, violation of civil rights with bodily injury, harassment, stalking and disturbing a school assembly”).

¹⁹⁰ Schworm & Ballou, *supra* note 12.

¹⁹¹ See Eckholm & Zezima, *supra* note 4, at A16 (reporting that a South Hadley parent whose daughter had also been bullied by one of the accused bullies was “pleased that the charges were brought”).

¹⁹² See Turbert, *supra* note 32, at 680 (noting that most instances of cyberbullying are not serious enough to justify criminal penalties); Zande, *supra* note 43, at 121 (noting that most cyberbullying acts will not rise to the level of threat of violence contemplated by the true threat doctrine).

¹⁹³ H.R. 1966, 111th Cong. § 881 (2009).

¹⁹⁴ *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 23 (2009) [hereinafter *Cyberbullying Hearing*] (testimony of Rep. Linda T. Sánchez).

person, using electronic means to support severe, repeated, and hostile behavior”¹⁹⁵

The strong arm of criminal law can certainly deter and punish some instances of cyberbullying, but cyberbullying raises unique issues that criminalization fails to address.¹⁹⁶ Nancy Willard, Director for the Center for Safe and Responsible Internet Use, noted during the congressional hearing that criminalization would actually detract from prevention efforts.¹⁹⁷ Willard argued that it is more important to invest in comprehensive, in-depth prevention and intervention efforts to stop the behavior from occurring in the first place.¹⁹⁸ Other commentators also criticized The Megan Meier Act as too harsh.¹⁹⁹ Berin Szoka and Adam Theurer asserted that criminal records, particularly felony records, should not be doled out for peer-to-peer harassment.²⁰⁰ Such a result would stigmatize offenders for life because of their childhood blunders.²⁰¹

In expanding existing criminal law to include more instances of bullying behavior, lawmakers must also be mindful of the First Amendment. Off-campus Internet speech should be entitled to First Amendment protection, whether the speech is produced by a student or an adult.²⁰² As the Supreme Court observed in *Texas v. Johnson*,²⁰³ “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁰⁴ Hence, lawmakers must be careful to differentiate between criminally sanctionable conduct and constitutionally protected speech.²⁰⁵

¹⁹⁵ H.R. 1966, §881(a).

¹⁹⁶ See *Cyberbullying Hearing*, *supra* note 194, at 103 (statement of Nancy Willard, Director, Center for Safe & Responsible Internet Use, et al) (“The complexity of [cyberbullying] cannot . . . be addressed by simply declaring [it] illegal.”); Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 855 (2010) (arguing that cybercrimes raise unique issues that might not be adequately addressed by existing criminal law).

¹⁹⁷ *Cyberbullying Hearing*, *supra* note 194, at 103 (statement of Nancy Willard, Director, Ctr. for Safe & Responsible Internet Use, et al.).

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 170 (testimony of Berin Szoka & Adam D. Theurer, The Progress & Freedom Foundation) (arguing that the act would punish children rather than protect them).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Tuneski, *supra* note 160, at 162–63 (“[O]ff-campus speech of students should be treated and subject to the same strict scrutiny afforded to the off-campus speech of adults.”).

²⁰³ 491 U.S. 397 (1989).

²⁰⁴ *Id.* at 414.

²⁰⁵ See *Cyberbullying Vs. Free Speech*, CBS NEWS (Feb. 11, 2009, 3:31 PM), <http://www.cbsnews.com/stories/2008/01/30/scitech/pcanswer/main3768945.shtml> (“We need to be careful to draw the line between harmful harassment and constitutionally protected

B. The Civil Justice System

In addition to criminal liability, cyberbullies may also be subject to civil liability. Defamation is one possible civil cause of action.²⁰⁶ Cyberbullying is defamatory because it “tends so to harm the reputation of [the victim] as to lower him in the estimation of the community or to deter [others] from associating or dealing with him.”²⁰⁷ As compared to spoken words, written words are more permanent, capable of wider circulation, and show greater deliberation and intention on the part of the speaker.²⁰⁸ Because written words are particularly destructive, they more frequently lead to defamation actions.²⁰⁹ Hence, anyone who posts something that injures the reputation of another could face a defamation lawsuit.

However, in a defamation action the victim must also prove that the damaging statements were false.²¹⁰ Thus, while a defamation action may ensnare false rumors, it does nothing to curtail harmful statements that are truthful. For instance, a student who was relentlessly bullied because of his sexual orientation would be unable to sue his attacker for defamation.

Invasion of privacy is an alternative option that may be employed where the elements of defamation are not met. The Second Restatement of Torts provides that:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person, and . . . is not of legitimate concern to the public.²¹¹

Although the Supreme Court has held that there can be no liability for publicizing information that is a matter of public record,²¹² the posts and text messages written by bullies more often involve matters

speech.”).

²⁰⁶ Calvert, *supra* note 117, at 247–48 (relating that the teacher in *Bethlehem* sued the student for defamation, interference with contractual relations, invasion of privacy, and loss of consortium).

²⁰⁷ RESTATEMENT (SECOND) OF TORTS § 559 (1977).

²⁰⁸ ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2.3, at 2–10 (4th ed. 2011).

²⁰⁹ See *id.* at 2–9, 2–10 (explaining that it is easier for a libeled plaintiff to recover for written defamation).

²¹⁰ See RESTATEMENT (SECOND) OF TORTS § 558(a) (1977) (indicating that the first element of defamation is “a false and defamatory statement concerning another [individual]”).

²¹¹ *Id.* § 652D.

²¹² *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

of private concern. Thus, a bullying victim may bring an invasion of privacy action against a bully who publicizes private information about him.

The victim might also sue his bully for intentional infliction of emotional distress. “[The individual] who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress”²¹³ This cause of action is limited, however, in that it does not extend to mere insults, humiliations, or threats.²¹⁴

Despite numerous causes of action available to victims, the civil justice system fails as a practical solution to cyberbullying for several reasons. First, victims often hide their victimization from their parents for fear that they will be bullied even more.²¹⁵ Parents cannot initiate a civil suit if they are unaware that their child is being bullied. Even if the parents were aware of the situation, a lawsuit further publicizes the potentially embarrassing facts giving rise to the bullying. Second, because a bully can hide behind screen names and e-mails, it may be difficult to ascertain his identity.²¹⁶ Therefore, while the civil justice system is always an option, cyberbullying presents unique issues that the current system is unable to address. More is needed to adequately address the problem.²¹⁷

C. An Education-Based Approach

Many teens are immature and cannot comprehend the consequences of their actions.²¹⁸ Through an education-based approach, bullies may be better able to understand the impact of their behavior on others.²¹⁹

Several organizations have already launched online campaigns to educate Americans of all ages. In the early 1990’s, a short film called *Trevor* told the story of a gay thirteen-year-old boy who attempted suicide after his peers rejected him.²²⁰ *Trevor* inspired the establishment of the Trevor Project to focus on crisis and suicide

²¹³ RESTATEMENT (SECOND) OF TORTS § 46 (1965).

²¹⁴ *Id.* cmt. d.

²¹⁵ See Kelleher, *supra* note 39 (student explains to House committee that victims are often scared to tell adults they are being cyberbullied for fear that the situation will worsen).

²¹⁶ SHARIFF, *supra* note 41, at 37 (bullies often hide behind anonymous screen names and e-mails).

²¹⁷ *But see* Calvert, *supra* note 117, at 245–46 (arguing that the criminal and civil justice systems are sufficient in themselves to deal with all improper Internet conduct).

²¹⁸ *Media Myth*, *supra* note 162.

²¹⁹ See *Stop Cyberbullying*, *supra* note 55 (noting that most bullies do not understand the full impact their behavior has on their victims).

²²⁰ *Trevor – The Film*, THE TREVOR PROJECT, <http://www.thetrevorproject.org/TrevorFilm> (last visited Sept. 28, 2011).

prevention among lesbian, gay, bisexual, and transgendered (LGBT) teens.²²¹ Following the rash of teen suicides in the fall of 2010, the Trevor Project launched the “It Gets Better” campaign, which involved celebrities such as Ellen DeGeneres and Tim Gunn, filming testimonial videos of support.²²² The U.S. Department of Health and Human Services recently organized an anti-bullying campaign aimed at five- to eight-year-old children. Students can access the “Stop Bullying Now” campaign online for educational information, games, and videos.²²³ The site also has a section where parents can learn about bullying awareness, prevention, and intervention.²²⁴ MTV’s “A Thin Line” campaign aims to help teens “identify, respond to, and stop the spread of digital abuse,”²²⁵ providing information concerning textual harassment and cyberbullying in a teen-friendly format.²²⁶

These messages offer a unique approach in that they tend to focus on bullying itself, rather than the means by which it is communicated. They do not differentiate between the traditional and cyber forms of bullying. While the consequences of cyberbullying are more severe,²²⁷ preventive measures aimed at all forms of bullying may be more effective than those aimed at a particular mode.²²⁸

A solution to the bullying epidemic also requires educators, parents, and the community to take a stand. By our inaction, we are all part of the problem.²²⁹ Teachers and school officials at South Hadley High School have been subject to harsh criticism for failing to take any action to protect Phoebe Prince. School officials never contacted her parents to discuss the problem.²³⁰ One report indicated that a staff member idly looked on as Phoebe suffered verbal attacks

²²¹ *About Trevor*, THE TREVOR PROJECT, <http://www.thetrevorproject.org/organization> (last visited Sept. 28, 2011).

²²² ‘Project Runway’ Star Discloses Teen Suicide Attempt, WASH. POST, Oct. 7, 2010, at C4. For various celebrity testimonials created for The Trevor Project, see *TrevorProjectMedia’s Channel*, YOUTUBE, <http://www.youtube.com/trevorprojectmedia> (last visited Sept. 28, 2010).

²²³ *Kids*, STOPBULLYING.GOV, <http://www.stopbullying.gov/kids/index.html> (last visited Sept. 28, 2011).

²²⁴ *Parents*, STOPBULLYING.GOV, <http://www.stopbullying.gov/parents/index.html> (last visited Sept. 28, 2011).

²²⁵ *About Us*, A THIN LINE, <http://www.athinline.org/about> (last visited Sept. 28, 2011).

²²⁶ *Id.*

²²⁷ See *supra* Part I (discussing the effects of cyberbullying).

²²⁸ See *Cyberbullying Hearing*, *supra* note 194, at 126 (testimony of John Palfrey, Law Professor, Harvard School of Law) (“[F]ocus less on the cyber part of cyberbullying and think of it as bullying”); *id.* at 153 (statement of Michael W. MacLeod-Ball, Acting Director, American Civil Liberties Union Washington Legislative Office) (arguing that lawmakers should consider more than the particular modes of communication used to convey the threats).

²²⁹ *20/20* (ABC television broadcast Oct. 15, 2010), available at <http://abc.go.com/watch/2020/SH559026/VD5592259/bullied-to-death-victims-stories>.

²³⁰ Dorning, *supra* note 1.

in the library, just hours before she hanged herself.²³¹ Although the school's inaction was not criminal, the District Attorney called it "troublesome."²³² Some believe that a better-informed school community could have saved Phoebe; Phoebe's aunt explained that "[t]he signs were there [but] there was no support."²³³

One reason why teachers and school administrators have failed in protecting bullied students is that they may not understand the injurious effects of bullying. It is crucial that the school community receive training to detect, respond to, and prevent such behavior. The Olweus Bullying Prevention Program, which seeks to prevent and reduce bullying in schools, has served as a model for communities all around the country.²³⁴ The program encourages schools, among other things, to establish antibullying committees and hold staff discussions.²³⁵

Schools can also create forums where students, teachers, and parents can collectively discuss bullying issues and solutions, such as the anti-bullying task force that South Hadley High School implemented after Phoebe Prince's suicide.²³⁶ One parent, commenting on the task force's efforts, stated that "[t]eachers are more receptive to our complaints."²³⁷

It is equally important that schools "establish and maintain a school climate of respect and integrity" and punish students for on-campus violations.²³⁸ Schools play a very important, albeit secondary, role in socializing children.²³⁹ They must teach students that bullying behavior will not be tolerated at school.²⁴⁰ The Olweus Bullying Prevention Program asks school administrators to "ensure that all staff intervene on the spot when bullying occurs."²⁴¹

²³¹ Marie Szaniszlo & Laura Crimaldi, *Parent Details Phoebe's Agonizing Final Moment*, BOS. HERALD, April 2, 2010, at News 004.

²³² Peter Schworm, *Schools Head Defends Response to Bullying*, BOS. GLOBE, April 1, 2010, at Metro 1.

²³³ Setoodeh, *supra* note 1, at 63.

²³⁴ See *The Olweus Bullying Prevention Program Overview*, OLWEUS, http://www.olweus.org/public/bullying_prevention_program.page (last visited Sept. 28, 2011) (noting that some high schools and kindergartens have used the program).

²³⁵ *Id.*

²³⁶ Eckholm & Zezima, *supra* note 4, at A16.

²³⁷ Setoodeh, *supra* note 1, at 63.

²³⁸ Hinduja & Patchin, *supra* note 47, at 4.

²³⁹ See Steven Brint, *Schools and Socialization*, in *CHILDHOOD SOCIALIZATION* 157, 157 (Gerald Handel ed., 2d ed. 2006) ("Schools play a secondary role to families in socializing children."); see also *id.* at 158 (describing the process through which children are trained on moral values and acceptable standards of conduct through their experiences in the classroom).

²⁴⁰ See Hinduja & Patchin, *supra* note 47, at 3–4 (arguing that schools should create a culture where bullying is not tolerated by staff or students).

²⁴¹ OLWEUS, *supra* note 234.

To reinforce the antibullying message, schools can implement creative disciplinary measures aimed at education. For instance, a bully might be required to create an informational poster for public display.²⁴² Such a punishment would educate not only the bully, but also those students who view the poster. Schools could also request that students sign an antibullying pledge.²⁴³ One reason students bully is that they witness similar behavior from others.²⁴⁴ Perhaps seeing their classmates promise to respect others will encourage would-be bullies to do the same.

Children may be more likely to hear and appreciate the message if it comes from both their school and their parents. Schools should invite parents to join their antibullying committees and discussions.²⁴⁵ Parents could then reinforce at home what their children are learning about bullying in school. They may explain the reasons that people bully, that bullying is harmful and has injurious consequences, and that students face punishment for engaging in such behavior.²⁴⁶ Parents should also teach their children about responsible Internet use, clearly communicating and consistently enforcing Internet rules.²⁴⁷ Parents can easily monitor that these rules are complied with by keeping computers in a highly trafficked room.²⁴⁸

Community commitment also plays an important role in remedying the bullying problem. Community leaders can raise awareness about the issue, and spread antibullying messages throughout the community.²⁴⁹ For instance, they could sponsor a bullying awareness day for students to learn about the problem in a fun, yet educational environment. They could also invite students, parents, and educators to attend community discussions.²⁵⁰

Even bystanders may take action. “[B]y doing *nothing*, [bystanders] are doing *something*.”²⁵¹ By allowing bullying to continue in our presence, we may inadvertently condone the behavior.

²⁴² *Stop Cyberbullying*, *supra* note 55.

²⁴³ *Id.*

²⁴⁴ See *Recognizing the Warning Signs*, STOPBULLYING.GOV, http://www.stopbullying.gov/topics/warning_signs/index.html (last visited Sept. 28, 2011) (listing as a warning sign that a child is a bully that he or she “[h]as friends who bully others”).

²⁴⁵ See OLWEUS, *supra* note 234 (advocating the creation of “Bullying Prevention Coordinating Committee”).

²⁴⁶ See *Stop Cyberbullying*, *supra* note 55 (listing ways parents can help their children if they are being bullied).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ OLWEUS, *supra* note 234.

²⁵⁰ See *id.* (advocating, as a community-level component to helping victims of bullying, for increased involvement of community members in a “Bully Prevention Coordinating Committee”).

²⁵¹ Hinduja & Patchin, *supra* note 47, at 5.

Bystanders “can make a huge difference” by standing up for a victim.²⁵²

The Adolescent Web Awareness Requires Education (AWARE) Act incorporates this sort of educational approach.²⁵³ The AWARE Act authorizes \$125 million in grants to establish Internet crime awareness and prevention programs.²⁵⁴ Educational organizations, nonprofit organizations, and schools may use the grants to develop professional training programs for teachers and administrators and educational campaigns for parents about teaching children how to protect themselves from cybercrimes.²⁵⁵ The AWARE Act aims to inspire nonprofit Internet-safety organizations, schools, and communities to join forces to educate students, teachers, and parents about these risks.²⁵⁶

Experts have commended the scope and purpose of the AWARE Act. Michael W. MacLeod-Ball of the American Civil Liberties Union described the bill as “a better step forward than an overbroad attempt to criminalize certain kinds of online speech.”²⁵⁷ John Palfrey, a Harvard Law School professor, said “the education support described in the ‘AWARE Act’ is precisely the right place to start from here.”²⁵⁸

However, some commentators have criticized the AWARE Act. While the education-based approach requires substantial funding, some commentators would rather see federal funds employed differently.²⁵⁹ House subcommittee member Representative Louie Gohmert questioned whether the government should “spend another \$125 million of Chinese money that we will have to borrow in order to insert the Federal bureaucracy into a problem whose true resolution begins at home.”²⁶⁰

²⁵² *Id.*

²⁵³ See Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. § 2(d) (2009) (requiring the funds provided by the act to be used for training and education to promote the identification and prevention of cyberbullying).

²⁵⁴ *Cyberbullying Hearing, supra* note 194, at 34 (testimony of Rep. Debbie Wasserman Schultz).

²⁵⁵ See H.R. 3630 § 2(d) (limiting the funding of AWARE to programs aimed at identification and prevention of cyberbullying).

²⁵⁶ See *Cyberbullying Hearing, supra* note 194, at 34 (testimony of Rep. Debbie Wasserman Schultz) (stating that AWARE’s grant program will encourage nonprofit organizations, schools and communities to work together to educate others about the dangers associated with cyberbullying).

²⁵⁷ *Cyberbullying Hearing, supra* note 194, at 152 (statement of Michael W. MacLeod-Ball, Acting Director, American Civil Liberties Union Washington Legislative Office).

²⁵⁸ *Cyberbullying Hearing, supra* note 194, at 126 (testimony of John Palfrey, Law Professor, Harvard School of Law).

²⁵⁹ See *id.* at 137 (statement of Judi Westberg Warren, President, Web Wise Kids) (noting the difficulty in funding programs such as the one proposed in the AWARE Act).

²⁶⁰ *Id.* at 20 (statement of Rep. Louis Gohmert).

Despite its limitations, an education-based approach can create room to prevent cyberbullying where the Constitution leaves none. Given the troublesome situation many teens face today, educators have a moral duty to incorporate bullying awareness into their curriculum. Parents and community members have a similar obligation. The bullying epidemic will undoubtedly continue in the absence of collaboration from everyone to reverse its trend.²⁶¹ It is true, however, that these ideas cannot be realized without proper funding.

D. A Legislative Proposal

Education is primarily a state and local responsibility and, consequently, the federal role in education is limited.²⁶² Schools and local municipalities are in the best position to determine the conduct that they should prohibit. In his concurring opinion in *Morse*, Justice Breyer noted that, because “[s]tudents will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges[,] school officials need a degree of flexible authority to respond to disciplinary challenges.”²⁶³ Accordingly, states are entitled to enact their own laws aimed at bullying awareness and prevention.

Laws in nearly every state address bullying or harassment in schools.²⁶⁴ In recent years, legislators have amended many of them to reach electronic communications.²⁶⁵ Section Five of the Illinois School Code now provides that:

No student shall be subjected to bullying . . . during any school sponsored education program or activity; . . . while in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school

²⁶¹ See Andrew Hartzell, *Fighting Back: Bullying Prevention Under Ohio Law*, 25 OHIO LAW., Mar.-Apr. 2011, at 8, 11 (“All involved—students, school administrators, parents and the legal community—need to be educated, involved and proactive in their approach to curtailing the bullying situation . . .”).

²⁶² See *Federal Role in Education*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html?src=ln> (last updated Mar. 30, 2011) (noting that education is primarily a State responsibility and that the federal government only contributes 10.8 percent of all spending on primary and secondary education).

²⁶³ *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring).

²⁶⁴ As of the date of publication of this article, South Dakota is the only state without a policy regarding bullying or harassment. *State and Federal Bullying Information*, OLWEUS BULLYING PREVENTION PROGRAM, http://www.olweus.org/public/bullying_laws.page (last visited Sept. 28, 2011).

²⁶⁵ See, e.g., VA. CODE ANN. § 22.1–279.6 (LexisNexis 2008 & Supp. 2010) (requiring the Board of Education to establish guidelines and model policies that include standards for school board policies on the use of electronic means for the purposes of bullying, harassment, and intimidation).

bus, or at school-sponsored or school-sanctioned events or activities; or . . . *through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment.*²⁶⁶

Unfortunately, the widespread misuse of *Tinker* has led some states to go too far in extending the definition of electronic communications in their anti-bullying statutes. For example, under an Oklahoma statute the electronic communication need not originate at school or with school equipment, but is included under the policy if it is “specifically directed at students or school personnel.”²⁶⁷ This impermissibly includes student expression that occurs entirely off-campus. Moreover, to date, many states have not embraced the education-based approach of the AWARE Act and the Olweus Bullying Prevention Program.

Because education itself cannot eradicate bullying, it is equally important that the law include remedial measures.²⁶⁸ Teachers should be required to report bullying behavior to a designated authority within the school, and school officials should have a legal duty to investigate all reported incidents. Moreover, schools should have to notify parents whenever their student is involved in a bullying incident, whether the child was the bully or the victim.

If state legislatures fail to adopt cyberbullying laws or, as the Oklahoma legislature has done, adopt overly broad laws in contravention of the First Amendment, Congress may consider enacting laws of its own. Federal legislation would provide Congress the opportunity to differentiate speech that is constitutionally protected from that which is subject to school discipline. Congress could adopt the language of the Illinois School Code²⁶⁹ and explicitly define the school environment. In consideration of modern technology, the definition should provide that speech communicated *at school* via phone, school computer, or any other digital technology is considered on-campus speech and regulated where it causes a substantial disruption. This will clarify a point that has been complicated by inconsistent judicial rulings. In addition, States that allow for punishment of student speech outside that environment could risk losing their funding.

²⁶⁶ 105 ILL. COMP. STAT. § 5/27–23.7(a)(1)–(3) (West 2010 & Supp. 2011) (emphasis added).

²⁶⁷ OKLA. STAT. § 70–24–100.3 (2008).

²⁶⁸ See King, *supra* note 196, at 883 (arguing that educational tools work best when combined with disciplinary measures).

²⁶⁹ 105 ILL. COMP. STAT. ANN. § 5/27–23.7 (West Supp. 2010).

Federal legislation could also provide a remedy for the states' failure to adopt an education-based approach, conditioning the receipt of funds on the development of awareness and prevention campaigns for students, professional training programs for teachers, or educational campaigns for parents. That the federal government normally plays a limited role in education does not prevent it from fixing the terms upon which education funding shall be disbursed. In *South Dakota v. Dole*,²⁷⁰ the Supreme Court held that Congress may, under its spending power, attach conditions on the receipt of federal funds, provided that such conditions meet certain requirements. First, the exercise of the spending power "must be in pursuit of the general welfare."²⁷¹ Congress must also state any condition of funding unambiguously, thereby "enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation."²⁷² Moreover, conditions on federal grants may be illegitimate if they are unrelated "to the federal interest in particular national projects or programs" or there is an independent constitutional bar to the funding.²⁷³ Finally, Congress must ensure that its financial inducement does not rise to the level of unconstitutional coercion or compulsion.²⁷⁴

Congress could easily adopt antibullying legislation that meets the requirements set forth in *Dole*. First, laws that address bullying serve an undeniably public purpose, which is of chief concern to the Department of Education, of ensuring a safe and disciplined school climate.²⁷⁵ Moreover, this legislation would not induce the states to act in an unlawful manner,²⁷⁶ there is no independent constitutional bar to the funding. Schools receive only ten percent of their funds from the federal government and this conditional grant would involve only a small fraction of that funding. This can hardly be considered coercive. Therefore, provided that all conditions are unambiguously stated, Congress may enact a law that conditions the receipt of federal education funding on compliance with its anti-bullying legislation.

²⁷⁰ 483 U.S. 203 (1987).

²⁷¹ *Id.* at 207 (internal quotation marks and citation omitted).

²⁷² *Id.* (alteration in original) (internal quotation marks and citation omitted).

²⁷³ *Id.* at 207–08 (internal quotation marks omitted).

²⁷⁴ *Id.* at 211.

²⁷⁵ See U.S. DEP'T OF EDUC., STRATEGIC PLAN FOR FISCAL YEARS 2007—12 12 (2007), available at <http://www2.ed.gov/about/reports/strat/plan2007-12/2007-plan.pdf> (identifying the promotion of a safe and disciplined learning environment as one of the Department of Education's objectives in improving student achievement).

²⁷⁶ See *Dole*, 483 U.S. at 210 (holding that Congress may not use its spending power to induce state action that would itself be unconstitutional).

CONCLUSION

Cyberbullying is a rising concern that our nation is obligated to address. The line between on- and off-campus speech has become so blurred, and caused so much confusion, that clear boundaries must be drawn. The answer, however, does not lie in stripping students of their First Amendment rights. A student who speaks outside the “schoolhouse gate” is no longer a student and, therefore, *Tinker* does not apply. He or she is instead a “person,” and should be afforded the full protection of the First Amendment. The criminal and civil justice systems might allow victims, parents, and communities to punish bullies that go too far, but it is clear that significant inadequacies exist in both regimes. Neither criminal or civil penalties would sufficiently curtail cyberbullying and its effects. An education-based approach can fill the voids left by these systems of justice. Either the state or federal government should enact laws aimed at bullying awareness and prevention. Such laws will enable schools, parents, and community members to better explain the consequences of bullying, and the heightened abuse of cyberbullying, behavior to teens. It is only through a communal collaboration that the bullying epidemic can be appropriately addressed.

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