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Essay: Cyberbullying and Freedom of Speech

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ESSAY: CYBERBULLYING AND FREEDOM OF SPEECH

By David L. Hudson, Jr.*

Cyberbullying has been called "a social online terror"[1], "a deadly epidemic"[2], "a nightmare that happens all too often,"[3] and the cause of youth suicides. High-profile tragedies, such as the suicides of Megan Meier[4], Phoebe Prince[5], David Molak[6], and Tyler Clementi[7], have led to the enactment of state laws designed to address harmful online expression that abuses and harasses others. These tragedies have seared our collective conscience and placed cyberbullying at the forefront of national headlines.[8] The Pew Center reported in 2018 that 59% of teenagers contend that they have been the victim of cyberbullying.[9] The White House has held summits on the issue and October has been designated as Bullying Prevention month. Public figures and officials across the globe, including First Lady

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1. *Don't Be Cyberbullied*, STOMP OUT BULLYING, https://stompoutbullying.org/get-help/about-bullying-and-cyberbullying/dont-be-cyberbullied/ [https://perma.cc/EG7C-24P5].

2. John Stephens, CYBERBULLYING—A DEADLY EPIDEMIC, http://webcache.googleusercontent.com/search?q=cache:C5VHQDPXnLYJ:www.kcommhtml.com/ima/2011_04/cyberbullying.pdf+&cd=5&hl=en&ct=clnk&gl=us [https://perma.cc/QK99-DDWQ].

3. Phil McGraw, *It's Time to Stop the Cyberbullying Epidemic*, HUFFINGTON POST (May 6, 2015 12:51 PM), https://www.huffingtonpost.com/dr-phil/stop-cyberbullying_b_6647990.html [https://perma.cc/3AVA-UWL2].

4. *See generally Meghan's Story*, MEGAN MEIER FOUND., https://meganmeierfoundation.org/megans-story/ 020) [https://perma.cc/933F-VW4D].

5. *See* Alexi Cohan, *Special Report: 9 Years After Phoebe Prince's Suicide, Anti-Bullying Laws Failing*, BOS. HERALD (Jan. 14, 2009 9:19 AM), https://www.bostonherald.com/2019/01/14/its-been-9-years-since-phoebe-princes-death/ [https://perma.cc/2CX9-3SLW]; *see also* Brian Z. Brazeau, *The Transformation of Indirect Harassment in the 21st Century: Telephone Harassment Laws, Cyberbullying, and New Ways of Analyzing First Amendment Rights*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 292, 302 (2016).

6. *See* Candace Amos, *Brothers' Emotional Letter to Stop Bullying Goes Viral Following Youngest Sibling's Suicide*, N. Y. DAILY NEWS (Jan. 8, 2016, 3:47 PM), http://www.nydailynews.com/news/national/brothers-write-letter-bullying-sibling-suicide-article-1.2490355 [https://perma.cc/LSK9-UHD3].

7. *See Tyler Clementi's Story*, TYLER CLEMENTI FOUND., https://tylerclementi.org/tylers-story/ [https://perma.cc/7GZR-CAUZ].

8. *See, e.g.* Hilary Schronce Blackwood, *Regulating Student Cyberbullying*, 40 RUTGERS L. REC. 153, 154 (2012).

9. Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RES. CTR.: INTERNET & TECH. (Sept. 27, 2018), https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/ [https://perma.cc/2EJT-C5FD].

Melania Trump and Prince William of Great Britain, have spoken out against the phenomenon.[10]

It can be hard to quantify cyberbullying given the variety of names that legislators have assigned to the conduct. Terms such as online harassment, online bullying, electronic bullying, and digital bullying appear in the code books. States define the phenomenon differently. The Cyberbullying Research Center defines cyberbullying as the "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[11]

While no one supports one person harassing another person online, many free-speech advocates worry that the push to combat cyberbullying invades the province of protected speech or chills speech that some may find offensive. After all, much speech is in the eye of the beholder, or, as Justice John Marshall Harlan II famously declared in *Cohen v. California*, "one man's vulgarity is another's lyric."[12] Some courts have invalidated overly broad and vague cyberbullying laws. Even though the impetus to combat cyberbullying remains strong, some believe that the push to pass cyberbullying laws fails to take into account fundamental First Amendment principles. One critic refers to it as a "moral panic" that has led to the suppression of free speech.[13]

Part I of this essay examines state cyberbullying laws. These laws vary a lot in terms of language and coverage but this part attempts to group these different state laws into different categories. This section categorizes cyberbullying laws into two main categories—(1) those that treat cyberbullying as a crime and (2) those that address cyberbullying as a violation of a school's code of conduct. Part II of this essay then addresses court decisions that deal with cyberbullying. Once again, this essay examines the topic from both the perspective of (1) criminal law decisions and (2) school law decisions.

I. CYBERBULLYING LAWS

Approximately twenty-five (25) states have cyberbullying statutes.[14] They vary significantly in their verbiage and coverage. Some cyberbullying laws are

10. Jordyn Phillips, *First Lady Melania Trump Speaks Out Against Cyberbullying*, ABCNEWS (Aug. 20, 2018, 9:52 AM), https://abcnews.go.com/Politics/lady-melania-trump-speaks-cyberbullying/story?id=57284988 [https://perma.cc/7DXL-4V9Y]; Dave Burke, *Prince William Attacks Social Media in Passionate Anti-Cyberbullying Speech*, THE MIRROR (Nov. 15, 2018), https://www.mirror.co.uk/news/uk-news/prince-william-kate-middleton-visit-13594700 [https://perma.cc/9EBH-CCPR].

11. *About the Cyberbullying Research Center*, CYBERBULLYING RES. CTR., https://cyberbullying.org/about-us [https://perma.cc/7WMD-WWLY].

12. 403 U.S. 15, 25 (1971); *see also* David L. Hudson, Jr. *Paul Robert Cohen and "His" Famous Free Speech Case*, FREEDOM F. INST. (May 4, 2016), https://www.freedomforuminstitute.org/2016/05/04/paul-robert-cohen-and-his-famous-free-speech-case/ [https://perma.cc/RQT4-BF5Y].

13. ARTHUR S. HAYES, SYMPATHY FOR THE CYBERBULLY: HOW THE CRUSADE TO CENSOR HOSTILE AND OFFENSIVE ONLINE SPEECH ABUSES FREEDOM OF EXPRESSION (2017).

14. *See*, *e.g.*, ALA. CODE § 16-28B-3 (West, Westlaw through Act 2020-38); ARK. CODE ANN. § 5-71-217 (West, Westlaw though 2019 Reg. Sess.); CAL. EDUC. CODE §234.4 (West, Westlaw though Ch. 3 of 2020 Reg. Sess.); CONN. GEN. STAT. ANN. § 10-222d (West, Westlaw through Public Act 20–1); DEL. CODE ANN. tit. 14 §4164 (West, Westlaw through Ch. 236 of 150th Gen. Assemb. (2019–2020));

criminal statutes. Others are rooted in the school environment, requiring school districts to amend their anti-bullying policies to include online bullying.

The laws that criminalize cyberbullying differ greatly in their approach. Some states have amended existing electronic harassment or online harassment laws to include cyberbullying. Others specifically have created a new crime specifically called "cyberbullying."

A. Cyberbullying as a Crime

The initial problem with cyberbullying statutes that criminalize such behavior is a fundamental one—that the definitions of the term cyberbullying appear so broad as to cover quite a bit of speech that is protected by the First Amendment. One scholar opines: "The term 'cyberbullying' does not have an acceptable legal definition and it encompasses a broad spectrum of speech disseminated via electronic communication, ranging from threatening and harassing to annoying, offending, gossiping, and name calling."[15]

Arkansas' law may be the broadest law that criminalizes cyberbullying. After its passage one constitutional law critic called it "the most expansive piece of cyberbullying legislation in the country" and "the only law that criminalizes cyberbullying beyond the school setting, regardless of the age of the speaker or listener."[16]

The law specifically identifies cyberbullying as a term and treats it as an actual crime. The general criminal statute provides:

> A person commits the offense of cyberbullying if:
> **(1)** He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, or harass another person; and
> **(2)** The transmission was in furtherance of severe, repeated, or hostile behavior toward the other person.[17]

FLA. STAT. ANN. §1006.147 (West, Westlaw through 2020 2d Reg. Sess.); GA. CODE ANN. §20-2-751.4 (West, Westlaw through Laws 2020 Act 322); IND. CODE ANN. § 20-33-8-0.2 (West, Westlaw through 2020 2d Reg. Sess.); KAN. STAT. ANN. § 72-6147 (West, Westlaw through 2020 Reg. Sess.); LA. STAT. ANN. §14:40.7 (Westlaw through 2019 Reg. Sess.); ME. REV. STAT. tit. 20-A § 6554 (Westlaw through Ch. 676 of 2019 2d Reg. Sess.); MICH. COMP. LAWS ANN. § 380.1310b (West, Westlaw through P.A.2020, No. 67, 2020 Reg. Sess.); MINN. STAT. ANN. §121A.031 (West, Westlaw through 2020 Reg. Sess.); MO. ANN. STAT. § 160.775 (West, Westlaw through 2019 1st Reg. and 1st Extra. Sess.); NEV. REV. STAT. ANN. § 388.135 (West, Westlaw through 80th Reg. Sess. (2019)); N.H. REV. STAT. ANN. §193-F:3 (Westlaw through Ch. 7 2020 Reg. Sess.); N.Y. EDUC. LAW §11 (McKinney, Westlaw through L.2019 Ch. 758 & L.2020 Ch. 25); N.C. GEN. STAT. ANN. § 14-458.1 (West, Westlaw through 2019 Reg. Sess.), *invalidated by* State v. Bishop, 787 S.E.2d 814 (N.C. 2016); OHIO REV. CODE ANN. §3301.22 (West, Westlaw through File 29 133rd Gen. Assemb. (2019–2020)); OR. REV. STAT. ANN. § 339.353 (West, Westlaw through 2020 Reg. Sess.); TEX. EDUC. CODE ANN. § 37.0832 (West, Westlaw through 2019 Reg. Sess.); WASH. REV. CODE § 28A.300.2851(West, Westlaw through Ch. 92 2020 Reg. Sess.).

15. Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1697 (2015).

16. S. Cal Rose, *From LOL to Three Months in Jail: Examining the Validity and Constitutionality of the Arkansas Cyberbullying Act of 2011*, 65 ARK. L. REV. 1001, 1028 (2012).

17. ARK. CODE ANN. § 5-71-217 (West, Westlaw through 2019 Reg. Sess.).

This law seems to suffer from the two chief tools of constitutional litigators—overbreadth and vagueness. For example, scholars Lyrissa Lidsky and Amanda Ponzon Garcia explain:

> This law suffers from vagueness and overbreadth and is therefore unconstitutional. The law is vague because it fails to put the defendant on notice of the types of electronic communications he or she can engage in without violating the statute and because it gives law enforcement too much leeway to prosecute mere bad manners. The law is overbroad because it sweeps a large swath of clearly protected speech into its purview along with the unprotected speech it is designed, and constitutionally allowed, to prohibit.[18]

How is a person to know exactly when his or her social media post might be considered abusive or harassing to another individual? For example, let's say two people are vigorously debating the prospective candidates for the upcoming 2020 Presidential election. If one person vehemently criticizes another person's political choices, will that be considered abusive? Lidsky and Garcia offer the following trenchant example: "Would emailing a homophobic, racist, or religiously intolerant cartoon or joke to a known 'liberal' trigger the statute?"[19]

The second part of the statute is perhaps even more troubling. It criminalizes "hostile" behavior. If ever a term could be considered amorphous – the term "hostile" certainly qualifies. It has taken an entire body of employment discrimination law to try to unpack the meaning of when certain sexual or racially charged language might create a hostile workplace environment. And those laws impose civil liabilities, not criminal penalties. Lidsky and Garcia correctly point out that "the term 'hostile' is so malleable that it would inevitably lead to selective prosecution; the law therefore allows prosecutors far too much leeway in suppressing unpopular speech or charging unpopular speakers."[20]

Contrast Arkansas' cyberbullying statute with that of a more recent effort by the Michigan legislature, which became effective on March 27, 2019. Michigan's cyberbullying law more narrowly defines the term. It provides:

> (a) "Cyberbully" includes posting a message or statement in a public media forum about any other person if both of the following apply:
> (i) The message or statement is intended to place a person in fear of bodily harm or death and expresses an intent to commit violence against the person.
> (ii) The message or statement is posted with the intent to communicate a threat or with knowledge that it will be viewed as a threat.
> (b) "Pattern of harassing or intimidating behavior" means a series of 2 or more separate noncontinuous acts of harassing or intimidating behavior.

18. Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 714 (2012).

19. *Id.*

20. *Id.* at 716.

> (c) ”Public media forum” means the internet or any other medium designed or intended to be used to convey information to other individuals, regardless of whether a membership or password is required to view the information.[21]

Michigan's cyberbullying statute is much more sensitive to First Amendment concerns, as it defines cyberbullying as a form of a true threat—a recognized categorical exception to the First Amendment free speech clause.[22] The Supreme Court established that true threats are a narrow category of speech not protected by the First Amendment more than fifty years ago in *Watts v. United States*.[23] Many years later, in a cross-burning case, the Court clarified that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[24] There remains uncertainty as to the boundaries of the true threat category.[25]

Florida's cyberbullying statute differs much from that of both Arkansas and Michigan. Its statute provides:

> "Cyberbullying" means bullying through the use of technology or any electronic communication, which includes, but is not limited to, any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, including, but not limited to, electronic mail, Internet communications, instant messages, or facsimile communications. Cyberbullying includes the creation of a webpage or weblog in which the creator assumes the identity of another person, or the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in the definition of bullying. Cyberbullying also includes the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in the definition of bullying.[26]

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21. MICH. COMP. LAWS ANN. §750.411x(6) (West, Westlaw through P.A.2020, No. 61 of 2020 Reg. Sess.).

22. David L. Hudson, Jr., *True Threats*, FREEDOM F. INST. (May 12, 2008), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/true-threats/ [https://perma.cc/JGD5-MVUH].

23. *See* 394 U.S. 705, 708 (1969).

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

25. David L. Hudson, Jr., *50 Years Ago, the Court Enters the True Threats Thicket in* Watts v. United States, FREEDOM F. INST. (May 7, 2019), https://www.freedomforuminstitute.org/2019/05/07/50-years-ago-the-court-enters-the-true-threats-thicket-in-watts-v-united-states/#_ftn42 [https://perma.cc/ZMP9-2UVX].

26. FLA. STAT. § 1006.147(3)(b) (2019).

Suffice it to say that the state laws on cyberbullying are a veritable hodge-podge or a patchwork quilt of different laws. There still are not very many decisions that examine the constitutionality of these statutes, many of which are very recent. However, a cyberbullying statute that criminalizes speech that is merely offensive, annoying or hostile clearly runs afoul of First Amendment principles. Meanwhile, a cyberbullying law moored in the true threat doctrine likely will survive a constitutional challenge.

B. Cyberbullying at School

Many states have cyberbullying laws that are not part of the state's respective criminal code.[27] These states have tackled the problem of cyberbullying by passing laws that specifically refer to the phenomenon on school grounds. For example, New Mexico only recently repealed a law that defined cyberbullying as something specifically tied to the school environment. Its state law provided:

> "[C]yberbullying" means electronic communication that:
> (1) targets a specific student;
> (2) is published with the intention that the communication be seen by or disclosed to the targeted student;
> (3) is in fact seen by or disclosed to the targeted student; and
> (4) creates or is certain to create a hostile environment on the school campus that is so severe or pervasive as to substantially interfere with the targeted student's educational benefits, opportunities or performance.[28]

Laws like the New Mexico law present challenges because it is often difficult to determine when speech creates a hostile workplace environment. As free-speech scholar Eugene Volokh wrote: "There is no fixed rule as to what words or what kinds of speech can create a hostile work environment."[29] In fact, harassment and hostile workplace environment law can tread quite seriously on core political and religious speech.[30]

Some state laws provide that school districts must adopt policies that address both bullying and cyberbullying. For example, Oregon law provides that "Each school district shall adopt a policy prohibiting harassment, intimidation or bullying and prohibiting cyberbullying."[31] Other states have laws that provide schools must address cyberbullying in their codes of conduct but do not define the

27. U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 47–48 (2011), https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf (noting that twenty-seven states have included specific provisions in laws that direct public school districts to address cyberbullying).

28. N.M. STAT. ANN. § 22-2-21(D) (repealed 2019).

29. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1800 (1992).

30. *Id.* at 1801–02.

31. OR. REV. STAT. § 339.356(1) (West, Westlaw though 2020 Reg. Sess.).

term cyberbullying.[32] Still other states require that the department of education maintain a list of resources for parents and school officials to deal with the phenomenon.[33]

Lidsky and Garcia explain that much cyberbullying legislation suffers from a significant problem: "The critical constitutional flaw in much of the new criminal legislation is that, in its attempt to 'eliminate' cyberbullying, it conflates the definition of cyberbullying as a social problem with the legal definition of cyberbullying as a crime, leading to laws that violate the First Amendment."[34]

II. COURT DECISIONS INVALIDATING CRIMINAL ANTI-CYBERBULLYING LAWS

A. Criminal Law Decisions

The push to combat cyberbullying comes with a laudable purpose—the protection of minors. However, some of the laws do not comport with constitutional standards. A classic example comes from a law passed by Albany County, New York. The law defined cyberbullying as follows:

> any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.[35]

Authorities charged high school student Marquan M. with violating the law after he posted on Facebook sexually-charged comments on photos of several classmates. New York's highest court, in *People v. Marquan M.*, determined that the law was way too broad.[36] "The language of the local law embraces a wide array of applications that prohibit types of protected speech far beyond the cyberbullying of children," the court wrote.[37] "On its face, the law covers communications aimed at adults, and fictitious or corporate entities, even though the county legislature justified passage of the provision based on the detrimental effects that cyberbullying has on

32. *See, e.g.*, TENN. CODE ANN. § 49-6-4002(d)(3) (West, Westlaw through 2020 First Reg. Sess. of 111th Gen. Assemb. (stating that a school's code of conduct shall address "[f]ighting, threats, bullying, cyberbullying, and hazing by students").

33. *See* IND. CODE § 20-19-3-11.5 (West, Westlaw through 2020 Second Reg. Sess. of the 12st Gen. Assemb.) ("The department shall maintain a link on the department's Internet web site that provides parents and school officials with resources or best practices regarding the prevention and reporting of bullying and cyberbullying. The resources must include guidance on how to report to law enforcement agencies instances of bullying and cyberbullying that occur off campus.").

34. Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 698 (2012).

35. People v. Marquan M., 19 N.E.3d 480, 484 (N.Y. 2014).

36. *Id.* at 488.

37. *Id.* at 486.

school-aged children."[38] The court also explained that the First Amendment protects much annoying and embarrassing speech and such speech would be criminalized under this Albany County law.[39]

The North Carolina Supreme Court invalidated a similar law in *State v. Bishop*, another case involving a high school student who posted sexually-themed material and comments about a classmate.[40] Robert Bishop was charged and convicted of violating North Carolina's cyberbullying law, which provided: "it shall be unlawful for any person to use a computer or computer network to . . . post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor."[41]

Bishop and Dillon Price were classmates at Southern Alamance High School. Some of Price's classmates, including Robert Bishop, began posting negative information on Price's Facebook page. Some of the comments were of a sexual nature. Prosecutors charged Bishop with cyberbullying.

A jury convicted Bishop of one count of cyberbullying.[42] On appeal, Bishop contended that the statute violated his First Amendment free-speech rights. However, the North Carolina Court of Appeals determined that the statute regulated conduct, not speech.[43] The appeals court explained: "The Cyber-bullying Statute is not directed at prohibiting the communication of thoughts or ideas via the Internet. It prohibits the intentional and specific conduct of intimidating or tormenting a minor. This conduct falls outside the purview of the First Amendment."[44] Furthermore, the intermediate appellate court determined that any impact on speech was incidental rather than direct.[45]

Bishop appealed to the North Carolina Supreme Court. The state high court first rejected the idea that the cyberbullying statute regulated conduct instead of speech. The high court explained that the statute clearly prohibited online posting of particular subject matter and, as such, regulated speech.[46] "Posting information on the Internet—whatever the subject matter—can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long protected by the First Amendment," the court explained.[47]

Next, the state high court applied the content discrimination principle—perhaps the leading doctrinal principle in First Amendment law.[48] Under this

38. *Id*. at 486.

39. *Id*. at 487.

40. 787 S.E.2d 814 (N.C. 2016).

41. *Id*. at 815 (quoting N.C. GEN. STAT. § 14-458.1(a)(1)(d) (West, Westlaw though 2019 Reg. Sess.).

42. *Id*. at 816.

43. State v. Bishop, 774 S.E.2d 337, 343 (N.C. Ct. App. 2015).

44. *Id*.

45. *Id*. at 344.

46. *Bishop*, 787 S.E.2d at 819.

47. *Id*. at 817.

48. *See, e.g.*, Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1428 (2017) (describing the content discrimination principle as the "central tenet" of First Amendment free-speech jurisprudence); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) (describing the content discrimination principle as "the central inquiry" in First Amendment law); Genevieve Lakier, Reed v. Town of Gilbert, Arizona *and the Rise of the Rise of the Anticlassificatory First Amendment*, 2016

principle, content-based laws—or laws which regulate speech based on their subject matter or content—are subject to strict scrutiny, while content-neutral laws are subject to only intermediate scrutiny.[49] Content-based laws are presumptively unconstitutional.[50]

The North Carolina high court determined that the law was clearly content based because it defined and criminalized speech based on its subject matter.[51] The court wrote: "The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication."[52] Because the law was content-based, the court applied strict scrutiny. While the state had a compelling government interest in protecting minors, the state high court determined that the law was not narrowly tailored. The court was troubled by the fact that "the statute contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting."[53] The court concluded that while the state had a laudable purpose "North Carolina's cyberbullying statute 'create[s] a criminal prohibition of alarming breadth.'"[54]

North Carolina's high court noted that the law "contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting."[55] The court also explained that the breadth of the law meant that it could cover the "posting [of] *any* information about *any* specific minor."[56]

These decisions show that cyberbullying laws can violate core First Amendment principles. Sometimes the laws are simply too broad or too vague, either sweeping within their ambit of protected speech or leaving would-be speakers at a loss for when their speech might cross the line from protected expression to unprotected cyberbullying. Other statutes use terms that are equally troubling such as "hostile" or "annoying." Many of the cyberbullying laws are not geared toward prohibiting only those types of speech that fall within certain unprotected categories of expression, such as true threats.

B. School Decisions

The issue of cyberbullying often arises in public schools. As mentioned earlier, many states have laws that require public school districts to address

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SUP. CT. REV. 233, 233 (2016) ("The distinction between content-based and content-neutral regulations of speech is one of the most important in First Amendment law."); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) (calling the content discrimination "[o]ne of the most important" in First Amendment law and a principle of "growing prominence").

49. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1351– 52 (2006).

50. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

51. *See Bishop*, 787 S.E.2d at 819.

52. *Id*.

53. *Id*. at 820.

54. *Id*. at 821 (quoting United States v. Stevens, 559 U.S. 460, 474 (2010)).

55. *Id.* at 820.

56. *Id*. at 821.

cyberbullying. Public school districts may find that a student has engaged in cyberbullying that violates the school's code of conduct. Such action by a student may not rise to the level of a criminal act but it can still violate school rules and lead to suspensions or even expulsions.

The key question is what authority public school officials have to punish students for off-campus, online speech. The U.S. Supreme Court has not answered the question, leaving school officials in an area of significant uncertainty.[57] The leading student-speech case remains *Tinker v. Des Moines Independent Community School District*, a 1969 decision in which the Supreme Court ruled that public school officials violated the free-speech rights of several students by suspending them for wearing black peace armbands.[58] In *Tinker*, the Court reasoned that public school officials cannot punish students for their expression unless they can reasonably forecast that the student speech will cause a substantial disruption of school activities or invade the rights of others.[59]

The dominant test from *Tinker* is the so-called substantial disruption standard.[60] Thus, school officials generally would have to point to something that occurs on school grounds that results from a student's cyberbullying. In other words, there must be a nexus, or connection, between the off-campus online speech and what occurs on campus. James C. Hanks, author of *School Bullying: How Long Is the Arm of the Law?*, writes that "courts thus far are saying 'Show me the nexus.'"[61]

The federal circuit courts of appeals appear divided on the question. Many circuits will apply the *Tinker* "reasonable forecast of substantial disruption" test if they determine that there is a close enough connection between the online bullying and ramifications at school. For example, the Fourth Circuit Court of Appeals ruled in *Kowalski v. Berkeley County Schools* that public school officials in West Virginia could punish a student for violating the school's policy against "harassment, bullying, and intimidation" for creating a web page devoted to mocking another student.[62] The appeals court reasoned that there was a "sufficient strongly" nexus or connection between the student's web posts and bullying that occurred on school grounds.[63]

Similarly, the Second U.S. Circuit Court of Appeals ruled in *Doninger v. Niehoff* that public school officials in Connecticut were entitled to qualified immunity even though they punished a student for blogging on her own computer off school grounds that "jamfest [had] been cancelled due to the douchebags in

57. *See* David L. Hudson Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 OR. L. REV. 621, 622 (2012).

58. 393 U.S. 503 (1969).

59. *Id.* at 513.

60. *See* David L. Hudson Jr., *Substantial Disruption Test*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1584/substantial-disruption-test [https://perma.cc/FBW9-497E]; *see also* David L. Hudson Jr., *The Leading Student-Speech Standard: Reasonable Forecast of Substantial Disruption*, NAT'L ASS'N OF SCH. RESOURCE OFFICERS, Fall 2014, https://www.nasro.org/clientuploads/legal%20articles/The-Leading-Student-Speech-Standard-by-David-Hudson-Jr-JOSS-Fall-2014.pdf [https://perma.cc/6DYQ-72H4].

61. JAMES C. HANKS, SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW 100 (2d ed. 2016).

62. 652 F.3d 565, 569 (4th Cir. 2011).

63. *Id.* at 573.

central office."[64] Instead, the appeals court reasoned that it was "reasonably foreseeable that [the student's] post would reach school property and have disruptive consequences there."[65]

However, the Third U.S. Circuit Court of Appeals ruled in *Layshock v. Hermitage School District* that public school officials in Pennsylvania violated the First Amendment when they punished a high school student for creating a fake MySpace profile of his principal and mocking him.[66] "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities," the court wrote.[67]

The lack of uniformity in these cases is noticeable and a real problem for students, parents, teachers, and school officials. One legal scholar has identified at least five different approaches to the problem of determining what authority a public school has to regulate off-campus speech:

> (1) no authority to regulate off-campus speech; (2) little to no distinction between off-campus and on-campus expression; (3) requiring a sufficient nexus between the off-campus expression and the school environment; (4) requiring that the online speech creator reasonably forecast that the student speech reach the school environment; and (5) limiting school officials' authority to act when there is a clear and identifiable threat.[68]

Most courts require some sort of nexus or connection between the student's off-campus, online speech and events that occur at school. The Ninth U.S. Circuit Court of Appeals recently explained the three relevant factors that it considers in determining when school officials can punish or regulate student off-campus expression: "(1) the degree and likelihood of harm to the school caused or augured by the speech; (2) whether it was reasonably foreseeable that the speech would reach and impact the school; and (3) the relation between the content and context of the speech and the school."[69]

While it appears clear that courts will continue to use the *Tinker* case as the lodestar case, what is less clear is which part of *Tinker* courts will rely upon to justify restrictions of student's harmful expression. While most courts still use the substantial disruption test, in the era of cyberbullying, more courts will return to Tinker's second prong—the invasion of the rights of others.[70]

The unsettled nature over the reach of school official's authority to regulate students' off-campus, online expression remains a pressing issue in First

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64. 642 F.3d 334, 340 (2d. Cir. 2011).

65. *Id.* at 348.

66. 650 F.3d 205 (3rd Cir. 2011).

67. *Id.* at 216.

68. Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 UTAH L. REV. 831, 848.

69. McNeil v. Sherwood Sch. Dist., 918 F.3d 700, 707 (9th Cir. 2019) (citations omitted).

70. *See* David L. Hudson Jr., *How Free is Student Speech?*, FREEDOM F. INST. (May 7, 2009), freedomforuminstitute.org/2009/05/07/how-free-is-student-speech/ [https://perma.cc/DH4M-4MAX].

Amendment law. But, there is another unanswered question in student speech jurisprudence that could prove just as important to cyberbullying and free speech. This question concerns the reach of Tinker's forgotten test—the invasion of the rights of others.[71]

Recall that in *Tinker* the Supreme Court not only ruled that school officials could prohibit student speech when it posed a substantial disruption of school activities, but also when it impinges on the rights of other students.[72] However, the Supreme Court has never explained when student speech impinges or invades the rights of other students.

Some lower courts have examined this prong of *Tinker* and a few have even used the standard to justify the restriction of student speech. A prime example is the Ninth Circuit's decision in *Harper v. Poway Unified School District*.[73] High school Tyler Harper wore t-shirts to his public school in response to his school sanctioning a "Day of Silence" by the school's Gay-Straight Alliance. Harper wore a t-shirt with the message "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.[74] The next day he wore a t-shirt with the message "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED."[75]

School officials told him the t-shirts were "inflammatory" and created a "negative and hostile environment" for others.[76] While he was not suspended, Harper had to remain in the principal's office for the day and could not wear the t-shirts to school anymore.[77] He filed a federal lawsuit, alleging a violation of his First Amendment and other rights.[78] A federal district court dismissed some of his claims but not his First Amendment claims.[79] On appeal, a three-judge panel of the Ninth U.S. Circuit Court of Appeals reversed and ruled in favor of the school officials.[80]

The Ninth Circuit determined that Harper's t-shirts invaded the rights of others students "in the most fundamental way."[81] "Being 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," the panel wrote.[82]

The appeals court emphasized that gay and lesbian students were vulnerable to abuse from other students and Harper's t-shirts created a hostile environment for gay and lesbian students.[83] The panel wrote that "the School had a valid and lawful

71. *See id.*
72. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).
73. 445 F.3d 1166 (9th Cir. 2006).
74. *Id.* at 1171.
75. *Id.*
76. *Id.* at 1172.
77. *Id.*
78. *Id.* at 1173.
79. *Id.*
80. *Id.* at 1192.
81. *Id.* at 1178.
82. *Id.*
83. *Id.* at 1178–79.

basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn."[84]

The Eleventh U.S. Circuit Court of Appeals utilized *Tinker's* invasion of the rights of others to uphold the expulsion of a college student who sent sexually harassing text messages to a female classmate.[85] He sent her a variety of vulgar texts and also pictures when she declined his advances to date.[86] The Eleventh Circuit explained that the student's unwanted texts and "persistent harassment" of a female classmate invaded "her rights 'to be secure and let alone.'"[87]

The student argued that the college had no authority to discipline him for his text messages because he sent them all while he was off-campus.[88] The appeals court explained: "But *Tinker* teaches that 'conduct by the student, in class or out of it' that results in the 'invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[89]

The decision is significant for several reasons, including: (1) the Eleventh Circuit applied the K-12 precedent of *Tinker* and applied it on the college level; (2) the appeals court emphasized and revitalized the forgotten prong of *Tinker* that is focused on the invasion of the rights of others; and (3) that college officials can punish students for off-campus behavior.[90]

Author James C. Hanks asks the question in a similar fashion: "Will the courts adopt a broader standard for regulation of student conduct based on the 'invasion of the rights of others' principle enunciated in Tinker?"[91] He points out that widespread use of the "invasion of the rights of others" standard "would dramatically change the judicial discourse concerning bullying that is based on speech."[92]

CONCLUSION

It seems likely that the push to combat bullying and cyber-bullying will continue, particularly if more tragic suicides of young persons occur at least in part from harassment by others. This likely means that there will be cases involving cyberbullying—both criminal and school-code-of-conduct cases. While some of the early statutes appear to have been written too broadly and without sufficient clarity, some of the newer statutes now appear to comport with at least more constitutional standards. However, there is still an alarming degree of uncertainty as to the application of some of these cyberbullying statutes.

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84. *Id*. at 1180.

85. Doe v. Valencia College, 903 F.3d 1220 (11th Cir. 2018).

86. *Id*. at 1225–26.

87. *Id*. at 1230 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

88. *Id*. at 1231.

89. *Id.* (quoting *Tinker*, 593 U.S. at 513).

90. David L. Hudson Jr., *Federal Appeals Court Upholds College's Punishment of Student Who Sent Lewd Texts*, FREE SPEECH CTR. (Sept. 25, 2018), https://www.mtsu.edu/first-amendment/post/182/federal-appeals-court-upholds-college-s-punishment-of-student-who-sent-lewd-texts [https://perma.cc/428A-5MCH].

91. HANKS, *supra* note 62, at 103.

92. *Id.* at 104.

The problem becomes more exacerbated at the public school level when school administrators attempt to punish students for their off-campus, online expression. First, it is questionable exactly how far the arm of school authority extends to off-campus social media expression. Second, it often is difficult for school administrators to show a clear nexus or connection between the off-campus student expression and something that happens on school grounds. Third, there is a significant amount of uncertainty as to when exactly some student speech "invades" or "infringes" the rights of other students.