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SURPASSING DEMANDS FOR LUNCH MONEY AND PLAYGROUND BRAWLS: THE ARRIVAL OF CYBER-BULLYING, THE PROBLEMS IT CAUSES, AND POTENTIAL SOLUTIONS

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# SURPASSING DEMANDS FOR LUNCH MONEY AND PLAYGROUND BRAWLS: THE ARRIVAL OF CYBER-BULLYING, THE PROBLEMS IT CAUSES, AND POTENTIAL SOLUTIONS

## INTRODUCTION

Cyber-bullying is a recent phenomenon occurring among today's youth. With the development of cellular telephones equipped with text messaging and picture mail and the advent of social networking websites and instant messaging, schoolchildren possess numerous tools that allow them to harass, defame, stalk, embarrass, and wreak havoc on their classmates. As cyber-bullying infiltrates the school system and overflows from the digital realm on to school campuses, schools, parents, and legislators have become increasingly concerned about the adverse effects of cyber-bullying and increasingly motivated to correct the problem.[1]

Apprehending and punishing cyber-bullies, however, is difficult. Although it may seem logical for schools to punish cyber-bullies when their conduct affects their classmates during school hours, constitutional free speech rights are affected when schools restrict student speech.[2] Additionally, the extent of civil and criminal liability imposed on cyber-bullies and other third parties is unclear.[3] As a result, it is difficult for children, parents, schools, law enforcement, and legislators to take action against cyber-bullies.

This article begins by focusing on the evolution of cyber-bullying. The first section briefly recounts the history of bullying, defines cyber-bullying, and provides examples and statistics to illustrate the pervasiveness of the problem. Then, the second section explores the constitutionality of punishing cyber-bullies at school, recent relevant jurisprudence, and some related public policy concerns. After examining how courts have addressed cyber-bullying, the third section surveys some recent federal, state, and international attempts to curtail cyber-bullying through legislation and the fourth section examines the potential civil and criminal

liability of cyber-bullies, parents, schools, and websites. Finally, this article concludes with a comprehensive plan provides recommendations for federal legislation, state legislation, courts, schools, parents, and students.

## I. OVERVIEW AND EVOLUTION OF CYBER-BULLYING

### *A. The Definition of Cyber-Bullying*

Although bullying has existed for centuries, researchers have only recently begun studying it.[4] Bullying generally involves a wide range of physical, verbal, or emotional conduct that can affect an individual in a variety of ways.[5] Although there is significant academic debate regarding whether it is possible define "bullying,"[6] Dan Olweus, commonly regarded as the father of the study of bullying, believes three elements are common in most bullying: (1) intent on the behalf of the bully, (2) an imbalance of power between the bully and victim, and (3) repeated "bullying" behavior.[7]

Olweus believes that bullying is more serious and prevalent today than ten to fifteen years ago.[8] In less than a decade, cyber-bullying has (d)evolved and perverted formerly innocent forms of media and technology ranging from email, instant messaging, and websites to text and picture messaging on cellular telephones.[9] Its rise is likely attributable to its improved effectiveness compared to traditional bullying. Unlike traditional bullies, cyber-bullies use the Internet as a shield to disguise their identity and achieve a level of anonymity that empowers them to harass, defame, and intimidate their peers.[10] Children who would normally refrain from publicly bullying a classmate find it easier to harass someone anonymously behind a computer at home.[11]

Cyber-bullying is also preferable to traditional bullying because it can happen anywhere and at any time.[12] It is not limited to after-school confrontations or mornings at the bus stop –

rather, cyber-bullies can torment classmates at night before bed or on weekends during sleepovers. Furthermore, the speed with which information is transmitted in the digital age has also made cyber-bullying more effective.[13] Cyber-bullies can communicate to a large audience in a very short amount of time[14] and adults often are less skilled at using the technologies that their cyber-bullying children utilize.[15]

Thus, cyber-bullying is defined by its involvement of "a child, preteen, or teen [who] 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."[16]

### *B. Illustrative Examples of Cyber-Bullying*

Commentators generally group the actions of cyber-bullies into (1) direct attacks, or (2) cyber-bullying by proxy.[17] Direct attacks take many forms. For example, schoolchildren commonly harass classmates through instant messages, text messages, picture messages, blogs, websites, and e-mail.[18] Specifically, on instant messaging services, students have been caught sending hateful messages and death threats, assuming classmates' identities, stealing passwords, and changing profiles to include racist, sexual, and other inappropriate content.[19] In some particularly cruel cases, cyber-bullies have logged onto hate groups' message boards and posted provocative messages that include the victim's personal contact information.[20]

Social networking websites are also popular tools for cyber-bullies. Cyber-bullies have been caught using websites such as MySpace,[21] Xanga,[22] and Facebook[23] to manufacture fake profiles that embarrass and defame their classmates, and post polls that ask questions such as "Who is the ugliest kid at school?"[24] or "Who is the biggest slut?"[25]

In other situations, cyber-bullies have taken advantage of the text messaging and picture messaging capabilities of cellular telephones and initiated "text wars" or "text attacks" that

involve sending thousands of text messages to cause a peer's cell phone bill to skyrocket.[26] Worse yet, some cyber-bullies have invaded intimate, personal spaces such as locker rooms and bathrooms and used camera phones to videotape classmates changing or showering and then mass-distribute the video via cellular phone or on social networking websites or YouTube.[27]

Cyber-bullying by proxy occurs when a cyber-bully "gets someone else to do their dirty work."[28] Some believe cyber-bullying by proxy is more dangerous than a direct attack because it can involve people who are unaware they dealing with a cyber-bully who is a minor.[29] Websites can become accomplices to cyber-bullying during "warning wars" when children take advantage of security systems that websites create to detect violations of their usage policies.[30] For example, a cyber-bully might falsely report that the intended victim is verbally abusing the cyber-bully, ultimately prompting the victim to lose Internet access.[31] Other times, cyber-bullies implicate victims or their parents. For example, a cyber-bully may lead the victim's parents to believe that the victim is a cyber-bully, thus causing the parents to punish the victim.[32] Or, if the cyber-bully steals the victim's passwords and accesses the victim's online accounts, the bully can impersonate the victim online.[33] A particularly egregious example of this cyber-bullying tactic is when the bully impersonates the victim in known "child molester chat rooms" and provides personal contact information about the underage victim.[34]

Although the foregoing examples are informative, they are generalized and impersonal. The devastating impact of cyber-bullying is much more apparent in actual, real-life examples. Cyber-bullying victims suffer from "anxiety, depression, shame, destruction of self-confidence and self-esteem, school phobia, and failing grades."[35] Even worse, children have killed each other or even committed suicide as a result of cyber-bullying.[36] For example, a thirteen-year-old boy in Vermont received innumerable instant messages accusing him of being a homosexual.[37]

Over time, he became deeply depressed and ultimately killed himself.[38] Sadly, cyber-bullying is a real problem that can cause significant damage.

### *C. A Statistical Snapshot of the Current State Cyber-Bullying*

Statistics reveal the pervasiveness of cyber-bullying and its recent growth. Since 2003, cyber-bullying has been increasingly discussed on the Internet.[39] In 2004, a non-profit organization concerned with Internet safety – specifically cyber-bullying – conducted a cyber-bullying survey of 1,500 middle school students.[40] The survey revealed that 42% of students were bullied online, 53% admitted to saying mean or hurtful things online, and 58% never told their parents or another adult about the incidents.[41]

More recently, the Pew Internet & American Life Project published results of a cyber-bullying research project that involved 886 teenagers.[42] Although 67% of the teenagers believed that bullying occurred offline more often than online, 32% of the group had been cyber-bullied.[43] The Pew study also found that some specific groups of teenagers were more susceptible to cyber-bullying – specifically, girls are more likely than boys to be victimized.[44] Moreover, social networking website users were discovered to be more likely to encounter cyber-bullying.[45] In addition to identifying cyber-bullies based on age and gender, the survey also revealed that 15% of teens had private communications forwarded without their consent and 13% had suffered from rumors that were spread online.[46]

Adults' awareness of cyber-bullying has also been studied. The National Center for Missing and Exploited Children conducted a survey in 2005 that analyzed parental supervision of teenage computer use.[47] The survey revealed that that 51% of parents did not have or know about Internet monitoring software, 42% did not monitor their teenager's behavior in chat rooms and on instant messenger, and 30% allowed their teenagers to use computers in private rooms,

such as bedrooms.[48] The lack of parental supervision is particularly problematic considering that a survey compiled in 2006 revealed that 44% of preteens and 70% of teens who had been cyber-bullied received the cyber-bullying content at home.[49]

These statistics are alarming considering the consequences of cyber-bullying and the ease with which a cyber-bully can rapidly transmit rumors and gossip over the Internet.[50]

## II. REGULATING CYBER-BULLYING

### *A. The First Amendment's Impact on Educational Institutions*

Because children spend a significant amount of time at school, teachers and various other school officials frequently become entangled in situations that originate on-campus *and* off-campus. Responding to disruptive situations and disciplining students, however, can be dangerous because schools are deemed to be government actors and thus prohibited from unlawfully infringing students' constitutional rights.[51] Historically, *Tinker v. Des Moines Independent School District*,[52] *Bethel School District No. 403 v. Fraser*,[53] and *Hazelwood School District v. Kuhlmeier*[54] have been regarded as the three foundational cases that define the extent to which public schools can regulate student speech.[55] However, unlike previous cases in which schools restricted student speech and the court abided by clear, established standards, whether schools can punish off-campus cyber-bullying is unclear.[56] Worse yet, some fear that courts will avoid addressing the constitutional implications of cyber-bullying regulation because they claim that cyber-bullying is merely another form of traditional bullying and thus an "age-old problem" without a solution.[57]

#### 1. *Tinker v. Des Moines Independent School District*

*Tinker* involved a small group of high school students who wore black armbands to school to protest the Vietnam War.[58] In anticipation of the protest, the school's principal

adopted a policy that permitted the school to suspend students who refused to remove their armbands while at school.[59] Predictably, the students refused to shed their armbands and were consequently suspended until they agreed to return to school without an armband.[60]

As a result of the suspensions, the students' parents filed claims against the school under 42 U.S.C. § 1983 to enjoin the school from punishing their children.[61] To the parents' dismay, the District Court found that the school's actions were reasonable to prevent disturbances and maintain a disciplined environment.[62] The District Court's findings were affirmed on appeal.[63]

The United States Supreme Court, however, disagreed.[64] The Court declared that it has unmistakably held for fifty years that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[65] Although the Court acknowledged the importance of schools' rights to control the conduct of students, it did not believe that the students' silent, passive protest interfered with the school's work *or* the rights of other students.[66] The Court reversed the decision below, chastised the school for acting on "undifferentiated fear or apprehension of disturbance,"[67] and ultimately created a test that permits schools to restrict speech only if the student's speech either (1) materially and substantially interfered with the school's operations or disciplinary rules, or (2) collided with the rights of other students.[68]

2. *Bethel School District No. 403 v. Fraser*

Similar to *Tinker*, *Fraser* involved a public school student who was suspended and prohibited from speaking at his high school graduation after he attended a school-sponsored educational assembly during school hours and delivered a speech that contained a graphic, sexual, extended metaphor.[69] The student's father filed a lawsuit under 42 U.S.C. § 1983 and alleged, *inter alia*, that the school violated his son's First Amendment free speech rights.[70] The

District Court agreed with the father and enjoined the school from punishing his son.[71] The school appealed, but the Ninth Circuit Court of Appeals affirmed the decision below, holding that *Fraser* was indistinguishable from *Tinker* and rejecting the school's contention that the conduct disrupted the educational process.[72]

The United States Supreme Court, however, believed that the passive, political expression in *Tinker* was distinguishable from the graphic, sexual speech in *Fraser*.[73] Reversing the decision below, the Court reiterated that the speech in *Tinker* was specifically protected because it did *not* interfere with the school's work or students' rights[74] and that schools have the authority and discretion to determine the level of conduct that crosses the boundary of civility and becomes lewd, indecent, or offensive.[75] Thus, the Court held that it was "perfectly appropriate" for the school to punish conduct that "is wholly inconsistent with the 'fundamental values' of public school education."[76]

3. *Hazelwood School District v. Kuhlmeier*

In *Hazelwood*, a high school journalism class attempted to publish articles that discussed their classmates' experiences with teenage pregnancy and the impact of other students' parents' divorces.[77] Prior to publication, the school's principal reviewed the paper and unilaterally deleted the pregnancy and divorce articles because he believed that they were too controversial to be published in a school setting.[78]

Similar to *Tinker* and *Fraser*, the students filed a lawsuit and alleged that their First Amendment rights were violated.[79] The District Court declared that the school could restrain student speech "to avoid the impression that [the school] endors[ed] the sexual norms of the subjects" and to protect the privacy of the students mentioned in the divorce article.[80] Significantly, the District Court believed that the school acted within its rights because the

newspaper was the product of a journalism class and was entirely school-funded.[81] The Eighth Circuit Court of Appeals disagreed, however, holding that the student newspaper constituted a "public forum" in which the students enjoyed traditional constitutional protections unless the school could justifiably censor the speech under *Tinker*.[82] The Eighth Circuit found no evidence that the articles would have created the disorder, disruptions, or violations specified in *Tinker*.[83]

Ultimately, the United States Supreme Court reversed the Eighth Circuit's holding.[84] Citing *Tinker* and *Fraser* intermittently, the Court concluded that the school-sponsored aspect of the speech warranted the creation of a new standard.[85] Because the school exercised significant editorial and economic control over the school newspaper, the Court believed that the school could not only permissibly "disassociate itself . . . from speech that would substantially . . . impinge upon the rights of other students, but also from speech that is . . . biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[86] Accordingly, the Court held that *Tinker* does not apply when the restricted student speech is school-sponsored.[87]

4. Reconciling *Tinker*, *Fraser*, and *Hazelwood*

Although *Tinker*, *Fraser*, and *Hazelwood* each involved some form of on-campus expression[88] and are recognized for establishing the standards that define whether schools can regulate and restrict student speech,[89] the three cases are distinguishable and applied different standards. First, under *Tinker*, student speech that is on-campus and political is protected unless the school provides evidence of a reasonable belief that the student's behavior will substantially and materially disrupt school operations or infringe the rights of other students.[90] In *Fraser*, the prohibited speech was not academic or intellectual, but graphic and sexual.[91] Unlike *Tinker*, where the student speech was ultimately protected, *Fraser* held that schools could regulate inappropriate, offensive speech that challenges or undermines the school's fundamental values

and operations.[92] Thus, courts are more likely to protect academic, intellectual expressions[93] than speech that is overtly sexual, graphic, offensive, lewd, or indecent.[94]

*Hazelwood* is unlike *Tinker* and *Fraser* because it involved student speech that was school-sponsored and school-funded.[95] The *Hazelwood* court departed from *Tinker* because it did not believe that schools should be required to use their resources to facilitate student speech that is fundamentally inconsistent with their values and objectives.[96] Thus, at the outset, *Hazelwood* diverged from *Tinker* and created a lenient, school-friendly standard that applies to scenarios that involve either school-sponsored or school-funded student speech or activities.

### *B. Recent School Speech Jurisprudence*

In the wake of *Tinker*, *Fraser*, and *Hazelwood*, courts have relied on varying combinations of the three standards in student speech cases and the United States Supreme Court has reviewed only one other student speech case since *Hazelwood*: *Morse v. Frederick*.[97]

*Morse* involved a student who was suspended after he displayed a banner that read "BONG HiTS 4 JESUS" during a school-sponsored activity during school hours.[98] Although the event was off-campus, the Court believed that the student "[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."[99] After the student was suspended, he filed a lawsuit alleging First Amendment violations.[100]

The District Court found that the school did not violate the student's First Amendment rights and that school officials not only had the authority, but a moral obligation to prevent the dissemination of messages that promote illegal drug use.[101] The Ninth Circuit Court of Appeal, however, disagreed.[102] The Ninth Circuit buttressed its reversal of the District Court on the

school's failure to prove that the student's speech – albeit promoting marijuana use – caused a substantial disruption at school under *Tinker*.[103]

The Supreme Court ultimately reversed the Ninth Circuit's decision. The Court explained that *Fraser* stood for two principles: (1) that public school students' rights are not "automatically coextensive" with adults, and (2) that *Tinker*'s standard is not absolute because the Court diverged from it in *Fraser*.[104] The Court also distinguished *Hazelwood* as another example of how *Tinker* is not the only standard that applies to student speech cases.[105] Yet, despite the Court's discussion of the three seminal decisions, it did not expressly base its decision on any of them.[106] At the most, the decision fits within *Tinker* because the Court noted that the promotion of drug abuse in *Morse* was so "serious and palpable" that the prohibition of the student's speech was "well beyond an abstract desire to avoid controversy."[107] The Court dismissed arguments that *Fraser* was dispositive because it believed solely justifying the school's conduct under *Fraser* would "stretch [it] too far."[108] The Court did not want *Fraser* to be "read to encompass any speech that could fit under some definition of offensive"[109] because various types of controversial speech[110] could technically offend someone. Thus, the Court ultimately upheld the disciplinary measures imposed on the student[111] without altering the analytical framework established in *Tinker*, *Fraser*, and *Hazelwood*.[112]

In the midst of *Morse*, several federal and state cases have grappled with student speech restrictions. Commentators have observed that most courts have based their decisions on whether the student's conduct was on-campus or off-campus.[113] In some cases, courts ruled against the school because it failed to satisfy the *Tinker* standard and provide evidence of a substantial on-campus disruption stemming from the student's speech.[114]

Other cases have specifically addressed student Internet speech. Earlier this year, the United States District Court for the Western District of Pennsylvania decided a case involving a student who used his grandmother's computer to create an online parody profile of his high school's principal.[115] The fictitious profile was replete with vulgar, offensive content about the principal.[116] Although the school accused the student of disrupting school operations,[117] the court believed that the school did not establish a "sufficient nexus between [the student's] speech and a substantial disruption of the school environment" to justify the school's actions.[118] Specifically, the court found that the disruptions were minimal – no classes were cancelled, no widespread panic ensued, there was no violence among students, and no other students were disciplined.[119] Rather, the court thought that *Tinker* warranted a "far more boisterous and hostile environment."[120] *Layshock* not only demonstrates the continued relevance of *Tinker*, but also the high evidentiary threshold that schools must satisfy to justify student speech restrictions.

In contrast to *Layshock*, proponents of school rights in student Internet speech cases favor the rare standard espoused in *J.S. v. Bethlehem Area School District*.[121] In *J.S.*, a student created a website at home that featured "derogatory, profane, offensive, and threatening comments . . . pictures, animation, and sound clips" about his math teacher and principal.[122] The court analyzed whether a "sufficient nexus [existed] between the website and the school campus to consider the speech as occurring on campus" to qualify the case for the traditional on-campus speech standards.[123] Because the off-campus website had been accessed on campus, specifically targeted students and school officials, and caused disruptions on campus, the court believed a sufficient nexus existed to justify applying *Tinker* and *Fraser*.[124] The court held that *Fraser* and the disruptions stemming from the student's website justified the punishment that the student

received.[125] The *J.S.* court noted that although *Tinker* requires more than a "mild distraction or curiosity created by the speech, complete chaos is not required."[126]

Overall, irrespective of the results of *Layshock* and *J.S.*, both cases provide examples of how a "sufficient nexus" test can subject off-campus speech to on-campus standards for the purposes of applying either *Tinker* or *Fraser*. Though few cases have followed the "sufficient nexus" test,[127] it is a glimpse of hope for schools to punish cyber-bullies whose off-campus, online activities overflow from the digital realm and cause on-campus disruptions.

### *C. Whether Existing School Speech Standards Apply to Cyber-Bullying*

Despite the consistent citation of *Tinker*, *Fraser*, and *Hazelwood* in innumerable student-speech cases over the last forty years, the applicability of these standards to student speech on the Internet – and more importantly, cyber-bullying – is unclear.[128] Cyber-bullying often occurs after school hours and off-campus, which poses significant hurdles to schools becoming involved.[129]

Thus, a common objection to applying the existing standards to cyber-bullying is that off-campus Internet activities are definitionally *not* on-campus and thus subject to the school's disciplinary measures.[130] This argument has been referred to as the "on-campus, off-campus distinction"[131] or the "geographic distinction."[132] Proponents of the geographic distinction simplistically insist that off-campus conduct does not disrupt the school environment.[133]

But blindly adhering to the geographic distinction is problematic. First, the Internet does not fit within traditional geographic definitions.[134] Unlike an off-campus playground that students visit after school, the Internet can be accessed anywhere and at any time.[135] Furthermore, the Internet is electronic; it is not a physical space.[136]

The geographic distinction is also unreasonable because it ignores the relationships between the parties involved and the overall context of the communications.[137] Not only does the conduct often stem from interactions and relationships at school, but the harm that cyber-bullies cause is often felt on-campus *and* off-campus. As a result of cyber-bullying, some students' grades suffer, while others require additional attention from teachers, seek counseling during school hours, or skip school altogether.[138] In these situations, the educational environment is undermined, students are distracted, and schools are forced to devote otherwise limited resources to address the fallout of cyber-bullying during school hours.[139]

In addition to the geographic fallacy imposed on student Internet conduct, it is arguable that *Tinker* and *Fraser* apply to student conduct in general and not *only* on-campus student conduct. Although *Tinker* and *Fraser* involved disputes stemming from on-campus disputes, neither decision expressly holds that it is limited solely to on-campus student speech. Rather, this geographic limitation has been assumed and imposed from the facts of the cases. In fact, in *Tinker*, the Court explains that student conduct in *or* out of the classroom that materially disrupts class or invades other students' rights is *not* protected by the First Amendment.[140] Therefore, it is arguable that *Tinker* might permit a school to punish a cyber-bully's off-campus conduct if it materially disrupts classes and substantially infringes other students' safety and right to learn.

Additionally, *Fraser* is even more relevant to cyber-bullying than *Tinker*. Because cyber-bullying frequently involves immature, graphic, vulgar, and indecent conduct, it involves student conduct similar to the speech that was punished in *Fraser*. Ignoring the geographic distinction of the speech, conduct that is commonly classified as cyber-bullying would presumably fit within *Fraser*'s holding that schools can punish vulgar and lewd speech that undermines the school's basic educational mission.[141]

Ultimately, the ideal solution would be to eliminate the geographic distinction in cyber-bullying cases. The goal is not to classify cyber-bullying as "on-campus" to bring it within *Tinker*, but to allow it to entirely escape the geographic classification. Automatically assuming that schools do not have any authority or influence over off-campus Internet conduct completely prevents schools from addressing foreseeable problems and resolving ongoing bullying.[142] Furthermore, it not only ignores the borderless nature of the Internet, but the boundless damage that cyber-bullying causes; a teenager who is harassed online feels pain in the real world – not only on the Internet.

Therefore, a modified *Tinker* standard should apply to cyber-bullying cases. If the cyber-bully's conduct materially disrupts on-campus activities and substantially invades other students' rights during school hours, the school should be permitted to step in and discipline the troublesome cyber-bully. It is harmful to the students to prevent the school from becoming involved merely because the on-campus disruption derived from off-campus electronic communications. Therefore, schools should have the right to punish cyber-bullies when their actions "colli[de] with the rights of other students to be secure and to be let alone."[143] Schools should be prepared to justify their actions and prove that an actual disruption occurred or was reasonably foreseeable because *Tinker* disfavored discipline based on mere "undifferentiated fear or apprehension of disturbance."[144] In some ways, this test follows the same logic as the "sufficient nexus" test employed in *J.S.*[145] Because cyber-bullying jurisprudence is still in its infancy, it is still possible for courts to delineate an exception to the previous student speech standards to justify schools' restrictions of student speech that are not intellectual or academic, but insidious off-campus acts that hurt children anywhere, anytime.

## III. FEDERAL, STATE, AND INTERNATIONAL EFFORTS TO CURTAIL CYBER-BULLYING

### *A. Federal Legislation*

Legislators have only recently begun to address the looming threat of cyber-bullying.[146] Two years ago, the Antibullying Campaign Act of 2005 was introduced.[147] Although the Act was not passed before the congressional session ended,[148] it would have required states to require their school districts to develop programs and policies that not only prevent, but specifically respond to cyber-bullying on school computers and other technology.[149] It also would have encouraged cooperation by enabling schools to apply for federal grants that would allow schools to develop anti-bullying programs for students and teachers.[150]

Although some organizations have successfully lobbied Congress to pass laws that protect children from bullying and harassment,[151] the resulting statutory language often fails to address – or even mention – cyber-bullying.[152] In other cases, legislation intended to protect children while they are on the Internet has employed overbroad language that actually restricts minors' productive use of the Internet. For example, the Deleting Online Predators Act of 2006 ("DOPA") was enacted to limit the ability of sexual predators to prey on children who were using chat rooms and social networking websites while at school.[153] DOPA rendered numerous websites and chat rooms inaccessible to children from public schools and off-campus libraries. Critics are skeptical of its effectiveness and believe it unnecessarily restricts children's access to educational websites and learning tools.[154]

Although DOPA was not intended to stop cyber-bullying, it has nonetheless laid the foundation for subsequent debates about protecting children when they are on the Internet. In 2007, the Protecting Children in the 21st Century Act was introduced.[155] Title II of the proposed legislation would delete DOPA and replace it with provisions that target cyber-bullying.[156] It would also require minors to obtain parental authorization prior to using commercial social

networking websites or chat rooms while at school.[157] Notably, the forms that parents would sign to authorize their child's use of these otherwise prohibited websites would explain that sexual predators use social networking websites and chat rooms to prey on children.[158] Thus, the bill would not only filter websites that students can visit while at school, but also educate otherwise uninformed, technologically inexperienced parents about cyber-bullying and the Internet.

Some have criticized the Protecting Children in the 21st Century Act, however, because the definition of social networking websites and chat rooms that would be prohibited might unnecessarily exclude blogs, message boards, and other websites such as Yahoogroups and Google Groups.[159] Teachers might also be prevented from using some interactive websites and technologies in the classroom.[160] Furthermore, because this legislation would only apply to schools and libraries who receive federal Internet subsidies, some adults and children may be unintentionally prevented from accessing numerous websites.[161] Sadly, to protect children and battle cyber-bullying, this Act would force some public institutions to censor and block web content or sacrifice federal subsidies that fund them.

### *B. State Legislation*

In addition to federal legislation, some states have enacted statutes that address cyber-bullying. Some state legislation requires the state's schools to amend their harassment, intimidation, and bullying policies to specifically address cyber-bullying.[162] For example, Washington's statutes not only authorize schools to create procedures for punishing cyber-bullies, but also require that the schools distribute informational materials to parents to explain cyber-bullying, describe safe Internet use, and provide options for reporting cyber-bullying.[163] Some have even authorized schools to expel cyber-bullies.[164]

In other states, legislators have updated criminal laws to allow the prosecution of students and parents if Internet activity or text messages that the student sends after school and off-campus subsequently cause disruptions on-campus.[165] Some state statutes, however, focus less on punishment and more on prevention. Oregon's recent cyber-bullying legislation orders schools to install blocking technology on all school computers, encourages schools to require that students keep cell phones "out of sight during the day," and even permits school officials to check students' mailboxes.[166]

Meanwhile, other states have been less successful at passing cyber-bullying legislation. South Carolina, for example, is still in the early phases of passing laws that simply define cyber-bullying[167] and Florida's legislators have failed to pass cyber-bullying legislation for two consecutive years because of bureaucracy and unresolved debates.[168]

### *C. Other Countries' Response to Cyber-Bullying*

The international impact of cyber-bullying further evidences its prevalence. Cyber-bullying is *not* just an American problem – indeed, numerous other countries are also having difficulty preventing and imposing punishment for cyber-bullying.[169]

In India, for example, cyber-bulling is commonplace.[170] Indian cyber-bullying critics complain that legislators have completely ignored the problem.[171] Neither India's Information Technology Act of 2000[172] nor its Juvenile Justice Act (Care and Protection of Children) Act[173] mention cyber-bullying.[174] Furthermore, there are no school manuals, guidelines, or regulations that address cyber-bullying.[175] Rather, the common remedial measure is to refer the cyber-bully to a school counselor for counseling.[176]

In other countries, such as Canada, proactive teachers have lobbied legislators[177] and in some provinces cyber-bullies have faced defamation and libel lawsuits.[178] England is also

waging a persistent war against cyber-bullies.[179] Not only has the British government promulgated guidelines to instruct parents and children how to deal with cyber-bullies,[180] but it has also organized a program that protects teachers and children from abusive phone calls, emails, text messages, and other online activity.[181] The British government also launched an online advertising campaign to raise awareness about cyber-bullying.[182] Surprisingly, the British government also imposes responsibilities on parents[183] and websites.[184] Finally, some countries have taken drastic measures to curb cyber-bullying.[185] In New South Wales, Australia, a comprehensive statutory scheme delineates specific penalties for cyber-bullies that include drastic fines and extensive prison sentences.[186]

Although the aforementioned attempts to curtail cyber-bullying vary in severity and detail, it is helpful to consider the wide range of options that American legislators may pursue. Some of the Canadian and British measures outlined above would likely benefit Americans. The British government's sponsorship of online advertisements, for example, would be helpful because many Americans are unaware of the extent – or even existence – of cyber-bullying.[187] Furthermore, imposing a legal duty on websites to eliminate cyber-bullying content would be an excellent measure to attack the foundation of cyber-bullying. Any laws resembling the New South Wales criminal laws, however, should be completely avoided. Incarcerating children will deprive them of their parents and an education, and any fines imposed on cyber-bullies will likely be borne by their parents. Instead of banishing cyber-bullies from schools through incarceration or expulsion, American legislators and schools should model legislation after the Indian focus on counseling and providing therapy to cyber-bullies.

### *D. Broad Federal Legislation & Specific State Legislation – The Right Combination*

As demonstrated herein, cyber-bullying is widespread and takes many forms.[188] It is difficult to track because students are anonymous on the Internet[189] and difficult to anticipate because of ceaseless technological innovation and the resulting technology gap between children and adults.[190]

To effectively combat cyber-bullying, our federal government should encourage the development of unique statutes and procedures at the state level. Drafting a single, comprehensive federal statute that ambitiously solves America's cyber-bullying woes is likely impossible. It would be most beneficial if our federal legislators introduced legislation that (1) defines and publicizes the cyber-bullying problem, and (2) requires states to create their own cyber-bullying statutes. Using states as "laboratories of democracy"[191] would allow our country to test a variety of anti-cyber-bullying strategies rather than committing to a single federal regulatory scheme. Additionally, the general federal statute should require a committee or private organization to analyze the efficacy of the states' cyber-bullying policies in five to seven years to determine whether a particular state's policy was successful.

States should employ a variety of measures that (1) raise awareness about cyber-bullying, (2) empower schools to discipline cyber-bullies when their conduct disrupts on-campus activities and infringes other students' rights, (3) impose counseling and community service requirements for violators, (4) provide aid for victims and their parents, and (5) establish a system for discussing, reporting, and ultimately facilitating an ongoing discussion about cyber-bullying. State legislation should be drafted carefully, however, and avoid overbroad language that could punish otherwise innocuous, innocent activities.[192] Moreover, the state statutes should try to avoid criminalizing cyber-bullying or carving out exceptions to traditional tort laws that would expose cyber-bullies and their parents to increased liability.

Ultimately, federal legislation would benefit from state governments testing various solutions to cyber-bullying. Contemporaneously, the federal legislation would effectively express the government's dedication to resolving this problem by raising awareness and compelling states to commit some resources to battle against cyber-bullying.

## IV. WHO IS LIABLE FOR CYBER-BULLYING?

When cyber-bullies cause legitimate physical, psychological, and emotional harm, there are numerous parties involved who are arguably partially liable for the cyber-bully's actions. Commonly, cyber-bullying involves the bully, his or her parents, teachers, the school board, and possibly even websites. Considering the varying combinations of liable parties, before enacting comprehensive cyber-bullying legislation, it is necessary to contemplate whether new laws will be necessary to adequately punish parties who negligently contribute to cyber-bullying.

### *A. Imposing Liability on the Cyber-Bully*

Although the most instinctive, logical recourse for a cyber-bullying victim might be lawsuits and litigation, there are numerous problems with pursuing civil remedies against cyber-bullies. In the civil context, the liability of cyber-bullies is murky because cyber-bullying case law is limited and the few cases that actually address the liability of a cyber-bully are unclear and provide little guidance.[193] This looming uncertainty is particularly problematic because criminal charges against cyber-bullies are rarely filed and the cases often degenerate into civil lawsuits.[194] In civil lawsuits, cyber-bullies have been found liable for a host of claims including negligence, libel, slander, defamation, invasion of privacy, public disclosure of a private fact, and even intentional or negligent infliction of emotional distress.[195]

Although victims deserve to be compensated for their suffering, subjecting cyber-bullies (and likely their parents) to civil judgments is excessive and could inspire frivolous litigation.

Moreover, forcing children to endure costly, complicated, and time-consuming litigation not only forces victims to relive the bullying, but also interrupts their education. States should refrain from enacting laws that create causes of action for "cyber-bullying." Rather, victims' claims should be capable of satisfying traditional elements of negligence and intentional tort claims. A statute that creates a claim for cyber-bullying *per se* will not solve the problem. Victims should work within our existing system and be entitled to civil judgments only if their case satisfies ordinary claims such as defamation and intentional infliction of emotional distress.[196]

Similarly, criminal penalties for cyber-bullying should be based on the criminal penalties imposed on traditional bullies. Currently, our criminal justice system is unprepared to create new laws specifically for cyber-bullying because detectives are clueless in cyber-bullying cases.[197] Moreover, in many cases, criminal charges are dropped because civil remedies are more appropriate.[198] Instead of drafting legislation that would incarcerate or fine *any* cyber-bully, states should reserve criminal cyber-bully sanctions for particularly egregious scenarios, such as bona fide harassment or stalking, hate or bias crimes, and sexual exploitation.[199] A cyber-bully's criminal liability becomes more appropriate as the communications and bullying escalate in seriousness, dangerousness, and specificity.[200]

Criminalizing cyber-bullying might also be difficult because the high incidence of cyber-bullying[201] might cause juvenile detention centers and jails to become overcrowded. Moreover, if cyber-bullying is criminalized, a large segment of the youth might acquire a criminal record before reaching the age of majority. Courts might also have difficulty consistently adjudicating cyber-bullying cases because of the variety of facts and subjectivity often involved. Students have varying thresholds for bullying and requiring a judge to compare bullying through text messages to bullying on Facebook might be a distinction without meaning. Therefore,

prosecutors should attempt to utilize existing criminal laws to charge cyber-bullies and reserve criminal charges for situations in which the bully's actions warrant traditional criminal charges.

### *B. Parental Liability*

When victims of cyber-bullying file lawsuits, the claims are often filed against the cyber-bully's parents because most cyber-bullies are minors and state statutes generally subject parents to some liability for the torts of their minor children.[202] Thus, the viability of a cyber-bullying case is often contingent upon the jurisdiction's parental liability laws.[203] Regardless, parents are typically liable if they knew or should have known about their child's conduct, their child's conduct and resulting harm were foreseeable, and their negligence specifically contributed to their child's behavior.[204]

Although parents are liable for their cyber-bullying child's actions, proving that parents foresaw their child's cyber-bullying might be difficult because of the anonymity of cyber-bullies.[205] Furthermore, parents are generally unaware of their child's Internet activity or that cyber-bullying even exists, thus it is also unlikely that a parent could foresee damages stemming from cyber-bullying.[206] Unless a victim could prove that the cyber-bully's parents were aware of the bullying and disregarded it, it might be difficult for an aggrieved cyber-bullying victim to hold the bully's parents liable.

In the future, as states enact cyber-bullying legislation, they should defer to existing statutes that govern parental liability rather than creating statutes that specifically impose new legal duties on parents. Although parents should supervise their children, because many parents are unaware of the prevalence of cyber-bullying, a new statute might inadvertently subject unwitting parents to liability. Fines should also be avoided – rather, the prospect of civil liability

for defamation or other torts should be a sufficient deterrent. If a child is a cyber-bully, notifying the parent of potential litigation stemming from their child's actions should suffice.

### *C. Liability of Educational Institutions*

Even though schools can be liable for restricting student speech,[207] they have also been found liable for failing to adequately supervise students and intervene in foreseeably dangerous situations.[208] Despite this "Catch-22,"[209] however, public schools are rarely found liable for students' transgressions.[210] Generally, parties asserting negligent supervision claims must prove that the teacher or faculty member was grossly negligent in failing prevent foreseeable harm.[211] Still, even if danger is foreseeable, schools have avoided liability when reasonable supervision would not have prevented the students from suffering harm.[212]

Because the imposition of liability on schools is contingent on foreseeability, it would likely be difficult to prove that a school is liable for damages stemming from cyber-bullying because it is transitory, anonymous, and often off-campus and after school.[213] Moreover, although some might argue that schools should be permitted to regulate off-campus conduct that establishes a sufficient nexus with on-campus activities, courts and legislators cannot reasonably expect schools to become liable for students' off-campus cyber-bullying unless the courts are willing to employ the "sufficient nexus" test.[214] If courts extend to schools the right to punish cyber-bullies, courts reviewing negligent supervision claims in cyber-bullying cases should examine the schools' policies and other factors to determine whether the school was negligent.[215]

### *D. Liability for Internet Service Providers and Websites*

Aside from imposing liability on cyber-bullies, their parents, or school officials, some critics believe liability should be imposed on Internet Service Providers and websites

(collectively referred to as "ISPs") who fail or refuse to delete cyber-bullying content despite complaints and notice of its existence.[216]

When an anonymous cyber-bully[217] broadcasts offensive, defamatory information over the Internet, the only option for victims who are unable to identify, contact, or retaliate against the cyber-bullies is to contact the ISP and request that the content be deleted.[218] The ISPs create and control their websites and are presumably in an ideal position to monitor its content.[219] However, ISPs are frequently slothful at removing cyber-bullying content – often, it is removed long after the victim has suffered.[220] Worse yet, even if the ISP fails to remove the cyber-bullying content after receiving notice, the Communications Decency Act ("CDA")[221] immunizes ISPs from publisher liability[222] and distributor liability[223] for Internet content created and posted by third parties.[224]

Although early cases exposed ISPs to publisher or distributor liability,[225] Congress' passage of the CDA[226] nullified prior precedent that arguably permitted ISPs to be liable.[227] Whereas *before* the CDA, courts implied that ISPs might be treated as distributors if a party could prove that the ISP knew or had reason to know of defamatory content on its website,[228] courts' later interpreted distributor liability as a mere derivative of publisher liability under the CDA,[229] thus effectively immunizing ISPs.[230] Ironically, the CDA's admirable goal of granting *some* immunity to ISPs as an incentive to promote responsible supervision of their content actually rendered ISPs impervious to liability.[231]

Considering recent cases criticizing the prevailing interpretation of the CDA,[232] the CDA should be amended to address cyber-bullying. Cara J. Ottenweller recently chastised the CDA and suggested that it be amended to impose a legal duty on ISPs to remove cyber-bullying content after receiving notice.[233] Ottenweller's proposed amendment would not only clarify the

Act's language and encourage ISPs to regulate their own content, but also provide aggrieved victims a legal right to recover by creating a legal obligation to accompany the moral obligation that ISPs have to regulate their web content.[234]

However, imposing distributor liability on ISPs is not the best solution. First, exposing ISPs to distributor liability could impose significant burdens on ISPs. If a potential cyber-bullying victim notified the ISP of cyber-bullying content on its website, a responsible ISP would preferably investigate the accusation rather than blindly delete the content. Fact-intensive investigations could be time-consuming, drain the ISP's resources, and there would be no guarantee that the investigation would be completed *before* the victim suffers.[235] Conversely, an overcautious ISP might simply remove *any* content that triggers cyber-bullying accusations. But carelessly removing content without verifying its veracity might cause loyal users to defect, chill speech, and potentially even promote fraud and cyber-bullying.[236] Finally, popular ISPs could face innumerable lawsuits premised on their newfound distributor liability, thus exposing their "deep pockets" to cyber-bullying victims. ISPs should not be forced to unilaterally bear monetary damages that cyber-bullies cause.

Instead, the CDA should be amended to provide cyber-bullying victims the right to file for an injunction against ISPs distribution of cyber-bullying content. The statute should require ISPs to pay the victim's attorney's fees if he or she is successful. This amendment would not only provide cyber-bullying victims with legal rights, but also encourage attorneys to battle cyber-bullies. The amendment should expose ISPs to liability as a last resort, *only* if they fail to respond to an injunction requiring the deletion or suspension of content. In a perfect world, authorizing distributor liability against ISPs would solve this problem. But in reality, our litigious society would take advantage ISPs and drain their "deep pockets."

## CONCLUSION - A POTENTIAL SOLUTION

Because courts and legislators have barely addressed cyber-bullying,[237] there is latitude to speculate and hypothesize about potential solutions to the problem. Although scholars debate whether bullying can even be curtailed[238] and cynically insist that cyber-bullying is fundamentally similar to traditionally bullying and that our existing system works,[239] cyber-bullying *does* require new, innovative solutions. To punish cyber-bullies and let victims obtain justice, federal and state governments, law enforcement officials, school boards, administrators, teachers, parents, and students must collaborate.

First, federal and state governments must pass legislation that specifically defines and addresses cyber-bullying. At the federal level, legislation resembling the Anti-Bullying Act of 2005 should be introduced.[240] The recently introduced Protecting Children in the 21st Century Act exemplifies legislation that raises awareness about cyber-bullying and demands state action.[241] The key tenet to federal cyber-bullying legislation is not requiring specific liability or punishments, but instead mandating that states enact cyber-bullying legislation that establishes a single state policy and creates a comprehensive system for reporting and punishing cyber-bullies. Using states as a "laboratory of democracy"[242] allows states to test various solutions to the problem. Moreover, in addition to the combination of federal and state legislation, Congress should amend the CDA to provide aggrieved cyber-bullying victims with legal rights to force ISPs to monitor and possibly delete cyber-bullying content.[243]

Meanwhile, our Courts should stop deciding student Internet speech cases based on the geographic location of the disputed conduct. Instead, courts should apply a modified *Tinker* standard that analyzes whether the cyber-bully's conduct materially disrupted campus activities or invaded students' rights.[244] Furthermore, in determining whether the off-campus cyber-

bullying warrants the *Tinker* analysis, which is traditionally reserved for on-campus student speech, courts should utilize *J.S.*'s "sufficient nexus" test.[245]

Additionally, legislators and courts should avoid creating laws that impose new forms of liability on cyber-bullies, their parents, schools, and ISPs.[246] Rather, civil and criminal liability should be based on our existing laws. Current tort laws, such as defamation and the intentional infliction of emotional distress, and criminal laws like cyber-stalking, should provide adequate claims for prosecutors and civil litigants.

Finally, drafting legislation and deciding contentious cases cannot completely curtail cyber-bullying. Teachers, parents, and students must recognize the gravity of the situation and take action. Regardless of the amount of cyber-bullying actually taking place on campus during school hours, schools must be proactive and communicate and enforce cyber-bullying rules.[247] Schools should block social networking websites and any instant messaging applications on the school's computers. Furthermore, policies that describe acceptable Internet use should be drafted and distributed to students before they are permitted to access the Internet on school computers.[248] Not only would this cripple some of the cyber-bullies most effective tools during school hours, but it would also promote the overarching goal of using computers in a fruitful, productive, and educational manner.

Schools should also position computers in open areas rather than private carrels or nooks in which cyber-bullies can conceal their actions.[249] This configuration would presumably deter cyber-bullies because they work covertly rather than in public view. Some scholars also suggest that schools require students to acknowledge and sign computer use contracts that specifically address cyber-bullying and prohibit activities such as sending unwanted emails or messages that

are hurtful to other students, using other student's passwords or protected files, or sending or displaying pictures that harass, insult, or attack other students.[250]

Contemporaneously, parents must cooperate with schools and monitor their child's activities. Adults should look for "red flags," such as children spending significant amounts of time online and in chat rooms or on suspicious websites, acting secretly or evasively when online, scrambling and hurriedly closing computer programs when adults enter the room, and unusual cell phone charges from the same telephone number.[251] Parents should also try to become more Internet savvy and bridge the technological gap.[252] If parents learn their child has become involved in cyber-bullying, they should encourage their child to ignore the cyber-bully and inform any relevant teachers or ISPs.[253]

Finally, adults should teach children how to handle private information on the Internet and explain the importance of not telling classmates or strangers their email address, cell phone number, passwords, or any other personal information.[254] One scholar even suggests that parents create an at-home Internet contract to symbolize a commitment to responsibly using the Internet.[255]

If legislators, courts, schools, teachers, parents, and children all make a concerted effort to accomplish some of the goals outlined herein, cyber-bullying will liked diminish in frequency and severity.

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[1] *See* Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 Val. U. L. Rev. 1285, 1294 (2005) ("The lack of legislation addressing cyberbullying is even more troubling when considering that the effects of cyberbullying may be even more detrimental to a child's psychological well-being than other forms of bullying.").
[2] *See infra* discussion Part II.
[3] *See infra* discussion Part IV.
[4] *See* KEN RIGBY, NEW PERSPECTIVES ON BULLYING 15, 19 (2002) (explaining that some researches trace bullying back more than 2,000 years to the Jewish authors of the Psalms, while others believe bullying is another sign of our Darwinian survival of the fittest).

[5] JOANNE SCAGLIONE & ARRICA ROSE SCAGLIONE, BULLY-PROOFING CHILDREN A PRACTICAL, HANDS-ON GUIDE TO STOPPING BULLYING 3 (2006) (explaining that bullying takes many forms and "can impact another's body, property, self-esteem, or social position.").
[6] *See id.* at 4.
[7] *See id.* at 4; *see also* RIGBY, *supra* note 4, at 13; Darby Dickerson, *Cyberbullies On Campus*, 37 U. TOL. L. REV. 51, 52 (2005) ("The definition most commonly used by researches provides that '[a] person is . . . bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more persons.'") (citing JOHN H. HOOVER & RONALD OLIVER, THE BULLYING PREVENTION HANDBOOK: A GUIDE FOR PRINCIPALS, TEACHERS AND COUNSELORS 4 (1996), which was derived from Dan Olweus' definition).
[8] RIGBY, *supra* note 4, at 25.
[9] MARY ANN BELL, BOBBY EZELL, & JAMES L. VAN ROEKEL, CYBER SINS & DIGITAL GOOD DEEDS A BOOK ABOUT TECHNOLOGY & ETHICS 38 (2007).
[10] SCAGLIONE, *supra* note 5, at 7; AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, CYBERBULLYING & ONLINE TEENS 5 (June 27, 2007), http://www.pewinternet.org/pdfs/PIP%20Cyberbullying%20Memo.pdf (quoting a high school boy who explained that "[p]eople think they are a million times stronger because they can hide behind their computer monitor") [hereinafter LENHART, PEW MEMO].
[11] BELL, *supra* note 9, at 38.
[12] Stop Bullying Now!, What Can Adults Do, http://stopbullyingnow.hrsa.gov/adult/indexAdult.asp?Area=cyberbullying (last visited Nov. 27, 2007).
[13] *Id.*
[14] *Id.*
[15] Kathy Aney, *Bullies Go High-Tech*, EAST OREGONIAN, Oct. 3, 2007, http://www.eastoregonian.info/main.asp?SectionID=13&SubSectionID=48&ArticleID=67429&TM=48933.86 (last visited Oct. 30, 2007) (explaining that adults have difficulty keeping up with constantly evolving technology).
[16] STOP Cyberbullying, What is Cyberbullying, Exactly?, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Nov. 27, 2007) [hereinafter What is Cyberbullying, Exactly?].
[17] *Id.*; *see also* Dickerson, *supra* note 7, at 56-59.
[18] STOP Cyberbullying, Direct Attacks, http://www.stopcyberbullying.org/how_it_works/direct_attacks.html (last visited Nov. 27, 2007) [hereinafter Direct Attacks].
[19] *Id.* (referring to tactics including "warning wars," locking victims out of their accounts after stealing passwords, hacking into computers).
[20] *Id.* (describing how cyber-bullies will sign onto controversial messages boards, such as hate groups and racists and post a "provocative message [on the message board or] . . . chat room posing as the victim, inviting an attack against the victim, [and] often giving the name, address and telephone number of the victim to make the hate group's job easier.").
[21] MySpace, http://www.myspace.com (last visited Nov. 27, 2007).
[22] Xanga, http://www.xanga.com (last visited Nov. 27 2007).
[23] Facebook, http://www.facebook.com (last visited Nov. 27, 2007).
[24] BELL, *supra* note 9, at 38.
[25] Direct Attacks, *supra* note 18.
[26] Direct Attacks, *supra* note 18.
[27] YouTube, http://www.youtube.com (last visited Nov. 27, 2007).
[28] STOP Cyberbullying, Cyberbullying by Proxy, http://www.stopcyberbullying.org/how_it_works/cyberbullying_by_proxy.html (last visited Nov. 27, 2007) [hereinafter By Proxy]; *see also* Dickerson, *supra* note 7, at 59.
[29] By Proxy, *supra* note 28.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] SCAGLIONE, *supra* note 5, at 10.

[36] What is Cyberbullying, Exactly?, *supra* note 16; Jason Wermers, *Cape Mother Tells of Son's Tragic Bully Encounter*, The News-Press, Oct. 1, 2007, http://www.news-press.com/apps/pbcs.dll/article?AID=/20071001/NEWS0101/70930026/1075 (last visited Nov. 27, 2007) (noting that the rise in suicides linked to cyber-bullying has caused critics to coin the phrase "Bullycide").
[37] Aney, *supra* note 15.
[38] *Id.*; Wermers, *supra* note 36 (sharing the story of a fifteen-year-old student who committed suicide after enduring more than two years of cyber-bullying).
[39] KATHLEEN CONN, BULLYING & HARASSMENT: A LEGAL GUIDE FOR EDUCATORS 163 (2004) (discussing a 2003 Washington Post article that reported that a simple web search would turn up 4,100 websites dedicated to reporting about cyber-bullying).
[40] SCAGLIONE, *supra* note 5, at 8.
[41] *Id.*
[42] LENHART, PEW MEMO, *supra* note 10, at 1.
[43] *Id.*
[44] *Id.* at 2 ("Girls are more likely than boys to say that they have ever experienced cyberbullying – 38% of online girls report being bullied, compared with 26% of online boys. Older girls in particular are more likely to report being bullied than any other age and gender group, with 41% of online girls ages fifteen to seventeen reporting these experiences."). It is possible that girls are more likely than boys to resort to cyber-bullying because society occasionally perceives teenage boys to be immature and apt to act on violent pubescent impulses.
[45] *Id.* at 2 (finding that 39% of social network users were cyber-bullied versus only 22% of teens who did not).
[46] *Id.* at 2.
[47] SCAGLIONE, *supra* note 5, at 12-13.
[48] *Id.* at 13.
[49] Stop Bullying Now!, What Can Adults Do, http://stopbullyingnow.hrsa.gov/adult/indexAdult.asp?Area=cyberbullying (last visited Nov. 27, 2007).
[50] SCAGLIONE, *supra* note 5, at 9.
[51] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.") (quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943)).
[52] *Id.* at 503.
[53] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[54] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[55] Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1224 (2003) (referring to *Tinker*, *Fraser*, and *Hazelwood* as the "[t]hree landmark cases [that] set [the] standards for public school speech."); Sandy S. Li, *The Need For a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 67-68 (2005) ("Three landmark U.S. Supreme Court decisions that articulate the standards regarding student speech must be discussed in order to understand why a new standard is needed for Internet-related student speech.").
[56] CONN, *supra* note 39, at 164.
[57] Posting of Anne Collier to http://www.netfamilynews.org/labels/cybercitizenship.html (Sept. 17, 2007, 10:49 A.M. EST) ("[C]ourts and prosecutors 'have largely agreed, concluding that the [First] Amendment covers even the most offensive online speech.'").
[58] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 504-05.
[63] *Id.* at 505.
[64] *Id.* at 514.
[65] *Id.* at 506.
[66] *Id.* at 508.
[67] *Id.* at 508.
[68] *Id.* at 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[69] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).
[70] *Id.* at 679.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 680.
[74] *Id.*
[75] *Id.* at 683.
[76] *Id.* at 685-86.
[77] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-63 (1988).
[78] *Id.* at 263.
[79] *Id.* at 264.
[80] *Id.* 264-65.
[81] *See id.* at 264.
[82] *Id.* at 265 (citing *Tinker*, 393 U.S. at 511).
[83] *See id.* at 265-66.
[84] *Id.* at 276.
[85] *See id.* at 270-71.
[86] *Id.* at 271 (citing *Fraser*, 478 U.S. at 685 and *Tinker*, 393 U.S. at 509).
[87] *Id.* at 272-73.
[88] *Id.* at 262-63; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).
[89] *See supra* note 55.
[90] *Tinker*, 393 U.S. at 513.
[91] *Fraser*, 478 U.S. 677-78.
[92] *Fraser*, 478 U.S. at 686; Servance, *supra* note 55, at 1231 ("In contrast, *Fraser* allows schools to regulate speech deemed inappropriate for the school setting, even when the same speech is protected outside of school. Fraser recognized some measure of school authority over speech that the school found sufficiently offensive and reiterated authority over on-campus speech that invades the rights of others.").
[93] *Tinker*, 393 U.S. at 514.
[94] *Fraser*, 478 U.S. at 686.
[95] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-63 (1988).
[96] *See id.* at 271-73; Servance, *supra* note 55 ("Because the First Amendment does not require schools to use their resources to support speech inconsistent with the values of the school, [*Hazelwood*] gives schools the right to impose limitations on school-sponsored speech without satisfying the material and substantial disruption test of *Tinker*.").
[97] Morse v. Frederick, 127 S. Ct. 2618 (2007).
[98] *Id.* at 2623.
[99] *Id.* at 2624.
[100] *Id.* at 2623.
[101] *Id.*
[102] *Id.*
[103] *See id.*
[104] *Id.* at 2626-27.
[105] *Id.* at 2627.
[106] *Id.* at 2629.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* (using political and religious speech as examples of speech that could offend someone).
[111] *Id.*
[112] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 596 (W.D. Penn. 2007).
[113] Servance, *supra* note 58, at 1242.

[114] *See, e.g.*, Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).
[115] *Layshock*, 496 F. Supp. 2d at 591.
[116] *Id.*
[117] *Id.* at 594.
[118] *Id.* at 600.
[119] *Id.*
[120] *Id.*
[121] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Penn. 2002).
[122] *Id.* at 851.
[123] *Id.* at 865.
[124] *Id.* at 869 n.14 ("The site was not aimed at a random audience but at the specific audience of students and others in the School District. Thus, it was inevitable that the site would pass from students to teachers and have an impact upon the school environment. The website was directly aimed at disrupting the school environment and did so in concrete fashion.").
[125] *Id.* at 865, 868 n.13.
[126] *Id.* at 868 n.13.
[127] Servance, *supra* note 55, at 1242 ("[C]ourts have not followed the reasoning in *J.S.* In cases decided since *J.S.*, the focus has remained on the geographic status of the speech . . . .").
[128] Li, *supra* note 55, at 87 ("Internet-related student speech is given inconsistent treatment by the courts. . . . [There are] several reasons for the need of developing one, uniform standard for Internet-related student speech cases that do not involve school sponsorship of the student's Internet activity.").
[129] *See* BELL, *supra* note 9, at 38; *see also* SCAGLIONE, *supra* note 5, at 12-13.
[130] *See generally* Servance, *supra* note 55, at 1231-38; *see also* Li, *supra* note 55, at 92-94.
[131] Li, *supra* note 55, at 92.
[132] Servance, *supra* note 55, at 1232.
[133] Li, *supra* note 55, at 92 ("Some courts have used the on-campus, off-campus speech distinction based on the belief that if the speech is considered on-campus speech, it is less likely that the student's speech disrupted the school environment.") (citing Servance, *supra* note 58, at 1234-35 (using *Granville*, 607 F.2d at 1052 n.17 to illustrate that courts have used the off-campus location of student speech to eliminate any disruption that might have occurred).
[134] Servance, *supra* note 55, at 1235 ("Internet content is not limited by geography."); Li, *supra* note 55, at 93 (explaining the absurdity of geographically defining conduct on the Internet) ("[T]he Internet is a borderless medium . . . it is pervasive . . . it allows users to disseminate information to millions of people immediately and easily, and . . . it can be accessed anywhere.").
[135] *See id.* at 1235.
[136] *See id.* at 1235 (arguing that geographically classifying a website is nonsensical because it "ha[s] no physical attributes and [exists] in no particular time or geographical space").
[137] *Id.* at 1237 ("The relationship between the two parties also supports extending school authority over off-campus websites. Both the speaker and the target are members of the same community and form their relationship as a result of that common membership. If the parties had not attended the same school the speech would not likely exist.").
[138] *See id.* at 1237 ("First, because they may avoid school or suffer emotional harm from cyberbullying, victimized students may not be able to participate fully in their education. Thus, cyberbullying interfere [sic] with the school's ability to educate.").
[139] *Id.* at 1238 ("[T]eachers and counselors spend considerable time mediating off-campus student disputes that inevitably make their way onto the campus. This mediation distracts school officials from the educational mission and thereby disrupts the school environment.") (citing Lisa Guernsey, *Telling Tales Out of School*, N.Y. TIMES, May 8, 2003, at G1).
[140] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("But conduct 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.").
[141] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986).
[142] Servance, *supra* note 55, at 1242 ("By assuming that an off-campus origin means there is automatically no disruption, courts have taken away the school's ability to respond when there is a foreseeable disruption posed by student speech, frustrating the school's goal of maintaining an environment conducive to learning.").
[143] *Tinker*, 393 U.S. at 508.
[144] *Id.*
[145] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Penn. 2002). ("We find there is a sufficient nexus between the website and the school campus to consider the speech as occurring on-campus.").
[146] SCAGLIONE, *supra* note 5, at 8; *see also* Ottenweller, *supra* note 1, at 1294 ("The lack of legislation addressing cyberbullying is even more troubling when considering that the effects of cyberbullying may be even more detrimental to a child's psychological well-being than other forms of bullying.").
[147] Antibullying Campaign Act of 2005, H.R. 3787, 109th Cong. (2005) (introduced but not debated or voted on), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h109-3787 (last visited Nov. 27, 2007).
[148] *Id.*
[149] SCAGLIONE, *supra* note 5, at 8.
[150] *Id.*
[151] Anne Broache, *Anticrime Group Calls For Laws to Curb 'Cyberbullying'*, CNET NEWS.COM, Aug. 17, 2006, http://www.news.com/2100-1028_3-6106920.html (last visited Nov. 27, 2007).
[152] *Id.*; *see also* Safe and Drug-Free Schools and Communities Act, H.R. 284, 109th Cong. (1st Sess. 2005) *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.284: (last visited Nov. 27, 2007).
[153] Deleting Online Predators Act of 2006, H.R. 5319, 109th (2006) *available at* http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c109e1FgJH (last visited Nov. 27, 2007) (amending "the Communications Act of 1934 to require . . . schools and libraries to protect minors from commercial social networking websites and chat rooms.").
[154] Declan McCullagh, *Chat Rooms Could Face Expulsion*, CNET NEWS.COM, July 27, 2006, http://www.news.com/Chat-rooms-could-face-expulsion/2100-1028_3-6099414.html (last visited Nov. 27, 2007).
[155] Protecting Children in the 21st Century Act, S.49, 110th Cong. (1st Sess. 2007) (read twice and referred to the Committee on Commerce, Science, and Transportation) (last visited Nov. 27, 2007).
[156] Andy Carvin, *Lifting The Hood on DOPA Jr.*, PBS TEACHERS LEARNING.NOW, Jan. 26, 2007, http://www.pbs.org/teachers/learning.now/2007/01/lifting_the_hood_on_dopa_jr.html (last visited Nov. 27, 2007); *see also* Protecting Children in the 21st Century Act, S.49 (establishing "policy of Internet safety that prevents cyber-bullying and includes the operation of a technology protection measure with respect to any [public school] computers with Internet access.").
[157] Protecting Children in the 21st Century Act, S.49
[158] *Id.*
[159] *See* Carvin, *supra* note 156.
[160] *Id.*
[161] *Id.*
[162] Wash. Rev. Code § 28A.300.285 (2007).
[163] *Id.*
[164] Collier, *supra* note 57 (describing an Oregon statute that permits schools to not only adopt policies that ban cyber-bullying, but expel particularly disruptive cyber-bullies).
[165] *Id.* (explaining that Rhode Island has very rigid anti-cyber-bullying laws).
[166] Aney, *supra* note 15.
[167] *See* Collier, *supra* note 57.
[168] *See* Wermers, *supra* note 36.
[169] *See* BELL, *supra* note 9, at 8 (providing examples of cyber-bullying in Canada, England, and Japan).
[170] Debarati Halder & K. Jaihankar, *The Problem of Cyber Bullying Amongst School Students in India: The Loopholes in IT Act*, CYBER LAW TIMES, http://www.cyberlawtimes.com/articles/105.html (last visited Nov. 27, 2007) (referring to an Air Force Balbharati school case and a case involving the social networking website Orkut, which brought cyber-bullying to the forefront in India).
[171] *Id.*

[172] The Information Technology Act, No. 21 of 2000, *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002959.pdf (last visited Nov. 27, 2007); *see also* Pavan Duggal, *India's Information Technology Act, 2000*, http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002090.pdf (last visited Nov. 27, 2007) (explaining that the Information Technology Act of 2000 "makes punishable cyber crimes like hacking, damage to computer source code, publishing of information which is obscene in the electronic form, breach of confidentiality and privacy, and publication of digital signature certificate false in certain particulars").
[173] The Juvenile Justice (Care and Protection of Children Act, No. 56 (2000), *available at* http://socialwelfare.delhigovt.nic.in/juvenilejustice1.htm (last visited Nov. 27, 2007).
[174] *See* Halder, *supra* note 170 (criticizing the Indian government's failure to establish procedures for preventing and punishing cyber-bullies and the lack of laws regarding the age at which children are allowed to use cellular telephones and Internet cafes).
[175] *Id.* ("The correspondent of Pushpalatha Matriculation Higher Secondary School, Triunelveli, an elite school from south Tamil Nadu, regretted on the fact that there is [sic] no uniform school regulations or policy guidelines banning general bullying, usage of cell phones or restricting internet visits inside the school premises.").
[176] *See id.*
[177] *Educators to Work on Anti-Online Bullying Plan*, CTV.CA, July 8, 2007, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070708/Educators_bullying_070708/20070708?hub=Canada (last visited Nov. 27, 2007) [hereinafter *Educators*].
[178] *Two Students Charged Over Facebook Content*, THUNDER BAY SOURCE, Oct. 25, 2007, http://www.tbsource.com/localnews/index.asp?cid=101242 (last visited Nov. 27, 2007) (recounting the story of students who incurred civil judgments for defamation and libel because of Facebook profiles through which death threats were sent to classmates).
[179] *Cyber-Bullying Gathers Pace in US*, BBC NEWS, June 28, 2007, http://news.bbc.co.uk/2/hi/technology/6245798.stm (last visited Nov. 27, 2007) ("Last year . . . the Anti-Bullying Alliance found that one in five UK schoolchildren had been the victim of some form of online and mobile abuse.") [hereinafter *Pace in US*].
[180] *Id.*
[181] Matt Chapman, *Government Cracks Down on Cyber-Bullying*, VNUNET.COM, Sept. 21, 2007, http://www.vnunet.com/vnunet/news/2199253/government-cracks-cyberbullying (last visited Nov. 27, 2007).
[182] Dinah Greek, *Government Launches New Crackdown on Cyberbullying*, COMPUTERACT!VE, Sept. 21, 2007, http://www.vnunet.com/computeractive/news/2199258/government-launches-crackdown (last visited Nov. 27, 2007).
[183] *Id.* (indicating that the British government has authorized the imposition of £1,000 fines against parents who fail to prevent their child from becoming a cyber-bully).
[184] Jane Hoskyn, *You-Tube Urged To Get Tough With Cyber-Bullies*, VNUNET.COM, Apr. 10, 2007, http://www.vnunet.com/vnunet/news/2187419/youtube-urged-tough-cyber (last visited Nov. 27, 2007). Hoskyn explains that the British government has asked websites such as YouTube and RateMyTeachers to respond to their moral obligation to become involved in the fight against cyber-bullying. Specifically, the British education secretary has asked websites on which cyber-bullies upload offensive or abusive content to block or remove offensive content in the same way the delete pornographic content. In response, YouTube claims that it "trusts" its users to be responsible and that because a majority of the postings on their websites are positive and not abusive, they will continue to trust their users to use their websites in a legal, permissible manner.
[185] Helen Signy, *Bullies Who Leave No Bruises*, THE AGE, Oct. 25, 2007, http://www.theage.com.au/news/parenting/bullies-who-leave-no-bruises/2007/10/25/1192941199459.html?page=fullpage#contentSwap1 (last visited Nov. 27, 2007).
[186] *See generally id.* (providing the following examples of New South Wales criminal laws: (1) five years incarceration and/or $5,000 fine for unlawfully accessing someone's email account and sending abusive emails from it, (2) two years incarceration for taking impermissibly filming someone in a shower and distributing the video, (3) five years incarceration and/or $5,500 fine for "teasing, making fun of or spreading rumours about someone online," and (4) five years incarceration and/or $5,500 fine for harassing or threatening someone online).
[187] *See supra* Part I.C.
[188] *See id.*

[189] *See supra* Part I.A.; SCAGLIONE, *supra* note 7, at 7; LENHART, PEW MEMO, *supra* note 7, at 5.
[190] *See* Aney, *supra* note 12.
[191] Landell v. Sorrell, 406 F.3d 159, 178 (2d Cir. 2005) ("States may be laboratories of democracy, and they should have leeway to experiment, but innovation is limited by the Constitution.").
[192] *See* Carvin, *supra* note 156.
[193] *See* Kimberly Mason, *Cyberbullying: Legal Issues*, EBASEDPREVENTION.ORG, http://www.ebasedprevention.org/bullying.asp?id=3086 (last visited Nov. 27, 2007). Generally, most cases that involve cyber-bullying are lawsuits filed against schools or other institutions that restrict student speech.
[194] Amy Benfer, *Cyber Slammed*, Salon.com, http://archive.salon.com/mwt/feature/2001/07/03/cyber_bullies/print.html (last visited Nov. 27, 2007) (providing examples of cyber-bullying cases in which criminal charges were either not filed or dropped entirely, and explaining that "many authorities simply [do not] understand the laws" that govern "behavior by teens and adults on the Internet").
[195] Mason, *supra* note 193.
[196] *See* Benfer, *supra* note 194 (sharing the story of a cyber-bullying victim who was awarded $200,000 in damages in a defamation suit).
[197] *Id.* (mentioning that a detective who specialized in Internet crime privately admitted that he was clueless regarding where to begin in a cyber-bullying case); *see also* David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 Penn. St. L. Rev. 667, 669 (2006) (describing a police officer who candidly admitted that Internet bullying is difficult to investigate unless it involves death threats or other criminal offenses).
[198] Benfar, *supra* note 194. Benfer's article providers two examples of cases in which criminal charges were initially filed, eventually dropped, and a civil suit was pursued. First, in New York, a group of teenage high school boys created a website that divulged personal contact information of girls at school and their sexual experiences. Initially, the boys faced 2nd degree harassment charges, up to one year in jail, and a $1,000 fine. The charges were eventually dropped, however, because the site's content did not meet the legal definition of harassment. Second, in a different case, a child edited a digital photograph of a teacher to morph into Adolf Hitler's face, criminal charges were dismissed, and the teacher subsequently won a $200,000 civil judgment.
[199] *See* Mason, *supra* note 193.
[200] *Id.*; Benfar, *supra* note 194.
[201] *See supra* Part I.C.
[202] 59 Am. Jur. 2d *Parent and Child* § 96 (2007); *see also* Mason, *supra* note 193 (describing the circumstances under which parents of cyber-bullying victims file lawsuits and explaining that some jurisdictions have parental liability laws that permit an intentionally injured individual to hold a minor's parents financially responsible for injuries that the child causes).
[203] *See* Mason, *supra* note 193.
[204] 59 Am. Jur. 2d *Parent and Child* § 99 (2007) ("Generally, a parent may be liable for the consequences of failure to exercise the power of control which he has over his children, where he knows, or in the exercise of due care should have known, that injury to another is a probable consequence. However, to render a parent responsible, his negligence in the exercise of parental supervision must have some specific relation to the act complained of. Also the injury committed by the child must be one which ought reasonable to have been foreseen as likely to flow from such negligent act.") (citing Restatement (Second) of Torts § 316 ("A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he hast he ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.").
[205] *See supra* Part I.C.
[206] *Id.*
[207] *See supra* Part II.
[208] *See* Kathleen Hart, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 Ga. L. Rev. 1109, 1146 n.240 (2005).
[209] By "Catch-22," I am referring to the possibility of schools being liable for failing to supervise students, while simultaneously potentially being liable for intervening and restricting student speech or conduct.

[210] 36 A.L.R.3d 330 (2007) ("Generally speaking, a school district, school board, or other agency or authority in charge of public schools or a public institution of higher learning is not liable, as such, for the acts or omissions of pupils or students."); *see also* Benfer, *supra* note 194 (explaining that private schools are not subject to the same liability traditionally imposed on public schools).
[211] 36 A.L.R.3d 330 (2007) ("Liability may be imposed for failure of supervision where there are foreseeable dangerous circumstances and a failure to exercise ordinary care to prevent such circumstance causing injury."); *see also* Hart, *supra* note 208, at 1146 n.240 (explaining that schools are unlikely to be found liable unless their conduct was grossly negligent).
[212] 57 Am. Jur. 2d *Municipal, County, School, & State Tort Liability* § 570 (2007).
[213] See *supra* Part I.B. For example, if a cyber-bully has tortured a classmate online for weeks, the first incident that a teacher may witness or know about might be an on-campus fist-fight during school hours that the teacher did not know stemmed from weeks of off-campus, online abuse.
[214] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Penn. 2002).
[215] Mason, *supra* note 193 (suggesting that courts examine the content of the school's relevant policies, whether those policies were adequately communicated to the students, whether the school permits students to access the Internet through on-campus connections, the extent to which the school monitors students' Internet use, and whether the school has procedures regarding cyber-bullying reporting and discipline).
[216] *See* Ottenweller, *supra* note 1, at 1285.
[217] *Id.* at 1287 ("Because many Internet users and Web page creators are afforded anonymity by ISPs, it is oftentimes very difficult to track down the individual responsible for posting harmful and offensive materials.").
[218] *Id.* at 1287.
[219] *Id.* at 1332-33.
[220] *Id.* at 1285-86. Ottenweller recapitulates the story of David Knight, a cyber-bullying victim who had an entire website made about him. Classmates used the website to make fun of him and post hurtful, hateful messages. After six months of humiliation, the website was finally removed. By that time, the damage was done and David finished his final year of high school at home. Ottenweller asserts that "[s]tories like David's are becoming increasingly common."
[221] 47 U.S.C. § 230 (2000).
[222] Ottenweller, *supra* note 1, at 1297 (explaining that primary publishers ISPs who are held strictly liable when they either have editorial control over the material that is publicized or intend to directly distribute the defamatory material).
[223] *Id.* at 1298 (defining distributor liability applying when an ISP "deliver[s] or transmit[s] material published by a third party" and the ISP had notice that the material was defamatory).
[224] *Id.* at 1287-88 (explaining that "ISPs have no legal responsibility to remove defamatory remarks or instances of cyberbullying" even if they are notified about the disparaging material); *see also* Myers, *supra* note 197, at 672 ("The CDA . . . presents an interesting paradox. . . . Walter Pincus, a highly regarded reporter at the Washington Post, explained the paradox this way: I work under contract for the Washington Post Newspaper. If the Post published an article of mine defaming a private individual, the paper would be liable. However, if washingtonpost.com, the Post's on-line Internet site, were to carry the same article, it would not be similarly liable. Why? Because Section 230 of the Communications Decency Act of 1996 bars liability for interactive computer service providers . . . .").
[225] *See, e.g.*, Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding that CompuServe, an ISP, could "not be held liable if it neither knew nor had reason to know of the allegedly defamatory . . . statements"); *see also* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (N.Y. Sup. Ct. 1995) (imposing publisher liability on Prodigy, an ISP, because it advertised that it exercised some level of editorial control over its web content).
[226] 47 U.S.C. § 230 (2000).
[227] 47 U.S.C. § 230 (2000)(c) (providing that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider . . . [and] [n]o provider or user of an interactive computer service shall be held liable . . . ."); Ottenweller, *supra* note 1, at 1302-03.
[228] *Cubby*, 776 F. Supp. at 141.

[229] Zeran v. American Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) ("Assuming *arguendo* that Zeran has satisfied the requirements for [the] imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by [the CDA]").
[230] Ottenweller, *supra* note 1, at 1304 ("[S]ubsequent courts have interpreted the statute in such a way that effectively gives ISPs absolute immunity from civil litigation for content posted by third parties.").
[231] *Id.* at 1310 ("The practical effect of [*Zeran*] is that ISPs are completely exonerated from civil liability for materials posted by third parties, even though they have the ability to remove defamatory materials when given notice that such materials exist.").
[232] *See, e.g.*, Doe v. America Online, Inc., 783 So. 2d 1010 (Fla. 2001); Barrett v. Rosenthal, 5 Cal. Rptr. 3d 416 (Cal. Ct. App. 2003).
[233] Ottenweller, *supra* note 1, at 1326, 1329 (recommending that Congress "replace the word 'publisher' with 'primary publisher' . . . to remov[e] the ambiguous and problematic use of the term 'publisher' . . . while . . . expressly stating that ISPs may be held liable as distributors of information.").
[234] *Id.* at 1329-30.
[235] *Id.* at 1285-86 (discussing the story of David Knight).
[236] Cyber-bullies might claim that an innocuous, inoffensive website is actually cyber-bullying, ultimately causing its deletion.
[237] CONN, *supra* note 39, at 164.
[238] CHERYL E. SANDERS & GARY D. PHYE, BULLYING: IMPLICATIONS FOR THE CLASSROOM 35 (2004).
[239] SCAGLIONE, *supra* note 5, at 10.
[240] *See supra* Part III.A.
[241] *See id.*
[242] Landell v. Sorrell, 406 F.3d 159, 178 (2d Cir. 2005).
[243] *See supra* Part IV.D.
[244] *See supra* Part II.
[245] *See supra* Part II.B.
[246] *See supra* Part IV.
[247] SCAGLIONE, *supra* note 5, at 12.
[248] MARY JO MCGRATH, SCHOOL BULLYING: TOOLS FOR AVOIDING HARM AND LIABILITY 33 (2007) (citing KATHLEEN CONN, THE INTERNET AND THE LAW: WHAT EDUCATORS NEED TO KNOW 20-23 (2002)); *see also* Collier, *supra* note 57 (explaining that some schools in Texas require students to sign detailed one-page Internet-use contracts and that "any online behavior that detracts from learning in school . . . get[s] school action").
[249] SCAGLIONE, *supra* note 5, at 12 (suggesting that schools place computers in areas "where there is foot traffic nearby").
[250] *Id.* at 12.
[251] *Id.* at 9; Bell, *supra* note 9, at 39.
[252] *See* SCAGLIONE, *supra* note 5, at 10-11. Scaglione explains that parents should educate themselves about identity protection and discovery software and learn how to track emails, filter chat and web content, and scan their computers for threatening and harassing emails and other media. Other scholars suggest educating children about "netiquette," which entails the correct etiquette to use online and essentially modifies the "Golden Rule" for behavior online. For example, "[c]hildren need to learn to never send messages to other when they are angry."
[253] *Id.* at 11.
[254] *See id.* at 10.
[255] *Id.* at 14.

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