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When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying

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**WHEN THE SCHOOL BULLY ATTACKS IN THE LIVING ROOM:
USING *TINKER* TO REGULATE OFF-CAMPUS STUDENT
CYBERBULLYING**

*Karly Zande**

“It lowers my self esteem. It makes me feel really crappy. It makes me walk around the rest of the day feeling worthless, like no one cares. It makes me very, very depressed.”

– *Twelve Year Old Cyberbullying Victim*¹

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1. Share Your Cyberbullying Story, <http://www.cyberbullying.us/shareyourstory.php> (last visited Mar. 3, 2009) (chronicling the experiences and feelings of real-life victims of cyberbullying).

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INTRODUCTION

Everyone remembers the school bully from their childhood years, even if they were never a victim themselves. He was the one who was unbelievably large for his age and surrounded by myths of flunking several grades, or who picked on the first graders by the monkey bars on the playground, or the popular student who spread rumors about classmates.² His victims could only escape him by retreating to the refuge of their home as soon as the final school bell rang.

However, the Columbine shootings led to massive changes to how the law deals with incidents of so-called “traditional bullying.”³ In the ten years since that tragedy, advancements in technology have changed interactions among students. Instead of rushing to the playground and local restaurants after school, today’s students “meet up” with their peers on social networking websites, such as MySpace

2. It is not the author’s view that all bullies are male; he is merely being used for simplicity.

3. Many states have adopted some version of an anti-bullying statute. For instance, Louisiana defines bullying as:

[A]ny intentional gesture or written, verbal, or physical act that . . . [a] reasonable person . . . should know will . . . harm[] a student or . . . plac[e] a student in reasonable fear of harm to his life or person or damage to his property; and . . . [i]s so severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.

LA. REV. STAT. ANN. § 17:416.13 (2006). This is similar to many states’ anti-bullying laws. *See, e.g.*, IND. CODE ANN. § 20-33-8-0.2 (West 2006); OHIO REV. CODE ANN. § 3313.666 (West 2006); W. VA. CODE R. § 18-2C-2 (2006); MO. REV. STAT. § 160.775 (2009). Only nine states, however, include provisions in their bullying code to sufficiently handle cyberbullying and other online harassment. *See* ARK. CODE ANN. §§ 6-18-514 (2007) (stating bullying can occur by a “written, verbal, electronic, or physical act”); CAL. EDUC. CODE § 32261 (West 2009) (including bullying by electronic acts); IDAHO CODE ANN. § 18-917A (2009) (asserting that bullying could occur by telephone, or computer, or internet); IOWA CODE § 280.28 (2007) (including electronic acts in its definition); KAN. STAT. ANN. § 72-8256 (West 2008) (including “cyberbullying” in its definition); MINN. STAT. ANN. § 121A.0695 (West 2009) (including electronic acts in its definition); OKLA. STAT. ANN. tit. 70, § 24-100.3 (West 2009) (including electronic communications); OR. REV. STAT. ANN. § 339.356 (West 2009) (including cyberbullying in its definition); S.C. CODE ANN. § 59-63-120 (2006) (also including electronic acts in its bullying definition). Three other states allow schools to punish cyberbullies, but only for intentional acts, which does not adequately protect student victims. *See infra* Parts III.D.2 and IV.B; *see also* MD. CODE ANN., EDUC. § 7-424 (West 2009); R.I. GEN. LAWS § 16-21-26 (2008); WASH. REV. CODE ANN. § 28A.300.285 (West 2009). An additional four states allow schools to intervene only if the cyberbullying occurs on the school grounds or computers, which also fails to protect student victims, and account for the fact that most cyberbullying occurs off-campus. *See infra* Parts III.C and IV.B.2.; *see also* FLA. STAT. ANN. § 1006.147 (West 2009); NEB. REV. STAT. ANN. § 79-2, 137 (LexisNexis 2008); N.J. STAT. ANN. § 18A:37-14 (West 2007); PA. CONS. STAT. ANN. § 13-1303.1-A (West 2008).

and Facebook, and instant messaging programs.⁴ In response to this constant availability of technology, bullies have adapted their tactics to the times, giving rise to an emerging problem known as cyberbullying.⁵

For example, Ryan Halligan, a seventh grader, was tormented online in the privacy of his own living room by schoolmates who used instant messaging software to mock and ridicule him, causing him to take his own life.⁶ Eighth grader Jeff Johnston also committed suicide after a group of hackers destroyed an online game that he had invented and replaced it with a website full of malicious comments about him.⁷ Kylie Kenney was forced to change schools after a group of classmates created a website entitled “Kill Kylie Incorporated.”⁸ Those students also sent her harassing emails and phone messages, and used instant messaging to spread rumors that she was a lesbian.⁹

The continuous access to other students and the anonymity offered by these technologies has created a constant problem both for school administrators, in trying to prevent cyberbullying and discipline perpetrators, and for victims, who are just as vulnerable at home as they are in school.¹⁰ The law has failed to keep pace with today’s technology, and is currently inadequate to protect victims of cyberbullying.¹¹ Until a nationwide cyberbullying regime is implemented, courts need to give schools the authority to constitutionally intervene in cyberbullying incidents and punish perpetrators, even when such acts occur off campus in the living rooms of the students.¹²

Accordingly, Part I of this paper will define cyberbullying and discuss its effects on victims. Next, Part II will discuss the free speech rights of students as it stands today. Part III will then examine the current ambiguous state of the law addressing cyberspeech and off-campus student speech. Finally, Part IV will dis-

4. *Frontline: Growing Up Online* (PBS television broadcast Jan. 22, 2008) (calling social network sites the “hub” of teenagers’ social lives); see also ROBIN M. KOWALSKI ET AL., CYBER BULLYING: BULLYING IN THE DIGITAL AGE, 3 (2008) (referring to the Internet as the “digital communication backbone of teens’ daily lives”).

5. See *Growing Up Online*, *supra* note 4 (chronicling how technology has changed the lives of today’s students); see also KOWALSKI, *supra* note 4, at 3-5 (describing how technology has led to the problem of cyberbullying).

6. See *Growing Up Online*, *supra* note 4. Ryan’s father details how Ryan’s online “friends” from school spread rumors about Ryan being gay, how a girl Ryan liked pretended to return his affection so she could later humiliate him, and how when Ryan told a friend he was going to commit suicide, the friend responded, “It’s about [expletive] time.” *Id.*

7. Laird Harrison, Special Report: Cyberbullying, <http://www.ahealthyme.com/topic/cyberbullying> (last visited Feb. 25, 2009).

8. Suzanne Struglinski, *Schoolyard bullying has gone high-tech*, DESERET NEWS, Aug. 18, 2006, available at <http://deseretnews.com/article/1,5143,645194065,00.html>.

9. *Id.* Kylie noted that she felt “‘ashamed, humiliated and scared.”” *Id.*

10. See KOWALSKI, *supra* note 4, at 35-37 (describing what school administrations are attempting to do to prevent cyberbullying); see also *Growing Up Online*, *supra* note 4 (interviewing Anne Collier, the author of *MySpace Unraveled*, who stated that “there are so many devices [students] can use to connect, there are so many hot spots and friends’ houses and libraries and cafes and schools and all these places where they can go on line where we can’t control them”).

11. See *supra* note 3, noting that only nine states’ anti-bullying statutes include a definition of bullying that would adequately allow schools to intervene in student cyberbullying incidents. See also *infra* Part III for a discussion on the inconsistency of court decisions regarding cyberbullying.

12. This nationwide regime should be similar to that in place for traditional bullying. See discussion *supra* note 3 on the different state anti-bullying statutes.

cuss how courts can empower schools to prevent and stop student cyberbullying using the *Tinker* test.¹³ Utilization of the *Tinker* analysis will give school administrators and courts a workable and well-developed test for determining whether or not schools can curtail student cyberbullying, even when such speech occurs off campus.

I. CYBERBULLYING EXPLORED

A. Defining Cyberbullying

Cyberbullying is such a newly recognized phenomenon that there is no current consensus on whether it is one word or two words, let alone what it entails.¹⁴ Despite an absence of widespread knowledge on the subject, cyberbullying is extremely prevalent among today's school children, with several studies reporting that approximately eighteen percent of students are cyberbullied during a two-month period.¹⁵

But before one can understand the trouble courts are having in deciding how to regulate cyberbullying, it is important to understand what it entails, and how it differs from traditional bullying. Most courts and commentators agree that it is a very narrow part of cyberspeech, which is yet another developing area.¹⁶ In general, cyberbullying can be described as the use of technology to humiliate, embarrass, or otherwise bully another.¹⁷ Today's child has numerous technologies at their dis-

13. *Tinker v. Des Moines Independent Community School District* was the first decision by the U.S. Supreme Court discussing student free speech rights, and held that schools could discipline students for speech that was materially and substantially disruptive or impinged on the rights of other students. 393 U.S. 503, 504 (1969). See also *infra* Part II-A.

14. Many variations in spelling are seen across articles on this topic, including cyber bullying, cyberbullying (as used in this Article), and cyber-bullying.

15. Robin M. Kowalski & Susan P. Limber, *Electronic Bullying Among Middle School Students*, Vol. 41, Iss. 6, Supp. 1 J. ADOLESCENT HEALTH S22, S28S26 (2007). Of those, 52% were cyberbullied by a known schoolmate, and another 36% reported that the cyberbully was a friend. *Id.* This data reinforced the results of another study conducted in 2000, where 19% of the school-age children reported being the victims of cyberbullying within the prior year. Michelle L. Ybarra & Kimberley J. Mitchell, *Online aggressor/targets, aggressors, and targets: A comparison of associated youth characteristics*, 45 J. CHILD PSYCHOLOGY & PSYCHIATRY 1308, 1311-12 (2004). However, another survey, albeit less scientific and controlled than the others cited in this footnote, reports currently 52% of those polled have been cyberbullied. Wired Safety Cyberbullying Poll, http://www.wiredsafety.org/cgi-bin/survey/survey.cgi?survey_name=site (last visited Mar. 11, 2009). This increase may be due to its location on a website devoted to stopping cyberbullying, which would likely attract more cyberbullying victims.

16. Cf. Christopher E. Roberts, Note, *Is MySpace Their Space? Protecting Student Cyberspeech in a Post-Morse v. Frederick World*, 76 MO. KAN. CITY L. REV. 1177, 1188-89 (2008) (naming cyberbullying as an area of cyberspeech which that author believes should be governed by an intent test). See also *infra* Parts III.D.2 and IV.B.2 for more discussion on the intent test and cyberbullying.

17. Darby Dickerson, *What is Cyberbullying?*, 29 NAPSAs LEADERSHIP EXCHANGE 28, 28 (2009), available at <http://www.leadershipexchange-digital.com/leadershipexchange/2009spring/?pg=31>. All the definitions have similar elements in common to the definition provided in this Comment. See, e.g., Stopcyberbullying.org, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Mar. 6, 2009) (defining cyberbullying as "when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies or mobile phones"); KOWALSKI, *supra* note 4, at 1 (defining it as "bullying through e-mail, instant messaging (IM), in a chat room, on a Web site (sic), or through digital messages or images sent to a cellular phone").

posal that they can employ to perpetrate acts of cyberbullying.¹⁸ Among others, these include text messages, emails, chat rooms, instant messages, social networking sites, other websites, and cell phones.¹⁹ These technologies give cyberbullies perpetual access to their victims, and the ability to hide their true identities.²⁰

One notable difference between many cyberbullying definitions is an age element.²¹ While some definitions and scholars specify that cyberbullying describes behavior between two adolescents, others use the term to describe incidents between two adults, or between an adult and adolescent.²² Indeed, what is perhaps the most notorious case of cyberbullying involved the suicide of thirteen-year-old Megan Meier, after she was tormented on MySpace by forty-nine-year-old Lori Drew.²³

Cyberbullies, like traditional bullies, use multiple methods to accomplish their ends, some more violent than others.²⁴ Flaming is one such technique, involving a short online argument between two or more persons trading insults while using offensive language.²⁵ It often occurs in chat rooms, on discussion boards, or on virtual game websites.²⁶ Harassment involves the one-sided sending of offensive

18. See KOWALSKI, *supra* note 4, at 1-3, 46 (delineating the different technologies accessible to today's generation of students and how they affect students' lives).

19. See NANCY WILLARD, *CYBERBULLYING AND CYBERTHREATS* 17-26 (2007) (discussing the various digital technologies which can be used to cyberbully).

20. See *id.*

21. See KOWALSKI, *supra* note 4, at 43 (noting that "[t]here is also confusion surrounding the ages at which cyber bullying may take place.").

22. Compare, e.g., Stopcyberbullying.org, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Mar. 6, 2009) (stating that cyberbullying "has to have a minor on both sides") with Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 867 (2008) (noting that common cyberbullying cases "involve students posting comments critical of school administrators and teachers to personal webpages or social networking sites") and Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 265-66 (2008) (listing a "quartet" of cyberbullying cases, three of which involved student speech directed towards a teacher or administrator). See also KOWALSKI, *supra* note 4, at 43 (stating that when an adult is involved, the incident should be called cyber-harassment and not cyberbullying).

23. See, e.g., Parents: Cyber Bullying Led to Teen's Suicide, <http://abcnews.go.com/GMA/Story?id=3882520>, (last visited Mar. 25, 2009). Lori Drew created a fake MySpace profile masquerading as a sixteen year old boy named Josh who befriended Megan and tricked her into thinking he liked her. *Id.* Drew wanted to get back at Megan for getting into a fight with her daughter. *Id.* After Megan began to like Josh, he told her the world would be better off without her, that she was fat and ugly, and that she was not a nice person. *Id.* Megan killed herself that night. *Id.* Drew was convicted of three misdemeanor counts of computer fraud. Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES, (Nov. 27, 2008), at A25, available at <http://www.nytimes.com/2008/11/27/us/27myspace.html>. This conviction was later tentatively dismissed by a federal district court judge. See, e.g., Tom McCarthy & Scott Michels, *Lori Drew, MySpace Suicide Hoax Conviction Thrown Out*, ABCNEWS.COM, July 2, 2009, available at <http://abcnews.go.com/TheLaw/story?id=7977226&page=1>.

24. See, e.g., KOWALSKI, *supra* note 4, at 46 (noting that, like traditional bullying, cyberbullying occurs in varying extremes, and is sometimes harder to identify than others); WILLARD, *supra* note 19 at 5 (stating that categories of cyberbullying often "overlap or [are] interrelated").

25. See KOWALSKI, *supra* note 4, at 47. Willard, however, questions whether this category should be included as cyberbullying, since bullying is generally categorized by behavior over time, instead of the short-lived disputes characteristic of flaming. WILLARD, *supra* note 19, at 5.

26. See KOWALSKI, *supra* note 4, at 47.

messages to a targeted individual over a period of time.²⁷ It usually occurs over email, instant messaging, and text messaging.²⁸ Denigration is the dissemination of cruel, harmful information about a target, where the target is generally not the recipient of the information.²⁹ This information is usually spread over email, instant messaging software, or posted online at a website.³⁰ Impersonation occurs when a cyberbully gains access to the victim's password, logs on to one of the victim's accounts, and sends out hurtful messages or posts hateful comments purporting to be the victim.³¹ Another method, outing and trickery, involves the cyberbully pretending to befriend the victim in order to learn personal, and often embarrassing, information which the victim believes will be kept private, and then spreading that information to others.³² Finally, exclusion/ostracism is when the cyberbullying victim is purposefully excluded from groups, chat rooms, or websites, due to a change in password, omission from a buddy list, or from being ganged up on by other members.³³

A related concept is that of cyberbullying by proxy, which occurs when the cyberbully gets a third party to do the bullying for him or her.³⁴ Often, the third party is unaware that he or she is being used to cyberbully a victim.³⁵ Unsurprisingly, some forms of cyberbullying by proxy overlap with the cyberbullying methods of denigration and impersonation. For instance, the cyberbully can enlist the third party to send harassing emails or instant messages from the victim's personal accounts, or the cyberbully can hack into the third party's accounts and use those accounts to transmit attacks.³⁶ More commonly, however, the cyberbully will get others to engage the victim in "Notify Wars," where the accomplices press a "notify" or "warning" button in the software, which will wrongly alert the victim's instant messaging service, chat room, or email server that the victim is writing objectionable content.³⁷ Once the service or chat room administrator receives a certain number of warnings, the victim's account is terminated.³⁸ Cyberbullying by proxy can also occur when the cyberbully urges the others to send harassing messages to the victim.³⁹ The cyberbully provokes the victim until the victim responds, either in an emotional or harassing message, email, or some other form. The cyberbully

27. See WILLARD, *supra* note 1919, at 6-7. Note that harassment involves one or many protagonists, but a victim who does not send offensive messages back. *Id.* This distinguishes harassment from flaming, where both sides send offensive messages. *Id.*

28. *Id.*

29. *Id.* at 7. Examples include sending digitally altered photographs or websites targeting a specific student. KOWALSKI, *supra* note 4, at 48. Kylie, from the Introduction, was the victim of denigration. See *supra* note 9 and accompanying discussion.

30. See WILLARD, *supra* note 19, at 7-8.

31. See *id.* at 8. Willard points out that the cyberbully does not necessarily steal the password, noting that it is common practice among teen girls to exchange passwords as a pledge of friendship. *Id.*

32. *Id.* at 9. It is this method by which Ryan Halligan from the Introduction was tormented by numerous cyberbullies, including a girl he liked. See *supra* note 6 and accompanying text.

33. See KOWALSKI, *supra* note 4, at 49-50.

34. Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 59 (2005).

35. KOWALSKI, *supra* note 4, at 44.

36. *Id.* at 45.

37. *Id.* at 44.

38. *Id.*

39. Dickerson, *supra* note 34, at 59.

then forwards the victim's response on to either friends, to embarrass the victim, or to an authority figure, in an attempt to get the victim in trouble.⁴⁰

B. Differences Between Cyberbullying and Traditional Bullying

In the aftermath of the Columbine tragedy, the mindset of the public towards bullying changed from being begrudgingly tolerant to actively preventing bullying from occurring.⁴¹ Ironically this same earlier tolerance of traditional bullying is prevalent again today in incidents of cyberbullying.⁴² Cyberbullying shares three common characteristics with traditional bullying: it is aggressive, it involves an imbalance of power between the players, and the bullying is repeated over a period of time.⁴³ However, differences in how these characteristics play out in a cyberbullying event makes cyberbullying more difficult to regulate than traditional bullying.⁴⁴

Traditional bullying usually involves a physically stronger bully and a weaker victim.⁴⁵ However, technology enables an otherwise powerless child to subject a physically stronger or older child to fear and abuse that the cyberbully would be unable to assert in a face-to-face confrontation.⁴⁶ Technology can also obstruct a victim's ability to trace the comments back to the bully.⁴⁷ Thus, a cyberbully, unlike a traditional bully, can use technology to hide behind anonymity and inspire additional fear.⁴⁸ Cloaked by this anonymity, the cyberbully is enabled to say harsher, more destructive things than a traditional bully due to his physical removal from the situation.⁴⁹ Since tone, inflection, and facial expression are lacking in

40. *Id.*

41. See Erb, *supra* note 22, at 259 (averring that “[t]he viewpoint that harassment and bullying by one’s peers is relatively harmless and a rite of passage for school children changed drastically” after the Columbine shootings). Horrified viewers were glued to their television for days after the Columbine shooting, and outraged that the two teen shooters supposedly committed this horrendous act in response to being victims of bullies at school. See *id.*; see also Stephanie Chen, *Debunking the Myths of Columbine, 10 Years Later*, CNN, Apr. 20, 2009, available at <http://www.cnn.com/2009/CRIME/04/20/columbine.myths/>. In response to this outrage, schools have enacted numerous measures to make students safer, and have petitioned for stronger bullying statutes to allow schools to intervene in bullying incidents. Kathy Bushouse & Marc Freeman, *Columbine made schools take notice on 10-year anniversary, Safety now paramount*, S. FLA. SUN-SENTINEL, Apr. 20, 2009, at B1.

42. See, e.g., Jonathan Stayton, *Cyber bully drove schoolboy to attempt suicide*, THE ARGUS, Feb. 18, 2008, available at http://www.theargus.co.uk/news/2053716.cyber_bully_drove_schoolboy_to_attempt_suicide (stating that the cyberbully told all of his friends and teachers of his attacks about a fellow student yet no one intervened). Similarly, Ryan Halligan’s classmates were aware he was being cyberbullied, but did nothing to stop it. See *Growing Up Online*, *supra* note 4.

43. KOWALSKI, *supra* note 4, at 61-62.

44. *Id.*

45. *Id.* at 62.

46. *Id.* (noting that “a child who might wield little power over a victim face-to-face may wield a great deal of power . . . in cyber space”).

47. *Id.* at 65.

48. *Id.*

49. See Glenn Stutzky, *Stutzky’s Cyberbullying Information*, http://www.ippmr.msu.edu/Documents/Forums/2006_Mar_CYBER_BULLYING_INFORMATION_2006%20--%20Provided%20by%20Mr.%20Glenn%20Stutzky.pdf <http://glennstutzky.com/id14.html> (last visited Mar. 11, 2009) (stating that “[i]f I’m bullying you face to face I can see the impact it’s having on you . . . and I might back off and end it seeing that I’ve got you good. This technology removes me from being able to see the impact of my

online conversations, a cyberbully might not even be aware of the harm he or she is unintentionally causing the victim.⁵⁰

Additionally, while traditional bullying involves multiple, separate acts between the players, one act of cyberbullying can be spread over and over again to thousands of people, and cause far more damage.⁵¹ Degrading comments posted online are accessible to people across the globe, including relatives, friends, and future employers, who may mistake the cyberbullying comments as truth.⁵² While acts of traditional bullying are instantaneous, and can be easily forgotten by observers over time, cyberbullying acts posted on the Internet spread rapidly and are left up for a potentially infinite length of time, increasing the duration of the acts, and causing an extended period of embarrassment and shame.⁵³

It is not uncommon for victims of cyberbullying to also be victims of traditional bullying during school hours.⁵⁴ But, unlike the victims of traditional bullying, cyberbullying victims have no safe haven to run home to after school.⁵⁵ Because students are constantly accessible to each other via the Internet and cell phones, a cyberbully can reach into the victim's own living room to torment him or her.⁵⁶ Further, where a bully at school must operate under the watchful eyes of teachers, lunchroom monitors, and other faculty, there is no one supervising his or her actions in cyberspace.⁵⁷ There is no one to punish the cyberbully, except for his or her parents, who may be blissfully unaware of their child's online activities.⁵⁸

actions and so lends itself to greater cruelty"). See also KOWALSKI, *supra* note 4, at 65 (referring to this as "the phenomenon of disinhibition").

50. See, e.g., *id.* at 65 (including the comments of one child who describes how you can become an accidental cyberbully by thinking you are making a joke and inadvertently hurting someone's feelings due to the lack of tone and expression). Likewise, it is almost certain that no cyberbully, or traditional bully, would intend to cause death, or suicidal ideations, such as those experienced by many victims. See *supra* notes 6-9 and accompanying text.

51. See KOWALSKI, *supra* note 4 at 62 (stating that although "there may have been only one initial [cyberbullying] act, it may have been perpetrated through many people and over time").

52. See, e.g., CBC News In Depth: Cyberbullying, http://www.cbc.ca/news/background/bullying/cyber_bullying.html (last visited Mar. 31, 2009) One victim described the humiliation from having such an increased audience:

Rather than just some people, say 30 in a cafeteria, hearing them all yell insults at you, it's up there for 6 billion people to see. Anyone with a computer can see it . . . And you can't get away from it. It doesn't go away when you come home from school. It made me feel even more trapped.

Id.

53. See, e.g., Stutzky, *supra* note 49 (noting that cyberbullying "lengthens the duration of . . . torment" compared to traditional bullying).

54. See, e.g., Carroll, *infra* note 77 (describing the plight of a high school girl who was the victim of cyberbullying at home, and "berated . . . in person during school hours").

55. See Bob Meadows, *The Web: the Bully's New Playground*, PEOPLE, Mar. 14, 2005, at 153 (emphasizing the difficulty cyberbullying victims have in escaping the perpetrator). The mother of a cyberbullying victim aptly described that "[w]hen [the bullying] is on the computer at home, you have nowhere to go." *Id.*

56. See Mike Wendland, *Cyber-bullies make it tough for kids to leave playground*, DET. FREE PRESS, Nov. 17, 2003, at 1A (describing the accessibility of today's teens due to the technology available to them).

57. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: What You Need to Know About Online Aggression 1, 2* (2008), available at http://www.cyberbullying.us/cyberbullying_fact_sheet.pdf (stating that "supervision is lacking in cyberspace").

58. See *id.* (noting that the lack of supervision renders many incidents of cyberbullying "outside of regulatory reach"). According to one survey, although ninety-three percent of parents think they know what their child is doing online, approximately forty-one percent of children reported that their parents didn't know what activities they did online. KOWALSKI, *supra* note 4, at 91. Kowalski points out that parents are often not members of social

While some may argue that the victim could escape merely by turning off her cell phone or signing offline, this is not the reality for today's students. Technology has become so entwined with teenage lives, as a vehicle for both completing schoolwork and hanging out with friends, that logging off is simply not a viable option.⁵⁹ Thus, cyberbullies effectively "have their victims on an electronic tether."⁶⁰

Perhaps surprisingly, while boys are generally the perpetrators and victims of traditional bullying, it is girls who are more likely to be on both ends of cyberbullying.⁶¹ However, it appears that the boys who cyberbully others do so more frequently than their female counterparts.⁶² Cyberbullying also peaks during the middle school years, while most traditional bullying occurs during elementary school years.⁶³

An intriguing difference between cyberbullying and traditional bullying is the role that bystanders play. Traditional bullying is witnessed by a number of bystanders who play a variety of different roles.⁶⁴ While some bystanders might become accomplices and assist in the bullying, others may try to help the victim get out of the situation.⁶⁵ Another group may indirectly engage in the bullying by laughing, egging the bully on, or otherwise reinforcing the bully's behavior.⁶⁶ The largest group of bystanders will likely witness the event silently without assisting either side or reporting the bullying to a teacher.⁶⁷

Comparatively, cyberbullying bystanders can be either more or less of a presence depending on how the cyberbully chooses to operate.⁶⁸ It is possible that a bystander to a cyberbullying act could participate in the bullying, defend the victim, or choose to ignore it, just as with traditional bullying.⁶⁹ Unlike traditional bullying, the bystander could unwittingly become part of the bullying, such as in a cyberbullying by proxy scenario, if the cyberbully utilizes the bystander's screen name or email account to harass the victim.⁷⁰ Troublingly, research also suggests

networking websites, and are unfamiliar with the technologies that their children are using, making it more difficult to monitor their child's online activities. *Id.*

59. See *supra* note 4 and accompanying text, describing how pivotal technology is in the lives of teens today. See also Melissa McNamara, *Teens Are Wired . . . And, Yes, It's Okay*, CBS NEWS, June 13, 2006, available at <http://www.cbsnews.com/stories/2006/06/09/gentech/main1698246.shtml> (reporting that "[t]echnology is so integrated into teens' lives that it's difficult to measure where their offline life begins and their online life ends").

60. Wendland, *supra* note 56 (quoting Glenn Stutzky, a clinical professor at Michigan State University's School of Social Work and school-violence specialist).

61. See KOWALSKI, *supra* note 4, at 78-79 (noting that "cyber bullying overall seems to occur more frequently among girls than among boys") (citation omitted).

62. *Id.* (describing survey results that showed more boys acknowledging that they cyberbullied someone at least once a week, and several times a week, than the girls surveyed who admitted to cyberbullying).

63. *Id.* at 80 (discussing the results of a scientific survey that authors conducted).

64. WILLARD, *supra* note 19, at 44 (noting that bystanders play varying roles "within the bullying dynamic").

65. *Id.*

66. *Id.*

67. KOWALSKI, *supra* note 4, at 63. However, even the silence by these bystanders can be taken as passive support by the bully, or cause the victim to feel even more humiliated. *Id.* at 63-64.

68. See WILLARD, *supra* note 19, at 44 (suggesting that more research should be done on the role of bystanders in cyberbullying).

69. KOWALSKI, *supra* note 4, at 64.

70. *Id.*

that bystanders to cyberbullying are more likely to become cyberbullies themselves in the future, due to the lack of physical requirements associated with traditional bullies and anonymity offered by the internet.⁷¹ Thus, it is imperative that schools make preventing cyberbullying a priority.

Although cyberbullying attacks may sound insignificant to an outside observer, these acts can have permanent, serious effects on victims that cannot, and should not, be ignored.⁷² These effects are often more devastating than those experienced by victims of traditional bullying.⁷³ In addition to feeling lonely, humiliated, and insecure, like victims of traditional bullying, cyberbullying victims also experience heightened feelings of anger, frustration, and depression.⁷⁴ In some cases, these emotions can be so strong as to lead to suicidal ideations and even suicide attempts.⁷⁵ Victims also experience trouble concentrating, exhibit lower self-esteem, and demonstrate physical symptoms, such as headaches and abdominal discomfort.⁷⁶ Furthermore, cyberbullying victims who know that the cyberbully is another student at school often fear and avoid attending school in an effort to evade face to face contact with the bully.⁷⁷ Victims may be in constant fear for their safety at school and become preoccupied with both avoiding the perpetrator and ensuring that their surroundings are safe.⁷⁸

All of these effects culminate in the victims' inability to form positive relationships with others and to function normally in their academic and familial responsibilities.⁷⁹ Stories shared by cyberbullying victims attest to the fact that cyberbullying can decrease students' grades and performance in school.⁸⁰ Even when the

71. *Id.* Kowalski believes that all of these factors coupled together will make it easier for bystanders of cyberbullying to become desensitized to cyberbullying, and to become one themselves. *Id.*

72. Wendland, *supra* note 56 (quoting Professor Glenn Stutzky as saying that "while these comments may seem silly to people who have matured, they are very devastating to the young people on the receiving end."). See also Hinduja & Patchin, *infra* note 77, at 2 (stating that the effects of cyberbullying are not limited to hurt feelings that can be easily disregarded and can permanently damage the psyche of many adolescents).

73. See, e.g., Meadows, *supra* note 55; see also Wendland, *supra* note 56.

74. See Hinduja & Patchin, *infra* note 77, at 1-2; WILLARD, *supra* note 19 at 33-34 (listing the emotional problems experienced by cyberbullying victims).

75. See WILLARD, *supra* note 19, at 34. Unfortunately, this is what happened to Jeff Johnston and Ryan Halligan when they could no longer stand being cyberbullied. See *supra* notes 7 and 8 and accompanying text.

76. See KOWALSKI, *supra* note 4, at 85 (stating that the effects of cyberbullying are similar to traditional bullying, and can include "depression, low self-esteem, helplessness, social anxiety, reduced concentration," and other negative emotions); see also WILLARD, *supra* note 19, at 34 (listing psychosomatic symptoms a cyberbullying victim may experience).

77. See, e.g., Sameer Hinduja, Ph.D. & Justin W. Patchin, Ph.D., *Cyberbullying Research Summary: Emotional and Psychological Consequences* (2008), available at http://www.cyberbullying.us/cyberbullying_emotional_consequences.pdf. Another report found that 400,000 adolescents nationwide try to avoid attending school because they are being bullied, and approximately one out of three of those children are being cyberbullied. Kathleen Carroll, *Schools step up efforts to stop cyber bullying*, Jan. 4, 2009, available at <http://www.northjersey.com/education/bigpicture/37055169.html> (quoting J. Frank Vespa-Papaleo, the director of the New Jersey Division on Civil Rights).

78. See Hinduja & Patchin, *supra* note 77, at 2 (noting that victims are constantly surveilling the landscape of cyberspace or real space to guard against problematic personal encounters).

79. See *id.* (stating that a victim's ability to focus on academics, family matters and responsibilities, and prosocial choices is compromised to some extent).

80. See, e.g., Meadows, *supra* note 55 (sharing several teen accounts of cyberbullying, and noting that more common than suicide, which one cyberbullying victim committed, cyberbullying "caused victims' grades to plummet and kids to seek psychiatric help and change schools"); see also Amanda Burgess-Proctor, Ph.D., et al., *Cyberbullying Research Summary: Victimization of Adolescent Girls* 1, 1-2, available at

cyberbullying acts occur off campus, in the privacy of the perpetrator and victim's respective homes, it can have long-lasting and destructive effects on the victim inside the school.⁸¹

In sum, cyberbullying is a growing problem in schools, just like traditional bullying before the tragic Columbine shootings. Because of its severe effects on students, schools should be allowed to intervene in student cyberbullying cases and prevent further harm to victims of cyberbullying. However, unlike incidents of traditional bullying, cyberbullying remains essentially unregulated in most states.⁸²

II. STUDENT FREE SPEECH ISSUES

Although a school may wish to intervene in cyberbullying incidents between students, its authority to do so under the First Amendment is currently unclear. While most states have adopted anti-bullying statutes, only a few of those clearly give schools jurisdiction to act in cyberbullying situations.⁸³ Thus, the school must look to court decisions to ensure that it is not violating the free speech rights of cyberbullies by disciplining them. This section details the current state of the law governing the free speech rights of students.

A. Supreme Court Authority on Free Speech in the Schools

Student rights to free speech in a public school are governed by a quartet of Supreme Court cases spanning the last four decades. The first, *Tinker v. Des Moines Independent Community School District*, involved a group of students who were suspended for wearing black armbands to voice their opposition to the Vietnam War.⁸⁴ The Supreme Court remarked on the need to balance the First Amendment rights of students with the ability of school administrators to make and enforce rules governing appropriate student conduct.⁸⁵ Thus, it held that the school could quash student speech when it was materially or substantially disruptive, or when it violated the rights of other students.⁸⁶ Since the armbands in *Tinker* were passive, and neither disrupted the classroom nor impinged on the rights of other

http://www.cyberbullying.us/cyberbullying_girls_victimization.pdf (22.7% of female victims in this study reported feeling affected at school, even though the cyberbullying took place off-campus). Depriving victims of their educational opportunities in this way is also one of the harms recognized in Title IX sexual harassment lawsuits. See, e.g., *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (noting that Title IX requires that "students must not be denied access to educational benefits and opportunities on the basis of gender").

81. See, e.g., *Hinduja & Patchin, supra* note 77, at 2 (describing the difficulties cyberbullying victims have in going to school after being cyberbullied).

82. See *supra* note 3 and accompanying text.

83. *Id.*

84. 393 U.S. 503, 504 (1969).

85. *Id.* at 506-07 (stating that while "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," schools must be able "to prescribe and control conduct in the schools" under the First Amendment).

86. *Id.* at 512-13 (citing *Blackwell v. Issaquena Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) (discussing past decisions in lower courts, and noting that student speech which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech").

students, the Court ruled that the school violated the students' right to free speech.⁸⁷ Commentators suggest that *Tinker* is the most important case regarding student free speech rights, and that the later decisions are merely exceptions to the *Tinker* standard.⁸⁸

The second case in the student speech quartet, *Bethel School District Number 403 v. Fraser*, involved a high school student who described a fellow student's candidacy for student body vice president using a series of sexual metaphors during a school assembly.⁸⁹ The Court noted that Fraser's speech was lewd and offensive, and upheld the school district's suspension.⁹⁰ In so ruling, the Court limited the scope of *Tinker*, and gave schools the authority to curtail student speech when its expression was lewd, offensive, and contrary to the school's mission, even when not disruptive.⁹¹

Hazelwood School District v. Kuhlmeier, the third school speech case, further chipped away at *Tinker*.⁹² The school administration in that case deleted two articles from the school newspaper concerning student pregnancy and the effect of divorce on students.⁹³ Administrators were concerned that the topics were not appropriate for younger students and that some of the anonymous students in the article could be identified.⁹⁴ The Court reiterated that a school could curtail otherwise un-censorable speech that conflicted with the school's educational mission and values.⁹⁵ This decision was partly because the student speech could be perceived as "school-sponsored."⁹⁶ Thus, school-sponsored speech became another exception to *Tinker*.

The most recent case, *Morse v. Frederick*, further expanded the rights of school administration to curtail student speech.⁹⁷ The school planned an event during the school day, allowing students to leave class to observe the Olympic torch passing

87. See *Tinker*, 393 U.S. at 508-09. The Court noted that the district court had found no evidence of disruption caused by the armbands, or that the armbands had interfered with the rights of other students at the school. *Id.* at 509. It further observed that a school-issued memo on the suspension of the students had made no mention of any actual or potential disruption. *Id.*

88. See, e.g., Kellie A. Cairns, *Morse v. Frederick: Evaluating a Supreme Hit to Students' First Amendment Rights*, 29 PACE L. REV. 151, 151 (2008) (stating that "the Court has steadily continued to carve out exceptions to [*Tinker*]").

89. *Bethel Sch. Dist. Number 403 v. Fraser*, 478 U.S. 675, 684-90 (1986). Fraser depicted the other student as "'firm in his pants,'" and a person who goes to the "'climax'" for his peers. *Id.* at 687 (Brennan, J., concurring) (citation omitted).

90. *Id.* at 683 (stating that the "pervasive sexual innuendo . . . was plainly offensive . . . to any mature person").

91. *Id.* at 684-90.

92. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

93. *Id.* at 263.

94. *Id.*

95. *Id.* at 260 (holding that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school").

96. *Id.* at 261 (maintaining that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

97. 127 S. Ct. 2618, 2622 (2008); see also Cairns, *supra* note 88, at 151 (arguing that the Supreme Court made a mistake in carving an exception out of *Tinker* with *Morse v. Frederick*).

through the town.⁹⁸ Frederick, a student at the school, did not show up for classes that morning, but came to see the torch pass.⁹⁹ He stood off campus with classmates and held up a fourteen-foot wide, homemade banner with the phrase “BONG HiTS 4 JESUS.”¹⁰⁰ When Frederick refused to take down his banner, the school principal suspended him.¹⁰¹ The Court rejected Frederick’s argument that the school could not punish his actions, as he had not been in attendance at school that day.¹⁰² However, the Court did note that there was no established boundary for when the school speech rules apply.¹⁰³ It also found that the school principal did not violate Frederick’s First Amendment rights by prohibiting him from displaying the banner because it could reasonably be seen as promoting drug use, and the school could curtail such speech.¹⁰⁴

All of the cases in the Supreme Court quartet reiterate the original standard set forth in *Tinker*: schools are allowed to discipline students for speech that causes a substantial disruption in the classroom or interferes with the rights of other students.¹⁰⁵ However, the quartet leaves many questions unanswered, including whether off-campus student speech that reaches onto the school campus can be curtailed by school administrators. This makes application of the Supreme Court precedent to cyberbullying cases difficult and unpredictable.

B. Fleshing Out the *Tinker* Test

Tinker gave the lower courts an adaptable test to use when analyzing student speech cases. Since then, it has been largely up to the lower courts to flesh out the nuances of the *Tinker* test and to determine what constitutes substantial disruption and what speech impinges on the rights of others.¹⁰⁶ This section discusses cases interpreting *Tinker* that are relevant to cyberbullying.

1. Material and Substantial Disruption under *Tinker*

The first prong of the test laid out in *Tinker* allows schools to curtail student speech consistent with the First Amendment when the speech causes a substantial and material disruption inside the school.¹⁰⁷ Since this prong has been well devel-

98. *Morse*, 127 S. Ct. at 2622. The school arranged for students to be dismissed from class for a specified period of time, under the supervision of teachers and administrators, to view the event. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 2624 (stating that Frederick could not “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”) (citations omitted).

103. *Id.* The Court asserted that while there “is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents . . . [it would not be] based on these facts.” *Id.*

104. *Id.* at 2625.

105. *See supra* Part II.A.

106. The *Tinker* Court failed to define what behavior would constitute material and substantial disruption, and how large a portion of the classroom the speech would have to affect. *See, e.g.*, Denning & Taylor, *supra* note 22, at 844. The case also neglects to define what types of behavior would impinge on others’ rights, as well as what rights those students possessed in the first place. *Id.* at 847. *See also supra* Part II.A.

107. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

oped by courts interpreting it, school administrators can find a wealth of information on which they can draw to determine if they can constitutionally prohibit certain student speech, including cyberbullying.

Even before *Tinker*, several courts found that a school could prohibit student speech that caused an actual disruption inside the classroom.¹⁰⁸ Both *Burnside v. Byars* and *Blackwell v. Issaquena County Board of Education* involved students wearing freedom buttons at school to show support for African American voting rights.¹⁰⁹ Both lower courts that considered the matter rejected the students' arguments that the prohibition violated the students' free speech rights.¹¹⁰ However, because the freedom buttons in *Blackwell* caused actual disruption in the school, the Fifth Circuit upheld the prohibition against wearing the freedom buttons in that case on appeal, where in *Burnside* it did not.¹¹¹

However, neither *Tinker* nor the First Amendment requires schools to wait until actual disruption occurs within the school. Instead, administrators have a duty to prevent any such disruption from taking place.¹¹² In order to constitutionally curtail speech by forecasting disruption, the *Tinker* Court examined whether the school could point to specific facts which made it reasonable to believe that material and substantial disruption could occur on campus.¹¹³

Since then, other courts have expanded on what criteria schools can use to forecast material and substantial disruption. Schools cannot, for instance, forecast material and substantial disruption due to students refusing to stand for the Pledge of Allegiance, but may base it on speech with sexual connotations.¹¹⁴ It is well established that schools can reasonably forecast disruption based on prior incidents outside the school.¹¹⁵ However, the prior events must have occurred relatively recently in time.¹¹⁶

108. See Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129 (2009) (describing the Fifth Circuit cases *Burnside* and *Blackwell* which were decided just prior to *Tinker*, and cited in its opinion). The *Tinker* Court cited these cases only in the final draft of its opinion, lending the ultimate test that it announced greater clarity than it had articulated in previous drafts. *Id.* at 1160.

109. *Burnside v. Byars*, 363 F.2d 744, 745 (5th Cir. 1966); *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749, 750-52 (5th Cir. 1966).

110. *Burnside*, 363 F.2d at 744; *Blackwell*, 363 F.2d at 752.

111. *Burnside*, 363 F.2d at 749; *Blackwell*, 363 F.2d at 753-54. The court compared the two in its *Blackwell* opinion, noting that in *Blackwell*, the facts were much different than in *Burnside* which involved "no disruption of classes or school routine." 363 F.2d at 753.

112. *Tinker*, 393 U.S. at 514. See also *Karp v. Becken*, 477 F.2d 171, 174 (9th Cir. 1973) (stating that, under *Tinker*, school administrators "have a duty to prevent the occurrence of disturbances" which could result from student speech).

113. *Tinker*, 393 U.S. at 514.

114. See *Goetz v. Ansell*, 477 F.2d 636, 638-39 (2d Cir. 1973) (rejecting school's claim that they could forecast material and substantial disruption when a high school student refused to stand for the Pledge of Allegiance); *Broussard ex rel. Lord v. Sch. Bd.*, 801 F. Supp. 1526, 1535 (E.D. Va. 1992) (noting that children are "easily distracted by language with sexual connotations").

115. See, e.g., *Guzick v. Drebus*, 431 F.2d 594, 600 (6th Cir. 1970) (school did not violate the First Amendment by prohibiting anti-war buttons because of a history of violence at the school regarding other buttons); *Melton v. Young*, 465 F.2d 1332, 1337 (6th Cir. 1972) (school could prohibit student from wearing a Confederate flag jacket to school because there was a tense, racial situation at the high school, and it could reasonably anticipate disruption based on past racial violence); *Karp*, 477 F.2d at 176 (school was justified in forecasting substantial and material disruption when a student organized a walkout during an awards presentation and invited the media); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488 (D.S.C. 1997) (school could reasonably

Additionally, some courts hold that the school must be able to demonstrate a close nexus between those events and the speech in question.¹¹⁷ For instance, in *Sypniewski v Warren Hills Regional Board of Education*, the court found that the school could not use prior incidents involving a gang called the “Hicks” to forecast disruption from a Jeff Foxworthy “You Might Be A Redneck If . . .” T-shirt that a student wore to school.¹¹⁸ Similarly, in *Chambers v. Babbitt*, the court found that there was not a sufficient nexus between a prior racial incident and a student’s “Straight Pride” T-shirt by which the school could reasonably forecast disruption.¹¹⁹

2. Impinging on the Rights of Other Students under *Tinker*

The second prong of *Tinker* allows schools to curtail student speech when it impinges on the rights of other students.¹²⁰ Particularly for incidents of cyberbullying, this test could assist school administrators in showing that prohibition of the cyberbully’s speech was constitutional.¹²¹ Many court cases have expanded on the *Tinker* standard governing actual disruption and forecasting material and substantial disruption.¹²² Curiously, though, very few courts have addressed the *Tinker* Court’s statement that a school can regulate speech that impinges on the rights of other students, leaving this standard regrettably ambiguous.¹²³

In *Nixon v. Northern Local School Board of Education*, the Southern District Court of Ohio grasped the opportunity to develop this test in ruling that a school

forecast material and substantial disruption from a Confederate flag jacket based on racial tensions and prior disruptive incidents); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1362 (10th Cir. 2000) (school could reasonably forecast disruption when a student drew a Confederate flag on a paper in class because there was a history of racial violence at the school).

116. See *Barber ex rel. Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 857 (E.D. Mich. 2003) (holding that a school could not reasonably forecast that a T-shirt stating George W. Bush was an “International Terrorist” would cause disruption based on events that occurred in response to Operation Desert Storm ten years earlier).

117. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 254-55 (3d Cir. 2002) (noting that there needed to be some identifiable relationship linking the past disruption and the present speech in order for the school to be able to forecast disruption).

118. *Id.* at 274-75. The court noted that a mere “association” between the prior events and the speech was not enough, because such a limited standard could lead to an almost unfettered authority to the school district to curtail student speech on a weakly premised connection. *Id.* at 257. Although the words “Hick” and “Redneck” had similar meanings, there was no evidence here that “Redneck” had ever been used to refer to the Hick gang before, or that the student’s shirt was intended to promote bigotry inside the school. *Id.*

119. 145 F. Supp. 2d 1068, 1072 (D. Minn. 2001). In the preceding school year, a series of racially-charged fights broke out in the school when a student wore a Confederate flag bandana. *Id.* at 1070. The court noted that the only factor in common between that incident and curtailment of the “Straight Pride” T-shirt was that the shirt and bandana were both articles of clothing. *Id.* at 1072. This, it held, was not a sufficient nexus to forecast violence based on sexual orientation from violence based on race. *Id.*

120. *Tinker*, 393 U.S. 503, 512-13 (1969).

121. See *infra* Part IV.C.2.

122. See *supra* Part II.B.1.

123. See, e.g., Andrew Canter & Gabriel Pardo, Comment, *The Court’s Missed Opportunity in Harper v. Poway*, 2008 B.Y.U. EDUC. & L.J. 125, 126 (2008) (stating that when the court denied certiorari to *Harper v. Poway*, it lost the chance to answer the question of whether it is “possible for a student’s words and writings alone to ‘invade the rights of others?’”). See also Harvard Law Rev. Ass’n, *Ninth Circuit Upholds Public School’s Prohibition of Anti-Gay T-Shirts*, 120 HARV. L. REV. 1691, 1694 (2007) (noting that there is not universal recognition that this is a separate prong of the *Tinker* test, and most courts “treat the likelihood of ‘material disruption’ as dispositive when considering bans on political speech and symbols”).

could constitutionally prohibit a student from wearing a T-shirt reading “Homosexuality is a sin! Islam is a lie! Abortion is murder!”¹²⁴ The court expressly recognized that schools could, under *Tinker*, restrict student speech that interfered with the rights of other students.¹²⁵ Noting the dearth of case law developing this test, the court interpreted *Tinker* to mean that students in the school maintain both the right to security and the freedom to be left alone.¹²⁶ Since the court concluded that this T-shirt did not violate those rights, it held that the actions of the school were unconstitutional.¹²⁷

Another case addressing this prong of *Tinker*, however, found that a similar T-shirt did impinge on the rights of other students.¹²⁸ A student attended school wearing a shirt reading “HOMOSEXUALITY IS SHAMEFUL.”¹²⁹ In holding that the school could constitutionally prohibit the student from wearing the shirt, the Ninth Circuit noted that it relied solely on the provision of *Tinker*, which allows schools to prevent speech that interferes with the rights of others.¹³⁰ The court observed that this shirt collided with the rights of other students in the “most fundamental way,” which includes the right to be secure from both physical and psychological attacks.¹³¹ The court determined that speech against groups which have been “made to feel inferior[] serves to injure and intimidate them, as well as to . . . interfere with their opportunity to learn.”¹³² This case, however, is not controlling because the Supreme Court subsequently vacated it as moot.¹³³ Additional courts have also recognized the right of students to feel psychologically secure under *Tinker*.¹³⁴

In sum, these cases, and others interpreting *Tinker*, give schools fairly wide latitude to curtail student speech under the First Amendment.¹³⁵ *Tinker* has withstood many scenarios and interpretations, and has prevailed as a superior test ba-

124. 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005).

125. *Id.* at 974 (“It is true that, according to *Tinker*, schools can regulate speech that invades on the rights of others.”). However, the court noted that it could find no cases allowing the schools to curtail student speech based solely on this prong of *Tinker*. *Id.*

126. *Id.* (stating that “invading on the rights of other students entails invading on other students’ rights to be secure and to be let alone”).

127. *Id.*

128. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177-84 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007).

129. *Id.* at 1171.

130. *Id.* at 1175. Lack of sole reliance on this prong of *Tinker* in other cases was pointed out in *Nixon* barely over a year prior. See *supra* note 125.

131. *Poway*, 445 F.3d at 1178 (stating that “[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society”).

132. *Id.*

133. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007). Had the Supreme Court merely denied certiorari, the case could still be used as controlling case law.

134. For example, the Tenth Circuit held that, despite any evidence of potential physical violence, exhibiting the Confederate flag could reasonably be seen as interfering with the rights of students to be let alone. *West v. Darby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000). The Ninth Circuit also previously held that vulgar terms may impinge on those same rights of students without any instance of physical attacks. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

135. See, e.g., Denning & Taylor, *supra* note 22, at 865-66 (commenting that after *Morse v. Frederick*, school administrators have many ways in which they can constitutionally curtail student speech).

lancing both the free speech rights of students and the interest of the schools in educating and protecting their students. It has also proven to be an adaptable test, and, if adopted by the courts, should provide schools additional guidance on how to analyze the murky and complicated scenario of the free-speech rights of student cyberbullies.¹³⁶

III. THE CYBERBULLYING DILEMMA

A review of relevant case law uncovers little precedent on cyberbullying cases, and, indeed, cyberspeech cases in general.¹³⁷ As with traditional bullying cases, this scarcity is likely due to most cases settling out of court, coupled with the fact that cyberbullying is only recently attracting the public's attention.¹³⁸ More troublesome is that what little precedent exists regarding both off-campus student speech and cyberspeech is riddled with contradictions.¹³⁹ This makes predicting how courts will treat cyberbullying, and thus advising clients, especially difficult. Cyberbullying cases are further complicated by the fact that most cyberbullying acts occur off campus, arguably beyond the school's authority.¹⁴⁰ Even the lower courts have bemoaned the paucity of direction given to them in deciding off-campus student speech cases.¹⁴¹ School officials are left uncertain as to which speech they can and cannot curtail without exposing themselves to liability, making them more likely to settle cases instead of litigate.¹⁴²

Because of the lack of guidance from the Supreme Court on how to treat off-campus student speech and cyberspeech, courts in different jurisdictions have applied inconsistent tests to the cases that have come before them. These tests employ approaches ranging from holding that schools cannot curtail off-campus student speech that arrives on campus, to utilizing a completely different constitutional approach under a "true threat" analysis, to applying several variations of *Tinker*. This variety of approaches among the courts illustrates the need for a standardized,

136. See *infra* Part III.

137. See, e.g., KOWALSKI, *supra* note 4, at 165 (noting that court decisions regarding cyberbullying are "scant").

138. *Id.* at 164-65.

139. See *infra* Part III.A-C.

140. See Tracy L. Adamovich, *Return to Sender: Off-Campus Student Speech Brought On-Campus By Another Student*, 82 ST. JOHN'S L. REV. 1087, 1088 (2008) (stating that the courts have given "little guidance" on this issue despite an "abundance of cases" regarding free speech rights of students with off-campus speech). Because of the increasing availability and accessibility of technology, it is likely that these cases will increase in frequency. *Id.* at 1113.

141. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619-20 (5th Cir. 2004) (discussing the various standards applied to off-campus student speech, and stating how commentators are "[f]rustrated by these inconsistencies" and are "calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation").

142. See, e.g., Kara D. Williams, Note, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 730-31 (2008) (stating that "[s]chool officials have admitted to not knowing what students' speech rights are," especially when applying to social networking sites and other cyberspeech) (citation omitted); see also Tresa Baldas, *As 'Cyber-Bullying' Grows, and So Do Lawsuits*, NAT'L L.J. (Dec. 10, 2007), available at <http://www.law.com/jsp/article.jsp?id=1197281074941> (noting that school districts are fearful that if they curtail student cyberbullying they will be sued for violating student free speech rights, and if they do not stop that speech that they will be sued for failure to act).

adaptable test for courts to apply in cyberbullying cases, such as *Tinker*, that reflects the shrinking distinction between on- and off-campus speech due to today's technology.¹⁴³ This section details the Circuit Courts' split regarding the free-speech rights of students in off-campus student speech and cyberspeech cases under these varied approaches.

A. Courts Holding Off-Campus Speech Cannot be Curtailed by the Schools

Some scholars argue that off-campus student speech should not be subjected to analysis under *Tinker*, even if the speech is brought on campus by another student or a third party.¹⁴⁴ Several courts have adopted this approach. For instance, in *Thomas v. Board of Education, Granville Central School District* the New York Supreme Court refused to apply *Tinker* to an offensive student newspaper article because it was written and distributed off campus, holding the article was beyond the reach of school administrators.¹⁴⁵

In *Porter v. Ascension Parish School Board*, the Fifth Circuit also had to rule on off-campus student speech that was brought on campus by a third party.¹⁴⁶ In reaching its decision, the court summarized a series of cases both following and refusing to apply *Tinker* in off-campus student speech cases.¹⁴⁷ The court noted that the line between on-campus speech, subject to school curtailment, and off-campus speech, receiving full constitutional protection, was unclear.¹⁴⁸ However, it declined to apply *Tinker* to this set of facts, finding that the drawing in question was off-campus speech that only accidentally made its way on campus.¹⁴⁹ A feder-

143. Some may argue that it does not matter whether students in different jurisdictions have different rights, and thus there is no need for a standardized test. However, since free speech is a First Amendment right under the Constitution of the United States, students in all jurisdictions should have uniform rights regarding what speech is and is not allowed in school.

144. See, e.g., Denning & Taylor, *supra* note 22, at 882 (stating that students should not be accountable for off-campus speech which is brought on-campus by another student). This reflects the analysis under the intent test. See Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 143-44 (2007) (arguing that courts should not be able to use a pure *Tinker* analysis to curtail off-campus student speech, and advocating the adoption of an intent test).

145. 607 F.2d 1043, 1051 (2d. Cir. 1979) (holding that the "First Amendment will not abide the additional chill on protected expression that would inevitably emanate from" school administrator's regulation of off-campus speech).

146. 393 F.3d at 608. Fourteen-year-old Adam Porter drew a violent sketch at home of his high school exploding, accompanied by racial slurs and other offensive language. *Id.* at 611. Adam showed the drawing only to his mother and younger brother. *Id.* Two years later, Adam's younger brother brought the picture to school and showed it to a bus driver. *Id.* School officials, alarmed over the graphic content of the drawing, suspended both Adam, for making the picture, and his younger brother, for possessing it on campus. *Id.* at 612.

147. *Id.* at 619-20.

148. *Id.* at 618 ("The line dividing fully protected 'off-campus' speech from less protected 'on-campus' speech is unclear, however, in cases such as this involving off-campus speech brought on-campus without the knowledge or permission of the speaker.").

149. *Id.* at 620 (holding that since the drawing was "composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him . . . or publicized in a way certain to result in its appearance at EAHS" the drawing was entitled to full constitutional protection).

al district court in Washington held similarly in a case analyzing a student's website in *Emmett v. Kent School District No. 415*.¹⁵⁰

These cases illustrate the very real possibility that a court may hold that schools cannot discipline student cyberbullies for speech that originates off campus. The cases also demonstrate the current uncertainty as to the school's jurisdiction over off-campus student speech, and exemplify the need for courts to adopt clear standards to govern future cases.

B. Applying a True-Threat Analysis

The Eighth Circuit, seemingly believing that off-campus speech should be censored by the schools but unsure under what standard, applied a different constitutional approach in *Doe v. Pulaski County Special School District*.¹⁵¹ The majority opinion omitted any discussion of *Tinker*, and analyzed the letters at issue, authored by a student at home, under a "true threat" analysis.¹⁵² The "true threat" analysis looks at whether the speech in question involves a threat of violence such that it loses constitutional protection.¹⁵³ The court ultimately found for the school because of the brutal nature of the letter, deciding that the letter constituted a true threat with no protection under the First Amendment.¹⁵⁴ The dissenting opinion in *Pulaski*, however, pointed out that the majority failed to consider the effects stemming from the speech arriving on a school campus.¹⁵⁵

While the "true threat" analysis may be a possible tool in the school's arsenal, it is unlikely to meet the needs of a school hoping to stop student cyberbullying, as most cyberbullying acts will not rise to this level of threat of violence.¹⁵⁶ Indeed, most student speech in general would fail to satisfy the heightened threshold of a "true threat" analysis. Perhaps that is why most courts, other than *Pulaski*, have failed to adopt this standard. Instead, it would be better for the courts to adopt a

150. 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (noting, after explaining the *Tinker* standard, that "[a]lthough the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control.")

151. 306 F.3d 616 (8th Cir. 2002). J.M., an eighth grader, wrote two violent and terrorizing letters to K.G., a girl who had broken up with him at the start of the summer. *Id.* at 619. The letters expressed J.M.'s plans to molest, rape, and murder K.G. *Id.* Although J.M. willingly told K.G. about the existence of the letters over the phone, it was ultimately a third party who brought the letters on campus and gave them to K.G. to read. *Id.* at 619-20. Yet another student, who was present when K.G. read the letters, reported J.M. to school officials, who expelled him. *Id.* at 620.

152. *Id.* at 622-27.

153. See *Watts v. United States*, 394 U.S. 705, 706-07 (1969) (holding that a true threat fell outside the protections of the Constitution). However, the Court did not define what constituted a true threat. *Pulaski*, 306 F.3d at 622.

154. *Pulaski*, 306 F.3d at 627.

155. *Id.* (Heaney, J., dissenting) (noting that the majority opinion "fail[ed] to consider the unique circumstances of speech in a school setting"). Using a test involving both a "true threat" and *Tinker* analysis, the dissent concluded that the school did have jurisdiction to punish the student for writing the letters, even though he did so off campus. *Id.* at 633-35. However, he also opined that the school's punishment was unduly harsh and should not be upheld. *Id.*

156. See, e.g., Wendland, *supra* note 56. Examples of cyberbullying acts include attacking someone's sexuality by calling victims gay or a lesbian, ridiculing their appearance or clothes, or spreading other rumors. *Id.* Professor Glenn Stutzky of Michigan State University notes that these often childish statements are devastating to victims because of their maturity level. *Id.*

more flexible test, such as *Tinker*, which gives schools a lower-threshold level on which they can act.

C. Courts Using a *Tinker* Analysis in Off-Campus Student Speech Cases

Since *Tinker* is well established, many courts and scholars believe that both off-campus and student cyberspeech cases should be analyzed under *Tinker*.¹⁵⁷ The first inkling that off-campus student speech is subject to the same standards as that occurring on-campus can be found in *Tinker* itself. In the majority opinion, Justice Fortas states that out-of-class speech that causes substantial disruption in the classroom, or impinges the rights of others, does not receive protection under the First Amendment.¹⁵⁸

The majority of courts ruling on whether schools can censor off-campus student speech have applied some form of the *Tinker* analysis.¹⁵⁹ In particular, *Tinker* has been used to analyze student newspapers created off campus¹⁶⁰ and student websites.¹⁶¹ This seems consistent with the trend of giving escalating authority to schools to curtail student speech under the First Amendment across the Supreme Court student speech quartet.¹⁶² However, when the Supreme Court was presented with the recent opportunity in *Morse v. Frederick* to delineate the school's jurisdiction over off-campus speech (or lack thereof) and eliminate inconsistencies in the various tests used, it instead only further complicated the analysis.¹⁶³

Although student Joseph Frederick's banner was displayed off campus, the Court both identified and quickly dismissed the issue of the boundaries of off-campus student speech by simply stating that Frederick was at school.¹⁶⁴ Frederick, however, was not in attendance during morning classes that day and was

157. See, e.g., Williams, *supra* note 142, at 724 (arguing that adopting a new test for cyberspeech would be problematic, overboard, and not applied by the courts); Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WISC. L. REV. 1213, 1238 (2003) (noting that *Tinker* should apply to off-campus cyberspeech because of a lack of physical borders on the Internet).

158. *Tinker*, 393 U.S. at 513. Justice Fortas opined that: "[C]onduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* (emphasis added). However, this statement, as used in the courts thus far, has been largely interpreted as referring to incidents on the playground, school bus, or other places connected to the school. Indeed, four of the states with electronic provisions in their anti-bullying statutes have limited it to a similar school setting. See *supra* note 3.

159. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619 (5th Cir. 2004) ("Many courts have applied the *Tinker* standard in evaluating off-campus student speech later brought on-campus by persons other than the speaker."); see also *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (noting that it used *Tinker* because "[t]he overwhelming weight of authority has analyzed student speech [whether on or off campus] in accordance with *Tinker*.").

160. See, e.g., *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 975 (5th Cir. 1972); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076-77 (5th Cir. 1973).

161. See *infra* Part IV.B.

162. See, e.g., *Adamovich, supra* note 140, at 1090-95 (tracing the Supreme Court student speech decisions and commenting on the increasing power of the school board apparent in each decision).

163. See *Roberts, supra* note 16 at 1180 (noting that in allowing Principal Morse to discipline Frederick for his off-campus banner, the Court is laying "a framework for school officials to restrict more student speech than ever before," especially cyberspeech).

164. See *supra* note 103 and accompanying text. In so deciding, the Court missed the opportunity to provide guidance on off-campus student speech to the lower courts which were hoping for it. See *supra* note 141.

standing off of school property among both students and non-students.¹⁶⁵ What could have potentially been ruled an off-campus speech case was brought within the jurisdiction of the school as on-campus speech, further eradicating the difference between on- and off-campus student speech.¹⁶⁶

Similarly, students' constant access to technology is also making it more difficult to judge which speech occurs on- and off-campus.¹⁶⁷ Students using the Internet as a forum for their speech are facing increasing difficulty keeping that speech off school grounds, even if they intend to do so.¹⁶⁸ For instance, in *J.S. v Bethlehem Area School District*, this issue was especially apparent when the Pennsylvania Supreme Court held that a school could not discipline a student for a webpage he created at home.¹⁶⁹ Analyzing the student's First Amendment claim under *Tinker*, the court determined that because the student accessed the website at school, the website was on-campus speech, despite being developed in the student's bedroom.¹⁷⁰ The problem of technological boundaries was similarly prevalent in *Coy v. Board of Education of North Canton City Schools* over another student's website.¹⁷¹ The federal district court in North Dakota reached the opposite result from *J.S.* over whether a website was on- or off-campus speech and ruled that the *Tinker* standard applied to the website despite the fact that it was off-campus speech.¹⁷² Another student webpage was the subject of analysis in *Beussink v. Woodland R-IV*

165. Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006), *rev'd* Morse v. Frederick, 551 U.S. 393 (2007). The court acknowledges Frederick's uncontradicted account that he had not attended school on that day, that he was across the street from the school campus, that the Olympic Torch relay was attended by many non-students in the community as well as students from his high school, that schools were released from classes and did not have to attend, did not have to stay near a designated area of students or with their teachers (with the exception of one gym class), and that school officials made no attempt to keep students from leaving the area to go home. *Id.*

166. See, e.g., Roberts, *supra* note 16, at 1178 (hypothesizing that *Morse* extends the schools' jurisdiction off campus).

167. See *supra* Part III.B.

168. See, e.g., Denning & Taylor, *supra* note 22, at 868 (noting that "no one knows quite where the limits to the school's authority lie" in off-campus cyberspeech cases).

169. 807 A.2d 847, 851 (Pa. 2002). *J.S.*, a middle school student, created a series of linked web pages disparaging his teachers and principal. *Id.* In addition to offensive language, the website encouraged students to contribute money to hire a hitman to kill his algebra teacher. *Id.* The court first applied a true threat analysis, and determined that the website did not constitute a true threat. *Id.* at 859-60 (noting that while in poor taste, the website did not indicate a real intention to inflict harm on the teacher).

170. *Id.* at 864-65 ("We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."). Because of the impact on the targeted teacher, and the fact that the website was a "hot topic" at school, the court held that the website materially and substantially disrupted the school, and the school's expulsion was upheld. *Id.* at 868-69. The targeted teacher reported being afraid someone would actually kill her, and feeling anxious and stressed. *Id.* at 852. She suffered headaches, became depressed, lost sleep and weight, and exhibited memory problems. *Id.* These symptoms prevented her from both interacting socially with others and forced her to take a medical leave of absence from school. *Id.*

171. 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002). A student created a website at home, containing pictures of three classmates and a series of insults under a section labeled "Losers." *Id.* The court observed that while objectionable, none of the material on the website could be considered obscene under *Fraser*. *Id.*

172. *Id.* at 799-800. It then noted that the defendants could point to no evidence that the website created disruption within the school, and thus denied the school's motion for summary judgment. *Id.*

School District.¹⁷³ A federal district court in Missouri again analyzed the case under *Tinker*'s material and substantial disruption standard.¹⁷⁴

In sum, courts have widely accepted the *Tinker* disruption test for on-campus student speech and used to analyze many instances of off-campus student speech. Thus, it is definitely one of the tests a court will consider adopting for instances of off-campus cyberbullying.

D. Courts Applying a Hybrid Approach to *Tinker* for Off-Campus Student Speech

Even in applying the *Tinker* test, many courts and scholars suggest the need for something besides material and substantial disruption, or an infringement on other students' rights in off-campus speech cases.¹⁷⁵ Particularly, one line of precedent examines whether there is a sufficient nexus between the speech and the forecast of disruption such that the school can constitutionally curtail the speech. A complementary set of cases considers the intent of the speaker, asking whether it was reasonably foreseeable that the speech would end up on campus.

1. Finding a Nexus Before Applying *Tinker*

The first of these hybrid approaches searches for a nexus between the off-campus student speech and the forecast of disruption, just as in *Sypniewski* and *Chambers*.¹⁷⁶ This test was utilized by the court in *Layshock v. Hermitage School District*.¹⁷⁷ The federal district court in Pennsylvania looked for a nexus between a mock MySpace page created by the student and the forecasted disruption before it applied the *Tinker* standard.¹⁷⁸ Another MySpace page was analyzed by a different federal district court in Pennsylvania in *J.S. ex rel. Snyder v. Blue Mountain School District*.¹⁷⁹ Reflecting on the enormous role technology is playing in students' lives, which is causing student speech to arrive on campus with increasing frequency, the court concluded that schools have the right to censor off-campus student

173. 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). A high school junior created a homepage containing vulgar language about his school, teachers, and administrators. *Id.*

174. *Id.* at 1180. Because the website had only been accessed by one student at school, and because Brandon did not share the website with any students except for that one, the court held the *Tinker*'s material and substantial disruption standard was not satisfied. *Id.* In fact, the only reason that the other student accessed the website at school was to show it to a teacher to get back at the defendant after they got in a fight. *Id.* at 1177-78.

175. See *infra* Part III.D.1-2. See also Markey, *supra* note 144, at 143-44 (advocating an intent test)

176. See *supra* Part II.B.1.

177. 496 F. Supp. 2d 587, 590 (W.D. Pa. 2007). A student created a mock MySpace page for his school's principal, filling in "silly" and "crude juvenile language" for answers to questions on the profile. *Id.*

178. *Id.* at 595-96. Since it found that no such nexus between the speech and alleged disruption existed, especially considering the presence of several other MySpace profiles mocking the principal, the court found the school's discipline unconstitutional. *Id.* at 600-01.

179. No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685, at *2-3 (M.D. Pa. Sept. 11, 2008). Like in *Layshock*, this MySpace page also scorned the student's principal. *Id.* This page, however, repeatedly referred to the principal as a pedophile and a sex addict. *Id.* at *1.

speech under *Tinker*.¹⁸⁰ However, it believed that a satisfactory nexus must exist between the off-campus speech and the *Tinker* factors before the school could punish the student for his or her speech.¹⁸¹

2. Conducting an Intent-Based Analysis

Many scholars suggest that the intent of the student speaker should be an important consideration in the analysis of whether a school has the authority to discipline students for their off-campus speech.¹⁸² The Second Circuit adopted this reasoning in several cases.

In *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit overturned its previous precedent in *Thomas*, holding that, under *Tinker*, schools could censor off-campus student speech that arrived on campus.¹⁸³ The court, however, struggled over whether the intent of the student speaker should be important in determining whether the school could curtail the speech.¹⁸⁴ The Second Circuit then had the opportunity to revisit this question in 2008, when it decided *Doninger v. Niehoff*.¹⁸⁵ The court began its analysis by recognizing that technology is clouding the lines between on- and off-campus speech, and then stated that *Tinker* was the appropriate standard to apply in both circumstances.¹⁸⁶ However, it then definitively stated that schools could censor off-campus student

180. *Id.* at *7 n.5 (stating that technology has blurred the line between on- and off-campus student speech, and that since “technology allows such access, it requires school administrators to be more concerned about speech created off campus—which almost inevitably leaks onto campus – than they would have been in years past.”).

181. *Id.* at *7. Here, the court found a satisfactory nexus between the MySpace page and the school, noting that the student used the principal’s photograph from the school website, and created the page for the entertainment of other students at the school. *Id.* at *6-7. Then, despite finding that there was no material or substantial disruption under *Tinker*, the court found that the school could still censor the student’s speech due to the serious language that the student used, which, in this instance, could warrant criminal charges. *Id.*

182. See, e.g., Roberts, *supra* note 16, at 1183-85 (suggesting that the intent of the student should be an important factor in any analysis of off-campus speech, as otherwise you are giving too much deference to the school board and other students); Markey, *supra* note 144, at 143-44 (advocating for the intent test); Dickerson, *supra* note 17, at 28-29 (discussing why the intent test is the best test for cyberbullying analyses).

183. 494 F.3d 34, 38 (2d Cir. 2007). See also *supra* Part III.A. In *Wisniewski*, a school suspended a student upon discovering a Buddy Icon he created on AOL’s Instant Messaging program depicting a person being shot, and the text “Kill Mr. VanderMolen,” the student’s English teacher. 494 F.3d at 36. A Buddy Icon is a small picture each AOL Instant Messaging user selects to be displayed on every conversation window that the user has with other users.

184. *Wisniewski*, 494 F.3d at 39 (noting its conflicting views over whether it must be “reasonably foreseeable that Aaron’s IM icon would reach the school property or whether the undisputed fact that it did reach the school preempts any inquiry as to this aspect of reasonable foreseeability”). Here, however, the court found this discussion was irrelevant, since it was reasonably foreseeable to the student that the Buddy Icon would make its way in to the school. *Id.* at 39-40. This gave school administrators authority to discipline the student for his off-campus speech consistent with *Tinker*. *Id.*

185. 527 F.3d 41, 45 (2d Cir. 2008). A disgruntled student wrote a blog entry referring to school administrators as “douchebags.” *Id.* The blog also contained misinformation claiming the principal had cancelled a school event, and urged students to call or email the principal to “piss her off more.” *Id.*

186. *Id.* at 48-49 (stating that the school’s ability to censor off-campus speech is more appropriate today “when students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication”).

speech only “when it was . . . foreseeable that the off-campus expression might also reach campus.”¹⁸⁷

Thus, the Second Circuit embraced the intent test for dealing with off-campus student speech. It is likely that the intent analysis will be one of the tests considered by a court deciding whether a school has the authority to stop cyberbullying, since it gives additional emphasis to the constitutional rights of students while off campus.

Because of the inconsistent application of standards to cases involving off-campus student speech that arrives on campus, the school’s authority to discipline cyberbullies over such speech is unclear. As such, current law is inadequate to protect victims of cyberbullying from its devastating effects.¹⁸⁸ The courts must adopt a standardized test that gives schools the authority to discipline student cyberbullies and provides schools with a clear idea of when they can and cannot constitutionally intervene in cyberbullying incidents.

IV. *TINKER* SHOULD GOVERN OFF-CAMPUS STUDENT CYBERBULLYING

The cases above illustrate several ways in which courts can give schools the authority to punish cyberbullies for their speech. First, as in *Doe v. Pulaski*, the court can find that the student’s speech constitutes a “true threat” and lacks protection under the First Amendment.¹⁸⁹ Second, if the speech is school-sponsored, such as a blog for a class, the courts can apply the analysis in *Hazelwood* and allow the schools to curtail it consistent with the pedagogical values they are supposed to instill.¹⁹⁰ If the cyberbully uses a school-issued computer or school Internet, administrators could use the analysis under *Frederick* or *Hazelwood* to stop the speech.¹⁹¹ However, it is the most common type of cyberbullying, occurring off campus through personal computers, where the school’s jurisdiction is currently uncertain.

This section will first discuss why the definition of cyberbullying needs to be established, given the lack of consensus in the definition, as addressed earlier.¹⁹² Specifically, it will argue why cyberbullying should be confined to incidents occurring between two minor children. This section will then analyze why *Tinker* is a superior test, and why the courts should adopt *Tinker* for determining whether a school’s curtailment of off campus cyberbullying is constitutional. Finally, this section will describe how a school can use *Tinker* to intervene in cyberbullying situations.

187. *Id.* at 48 (citing *Wisniewski*, 494 F.3d at 40). The court looked at the student’s intent, saying that she created the blog to reach campus, and thus found the school could censor her speech. *Id.* However, this leaves open the question of whether recklessness in making the speech would satisfy this requirement.

188. *See supra* Part III.A-D; *see also supra* Part I.B.

189. *See supra* Part III.C.

190. *Hazelwood*, 484 U.S. at 261; *see also supra* Part II.A.

191. *Hazelwood*, 484 U.S. at 261; *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2008); *see also supra* Part II.A.

192. *See supra* Part I.A.

A. Cyberbullying Should Only Be Used to Describe Incidents Between Two Minors

As noted previously, many legal scholars refer to incidents involving a student and adult faculty members, such as that presented in *J.S. or Layshock*, as cyberbullying.¹⁹³ However, this is inconsistent with the current understanding of traditional bullying and will lead to the formation of a test that is ill-adapted to protect student cyberbullying victims.

from the school may be enough to curb the cyberbully's behavior.¹⁹⁴ Traditional bullying is used to describe incidents occurring between school-age children.¹⁹⁵ The law has developed other terms, such as harassment, abuse, or assault, to describe acts occurring between two adults, or an adult and child.¹⁹⁶ Following that trend, especially given the similarities between cyberbullying and traditional bullying, it is logical to limit the definition of cyberbullying to the acts of school-age children. Victims of incidents involving a child and adult, or two adults, have other legal claims available to proceed under, including defamation, cyberharassment, and cyberstalking.¹⁹⁷ These offenses, often more serious than the acts of a cyberbully, can be more appropriately prosecuted in the criminal system or litigated in civil courts.¹⁹⁸ Comparatively, it would be a waste to utilize court resources in a cyberbullying claim when schools are in a better position to educate the cyberbully as to appropriate online and social behavior, as well as to determine and oversee

193. See *supra* Part III.B; see also *supra* notes 22 and 23 demonstrating the current manner cyberbullying is being used to describe actions beyond those involving a minor perpetrator and minor victim.

194. This is especially true given the phenomenon of disinhibition on the Internet, where a cyberbully may not realize the extent of suffering the victim is experiencing because of his or her actions. See *supra* Part I.B; see also Stayton, *supra* note 42 (describing the remorse felt by a student cyberbully once he was aware of the effects of his actions on his victim).

195. See, e.g., *supra* note 23. All state bullying laws regulate incidents between two school children.

196. See generally Black's Law Dictionary 315 (2d. pocket ed. 2001) (defining harassment as "[w]ords, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose"); *id.* at 4 (defining abuse as "[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury"); *id.* at 45 (defining assault as "[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact").

197. See, e.g., Sajai Singh, *Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0*, 12 No. 6 J. INTERNET L. 3, 6 (2008) (describing cyber-harassment, and cyber-stalking). Indeed, this was pointed out in a recent incident deemed "cyberbullying" by many, when two female students at Yale Law School became victims of a series of vicious posts on an online bulletin board, commenting on their integrity and sexual promiscuity. See Cyber Harassment and the Law (NPR radio broadcast Mar. 3, 2009), available at <http://www.onpointradio.org/2009/03/cyber-harassment>. One victim claimed that the posts online harmed her reputation and ability to secure employment. *Id.* The show points out that this sort of behavior is much too serious to be termed "cyberbullying." It is a more serious defamation or cyber-harassment action. *Id.*

198. This, for instance, was the fate of Lori Drew, the forty-year-old woman who used MySpace to harass thirteen-year old Megan Meier. See, *supra* note 23, and accompanying text.

appropriate punishment.¹⁹⁹ Oftentimes, this decorum lesson from the school may be enough to curb the cyberbully's behavior.²⁰⁰

Giving a concrete age definition to cyberbullying also allows for the formulation of a better test reflecting the differences in maturity between children and adults. Child victims may fear going to school, experience physical symptoms, have low self-esteem, and exhibit decreased performance in school.²⁰¹ Adult victims of cyber-crimes are more likely to brush it off, making it unlikely that they will experience the same effects or, if they do, at the same degree of severity as a child victim.²⁰²

This limitation will also allow for the courts to develop a clearer, narrower test for dealing with instances of cyberbullying consistent with other student speech cases. Further, it will give added protection to the free-speech rights of the student cyberbullies themselves, taking into consideration the maturity level and ages of their targeted victims. Such a definition would allow punishment of the cyberbully for comments which, although seemingly silly, are hurtful and damaging to child victims. However, if a student targets an adult victim, he or she would be allowed a greater range of speech before it could be constitutionally censored. This reflects the different maturity levels of the student and adult involved.

Therefore, "cyberbullying" should be defined with an age limitation, restricting it to behavior between two minors. Any incidents involving two adults, or an adult and a minor, should be more properly categorized as cyber-harassment, cyber-stalking, or more general cyberspeech.

B. Courts Should Employ *Tinker* to Analyze Whether Schools can Regulate Off-Campus Cyberbullying

The Supreme Court student speech quartet leaves many unanswered questions, notably the authority of the school administrators over off-campus student speech.²⁰³ Already, issues regarding off-campus speech and technological boundaries have divided courts.²⁰⁴ Indeed, the federal district court in Pennsylvania and

199. Teachers and school administrators, more so than children's parents, can see the interactions between students and are more likely to either observe or hear about incidents of cyberbullying. The importance in school oversight has been recognized in statutes allowing schools to intervene in instances of traditional bullying. See, *supra* note 24, and accompanying text.

200. This is especially true given the phenomenon of disinhibition on the Internet, where a cyberbully may not realize the extent of suffering the victim is experiencing because of his or her actions. See *supra* Part I.B; see also Stayton, *supra* note 42 (describing the remorse felt by a student cyberbully once he was aware of the effects of his actions on his victim).

201. See *supra* Part I.B (explaining the effects of cyberbullying on victims).

202. Cf. FATIMA GOSS GRAVES, RESTORING EFFECTIVE PROTECTIONS FOR STUDENTS AGAINST SEXUAL HARASSMENT IN SCHOOLS: MOVING BEYOND THE *GEBSE*R AND *DAVIS* STANDARDS 2 (2008), <http://www.acslaw.org/files/Goss%20Graves%20-%20%20Moving%20Beyond%20Gebser%20and%20Davis%20Final.pdf> (stating that student victims of sexual harassment are more likely to suffer serious harms than adult victims, and are more likely to silently tolerate harassment that adults would not). See also Wendland, *supra* note 56 (quoting school violence expert Glenn Stutzky describing how cyberbullying acts that are devastating to student victims often seem silly and immature to adults).

203. See *supra* Part II.A.

204. See *supra* Part III.

the Supreme Court of Pennsylvania, in deciding *Layshock* and *J.S.*, reached opposite conclusions over whether silently accessing a website at school constituted on-campus speech.²⁰⁵ Courts in *Thomas* and *Porter* ruled that schools could not curtail off-campus speech under any circumstances, while other courts have ruled that schools can, provided the speech meets a variety of differing tests.²⁰⁶

The lower court decisions illustrate the main problem persisting after the Supreme Court decisions: the law governing student speech has not caught up with technology. Neither the courts, nor the anti-bullying laws of most states, provide assurance to school administrators that they have the authority to punish student-on-student cyberbullying.²⁰⁷ The decisions in the courts are inconsistent, and leave schools more confused than ever as to when they can constitutionally intervene in acts of cyberbullying.²⁰⁸ We should not wait for another Columbine-like tragedy before we recognize the seriousness of the cyberbullying problem and take steps to prevent it from occurring. However, until states enact laws suitable to deter cyberbullying and protect victims, schools should be given leeway to investigate cyberbullying incidents among their students and to punish student cyberbullies.

The ability of school administrators to curtail student speech occurring off-campus can be extracted from the Supreme Court decisions. In *Tinker*, the Court concerned itself with balancing the rights of students to voice unpopular political opinions with the rights of schools to maintain discipline and the rights other students to feel safe.²⁰⁹ In *Fraser*, the Supreme Court granted even more deference to school administrators to provide students with a safe school environment. Subsequently in *Hazelwood* and, even more clearly in *Morse*, the Court further expanded the authority of the schools to curtail student speech.²¹⁰ This trend suggests that the schools, and not the judicial system, are more aptly suited to determine what student speech is inappropriate, and to prohibit that speech under the First Amendment.

The school is in the unique position to both identify student cyberbullies and educate them as to proper behavior. This is, after all, consistent with schools' pedagogical mission, as the Supreme Court explicitly recognized in *Hazelwood*.²¹¹ Since cyberbullying, in both form and effect, is so similar to traditional bullying, where the school's authority is clearer, it seems logical that schools are the proper party to curtail student cyberbullying as well.²¹² Thus, schools should have the authority to constitutionally discipline students for acts of cyberbullying, even when occurring off campus.

205. In *J.S.* the court held that merely accessing the website at the school made it on-campus speech, in *Layshock* the court found it did not. See *supra* Parts III.B and III.D.

206. See *supra* Part III. The same circuit that decided *Thomas* later held that a website created off-campus in *Wisniewski* could be curtailed under *Tinker*. See *id.*

207. See *supra* note 24; see also *supra* Part III.

208. See *supra* Part III.

209. See *supra* note 85 and accompanying text.

210. See *supra* Part II.A.

211. *Hazelwood*, 484 U.S. at 261 (maintaining that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

212. See *supra* Part I.B.

1. A Clear Test for Cyberbullying Cases is Needed

While support for school authority to curtail and discipline students for incidents of cyberbullying can be found amongst commentators, many frequently state that such punishment decisions can and should be left to the school's discretion.²¹³ However, without the adoption of a more concrete standard for administrators to follow, this is an unacceptable position. First, it fails to properly balance students' free speech rights as identified in *Tinker*. Second, and perhaps more importantly, it does nothing to eliminate the current uncertainty over when a school can and cannot intervene in acts of student cyberbullying without violating the First Amendment.

Further, without the delineation of a useful test, school administrators will be uncomfortable curtailing student speech for fear of lawsuits.²¹⁴ Especially given the current uncertainty over the off-campus free speech rights of students and the muddled handling of student cyberspeech cases by the lower courts, it is in the best interests of teachers, students, and courts if a clear test is set forth. Ideally, such a test will give schools guidance as to when they can and cannot discipline students for off-campus cyberbullying.²¹⁵

Some advocate for the formulation of an entirely new test by the courts to deal with cyberbullying, citing the problems created by technological student speech, notably its common occurrence off campus.²¹⁶ However, implementation of a new standard unique to cyberbullying would bog down school administrators and cause additional burdens on courts forced to interpret its provisions. Instead, the *Tinker* test, which is already widely accepted and utilized by courts and educators alike, is the best test for courts to apply in cyberbullying cases.²¹⁷ Indeed, many courts have already adopted and applied *Tinker* in a variety of cyberspeech cases.²¹⁸ Given *Tinker's* acceptance and ease of application, there is no need for development of a separate test for a small subset of student speech cases.

Because of the balancing test in *Tinker*, it can adequately protect the rights of student speakers and schools, even given the additional complications associated with cyberbullying cases such as the off-campus nature of many cyberbullying attacks.²¹⁹ For instance, acts of off-campus cyberbullying that fail to meet the material and substantial disruption test cannot be punished by the school, thus protecting the free speech rights of the student cyberbully. However, the school can inter-

213. See, e.g., Erb, *supra* note 22, at 282 (arguing that it is "practical" to leave this decision to the school); see also Servance, *supra* note 157, at 1243 (stating that the "courts should defer to schools").

214. See Baldas, *supra* note 142 (noting that teachers are currently afraid to curtail student speech for fear of lawsuits). Although some schools and teachers may not settle because of the protection of qualified immunity, the expense and time of involvement of the lawsuit will serve as an effective deterrent for curtailing student speech in many instances.

215. See *supra* Part II-III; see also *supra* note 142 and accompanying text.

216. See Williams, *supra* note 142 (stating that courts would not likely apply a new test). At least one court has already declined to adopt a higher standard than *Tinker* for off-campus speech. *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448-49 (W.D. Pa. 2001).

217. See *supra* Part III.C-D.

218. See *supra* Part III.C.

219. See *supra* Part III.

vene in incidents that do satisfy the *Tinker* test, allowing the school to fulfill its obligation to protect its students. Additionally, adoption of the *Tinker* test also adequately reflects the age limitation proposed in this Article to the definition of cyberbullying.²²⁰ Since schools applying the *Tinker* standard generally lack authority over adults, limiting cyberbullying to acts between minors allows *Tinker* to be used in all cyberbullying situations instead of formulating separate tests.

Further, adoption of *Tinker* in cyberbullying cases provides educators with a wealth of information from scholars and courts alike, which they can utilize to make their decisions regarding punishing student cyberbullies.²²¹ Specifically, the line of precedent regarding forecasting material and substantial disruption within the school has been fleshed-out extensively by the lower courts.²²² This will give the schools ample guidance on when they can intervene under *Tinker*, even when the cyberbullying occurs off-campus. This information gives schools freedom to discipline student cyberbullies consistently with prior cases without fearing student lawsuits.²²³ Further, the prong of *Tinker* allowing schools to curtail student speech that infringes on the rights of others seems especially suited to cyberbullying cases. Although sparsely litigated, the psychological harm and fearfulness for safety experienced by cyberbullying victims seems to be the exact type of harm identified in the few cases to address the prong.²²⁴ Thus, cyberbullying cases are the perfect student speech cases for the widespread acceptance of this prong of *Tinker*, further supporting the adoption of *Tinker* in cyberbullying cases.²²⁵

Tinker is already familiar to both the schools and the courts, and will provide the workable test that is desperately needed. Indeed, *Tinker* has been widely utilized even in cases involving cyberspeech and off-campus student speech, which are uncertain areas that complicate the cyberbullying analysis.²²⁶ Thus, *Tinker* is the best test the courts can adopt to govern student cyberbullying decisions.

2. *Tinker* Should Be Used for Both On- and Off-Campus Cyberbullying

The unique and controversial legal aspects surrounding cyberbullying, namely the use of technology and the off-campus nature of the speech, are also easily adaptable to the *Tinker* test. While the courts are certainly not unanimous in their decisions, quite a few courts have already adopted *Tinker* analysis in off-campus student speech and cyberspeech cases.²²⁷ The latest Supreme Court decision in *Morse* also explicitly recognizes that the line between on- and off-campus speech is becoming increasingly unclear.²²⁸

220. See *supra* Part IV.1.

221. See *supra* Part II.B.

222. See *supra* II.B.

223. See *supra* note 214 and accompanying text.

224. See *supra* Part II.B.2.

225. See *infra* Part IV.C.2.

226. See *supra* Part III.

227. See *id.*

228. See *supra* Part III.B; see also *supra* note 103 and accompanying text.

By deciding *Morse* as an on-campus speech case, despite Frederick's physical presence off campus, the Court further added to the confusion between which speech is on-campus, and which speech is not.²²⁹ It seemingly expands the jurisdiction of schools over speech that occurs outside of the confines of the school grounds, consistent with what was perhaps the original intent of *Tinker*.

With today's tech-savvy students and the constant accessibility of cell phones and the Internet, the distinction between on- and off-campus speech only continues to blur, making this a very different world indeed than that in which *Thomas* was litigated thirty years ago.²³⁰ When Frederick displayed his banner, he knew that it would be seen by other students and adults, all standing off of, albeit around, school property. A cyberbully, however, has no way of knowing where or when his or her victim will be when the hurtful act is viewed. The constant accessibility of victims to the cyberbully, given the availability of technology, means the cyberbully has no real way of predicting whether the victim will receive the taunts while at home, at school, or somewhere else. This makes it increasingly difficult for courts already puzzled over whether accessing a website on school grounds is on-campus speech to decipher whether cyberbullying is more akin to on- or off-campus speech. Like Frederick's banner, it is hard to determine whether these acts occur on- or off-campus. This is especially true considering teachers and administrators are often less adept with today's technologies than their students and may be unable to determine whether the student cyberspeech was actually sent or accessed on campus.²³¹

Further, unlike the websites in *Beussnik* and *Snyder*, which may have inspired laughs from classmates, cyberbullying victims carry the off-campus speech back with them into the school. Besides constantly fearing that they will run into their tormentor, their academic performance in school is reduced.²³² Thus, even if the cyberbully knows his or her victim will view the acts while at home, victims are still bringing effects with them back into the school, where the acts may be amplified by the physical presence of the cyberbully.²³³

These same arguments also illustrate why using an intent test, such as that proposed by the Second Circuit in *Wisniewski* and *Niehoff*, is illogical for cyberbullying given today's technology.²³⁴ Regardless of the cyberbully's intent, because the cyberbully does not know the physical location of his or her victim may be either at

229. In addition, while the Court noted a distinction between on-and off-campus speech, it gave no hints as to whether the categorization of the speech made a difference as to which analysis applied. *See Morse*, 127 S. Ct. at 2618.

230. The court in *Snyder* acknowledged as much in its analysis. *Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, slip op. at 7 n.19 (M.D. Pa. Sept. 11, 2008).

231. *See, e.g.*, Growing Up Online, *supra* note 4 (interviewing a teacher who admits to feeling like a "dinosaur" because her students know how to use technology in ways she does not).

232. *See supra* Part I.B.

233. *See id.* (describing the effects of cyberbullying on victims). Particularly, cyberbullying victims are constantly on edge during the school day, trying to locate and avoid their cyberbully, leading to a greater decline in academic performance. *Id.*

234. *See supra* Part III.D.2 for a discussion of the intent test.

home or at school when he or she views the cyberbullying act.²³⁵ Further, while the cyberbully may not intend it, victims bring the effects of the cyberbullying into the school with them.²³⁶ The cyberbully should not be able to escape punishment by claiming that he did not intend the victim feel afraid of him, or intend the victim's grades to suffer. Instead, the cyberbully should have to be responsible for the consequences of his or her actions.²³⁷

Although an intent test approach has been championed in legal scholarship, it has not been adopted by other courts.²³⁸ This can, perhaps, also be partially explained by the Supreme Court's decision in *Morse*. Frederick's speech occurred off campus, among students and non-students, on a day Frederick had not been in attendance at school.²³⁹ By allowing the school to curtail Frederick's speech, the Court insinuates that the intent of the student is not an essential consideration of which speech the school can censor.

Due to the increasingly hazy line between on- and off-campus student cyberbullying, the distinction in location should not matter for purposes of any test or analysis. So long as the school can show that, pursuant to *Tinker*, the cyberbullying caused a material and substantial disruption inside the school or infringed on the rights of another student, the school should be able to punish the cyberbully regardless of the physical location where it occurred. Thus, *Tinker* is the best test the courts can adopt to protect student cyberbullying victims, while balancing the free speech rights of cyberbullies.

C. Using the *Tinker* Test in Off-Campus Cyberbullying

If courts adopt a *Tinker* analysis to determine whether schools can discipline students for off-campus cyberbullying, the school still needs to satisfy one of the prongs to avoid violating the free speech rights of the cyberbully. Under both prongs of the *Tinker* test, provided the victims experience the requisite effects, the school will be able to regulate and punish student cyberbullies. This section will provide guidance as to how schools can proceed under each prong of *Tinker*.

235. Thus, even if the court system did widely adopt the intent test, it is likely that cyberbullying would meet that test. Because the perpetrator committed the cyberbullying acts via technology, it was reasonably foreseeable that the acts would reach campus. It is similarly foreseeable that the cyberbullying victim will carry the effects of the cyberbullying acts into the school. The court's interpretation, though, seems to be less stringent than that advocated by legal scholars. See, e.g., Roberts, *supra* note 16, at 1183-85.

236. See *supra* Part I.B.

237. This position finds additional support when examining tort and criminal law, on the basis that the perpetrator takes his victim as he finds them, known as the eggshell skull doctrine. This doctrine was first enunciated in the English case *Dulieu v. White & Sons* [1901] 2 KB 669, 679, and has since been fairly universally accepted in the United States. JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 11:1 (1998). Thus, if a cyberbully chooses a victim who takes the effects of cyberbullying with him into the school, the cyberbully should be responsible for that even if another victim would find the acts less harmful. Criminal law standards further lend themselves to this position, in that recklessness is often a substitute for willfulness or intent.

238. See *supra* Part III.D.2.

239. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2008).

1. School Officials Can Forecast a Material and Substantial Disruption from Off-Campus Cyberbullying

Under *Tinker*, the school can curtail student cyberbullying if it causes actual disruption within the school. For instance, as in *Blackwell*, if the cyberbully physically bullies the victim during school, or if people are using classroom time to discuss the cyberbullying instead of doing schoolwork, the school will be able to step in and curtail the cyberbullying.²⁴⁰

But of course schools are not required to wait for actual disruption according to *Tinker*. This is especially important in our post-Columbine world. Waiting for the actual disruption to occur may have catastrophic detrimental effects for the cyberbullying victim.²⁴¹ Thus, it is in the best interests of the school to forecast reasonable disruption and curtail student cyberbullying as quickly as possible.

Layshock and *Snyder* seem to spin the test created in *Chambers* and *Sypniewski*, looking for a nexus between the off-campus speech and the forecasted disruption and the off-campus speech and the school.²⁴² With cyberbullying, showing this nexus should be easy for the school. The off-campus cyberbullying can be reasonably forecasted to cause substantial disruption within the school if the victim demonstrates effects such as insecurity at the school, fearfulness, or depression.²⁴³ Since empirical evidence shows that this will negatively impact the victim's ability to perform at school, administrators can point to academic harm as disruption.²⁴⁴

Further, there is a connection between the speech and the school, because the students likely initially met in the schoolyard, see each other at school, and are forced to interact within the confines of the classroom environment. It is possible that there are confrontations between the two parties on school grounds as well as in cyberspace. The cyberbully also likely gains insight into what he can use to bully his victims inside the classroom, even if he chooses to wait until after hours to perpetrate his acts.

Therefore, if the victim experiences some of the severe effects associated with cyberbullying, such as severe depression or fearfulness for safety among others, it is likely that the school will be able to step in. Because the school will be able to reasonably forecast disruption under *Tinker*, and show a nexus between the speech and school, if required, they will not violate the First Amendment rights of the cyberbully by stopping his or her speech.

2. Off-Campus Cyberbullying Impinges on the Rights of Other Students to Learn in a Safe Environment Within the School

As with *Tinker's* disruption test, school administrators may try to use the impinging on the rights of others test to curtail student cyberbullying. The case for

240. See *supra* Part II.B.1.

241. See *supra* Part I.B.

242. See *supra* Parts II.B.1, III.D.1.

243. See *supra* Part I.B (describing the effects of cyberbullying).

244. *Id.*

school authority to discipline cyberbullies is actually stronger under this prong of *Tinker* than disruption. In actuality, because of its unique effects on victims and the holdings of prior cases, cyberbullying seems to be the perfect vehicle for widespread acceptance of this prong of *Tinker*.

The T-shirts worn in *Harper* and *Nixon* were passive speech directed at a school-wide audience, stating a general opinion on a controversial topic. Comparatively, cyberbullying statements are directed specifically at a victim, inflicting various effects that are natural outgrowths of the bully's act.²⁴⁵ The effects from the targeted statements are much more harmful than any effects experienced by observers of the T-shirts' blanket statements.²⁴⁶

Harper provides educators with additional support, in holding that students have a right to be "secure from both physical and psychological attacks" which "interfere with their opportunity to learn."²⁴⁷ Cyberbullying is just such a psychological attack as was contemplated under *Harper*, affecting the victim's very self-esteem, security, and ability to continue existing relationships.²⁴⁸ Regardless of whether the cyberbullying acts occur on- or off-campus, many students clearly carry those effects with them into school. School administrators can point to dropping grades as an interference with the victim's ability to learn while at school.

Nixon noted that this impingement claim rested on the rights of other students to be "secure and let alone."²⁴⁹ Cyberbullying victims both attempt to avoid school and become preoccupied with avoiding their harasser because they feel as vulnerable to additional attacks at school as they do at home, and fear for their safety.²⁵⁰ Furthermore, unlike *Harper* and *Nixon* schools do not wish to curtail student cyberbullying because of any controversial content in the speech.²⁵¹ Rather, the schools' curtailment is to ensure the well-being of other students, and is based on empirical evidence showing that victims of cyberbullying feel unsafe at school.²⁵²

However, both *Harper* and *Nixon* involved speech occurring inside the school, unlike instances of cyberbullying, which generally occur off-campus. Thus, the school must utilize the Supreme Court's decision in *Morse*, which demonstrated the unclear boundary between on- and off-campus speech, along with technology, which only further blurs that line.²⁵³ Under such an analysis, schools can argue that

245. *Id.*

246. While the statements on the student T-shirts in these cases are offensive, particularly to students belonging in the group to which the message applies, targeted statements will cause students much more embarrassment and humiliation. Instead of being passive speech, the directed statements involved in cyberbullying make victims feel specifically victimized and inferior, which leads to more severe consequences than the offense taken to derogatory blanket statements.

247. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

248. *See supra* Part I.B.

249. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

250. *See supra* Part I.B.

251. *See supra* Part II.B.2. Plaintiffs in both cases alleged that the defendant schools curtailed their speech because of the political and social controversy surrounding homosexuality and abortion.

252. *See id.*

253. *See supra* Parts II.A and IV.B.2.

this distinction between on- and off-campus speech is irrelevant to the cyberbullying analysis, strengthening their use of *Harper* and *Nixon*.²⁵⁴

If the school can show that these effects interfere with the rights of students to feel safe at school or perform academically, then it should be able to discipline a cyberbully for off-campus acts under the second prong of the *Tinker* test. However, since the disruption test is more universally accepted than *Tinker*'s impingement on the rights of others analysis, schools would be advised to justify curtailment first under the disruption prong if they are so able.

CONCLUSION

Problems with cyberbullying are growing exponentially with the increased availability of technology throughout the day, along with the constant accessibility to others that such technology brings.²⁵⁵ It is in the best interests of all parties for the courts to adopt a test that schools can use to curtail student cyberbullying, even when such acts occur off-campus. *Tinker*, because of its widespread acceptance and adaptability to both cyberspeech and off-campus student speech, will provide educators with a well-established line of precedence which they can use in determining whether they can constitutionally curtail student speech.²⁵⁶ It is time for the courts to recognize that the law has failed to keep pace with technology and adopt measures to protect today's students.

^{254.} See *supra* Part IV.B.2.

^{255.} See *supra* Introduction and Part I.

^{256.} See *supra* Part IV.B.