

# A CASE FOR STRENGTHENING SCHOOL DISTRICT JURISDICTION TO PUNISH OFF-CAMPUS INCIDENTS OF CYBERBULLYING

Todd D. Erb<sup>†</sup>

Not long ago, society treated incidents of hazing, harassment, and bullying as part of the growing-up process. Today, however, we live in the shadow of sensational events that have changed the way our nation treats threats and bullying in our public school system. Our nation is engulfed by the epidemic of violence in public schools.<sup>1</sup> Just as the September 11th attacks shifted the nation's paradigm concerning issues of national security, the 1999 shootings at Columbine High School changed the way school administrators handle threats from students against faculty or other students on campus.<sup>2</sup> School administrators are now faced with further dilemmas, however, because on-campus bullying is now amplified by off-campus bullying on the Internet—a phenomenon called “cyberbullying.”<sup>3</sup>

Cyberbullying occurs when students use electronic means, including the use of Internet web sites, chat rooms, instant messaging, text and picture messaging on phones, and blogs, to bully peers.<sup>4</sup> “The only real difference

---

<sup>†</sup> Note and Comment Editor, *Arizona State Law Journal*. J.D. Candidate, Sandra Day O'Connor College of Law at Arizona State University, 2008; B.A. Political Science, Brigham Young University, 2005. I would like to thank Professor Tamara Herrera: an exceptional teacher and mentor. I would also like to thank Daneille Erb for her constant encouragement and Jack Erb for providing insights into current school law issues. Finally, I owe a special thanks to Kristin Erb for her untiring love and support.

1. See *In re Douglas D.*, 626 N.W.2d 725, 749–50 (Wis. 2001) (Prosser, J., dissenting) (“Over the past eight years, American education has endured an unprecedented outbreak of shooting incidents and other violence at schools across the United States. Parents, teachers, school administrators, and students have become hauntingly familiar with such names as Grayson, Kentucky (2 deaths, 1993); Lynnville, Tennessee (2 deaths, 1995); Blackville, South Carolina (3 deaths, 1995); Redlands, California (1 death, 1995); Moses Lake, Washington (3 deaths, 1996); Bethel, Alaska (2 deaths, 1997); Pearl, Mississippi (2 deaths, 1997); West Paducah, Kentucky (3 deaths, 1997); Jonesboro, Arkansas (5 deaths, 1998); Edinboro, Pennsylvania (1 death, 1998); Fayetteville, Tennessee (1 death, 1998); and Springfield, Oregon (2 deaths, 1998), all of which occurred before the incident in this case and all of which preceded the 15 deaths at Columbine High School in Littleton, Colorado in 1999. A number of these shooting deaths were perpetrated by boys between 12 and 14 years of age.”).

2. See Columbine High School Massacre, [http://en.wikipedia.org/wiki/Columbine\\_High\\_School\\_Massacre](http://en.wikipedia.org/wiki/Columbine_High_School_massacre) (last visited Feb. 26, 2008).

3. Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1218 (2003).

4. *Id.*

between cyberbullying and traditional bullying is that cyberbullying takes place on the Internet,” and thus “cyberbullying results in greater impact because Internet content is widely distributed and more public than traditional bullying.”<sup>5</sup> Furthermore, most of the content produced by cyberbullying originates away from the school campus on personal computers; however, the effects of such content can be felt every day within the schoolhouse gates.<sup>6</sup>

Incidents of cyberbullying have become commonplace among America’s youth. An ABC News correspondent recently sat down with a teenage girl to discuss a cyberbullying incident that resulted in the death of one of her junior high school classmates.<sup>7</sup> The deceased student, Ryan Halligan, had learning and motor disabilities, and students at his school bullied him throughout his childhood.<sup>8</sup> On one occasion Ryan told a friend that he had to get a rectal examination during a medical checkup.<sup>9</sup> As is often the case, the story was spread and changed, causing several students to taunt Ryan that he was gay.<sup>10</sup> Unlike previous generations when children would be safe from such taunting upon reaching the confines of their own homes, the jeering and innuendos about Ryan’s sexual orientation continued via Internet blogs and the personal web pages of other students.<sup>11</sup> Girls at Ryan’s school flirted with him over the Internet, but when he returned their interest they called him a loser and mocked him.<sup>12</sup>

What made the interview with the young teenage girl particularly compelling was the fact that her teasing, combined with other anonymous adolescents’ communications with Ryan through online chat rooms, pushed Ryan to hang himself.<sup>13</sup> The girl lamented the death of her classmate and was disturbed that she had contributed, in part, to Ryan’s death.<sup>14</sup>

Cyberbullying incidents do not always have such dramatic results. However, adolescent threats, teasing, and harassment over the Internet are occurring at an alarming rate throughout the nation, and many of these incidents follow a natural progression into the hallways of the local schools.

---

5. *Id.* at 1219.

6. *Id.*

7. Keturah Gray, *How Mean Can Teens Be?*, ABC NEWS, Sept. 12, 2006, <http://abcnews.go.com/Primetime/story?id=2421562&page=1>; Joan Whitely, *When Teasing Isn’t Funny: The Cost of Bullying*, LAS VEGAS REVIEW-JOURNAL, Oct. 31, 2005, [http://www.reviewjournal.com/lvrj\\_home/2005/Oct-31-Mon-2005/living/4038822.html](http://www.reviewjournal.com/lvrj_home/2005/Oct-31-Mon-2005/living/4038822.html).

8. Whitely, *supra* note 7.

9. *Id.*

10. *Id.*

11. *See id.*

12. *Id.*; *see also* Gray, *supra* note 7.

13. Whitely, *supra* note 7.

14. *See* Gray, *supra* note 7.

According to a 2007 study by the Federal Probation Juvenile Department, “90 percent of middle-school students have had their feelings hurt online,” while seventy-five percent had visited a web site that bashed another student.<sup>15</sup> Cyberbullying is not just limited to students: teachers and administrators are also targeted by cyberbullies. Commenting on students’ use of YouTube to post malicious videos about their teachers on the Internet, British Education Secretary Alan Johnson stated that “[t]he online harassment of teachers is causing some to consider leaving the profession because of the defamation and humiliation they are forced to suffer.”<sup>16</sup>

The viewpoint that harassment and bullying by one’s peers is relatively harmless and a rite of passage for school children changed drastically in 1999 when two bullying victims entered Columbine High School in Littleton, Colorado, and killed a teacher, twelve of their classmates, and finally themselves.<sup>17</sup> In the aftermath of the Columbine massacre, many states adopted bullying statutes that went further than mere verbal denunciations that “bullying is bad and won’t be tolerated.”<sup>18</sup> States differ on the appropriate definition of bullying, but most statutes prohibit written or verbal expressions, or physical acts or gestures, that are intended to cause distress to another student while on school grounds or at school activities.<sup>19</sup> Through these statutes, school districts around the country are better equipped to handle incidents of bullying that occur on their campuses.<sup>20</sup>

Despite the efforts of state legislatures, state antibullying statutes fail to address off-campus Internet communications between students. The court system has also struggled with how to handle cyberbullying incidents. Judges often use traditional legal doctrines that leave students like Ryan Halligan without the protection of either the educational or law enforcement community. Consequently, the use of cyberbullying as a new means of harassing one’s peers has fallen into a virtual “no-man’s-land” of legal liability.

---

15. Alvin W. Cohn, *Juvenile Focus*, 71 FED. PROBATION 44, 50 (2007).

16. Alex Braun, *Malicious Online Videos Hurting Teachers*, BREITBART.COM, Apr. 11, 2007, [http://www.breitbart.com/article.php?id=D8OEGJ6O1&show\\_article=1](http://www.breitbart.com/article.php?id=D8OEGJ6O1&show_article=1) (internal quotations omitted).

17. Columbine High School Massacre, *supra* note 2.

18. Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1, 3 (2005).

19. *See id.* at 8–11; *see also* ARK. CODE ANN. § 6-18-514(a)(3)(A), (b)(2) (Supp. 2007); CAL. EDUC. CODE § 35294.21(b)(1), (c)(10) (West Supp. 2007); COLO. REV. STAT. § 22-32-109.1(2)(a)(X) (2007); GA. CODE ANN. § 20-2-751.4(a) (2005); N.J. STAT. ANN. § 18A:37-16 (West Supp. 2007); OR. REV. STAT. § 339.351 (2005).

20. *See* Hartmeister & Fix-Turkowski, *supra* note 18, at 3.

An incident at Horace Greeley High School, located in a wealthy New York suburb, highlights the inability of the legal system to effectively deter cyberbullying.<sup>21</sup> Horace Greeley administrators were concerned with a web site run by two senior boys that contained personal information about forty female students.<sup>22</sup> The web site included the girls' phone numbers, addresses, and most alarmingly, their alleged sexual experiences.<sup>23</sup> The school's response was to suspend the students for five days and to notify the police of the situation.<sup>24</sup> Although the police initially charged the students with second-degree harassment, the county district attorney announced that, while some of the web site contents were "'offensive and abhorrent,' [they] did not meet the legal definition of harassment and the criminal charges against the [students] would be dropped."<sup>25</sup>

As was the case at Horace Greeley High School, material on web sites may be considered "offensive and abhorrent," but will rarely rise to the level of criminal or civil liability.<sup>26</sup> In addition, schools are limited in their ability to punish off-campus cyberbullying incidents because courts have continually granted such speech First Amendment protection.<sup>27</sup> Because school administrators are currently constrained by the legal system from addressing this growing problem, this Comment will argue that when cyberbullying incidents originate off-campus and fail to rise to the level of civil or criminal liability, but directly affect one or more individuals associated with the school environment, courts should expand the deference currently given to school districts to punish such speech.

This Comment will explore the need for the legal system to expand school district authority to punish cyberbullying incidents. It will begin by analyzing the ways our communities and courts have handled cyberbullying incidents thus far, including examining the current U.S. Supreme Court test used for off-campus cyberbullying incidents. The Comment will then outline why the current constitutional test is insufficient to handle cyberbullying cases and also examine how criminal and civil remedies also fail the victims of cyberbullying. The final portion of this Comment is dedicated to outlining plausible solutions to the cyberbullying problem.

---

21. Amy Benfer, *Cyber Slammed*, SALON.COM, July 3, 2001, [http://archive.salon.com/mwt/feature/2001/07/03/cyber\\_bullies/index.html?source=search&aim=/mwt/feature](http://archive.salon.com/mwt/feature/2001/07/03/cyber_bullies/index.html?source=search&aim=/mwt/feature).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *See id.*

27. *See, e.g.,* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 620 (5th Cir. 2004); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

## I. BACKGROUND

A. *The Current Constitutional Test: Tinker and Its Progeny*1. *Tinker v. Des Moines Independent Community School District*

When dealing with issues of student free-speech rights, almost every legal analysis begins with the Supreme Court decision of *Tinker v. Des Moines Independent Community School District*.<sup>28</sup> In *Tinker*, students wore black armbands at school to protest the Vietnam War.<sup>29</sup> After the school banned the armbands through its dress code policy, the students brought an action against the school district under the First Amendment.<sup>30</sup> Upon overturning these disciplinary procedures, the Supreme Court found that wearing the armbands was expressive conduct protected by the First Amendment, and that unless the school “showed a substantial disruption of or material interference with school activities[,]” it could not ban the armbands.<sup>31</sup> The Court reasoned that there was an interest in punishing speech that could lead to “substantial disruption of or material interference with school activities,” but found that the wearing of armbands did not rise to this level of interference.<sup>32</sup> The “material interference” and “substantial disruption” component of the *Tinker* decision has been the precedent most frequently applied to incidents of home-created, web-based expression.<sup>33</sup>

2. *Bethel School District v. Fraser*

The U.S. Supreme Court addressed the issue of student free-speech rights in schools seventeen years later in the case of *Bethel School District No. 403 v. Fraser*.<sup>34</sup> In *Fraser*, school administrators punished a student for giving a speech in front of 600 students that contained an “elaborate,

---

28. 393 U.S. 503 (1969).

29. *Id.* at 504.

30. *Id.* at 504–05.

31. *Id.* at 513–14.

32. *Id.* at 514. There must be more than some mild distraction or curiosity created by the speech. *See Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966). But “complete chaos is not required for a school district to punish student speech.” *See J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

33. *See, e.g., Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001); *J.S.*, 807 A.2d at 850, 861.

34. 478 U.S. 675 (1986).

graphic and explicit sexual metaphor.”<sup>35</sup> Although the Court reaffirmed *Tinker*, it reasoned that speech rights of students were not coextensive with those of adults.<sup>36</sup> The Court refused to protect student expression that intruded upon the work of the school and held that vulgar, indecent, or disruptive speech can be punished if it occurs on campus or during school activities because such speech is contrary to the school’s educational objectives.<sup>37</sup>

### 3. Hazelwood School District v. Kuhlmeier

The third seminal Supreme Court case addressing student speech is *Hazelwood School District v. Kuhlmeier*.<sup>38</sup> The issue in this case was slightly different than those in *Tinker* and *Fraser* in that it dealt with whether the school had to actively promote student speech with which it disagreed.<sup>39</sup> The school district did not allow students to publish articles in the school newspaper on sexual activities and birth control because it felt that the sexual references were inappropriate for younger students.<sup>40</sup> The court suggested that, although *Tinker* requires schools to tolerate particular student speech, the First Amendment does not require a school to affirmatively promote particular student speech.<sup>41</sup> Thus, a school can refuse to lend its resources to student expression with which it disagrees as long as its rationale is “reasonably related to legitimate pedagogical concerns.”<sup>42</sup> *Kuhlmeier* generally is not instructive in off-campus cyberbullying cases, but it strengthens school authority to punish students when web sites are created or accessed on school computers.

---

35. *Id.* at 677–78.

36. *Id.* at 682–83.

37. *Id.* at 683, 685 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)) (“Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the ‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’”).

38. 484 U.S. 260 (1988).

39. *Id.* at 270–71.

40. *Id.* at 263–64.

41. *Id.* at 270–72.

42. *Id.* at 272–73.

4. *Morse v. Frederick*

The Supreme Court once again visited the issue of school district jurisdiction to punish student speech in its 2007 term. In *Morse v. Frederick*,<sup>43</sup> a high school student brought an action against his principal and school board alleging that his First Amendment rights had been violated when he received a ten-day suspension for unfurling a banner stating “BONG HITS 4 JESUS” at an off-campus, school-approved activity.<sup>44</sup> In reversing the Ninth Circuit’s decision, the Court held 5-4 that the school’s disciplinary measures were constitutional in light of the prodrug message espoused by the banner.<sup>45</sup> *Morse* reaffirmed *Tinker*’s “material or substantial disruption” test but did little to “advance, overrule diminish or even substantively tweak any of the earlier precedents.”<sup>46</sup> *Morse*, like other related Supreme Court precedent, does not directly address the issue of off-campus cyberbullying incidents that affect the campus community.<sup>47</sup>

*B. Application of Supreme Court Precedent to Cyberbullying Cases*

Today, courts use the *Tinker* test, with some nuances, to analyze incidents of cyberbullying that originate on personal computers but affect students in the public school system.<sup>48</sup> Courts analyze several factors when addressing the narrow issue of whether web site content posted on personal computers can be punished by school administrators. First, courts must address the threshold issue of whether Internet speech originating on personal computers is “on-campus” or “off-campus” speech.<sup>49</sup> When doing

---

43. 127 S. Ct. 2618 (2007).

44. *Id.* at 2622.

45. *Id.* at 2625, 2629.

46. Clay Calvert & Robert D. Richards, ‘*Morse v. Frederick*’: *A Narrow Win for Schools*, NAT’L L.J., Aug. 1, 2007, at 26.

47. *Id.* (“[*Morse*] does nothing to answer the important and timely question of just how far a school’s authority may reach in punishing expression, such as the kind that students transmit through electronic means like homemade Web pages, social-networking sites, text messages and e-mail—arguably the most muddled area of student speech rights today.”).

48. *See, e.g.*, *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002) (using the *Tinker* test to hold that a student’s Internet web site was not a true threat because the district’s lack of immediate steps to correct the problem showed that the district did not take the threat seriously, but finding that the speech was not protected under the First Amendment because it caused a substantial disruption to the school environment when the threatened school teacher took a leave of absence for the remainder of the year).

49. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004); *J.S.*, 807 A.2d at 865. Several courts have considered the question of whether off-campus emails or web site postings constitutes on-campus or off-campus speech, but these courts have come to different conclusions. *Compare Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 448–49, 455 (W.D. Pa. 2001) (where email was created off campus, but printed and carried on school

so, courts have analogized these incidents to cases dealing with “underground newspapers” or other types of publications that were printed off-campus but later made their way onto campus.<sup>50</sup> In some cases, courts have found that where there is a “sufficient nexus between the web site and the school campus” the speech can be considered “on-campus.”<sup>51</sup> This nexus has been established in cases where a student accessed a web site at school during class<sup>52</sup> and in cases where the web site content was aimed specifically at the school and was carried by students onto campus.<sup>53</sup>

---

grounds by others, court surveyed case law and determined that, whether speech was on- or off campus, speech should be analyzed in accordance with *Tinker*, with *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (in granting temporary restraining order in favor of student, web site characterized as having “out-of-school nature”).

50. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983–84, 989 (9th Cir. 2001) (analyzing a poem composed off-campus and brought onto campus by the student under the *Tinker* standard); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 822–23 (7th Cir. 1998) (where a student was disciplined for an article printed in an underground newspaper that was distributed on school campus); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1074–77 (5th Cir. 1973) (punishing a student for authoring an article printed in an underground newspaper distributed off-campus, but near school grounds).

51. *J.S.*, 807 A.2d at 865. The determination of whether a sufficient nexus exists between off-campus speech and a school environment is based upon the point of receipt, not necessarily transmission. *Id.*; see also *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) (“It is clear that the test for school authority is not geographical. The reach of school administrators is not strictly limited to the school’s physical property.”). With oral speech, the distinction is clear-cut because both the transmission and receipt take place at the same time. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (student’s vulgar speech at a school assembly was not protected by First Amendment). With written speech or cyber-speech, the analysis is more complicated. For example, a school cannot ban an underground newspaper that is published and distributed off campus, but if the speech is brought onto campus the school may take disciplinary action because a sufficient nexus was established by students bringing the speech onto campus. See, e.g., *Boucher*, 134 F.3d at 822–23 (student disciplined for an article printed in an underground newspaper that was later distributed on school campus). As a result, similar to underground newspapers, courts have generally focused on where the cyber-speech was received rather than where it was created. See, e.g., *Layshock*, 496 F. Supp. 2d at 599 (“[I]n cases involving off-campus speech, such as this one, the school must demonstrate an appropriate nexus.”).

52. See, e.g., *J.S.*, 807 A.2d at 852, 865 (illustrating a time when students and administrators accessed a web site at school); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177–80 (E.D. Mo. 1998) (using the *Tinker* standard for on-campus speech when students and teachers access the web site on school computers, but ruling that the web site did not cause a substantial disturbance).

53. See, e.g., *J.S.*, 807 A.2d at 865. In some jurisdictions, when cyber-speech is aimed at a specific school or its personnel and is brought onto campus, the speech will be considered “on-campus.” In *J.S.*, a student created a web site entitled “Teacher Sux” on his home computer and posted it on the Internet. *Id.* at 850–51. The student told other students about the web site, and ultimately faculty and administrators of the school district viewed the web site from school computers. *Id.* at 851–52. The court held that there was a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus. *Id.* at 865. In its reasoning, the court found several factors to be dispositive in the analysis, including the fact that

The majority of courts, however, have found that Internet speech created off-campus cannot be subject to the jurisdiction of school disciplinary action.<sup>54</sup> The court in *Emmett v. Kent School District No. 415* considered the appropriateness of a student suspension for creating a web site from his home without using school resources or time and stated:

In the present case, Plaintiff's speech was not at a school assembly, as in *Fraser*, and was not in a school-sponsored newspaper, as in *Kuhlmeier*. It was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to [the school], the speech was entirely outside of the school's supervision or control.

The defendant . . . has presented no evidence that the mock obituaries and voting on this web site were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever. This lack of evidence, combined with the above findings regarding the out-of-school nature of the speech, indicates that the plaintiff has a substantial likelihood of success on the merits of his claim.<sup>55</sup>

Therefore, in most jurisdictions, even if the "intended audience was undoubtedly connected to [the school],"<sup>56</sup> courts will refuse to even address

---

(1) the student "inform[ed] other students . . . of the existence of the web site[;]" (2) the speech was brought onto the school campus; (3) the students, faculty members, and administrators accessed the web site at school; (4) "the web site was aimed not at a random audience, but at the specific audience of students and others connected with" the school; and (5) it was foreseeable to the student "that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property." *Id.* Conversely, where a student takes no action to increase the chances of off-campus speech finding its way onto campus, the speech will be considered "off-campus" in nature. *See, e.g., Porter*, 393 F.3d at 615. In *Porter*, a student sketched a violent drawing of an attack on his school while in the privacy of his own home. *Id.* at 611. The student stored the drawing in his closet, but two years later, his younger brother brought the drawing to school and showed it to other students. *Id.* The court held that the drawing was not on-campus speech because it "serendipitously" made its way onto campus and because the student took no action that would increase the chances that his drawing would find its way to the school. *Id.* at 615, 617.

54. *See, e.g., Emmett*, 92 F. Supp. 2d at 1090; *cf. Killion*, 136 F. Supp. 2d at 454 (reasoning that "school officials' authority over off-campus expression is much more limited than expression on school grounds").

55. *Emmett*, 92 F. Supp. 2d at 1090; *see also Beussink*, 30 F. Supp. 2d at 1180 (granting the plaintiff's motion for a preliminary injunction enjoining his suspension from school for creating a homepage on his home computer, noting that the web site did not materially and substantially interfere with school discipline).

56. *Emmett*, 92 F. Supp. 2d at 1090.

incidents of cyberbullying.<sup>57</sup> Even in the few jurisdictions applying the “sufficient nexus” test, school districts will struggle to establish the nexus in the numerous circumstances where the web site content negatively impacts the life of a student on campus but where it is not accessed at school or carried onto campus.<sup>58</sup>

In the rare case when the court does find a sufficient nexus between the speech and the school campus, it will then examine whether the speech substantially or materially disrupted the learning environment.<sup>59</sup> There is not a precise test for what defines a substantial disruption, but courts have reasoned that there must be more than some mild distraction or curiosity created by the speech,<sup>60</sup> but “complete chaos is not required.”<sup>61</sup> In determining the magnitude of the disruption, courts will consider factors such as: the reaction of the students and teachers to the speech,<sup>62</sup> whether any students or teachers had to take time off from school because of the speech,<sup>63</sup> whether teachers were incapable of controlling their classes because of the speech,<sup>64</sup> whether classes were cancelled,<sup>65</sup> and how quickly the administration responded to the speech.<sup>66</sup> If the court does find that the Internet speech actually disrupted or foreseeably could have disrupted the school’s learning environment, the administration’s disciplinary measures will most likely be upheld.<sup>67</sup>

---

57. See, e.g., *id.* at 1090; cf. *Killion*, 136 F. Supp. 2d at 454 (reasoning that “school officials’ authority over off-campus expression is much more limited than expression on school grounds”). But see *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39, (2d Cir. 2007) (“The fact that [the student’s] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.”).

58. See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864–65 (Pa. 2002).

59. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 827–28 (7th Cir. 1998).

60. *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (“The record indicates only a showing of mild curiosity on the part of other school children . . . [which] did not hamper the school in carrying on its regular schedule of activities. . .”).

61. *J.S.*, 807 A.2d at 868.

62. *Id.* at 869.

63. *Id.*; *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

64. *Killion*, 136 F. Supp. 2d at 455.

65. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (“The actual disruption was rather minimal—no classes were cancelled . . .”).

66. See *id.*; *J.S.*, 807 A.2d at 869.

67. See, e.g., *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38–40 (2d Cir. 2007) (upholding school disciplinary measures because it was reasonably foreseeable that the student’s conduct would “disrupt the work and discipline of the school”) (internal quotation omitted); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1390, 1392 (D. Minn. 1987) (finding that an underground publication that contained vulgar language and advocated violence against teachers substantially disrupted school operations because teachers “found it necessary to interrupt their teaching to quell these disruptions”); *J.S.*, 807 A.2d at 869.

Additionally, courts must evaluate the content of the speech to see if it falls outside the ambit of First Amendment protection on other grounds. Threats of harm or violence constitute a good portion of bullying incidents, and cyberbullying is no exception. In the post-Columbine era, it is the threatening nature of cyber-speech that often captures the attention of school administrators.<sup>68</sup> In particular, many cyberbullying incidents raise questions of whether speech constitutes a “true threat.”<sup>69</sup> “[A] true threat is a statement that, in light of all the surrounding circumstances, . . . a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech.”<sup>70</sup> When performing a “true threat” analysis, the court must (1) decide whether the speech was intentionally or knowingly communicated to the intended victim and (2) consider the “full context of the statement, including all relevant factors that might affect how the statement could reasonably be interpreted” such as a “serious expression[] of an intent to intimidate or inflict bodily harm.”<sup>71</sup> If the court determines that the web site content constitutes a “true threat,” the school’s punishment of the student will likely be upheld.<sup>72</sup>

### C. A Quartet of Cyberbullying Cases: The Muddled Law as Applied by Courts

The following four cases reveal how lower courts have applied the above-mentioned Supreme Court precedent to handle the emerging problem of cyberbullying. The cases highlight the unreasonably high “substantial

---

68. *J.S.*, 807 A.2d at 857–59.

69. The term “true threat” is a constitutional term of art used to describe a specific category of speech that is beyond the protective ambit of the First Amendment. *See Watts v. United States*, 394 U.S. 705, 708 (1969). The Supreme Court has held that true threats are those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . . [The] prohibition on true ‘threats protect[s] individuals from the fear of violence’ and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.

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

70. *In re Douglas D.*, 626 N.W.2d 725, 739–41 (Wis. 2001) (citing *State v. Perkins*, 626 N.W.2d 762, 770 (Wis. 2001)).

71. *In re A.S.*, 626 N.W.2d 712, 720 (Wis. 2001) (quoting *Perkins*, 626 N.W.2d at 770–71).

72. *See, e.g., Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, No. 5; 02CV1403, 2006 WL 1741023, at \*8 (N.D.N.Y. June 20, 2006) (dismissing a student’s first amendment claim against school disciplinary measures because the student’s comments constituted a true threat); *see also In re A.S.*, 626 N.W.2d at 720.

disruption” benchmark the Supreme Court has set to uphold school district disciplinary measures taken against cyberbullies. The cases also show the difficulty of proving that student speech falls into the constitutionally unprotected category of true threats.

### 1. Brandon Beussink and His Offensive Homepage

In early February 1998, Brandon Beussink created a web site at home on his personal computer.<sup>73</sup> Brandon’s web site was “highly critical of the administration at Woodland High School,” and he “used vulgar language to convey his opinion regarding the teachers” and school administrators.<sup>74</sup> Brandon’s web site “also invited readers to contact the school principal and communicate their opinions regarding” the school.<sup>75</sup> A fellow student of Brandon’s became angry with him when she saw the web site comments, so she printed a copy and showed school administrators.<sup>76</sup> Several of the teachers and administrators were visually agitated and offended by the comments, so the administration decided to handle the problem immediately.<sup>77</sup>

Consequently, the administration gave Brandon a ten-day suspension and ordered him to shut down the web site.<sup>78</sup> A district court granted Brandon’s motion for a preliminary injunction, however, reasoning that Brandon would likely succeed on the merits because the school discipline stemmed from the fact that the administrators were offended by the web site content rather than from a fear of disruption or interference with school discipline as required by *Tinker*.<sup>79</sup>

### 2. Joshua Mahaffey and His Death List

In early 2001, a parent of a Waterford Kettering High School student notified the police about a web site titled “Satan’s web page.”<sup>80</sup> The web page contained a list of students that Joshua Mahaffey wished would die, and included a “mission” for all those reading the web site to “[s]tab someone for no reason[,] then set them on fire[,] throw them off a cliff,

---

73. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

74. *Id.*

75. *Id.*

76. *Id.* at 1178.

77. *Id.*

78. *Id.* at 1179.

79. *Id.* at 1180.

80. Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 781–82 (E.D. Mich. 2002).

watch them suffer and with their last breath, just before everything goes black, spit on their face.”<sup>81</sup> The web site also contained a statement at the bottom encouraging readers not to “go killing people and stuff then blaming it on me.”<sup>82</sup> Although the police did not pursue criminal charges, the school district determined that the web site content violated the school’s Internet and intimidation policies.<sup>83</sup>

A Michigan district court, however, found the school district’s disciplinary measures unconstitutional on several grounds.<sup>84</sup> First, the court reasoned that since there was “no evidence that the web site interfered with the work of the school,” the disciplinary measures could not be upheld under the *Tinker* standard.<sup>85</sup> Second, the court found that the statements did not rise to the level of a “true threat” because “[t]here [was] no evidence on the record that [the student] communicated the statements on the web site to anyone” and he “never meant ‘anyone else to see it.’”<sup>86</sup> The court also took into consideration the short disclaimer on the bottom of the web site as a mitigating factor in the true threat analysis.<sup>87</sup>

### 3. *J.S.*: An Outlier to the Trend

In *J.S. v. Bethlehem Area School District*, a student created a web site entitled “Teacher Sux” on his home computer and posted it on the Internet.<sup>88</sup> The student told his friends about the web site, and ultimately faculty and administrators of the school district viewed the web site from school computers.<sup>89</sup> The web site became a topic of conversation at the school by both faculty and students, especially because one page outlined reasons why a particular teacher should die and solicited funds from visitors to pay for a hitman.<sup>90</sup> When the student’s teacher viewed the web site she became very distressed, as manifested by the onset of physical illness.<sup>91</sup> Because she was so emotionally distraught due to the web site’s contents, the teacher was unable to return to school to finish the school year.<sup>92</sup>

---

81. *Id.* at 782.

82. *Id.*

83. *Id.*

84. *Id.* at 784–86.

85. *Id.* at 784.

86. *Id.* at 786 (quoting Pl.’s Ex. H).

87. *Id.*

88. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850–51 (Pa. 2002).

89. *Id.* at 851–52.

90. *Id.*

91. *Id.* at 852.

92. *Id.*

In its true threat factors analysis, the court found that although the intended victim exhibited severe mental and physical distress from viewing the site and the statements were unconditional and unequivocal, the fact that the school administration delayed in taking immediate steps against the student undermined its position that the web site was truly threatening.<sup>93</sup> However, the court held that the web site caused a substantial disturbance because it disrupted the entire school community—students, teachers, and parents.<sup>94</sup> In addition, the court pointed out that the impact of the emotional and physical injuries to the teacher caused a significant disruption of the school environment because a teacher’s absence “unquestionably disrupted the delivery of instruction to the students and adversely impacted the educational environment.”<sup>95</sup>

#### 4. *Layshock*: Marginalizing the *J.S.* Decision

In *Layshock v. Hermitage School District*, a seventeen-year-old student created a MySpace.com page on his grandmother’s home computer.<sup>96</sup> The student posted a picture of his school principal on the web site with captions suggesting that the principal had alcohol abuse problems and that he was a “big fag,” “big steroid freak,” and “big whore.”<sup>97</sup> The web site was quickly brought to the attention of most of the high school student body, and several students viewed the web site while on campus.<sup>98</sup> During a staff meeting the principal became very emotional over the web site content, and he was unable to continue explaining the situation to the other staff members.<sup>99</sup> There were also incidents where students disrupted class by “congregating and giggling” around a computer, and the school technology coordinator had to spend twenty-five percent of his work week handling issues related to the web site.<sup>100</sup> The court found the disruption insufficient to meet the *Tinker* standard because “no classes were cancelled, no widespread disorder occurred, [and] there was no violence or student disciplinary action.”<sup>101</sup> The court acknowledged that the web site content “and its impact on school personnel[] was much more extreme in *J.S.*,” and it “respectfully reache[d]

---

93. *Id.* at 852, 856–59.

94. *Id.* at 868–69.

95. *Id.* at 869.

96. 496 F. Supp. 2d 587, 590–91 (W.D. Pa. 2007).

97. *Id.* at 591.

98. *Id.* at 591–92.

99. *Id.* at 592.

100. *Id.* at 592–93.

101. *Id.* at 600.

a slightly different balance between student expression and school authority.”<sup>102</sup>

## II. WHERE TO TURN FOR REDRESS: A NO MAN’S LAND

### A. *Insufficiency of the Tinker Test in Curbing Cyberbullying*<sup>103</sup>

Although the court in *J.S.* found that the web site speech sufficiently affected the on-campus atmosphere to justify disciplinary action by the school,<sup>104</sup> it stands as an exception to the trend. Most courts addressing the issue of off-campus Internet speech have denied school districts power to punish students for what, many times, is vulgar, cruel, sexually explicit, and threatening speech.<sup>105</sup> Because the current trend has been to give off-campus Internet speech First Amendment protection, many school officials are frustrated and left wondering what can be done to address speech that does not rise to the level of a “true threat” and does not cause enough problems on campus to rise to the level of a “substantial or material disruption,” but still negatively affects the school environment and the students that attend the school.<sup>106</sup>

The quartet of cyberbullying cases presented above highlights the many problems with the current constitutional test and shows the loopholes

---

102. *Id.* at 602.

103. *Tinker* and other Supreme Court precedents are ill suited to deal with off-campus student expression that is brought onto campus unintentionally by others. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004). University of Pennsylvania Professor Clay Calvert, when speaking about the current state of law, asserted: “The bottom line is that off-campus-created Web sites raise new issues and require new rules; they are not addressed either well or adequately by existing Supreme Court precedent, especially when a student does not ‘bring’ the site on campus.” Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 279 (2001).

104. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

105. *Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp. 2d 791, 800–01 (N.D. Ohio 2002) (expressing skepticism about the school district’s position because there was no evidence the web site substantially disrupted school activities even though the student accessed the web site from a school computer); *Beidler v. N. Thurston Sch. Dist.*, Case No. 99-2-00236-6 (Wash. Super. Ct. July 18, 2000), available at <http://web.archive.org/web/20050425161759/http://www.aclu-wa.org/legal/Beidler-Court's+Opinion.html> (rejecting the school district’s argument because the record established that the student’s on-campus activities concerning the web site were de minimus).

106. Lisa L. Swem, *Sticks and Stones in Cyberspace*, LEADERSHIP INSIDER: PRACTICAL PERSPECTIVES ON SCH. L. & POL’Y, Aug. 2006, at 5, 11.

available to students.<sup>107</sup> The *Beussink* and *Layshock* cases suggest that students will not be subject to discipline if they post blatantly offensive comments on the Internet that are intended to reach school administrators as long as the school fails to provide enough evidence that the entire educational environment was substantially disrupted.<sup>108</sup> This puts administrators in the difficult position of having to gauge when web site content has caused a sufficiently large disruption to address through disciplinary measures; otherwise, they run the risk of being unable to provide enough evidence in court that the *entire* educational environment was disrupted. The *Mahaffey* decision suggests that as long as students have the subjective intent that no one else views the web site, and provided they put a short disclaimer on the web page, they have the liberty to make intimidating threats to whomever they please.<sup>109</sup> *J.S.* shows that Internet speech must practically ruin an individual's career, wreak havoc throughout the entire school community, and cause severe emotional distress to be classified under *Tinker* as a substantial disruption of the learning environment.<sup>110</sup> Therefore, the lack of a bright-line rule with which to evaluate cyberbullying incidents has left school administrators to play a guessing game when deciding what sort of conduct should be punished.

*B. Conflicting Messages in State Laws and School Board Policies:  
Some Bullying Will Be Punished, Some Bullying Will Not*

In response to the deadly consequences of allowing bullying to go unchecked, states have scrambled to strengthen school districts' jurisdiction over incidents of bullying taking place on their campuses, at school activities, or on the way to and from school.<sup>111</sup> Schools have now developed procedures to track incidents of bullying, inform parents of such incidents, and enact disciplinary measures to punish breaches of the antibullying policies.<sup>112</sup>

---

107. *Supra* Part I.B.

108. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 600–02 (W.D. Pa. 2007); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1080–81 (E.D. Mo. 1998).

109. *See Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002).

110. *See J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

111. Hartmeister & Fix-Turkowski, *supra* note 18, at 1–2.

112. *See, e.g.*, PEORIA UNIFIED SCHOOL DISTRICT NO. 11 POLICY MANUAL, GOVERNING BOARD POLICY, BULLYING § 5.1.7.6.2 (2006), available at [http://portal.peoriaud.k12.az.us/Governing%20Board/Governing%20Board%20Policy%20Manual/PUSD%20Governing%20Board%20Policy/Governing%20Board%20Policy%20Section%2005.htm#\\_Toc181089089](http://portal.peoriaud.k12.az.us/Governing%20Board/Governing%20Board%20Policy%20Manual/PUSD%20Governing%20Board%20Policy/Governing%20Board%20Policy%20Section%2005.htm#_Toc181089089).

When it comes to cyberbullying, school administrators are now hearing the familiar justification that comments on web sites are sophomoric, childish, and made in a joking nature. But bullying is still bullying, no matter what the medium. Many commentators argue that cyberbullying is even worse than traditional bullying because the Internet content is widely distributed, causing constant harassment and compounding the emotional wreckage that arrives at the schoolhouse gate.<sup>113</sup> Witold Walczak, legal director for the ACLU of Pennsylvania, recently admitted: “For students, even though the speech may be protected there’s a big difference between whispering on a playground and posting on the Internet. They need to understand you can cause real pain to people on the Internet. The Internet just amplifies the speech, so the consequences are far greater.”<sup>114</sup>

Although the effects of cyberbullying can be the exact same as traditional bullying, courts have restricted school district jurisdiction because the cyberbullying incidents originate “off-campus.” However, there is already strong precedent for schools to monitor off-campus bullying incidents.<sup>115</sup> Through good-neighbor policies, schools have long been able to discipline students for off-campus conduct such as fighting, destruction of property, and violating traffic laws.<sup>116</sup> For example, in *Nicholas B. v. School Committee of Worcester*,<sup>117</sup> the Massachusetts Supreme Court

---

113. See Hartmeister & Fix-Turkowski, *supra* note 18, at 8; Swem, *supra* note 106, at 5; see also Tim Grant, *Bullies Take Intimidation to Cyberspace Using Computers, Cell Phones, They Can Inflict Pain Without Having to Catch Victims in the Schoolyard*, PITTSBURGH POST-GAZETTE, June 26, 2006, at A1 (“Scandalous gossip and embarrassing photographs posted online can reach a far wider audience than was ever possible before the computer age.”).

114. Grant, *supra* note 113, at A1.

115. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F. Supp. 3d 34, 39, (2d Cir. 2007) (“We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school . . . .”); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) (“It is clear that the test for school authority is not geographical. The reach of school administrators is not strictly limited to the school’s physical property.”).

116. See, e.g., PEORIA UNIFIED SCHOOL DISTRICT NO. 11 POLICY MANUAL, GOVERNING BOARD POLICY STUDENT CONDUCT WITHIN THE SCHOOL COMMUNITY § 5.1.7.4 (2006), available at [http://portal.peoriaud.k12.az.us/Governing%20Board/Governing%20Board%20Policy%20Manual/PUSD%20Governing%20Board%20Policy/Governing%20Board%20Policy%20Section%2005.htm#\\_Toc181089085](http://portal.peoriaud.k12.az.us/Governing%20Board/Governing%20Board%20Policy%20Manual/PUSD%20Governing%20Board%20Policy/Governing%20Board%20Policy%20Section%2005.htm#_Toc181089085) (“School rules and other reasonable expectations for acceptable student behavior are extended to include student conduct while going to and from school and while off campus during the normal school day, attending other schools or events on or off campus after the school day ends. This includes the responsibility to observe traffic and pedestrian laws and the responsibility to act as a good neighbor, respecting the safety, welfare, and property of others during lunch hour and released periods. Failure to conduct oneself in a safe manner or to act as a good neighbor within the school community may result in disciplinary action.”).

117. 587 N.E.2d 211 (Mass. 1992).

upheld a student's suspension for a fight that took place off-campus.<sup>118</sup> Although there was no explicit language in the school's disciplinary policy empowering school administrators to punish an off-campus fight, the court found the student's expulsion appropriate because the incident was "a product of planning" that had occurred on campus and because the student knew the conduct was "unquestionably improper."<sup>119</sup> Furthermore, off-campus conduct such as alcohol consumption, drug activity, or assault has been subject to school disciplinary authority.<sup>120</sup> Traditional methods of bullying have now been prohibited by state statutes,<sup>121</sup> and some school district policies include cyberbullying provisions.<sup>122</sup> But unlike other provisions in school district policies that courts extend to off-campus incidents, cyberbullying policies have been ineffective at punishing off-campus cyberbullies.<sup>123</sup>

Although the *Tinker* standard allows schools to punish cyberbullying incidents that escalate in a dramatic nature, it is absurd that courts continually overlook the fact that bullies usually target specific individuals, not the "entire school environment." Bullies naturally pick on weak individuals rather than large numbers of students. The effects of bullying may be excruciating to bear for that individual, but the rest of the student body may not even know about the bullying, much less feel its effects. Since bullying is often "individualized," there is a diminished chance that cyberbullying incidents will cause a "substantial or material disruption" to the school environment. It may cause a "substantial or material disruption" to one student's learning environment, but such a disruption would most likely fail the high standard required in cases like *J.S.*

Therefore, the legal system has supplied mixed messages about bullying. A bully that harasses another student will be subject to discipline as long as it occurs on campus, at a school activity, or on the way to and from school. But the instant the bully enters his home, sits down at his computer, and spends hours creating a web site to intimidate, scare, and ruin the reputation of another student, he will face no consequences for his actions. It is a good time to be a cyberbully.

---

118. *Id.* at 213.

119. *Id.* at 212.

120. *Id.*; *Bush v. Dassel-Cokato Bd. of Educ.*, 745 F. Supp. 562, 564, 572–73 (D. Minn. 1990).

121. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-341(A)(40) (2007).

122. Tanya Caldwell, *Schools Crack Down on Cyberbullies*, ORLANDO SENTINEL, Aug. 5, 2007.

123. *See, e.g.*, *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 604–05 (W.D. Pa. 2007) (criticizing the Hermitage School District computer and harassment policies as overbroad).

C. *The Inadequacy of Criminal Law as a Remedy*

Scholars that have criticized school district jurisdiction over Internet speech are quick to point out that other methods of recourse, such as criminal or civil proceedings, are better able to punish incidents of cyberbullying.<sup>124</sup> However, cyberbullying victims have had little success using civil and criminal laws to prosecute cyberbullies.<sup>125</sup> For example, the Horace Greeley High School seniors that posted the sexual history, names, and addresses of their fellow female students on a web site were initially charged with second-degree harassment, which carries a sentence of up to one year in jail and a \$1,000 fine.<sup>126</sup> Nonetheless, a few days later the Westchester District Attorney announced that, although the material on the web site was “offensive and abhorrent,” it did not meet the legal definition of harassment, resulting in the criminal charges against the boys being dropped.<sup>127</sup> In the rare cases where a student is criminally convicted of Internet harassment, appellate courts have been reluctant to enforce such penalties.<sup>128</sup>

States have enacted laws to govern behavior by individuals over the Internet, but many of these laws require a high threshold of threatening speech to trigger indictment. For example, the Nevada legislature has made it a felony if a person uses the “Internet or network site[s] or electronic mail or any other similar means of communication to publish, display or distribute information in a manner that substantially increases the risk of

---

124. See Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 143–44 (2003).

125. See, e.g., *United States v. Alkhabaz*, 104 F.3d 1492, 1493, 1496 (6th Cir. 1997) (holding that emails violently describing the rape and murder of a woman was not a “threat to kidnap or injure another person”); *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 275 Cal. Rptr. 494, 497 (Cal. Ct. App. 1990) (holding that statements concerning a teacher’s teaching ability were not actionable under civil law).

126. Benfer, *supra* note 21.

127. *Id.*; see also Calvert, *supra* note 103, at 261 (“Local police investigated the Web site but decided not to pursue any legal action. As Police Chief Thomas Nielen remarked, ‘It’s not a crime to call people names . . . . If there’s a threat or a means to carry out a threat, then we could get involved, but the items contained here didn’t rise to that.’”). Calvert further stated:

[T]he criminal justice system came into play. Both the local police and the Federal Bureau of Investigation (FBI) conducted investigations to determine if [the students’] site constituted a true threat of violence. Both agencies, however, declined to pursue criminal charges. The county attorney believed the threat to hire a hitman simply was not serious.

*Id.* at 248 (citations omitted).

128. See, e.g., *A.B. v. State*, 863 N.E.2d 1212, 1214, 1218 (Ind. Ct. App. 2007) (vacating an adjudication of delinquency based on six claims of harassment brought against a student for posting derogatory comments about his assistant principal on his MySpace.com web site).

harm or violence to the victim.”<sup>129</sup> Potential offenders are subject to the whims of a public prosecutor’s analysis of the claim, which many times results in charges never being brought.<sup>130</sup> Thus, for stalking charges to be brought against an individual for Internet speech the comments must be more than just derogatory or offensive; they must rise to a level that “substantially increases the risk of harm or violence to the victim.”<sup>131</sup>

Although these laws may be effective for victims of stalking in the community at large, such laws do not help school children combat the cyberbullying problem. The primary deficiency is that if the speech on the Internet puts another student in apprehension that he or she may be subject to bodily harm, the schools will most likely be able to reach such speech through a true threat analysis.<sup>132</sup> Furthermore, it is more difficult to prosecute bullies under anti-harassment or anti-stalking statutes due to the *mens rea* requirement in criminal proceedings that is not required in a “true threat” analysis.<sup>133</sup> Thus, criminal statutes do not offer victims of cyberbullying a viable option to seek redress against their harassers.

#### D. *Inadequacies of Civil Remedies*

The more difficult situation for school children and administrators is finding a recourse to deal with speech that is insulting, degrading, and cruel, but does not rise to the level of a true threat; in other words, the speech that causes a disruption to the learning environment but will never be analyzed by the court because of the difficulty of establishing the threshold issue that such speech is “on-campus.”<sup>134</sup>

Many critics of school district jurisdiction over Internet speech claim that off-campus behavior should be punished through off-campus civil remedies.<sup>135</sup> The primary civil remedy available for cruel and insulting

---

129. NEV. REV. STAT. § 200.575(3) (2006); *See also* ARK. CODE ANN. § 5-41-108(a) (2006); CAL. CIV. CODE § 1708.7(b)(2)(3) (West 2007); WIS. STAT. § 945.0125(2)(a) (2006). For a survey of cyber-stalking legislation, see Shonah Jefferson & Richard Shafritz, *A Survey of Cyberstalking Legislation*, 32 UWLA L. REV. 323 (2001).

130. *See, e.g.*, Calvert, *supra* note 103, at 261; Benfer, *supra* note 21.

131. NEV. REV. STAT. § 200.575(3).

132. *In re A.S.*, 626 N.W.2d 712, 720 (Wis. 2001).

133. *Compare* United States v. Alkhabaz, 104 F.3d 1492, 1494 (6th Cir. 1997) (“Although [the statute’s] language does not specifically contain a *mens rea* element, this Court has interpreted [the statute] as requiring only general intent.”) *with* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F. Supp. 3d 34, 37–38 (2d Cir. 2007) (stating that “true threat” requires *mens rea* of knowingly and willfully).

134. *See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 617 (5th Cir. 2004).

135. *See* Calvert, *supra* note 103, at 245 (“[I]f traditional and generally applicable *off-campus* civil law remedies such as libel are available for teachers and principals who feel

speech is a defamation action,<sup>136</sup> or one of its subsets—libel or slander.<sup>137</sup> In general, to establish a prima facie case for defamation, the following elements must be proved: (1) defamatory language on the part of the defendant; (2) the defamatory language must be “of or concerning” the plaintiff; (3) publication of the defamatory language by the defendant to a third person; and (4) damage to the reputation of the plaintiff.<sup>138</sup> In actions initiated by teachers against students or others in the community, the court will also factor in whether the comments impute or discredit the teacher’s fitness for employment.<sup>139</sup>

When criticism of a teacher significantly impairs her reputation in the community and affects her credibility in the profession, the courts have been willing to grant redress under a theory of defamation.<sup>140</sup> However, often the comments made about teachers on the Internet do not specifically impute their capacities as teachers; rather, they contain vulgar comments, violent parodies, or sexually explicit references.<sup>141</sup> When facing these types of comments, teachers have had less success. For example, the teacher in *J.S.* brought several claims in civil court against the student that created a

---

defamed by student speech that originates off campus, then why should school administrators be able to mete out a second, *in-school* punishment against those students?”). Several scholarly articles have addressed the issue of whether school districts should have the authority to punish off-campus speech that originates on personal computers at home, and most have opined that schools lack jurisdiction to reach the off-campus incidents. *See id.* at 248; Caplan, *supra* note 124, at 143–44. Scholars claim that discipline for off-campus incidents of cyberbullying makes public school students subject to too many sovereigns. *Id.* at 143. If our court system gave school districts power to punish for such incidents, the school children would face two sets of punishments—liability in court for criminal or civil violations and discipline from the school system as well. *Id.* at 143–44. Comparisons have been made between school principals and judges, stating that just as judges cannot put someone in contempt of court for statements made outside the courtroom, principals should not be able to punish students for comments made off school premises because it would be outside their jurisdiction. *Id.* at 143.

136. *See* Calvert, *supra* note 103, at 258.

137. *Id.* at 245; *see* JOHN D. ZELEDNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 105 (3d ed. 2001) (“Particularly in this era of computer-generated images, defamation through modified pictures is a danger.”).

138. 50 AM. JUR. 2D *Libel and Slander* § 21 (Supp. 2007).

139. *Spears v. McCoy*, 159 S.W. 610, 611 (Ky. 1913) (“Words are slanderous or actionable per se only in cases where they . . . impute unfitness to perform the duties of an office or employment; [ ] or prejudice him in his profession or trade; [ ] or tend to discredit him.”).

140. *See Bray v. Callihan*, 55 S.W. 865, 866 (Mo. 1900) (holding that a preacher’s statements insinuating that a male school teacher takes advantage of his female pupils were clearly actionable because “[n]othing could be more injurious to the business of a teacher than such imputations”).

141. *See Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 457–58 (W.D. Pa. 2001) (evaluating a “top ten” list about a school administrator that contained statements about the administrator’s appearance, including the size of his genitalia).

web site outlining why the teacher should be fired and that included, *inter alia*, a parody of the teacher as Hitler, and encouraged other students to donate money to help hire a hitman to kill her.<sup>142</sup> Although the court eventually found the student's parents liable under a theory of negligent supervision of their son,<sup>143</sup> the jury did not find the comments defamatory in nature.<sup>144</sup> When commenting on the verdict, the presiding judge stated: "I had serious doubts in my mind as to whether the Web sites were defamatory. . . . They were a lot of other things: They were distasteful, they were rude, they were crude, they were obscene."<sup>145</sup> Thus, even in extreme cases like *J.S.* where the comment caused a teacher to leave the profession and to suffer mental and physical illnesses, many of the classic civil remedies will fail to offer redress.

In less extreme cases, teachers have likewise struggled to recover in civil actions against students.<sup>146</sup> For example, in *Moyer v. Amador Valley Joint Union High School District*, a teacher brought a defamation claim against a student who wrote an article claiming that the teacher "is a babbler," the "worst teacher" at the school, and that the teacher "pissed [him] off."<sup>147</sup> When holding that the statements were not actionable, the court reasoned that "there was no factual assertion capable of being proved true or false," "the statement contains no verifiable facts," and the statements were "a form of exaggerated expression conveying the student-speaker's disapproval of plaintiff's teaching or speaking style."<sup>148</sup> Just as rhetorical hyperbole and violent parodies are many times not subject to school discipline because a court determines the comments were made "off-campus" or they fail to "substantially disrupt" the school operation, the same comments have proven not to be actionable by teachers in the civil realm.

Although protection of teachers and administrators is important, guarding the impressionable minds of our nation's school children is paramount—but the civil justice system equally fails student victims of cyberbullying. Just as teachers are afforded little protection from harassing speech through defamation claims, students are afforded even less protection because they do not have professional reputations in the

---

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

143. Lauri Rice-Maue, *Swindlers to Pay \$500,000 for Web Site*, THE MORNING CALL, Nov. 2, 2000, at A1.

144. *Id.*

145. *Id.*

146. *See, e.g., Moyer v. Amador Valley Joint Union High Sch. Dist.*, 275 Cal. Rptr. 494, 498 (Cal. Ct. App. 1990).

147. *Id.* at 495.

148. *Id.* at 497–98.

community that can be slandered.<sup>149</sup> Even if student victims of cyberbullying wanted to file civil actions, an entirely new set of problems arises. In a libel action, for example, the accused can use the affirmative defense that the hurtful statements are true.<sup>150</sup> In cases where the comments are sexually explicit, such as listing which girl on campus is the “biggest ‘ho’” or which one performs the best oral sex, the civil nature of the case leaves open the unsavory possibility of a defense team setting out to prove that the student really was the “biggest ho” in the school.<sup>151</sup>

Furthermore, in the case of name-calling, it may be difficult for the court to establish the nature of the slur. Cindy Cohn of the Electronic Frontier Foundation points out: “So and so is the biggest ho? What does that mean? The law doesn’t deal well with parsing student slang.”<sup>152</sup> Generally, civil statutes are tailored to deal with conflicts between adults, not children. If an adult male called an adult female a “slut,” the comment would not likely support a cause of action in civil court; likewise, the same comment posted on a web site about a thirteen year-old girl would not support a cause of action, even though the young girl could be dramatically more affected than her adult counterpart.

Since civil laws that are not likely to punish speech between adults would also not likely punish derogatory speech posted on students’ web sites about other students, what are parents supposed to do to protect their children from the emotional wreckage that such comments can cause in the life of an adolescent? Civil lawsuits are expensive, and parents have had little success using the Communications Decency Act in convincing Internet service providers to shut down cyberbullying web sites.<sup>153</sup> School districts are equally constrained by the First Amendment and by judicial precedent that will not allow disciplinary measures unless the damage is extreme. Therefore, the most pragmatic remedy is to allow schools to revert back to their traditional role as mediating institutions and expand school jurisdiction

---

149. See *Spears v. McCoy*, 159 S.W. 610, 611 (Ky. 1913).

150. See generally *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–92 (1975) (stating that under the common law, truth was not a complete defense to prosecutions for criminal libel, although it was in civil actions).

151. Benfer, *supra* note 21.

152. *Id.*

153. See 47 U.S.C. § 230 (2000) (providing safe harbor to service providers who voluntarily restrict access to objectionable material in good faith); see also Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 Val. U. L. Rev. 1285 (outlining the misinterpretation of the Communications Decency Act and how it presents obstacles to parents attempting to persuade Internet service providers to remove an offensive web site).

to punish these harmful cyberbullying incidents that are currently falling in between the cracks of our legal system.

### III. FINDING SOLUTIONS TO THE CYBERBULLYING PROBLEM

#### A. *Schools as Mediating Institutions: A Historical Perspective*

Traditionally, American schools served society as “mediating institutions” and were considered hybrid institutions that were “viewed as a natural extension of family life and parental interests” rather than governmental bureaucracies.<sup>154</sup> From the inception of public education, the school system has been empowered by delegated parental authority to nurture and instruct children in the intellectual and social processes necessary for the “development of personal autonomy and public citizenship.”<sup>155</sup> The American legal system has recognized this parental delegation and holds schools as being “*in loco parentis*,” or “in the place of parents.”<sup>156</sup> This natural link between families and the public school system was “reinforced by the tradition of local control and financing of public education, which relies heavily on locally elected school boards and local property tax revenues.”<sup>157</sup> Historically, Americans have resisted the intrusion of the federal government into state and local control over the public school system, validating the idea that “schools are extensions, and ultimately the responsibility, of both local communities and the homes that comprise them.”<sup>158</sup>

During the 1960s, however, progressive social movements that used the public school systems as battlegrounds changed the way Americans perceived public schools and how the courts defined the schools as institutions.<sup>159</sup> The Vietnam War spurred protests on college campuses to fight against “the man,” thus portraying some schools as “enemies of true learning and instrumentalities of social control.”<sup>160</sup> Simultaneously, the federal government invaded the traditional turf of state and local governments when enforcing the desegregation provisions mandated by

---

154. Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Institutions*, 48 OHIO ST. L.J. 663, 670–71 (1987).

155. *Id.* at 671.

156. *Id.* at 673.

157. *Id.*

158. *Id.* at 674.

159. *Id.* at 677–81.

160. *Id.* at 679.

*Brown v. Board of Education*.<sup>161</sup> These changes have been reinforced in our current generation through initiatives like the No Child Left Behind Act, solidifying the image that the public school system is just another bureaucratic institution rather than a localized extension of the family unit.<sup>162</sup>

Viewing public schools in this light, however, takes away their character as mediating institutions. Alexis de Tocqueville, in his 1835 commentary on American culture and politics, was quick to point out that Americans develop their social mores in private groups and associations.<sup>163</sup> Under the American theory of government, “the State is not the primary source of the substantive values that give ultimate meaning to individual lives.”<sup>164</sup> Instead, America has long relied on mediating structural institutions, such as the nuclear family, churches, and schools to inculcate values and encourage or deter certain behaviors.<sup>165</sup> From the outset of the public school system, although associated with state and local governments, schools have performed many of the “custodial and child-nurturing functions associated with the parental role.”<sup>166</sup> Due to the hybrid character of their source of authority, schools stand in an unusual interactive relationship with both the public governmental sphere and the private family sphere.<sup>167</sup>

Treating schools as purely governmental institutions under the law misconstrues the true character of schools as mediating institutions, but the judicial branch has done just that. For example, the *Tinker* court reasoned “that a school’s attempt to limit any student expression is presumptively chilling, and in the absence of a reasonable basis for forecasting serious disruption [to the school environment], any doubts of either fact or law should be resolved against the [school administration].”<sup>168</sup> If schools were adult public forums, such reasoning would be in line with classic First Amendment theory.<sup>169</sup> Even though the Supreme Court has recognized the principle that “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,”<sup>170</sup>

---

161. *Id.* at 674.

162. *See* No Child Left Behind, Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

163. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 485–88 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835).

164. Hafen, *supra* note 154, at 697. Such thought is manifest in the American practice of separating church and state, whereas totalitarian regimes look to mix the two.

165. *Id.*

166. *Id.* at 700.

167. *See id.* at 701.

168. *Id.* at 692.

169. *Id.*

170. *Bethel Sch. Dist. No. 403 v. Fraser*, 484 U.S. 675, 682 (1986).

courts continually hold school districts to higher standards of scrutiny than those to which other governmental institutions are subject. The public schools should be understood as mediating institutions between the state and individuals, rather than being seen “only as extensions of the state bureaucracy whose intrusion into students’ personal expression is presumptively chilling.”<sup>171</sup>

*B. Who Should Discipline Cyberbullies: Schools or Police?*

As mediating institutions, public schools are better equipped to handle student speech that is not actionable in the criminal or civil courts, but still disrupts the lives of teachers and students in the educational community. First, school-age children often make foolish decisions that will influence the course of their adult lives. For this reason, our society has embraced the juvenile justice system, with the underlying theory that children should be given some leeway and chances at rehabilitation before they face the full force of the law. Similarly, the educational system provides a “low-risk” medium to perhaps allow children to experience a limited set of consequences for writing or speaking their minds in a way that is offensive or hurtful to other members of society.<sup>172</sup> The process of guiding children through this stage in life is essential to the teaching process, and allowing schools to help parents and communities resolve disputes between students without resorting to the courts would benefit all parties involved.

Second, because the school system is much more involved with parents and children in the community than is the criminal justice system, it is practical to allow schools to use their discretion when dealing with off-campus Internet speech that affects those on campus. Critics of expanding school jurisdiction to punish Internet speech claim that school boards parallel the federal court system in that they are “‘impersonal political institutions’ that cannot be expected to exercise judgment superior to that of parents regarding [their children’s] off-campus conduct.”<sup>173</sup> To the contrary, school boards and administrators are probably the most personal of all political institutions. Parent-teacher conferences still take place twice a year

---

171. Hafen, *supra* note 154, at 670.

172. *Id.* at 696.

173. Caplan, *supra* note 124, at 145 (quoting *Bellotti v. Baird*, 443 U.S. 622, 638 (1979)). Scholars argue that schools do not have the “institutional competence” to punish off-campus speech. *Id.* They claim that educational administrators have a unique competence and expertise in operating schools, but they lack competence at controlling and monitoring the conduct of all youth in their communities. *Id.* When it comes to raising and disciplining children, the Supreme Court has stated that they “do not pretend any special wisdom on this subject.” *Bellotti*, 443 U.S. at 638.

in most elementary schools. Parent Teacher Organizations (PTOs) thrive in our communities as parents volunteer time to help in the schools and get involved in the educational process at the most basic levels. Parents consistently attend school board meetings to voice their opinions about educational policies affecting the community.

Alternatively, local police departments and judicial systems are much less friendly to parental involvement in their affairs. Police departments are already too busy to look into small burglaries and incidents of assault, much less harassment taking place on the web pages of neighborhood children. Likewise, court dockets are already hemorrhaging,<sup>174</sup> leaving judges little time to worry about the latest cut-down slung through cyberspace. Therefore, it is more practical to allow schools to reassume the role of mediating institutions that they traditionally held by deferring to administrators' discretion when punishing incidents of cyberbullying.

### C. A Chilling Effect That Should Be Encouraged

Another of the criticisms set forth in opposition to allowing school districts to gain jurisdiction over off-campus cyberbullying is that there will be a "chilling effect on speech because it gives rise to self-censorship and diminishment of the marketplace of ideas."<sup>175</sup> Such a statement makes sense when considering cases such as *Tinker* that involved a political statement about an unpopular war.<sup>176</sup> Grouping cyberbullying into the same category of political or academic speech, however, is illogical and falters when confronted by common sense. It would be hard to argue either in a judicial proceeding or in the court of public opinion that web sites allowing students to vote on "Who's the biggest slut in the school" will substantially "diminish the marketplace of ideas." Many times in cyberbullying cases, lawyers and judges get caught up in constitutional legalese and forget that they are dealing with the narrow issue of hateful and harassing speech from one child to another.

The right for one student to feel safe and comfortable in the school setting should outweigh another student's right to make offensive remarks.<sup>177</sup> Hateful or purposefully derogatory speech should be treated

---

174. See generally Hon. J. Patrick Brazil, *Court of Appeals Docket Overloaded, Judge Says*, 66 J. KAN. B. ASS'N. 13 (1997) (discussing the backlog of cases in the court of appeals and stating that "the court has reached its breaking point in resolving cases in a timely manner with no quick solutions looming on the horizon").

175. Caplan, *supra* note 124, at 148.

176. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503-04 (1969).

177. Servance, *supra* note 3, at 1243.

differently than political or academic speech, especially when directed to those of tender years. If allowing schools to discipline children for cyberbullying incidents will encourage students to “monitor their thoughts and statements” and have a “chilling effect” on the type of harassment and bullying taking place on the web sites of school children, it may not be such a bad thing.

#### IV. PLAUSIBLE SOLUTIONS TO THE CYBERBULLYING PROBLEM

Policymakers and judges have two distinct options if they want to truly address the problem of cyberbullying in our schools: either strengthen civil and criminal remedies with which victims could deter harassers,<sup>178</sup> or defer to school discretion in punishing abusive Internet speech. Strengthening civil and criminal judicial remedies is not appealing for two primary reasons. First, the stakes are much higher for children in such proceedings. Convictions would show up on criminal records and could affect a student’s chances to get admitted into college or the military after high school. Second, there is not a structure already in place to track bullying speech on web sites throughout the community. Asking police officers and judges to make time in their daily schedules to address these comparatively petty issues (although not petty in the eyes of the students) would not make for good public policy or efficient government.

Therefore, the more feasible option is to return schools to the status of “mediating institutions” that they once occupied and allow them substantial deference in disciplining conduct that affects the educational environment on their campuses. Bruce C. Hafen, a preeminent scholar on education-related constitutional law, has suggested a system giving schools broad powers, allowing them to discipline off-campus speech under their own discretion, and then permitting courts to review school discipline for fairness and abuses of discretion.<sup>179</sup> Such a broad standard of review raises issues of judicial efficiency and predictability. If school administrators are given too much discretion in making disciplinary decisions, they are less likely to weigh the countervailing constitutional considerations that would still remain at the forefront of a more conventional judicial analysis. Furthermore, a “fairness” standard of review reduces predictability because

---

178. See Phinjo Gombu, *Teen Girls Charged in Murder Plot; School Target of Cyber Threats*, THE HAMILTON SPECTATOR, Apr. 27, 2006, at A01 (“The bullying issue hit the news this week when Regina City Council passed a bylaw that allowed police to issue tickets that can result in fines of up to \$2,000 for bullying either in public or in cyberspace. The bylaw does not apply to students under 12.”).

179. Hafen, *supra* note 154, at 722–23.

results could differ dramatically from judge to judge due to each judge's subjective fairness standard.

Another commentator, Renee L. Servance, has suggested a more narrow approach: a three-part test that (1) replaces the on-campus/off-campus threshold test with an "impact analysis" that would evaluate whether "both the target and the speaker are members of the same school community," (2) requires the school to assess "whether the speech would cause the negative side-effects of traditional bullying," and (3) requires schools to show that the impact of the speech "disrupts their ability to educate students or maintain sufficient . . . control over the classroom."<sup>180</sup> The most significant portion of Servance's proposal is replacing the on-campus/off-campus threshold test with an impact analysis because it will allow schools to discipline cyberbullying incidents when only a small number of students are affected by the speech, as opposed to the current trend that requires the speech to negatively affect the entire school environment to fall under school jurisdiction.

The second element of Servance's test, whether the speech causes the same negative side effects of traditional bullying, may need to be tweaked slightly in light of Justice Alito's concurring opinion in *Morse*. Justice Alito made clear that he provides "no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . ." <sup>181</sup> Therefore, in addition to evaluating whether cyber-speech causes the same negative impact as traditional bullying, a second question must be asked as to whether the speech includes any sort of social or political commentary. This secondary question would most likely affect cyberbullying incidents where school administrators are targeted because harassing comments may come embedded in criticisms of school policy.

The Second Circuit, in a recent groundbreaking opinion that showed substantial deference to school administrators' decision to punish a cyberbully, performed a similar inquiry into the value of the speech involved. In *Wisniewski v. Board of Education of Weedsport Central School District*, an eighth-grader's instant messaging interface had an icon of a small drawing of a pistol firing a bullet at a person's head and was accompanied by the words "Kill Mr. VanderMolen" (the student's English teacher).<sup>182</sup> Although the argument was made that the "icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of *Tinker*," the court concluded the icon

---

180. Servance, *supra* note 3, at 1239.

181. *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring).

182. *Wisniewsk v. Bd. of Edu. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007).

“crosse[d] the boundary of protected speech and constitute[d] student conduct that . . . would ‘materially and substantially disrupt the work and discipline of the school.’”<sup>183</sup>

In addition to showing how courts should analyze the “value of speech”<sup>184</sup> in cyberbullying cases, the *Wisniewski* case is a beacon of hope for school administrators that have continually had their disciplinary decisions overturned by jurists. The increasing rate of cyberbullying incidents in U.S. schools, in connection with inability of school districts to effectively discourage such incidents, clearly shows that the *Tinker* standard must be changed<sup>185</sup> and that school district jurisdiction needs to be expanded to protect the thousands of cyberbullying victims sitting in our nation’s classrooms.

## V. CONCLUSION

The problem of cyberbullying on school campuses closely parallels the traditional problems associated with off-campus speech that has made its way onto school campuses. However, the current trend to treat all off-campus speech equally, whether it be political or harassing in nature, has failed many of the students in our nation’s schools and has deprived them of the right to receive an undisturbed education. Therefore, policymakers and judges should revert to the former practice of treating schools as mediating institutions and expand school jurisdiction to punish cyberbullying incidents.

Courts can implement the expansion of school district jurisdiction by replacing the current “sufficient nexus” and “substantial disruption” tests with an “impact analysis.” By doing such, the school will be able to reach an off-campus cyberbullying incident that directly affects the school environment, even if it affects only a handful of students. Alternatively, courts could adopt the practice of reviewing school district disciplinary measures with a more deferential standard of review such as “abuse of discretion.” By expanding school district jurisdiction to punish off-campus cyberbullying incidents that impact the in-school learning environment,

---

183. *Id.* at 38–39 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 405, 513 (1969)).

184. The Supreme Court has continually reaffirmed the notion that children can be protected from speech that has lesser social value. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (“We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language.”).

185. *See Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring) (“I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.”).

courts will protect innocent students and teachers from undue harassment and simultaneously allow schools to reassume their role as the mediating social institutions.